"THE FUTURE OF THE LEGAL PROFESSION IN THE CARIBBEAN"

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I must first of all express my appreciation to the authorities in OCCBA for being so kind as to ask me to deliver this feature address. At the same time, I must warn you that in the course of the past ten years or so my views on the profession have in some respects become rather revolutionary; and you will therefore have to excuse me if some of my pronouncements today are somewhat heretical. However, the right to freedom of expression is so firmly entrenched in all our constitutions that you will, I hope, be prepared to hear me to the end and even, at the end of the celebrations, to ponder on some of the musings I express in the course of this address.

When I was first approached to speak today, I was told of the subject on which I was expected to speak. I must confess that if at the time I had given the matter more thought, I would have suggested the subject: "The future of the *Caribbean* legal profession"; for until the indigenisation of training for the profession in the area, and the attempts at developing our own professional culture, what we had was the *English* Legal Profession transported to the Caribbean. Now we see on the horizon a glimmer of our own profession which unfortunately is still beset by some of the trappings and oddities of its predecessor. But we have a long way to go.

At the outset I must refer to my conviction that our biggest bugbear in the legal profession has always been and is likely to remain in the future, to strike a happy mean between what Professor William Twining speaks of as the difference between Pericles and the plumber; between aspiration and reality; between ethical pronouncement and what we do in practice.

If we are going to have, in common with other developing countries, our own legal professionalism, it goes without saying that we must have a body of systematic theory. This in turn means we must cultivate our educators and our legal theorists; and our newly established institutions of legal learning in this area will certainly enable us to have these in abundance. Indeed, in this regard we have performed a remarkable feat in the realm of regional solidarity and integration. My only hope in so far as our

legal intellectuals are concerned is that we do not have too many theorists and too few practising professionals who are doers of the people's business; for sometimes in the multiplicity of wisdom (even legal wisdom) there can be confusion. But apart from systematic theory, we must of course also have authority as lawyers—a subject on which I do not on this occasion think it necessary to dwell at any length.

Three other attributes of our professionalism must be alluded to:—

(a) community sanction;
(b) a culture; and
(c) an ethical code.

The first two of these three are self-evident but when we come to contemplate the third (viz., an ethical code) I have a feeling that we tend to take the line of least resistance and simply adopt someone else's code. Elsewhere, in a book that I have written on the Legal Profession, I have urged that in the matter of the regulation of the profession, we must be rather more innovative than we are at present. I have submitted that we consider the effect of the changes taking place about us when we are examining such issues as training, discipline, continuing legal education and specialisation and that we should attack these problems boldly, shaking off the shackles of the past in the process and taking decisions only after full deliberation of what is required in particular circumstances. I will not repeat that appeal here. But today I have decided to ask you to share with me the effects on our profession of some of the dramatic changes which confront us in the world today.

The favourite target for abuse by the younger generation in these days is the multi-national corporations. Much that is said about them is true. They do wield great power in the developing world and are sometimes insensitive to the wishes and aspirations of the people; but the lawyers today who represent them must also remember that developing countries are, from the political point of view, taking serious interest in permanent sovereignty over their natural resources. And it is as well that we remind ourselves that this concept is rapidly gaining international currency. Herein therefore lies a confrontation of issues and ideas that we as lawyers must always bear in mind in the course of our work. For this and other reasons, there is sometimes some degree of polarity between the private and the public sector, and the lawyer who represents the former is inevitably faced with policy decisions from the public sector over which he cannot ride rough-shod but which he must understand and even respect. When therefore a country turns as a matter of policy from a capitalist regime to a socialist one, the lawyers will find themselves faced with new political concepts and new legislative measures which it is their duty to try to appreciate. If we cannot, there will always be personal remedies available to us, remedies which will be clear to all of us.

The power wielded by the trade unions is a new force to be reckoned with, as they try to uphold the rights of their workers. The lawyers must in the future in the realm of industrial life adjust to a new aspect of conciliation and industrial tribunals. He must also endeavour to appreciate the new concepts of participatory democracy that have developed over recent years and not to fight against the tide. When he finds himself face to face with a worker on a company board, he must reconcile himself to the novelty, especially as our company law documents of incorporation always provide against directors taking decisions on Board matters in which they have an interest.

Urbanization and town-planning have brought about their own forms of land-use regulations and today a man owns property and has a right to it under our constitutions subject to several strictures – for the good of the society. And when I mention this regulation, I cannot refrain from drawing your attention to the recent English case of *Davis v. Johnson* in which the House of Lords ruled that Parliament could legislate to override a property right – in this case the right of a man to a half-share in a flat – when that man by his behaviour has made life intolerable for his paramour to continue to share the flat with him. The Court was therefore ready to confirm an injunction granted by a County Court judge to restrain her lover from returning to the flat. Thus in an effort to strengthen remedies, the courts do what amounts to the creation of new rights.

Apart from a general upsurge after World War II in the development of human rights, the tremendous developments in media communication and literacy have introduced a new awareness of the rights of the citizen –including the right to demonstrate and to dissent. And so today we find there are, for instance, economic rights concerning redundancy, maternity leave, and picketing which seem to surpass our wildest expectations. But we as lawyers must come to terms with these matters of social policy. In addition, we have reached the stage where we talk also of cultural rights. And since the lawyer is the central figure in defending these rights, we must become fully *au fait* with our responsibilities in this field of endeavour, and do what we can to discharge these duties.

The means of delivery of legal services is undergoing great changes and is likely to undergo even greater changes in future. Already legal aid clinics are being brought on stream. Consumer associations are being formed. Environmental groups are becoming active. Human rights organisations are beginning to make their power felt. These groups are already in several countries beginning to have their own legal representation – a matter to which we must become accustomed. It is also only a question of time before we will have neighbourhood law office arrangements. In other words, "public interest law" is beginning to come into its own and in my view nothing will stop it.

Unless all our future lawyers are going consciously to decide to give time to the legal requirements of the poor and needy – and this without fee or reward – they will in fact be inviting governments to take drastic action. In other words, conventional legal services will, as time goes by, gradually become a thing of the past. The public itself is coming to expect the lawyer to fulfil certain criteria in serving his clients. He is of course expected, when he holds himself out to be able to do a legal job, to be competent to undertake it. If he cannot, he should refer it to someone he knows is competent to handle it; and the fact that such an arrangement is not in existence in England or in Canada or in the U.S.A. is not a ground for not trying it. The public of tomorrow will also expect the Caribbean profession to come up with ethical norms suitable to particular circumstances. For instance, the Province of Quebec has recently made statutory provision to treat incompetence as a ground for disciplinary action and to permit the governing body of the profession to lay down conditions under which lawyers can continue to practice. In such a step not one which we can in this area adopt with advantage on all sides?

Law students are expected, and will be increasingly so, not only to master legal rules and precepts but also to grasp some understanding of the social sciences in so far as they relate to matters they will encounter in practice. And this applies also to those already in practice. No longer will the lawyer be able to withdraw from the environment he serves: rather it will be his duty to brief himself of the sociological problems of his clients and of his environment – without which he will be unable to help in the solution of their problems.

I turn now to another matter which is likely to be hotly debated in the years ahead, viz., are we as lawyers justified in monopolising the doing of all the work allotted to us by common consent, simply because we are "professionals"? Throughout the New Commonwealth this monopoly is confirmed by statutory provisions, making it an offence for a person to engage in "the unauthorised practice of law". While the monopoly is psychologically uplifting for members of the profession, there are clearly aspects of it that are repugnant to good sense and public conscience; and already one sees glimmers of a more rational approach in the suggestion which has come from New Zealand and Barbados that more use should be made of legal executives and para-legals in the routine work done by lawyers. It may well in future be that intensive use of such executives might reduce the cost of legal services – a matter to which we should all have an eye despite a contrary interest. Let us not forget that there is already a tendency for many existing practitioners to be dubbed "capitalist lawyers" –a charge which is levelled whenever we say or do anything that does not conform to other people's ideas of *egalitarianism.*

But the matter which I feel should engage the attention of practitioners with greatest urgency is the extent to which the profession itself must take

the lead in policing delinquency in its ranks, as well as competency. A supplementary aspect is the extent to which laymen should have a say in the disciplinary committees which must look into charges of professional misconduct brought against practitioners. Unfortunately, the self-governing regime (although it has been developing satisfactorily since independence in many countries in the developing Commonwealth) does not seem – for some odd reason – to have been satisfactorily applied in such countries as the West Indies Associated States, Grenada, Belize, the Cayman Islands, the British Virgin Islands, Turks & Caicos Islands and Montserrat; and one can only hope that there has been an oversight which will be corrected before long. In some of these territories the lawyers will in time have to take the question of professional discipline more seriously than they do at present, since the public we serve is likely to become more exacting and is likely to attack lapses which at present it allows to pass.

In the ranks of the profession itself, certain age-old principles have begun to be re-examined in the light of changed conditions the main issue being the matter of advertisement and solicitation. To be sure, no lawyers should try and attract business unfairly by spurious claims of expertise and unwarranted promises of success. At the same time the public needs to be assisted as to how it can take advantage of available legal skills, especially – as is the case in the Caribbean – where there are no proper referral services that can come to the community's aid. The issue is clearly put by Professor Harry Arthurs of the Osgoode Hall Law School in these terms:

> "The advertising issue and the specialisation issue are both special instances of a broader problem: how can the client be protected in his freedom to choose his own professional advisor, without being exposed to the risks of misinformation by over-agressive, client–seeking members of the profession? In fact, the basic rationale of the proscriptions against advertising or self-laudation is often forgotten. Some professional bodies seem to feel that they are merely designed to prevent unseemly or undignified marketplace behaviour. Some doubtless view proscriptions against advertising, price cutting, and other forms of competitive behaviour as purely economic measures, designed to maintain prices and established lines of dealing."

We in the Caribbean will need to examine carefully the full implications of the Bates decision reached in the U.S. Supreme Court in June 1977: the Court holding it to be unconstitutional to prevent a lawyer from advertising, provided the particular advertisement is not false, deceptive or misleading. In coming to this decision, the Court was however conscious of the need for serious regulation in this field and expressed the view that the profession will have a special responsibility to ensure that "advertising by attorneys flows both freely and cleanly". Is such a decision tenable, and can it be countenanced in the foreseeable future, in an area like the Caribbean? I leave the answer to you.

There will be, as time goes on, a great transformation concerning the external paraphernalia of the profession. The wig, bands and gown will be the subject of more and more debate. The "old guard" will do all in their power to cling to their wigs and gowns. The younger generation will continue to clamour for their abolition. The expression "my learned friend" has not, as far as I am aware, yet come under attack; yet how long it will continue to be used is anybody's guess in this turbulent world. The adversary system is already being challenged in some quarters and can be expected to be the subject of further attack in the foreseeable future.

This brings me to the matter of the reputation of the profession. Our profession has, I acknowledge, been notorious for its conservatism and even when so distinguished a jurist as Chief Justice Harlan Fiske Stone in 1934 called for "a new force in American legal life" his exhortation fell on deaf ears. When Bacon made his Proposition to King James I that a Digest of English Law be prepared and that all obsolete laws from the New Digest be suitably expunged, his urgings likewise went unheeded until as Lord Chancellor he was able to transform the Chancery Courts, modernising its procedures so as to bring "speedy justice in a court notorious for delays . . . Talkative lawyers were rebuked, sometimes held in contempt, as with one barrister whose argument covered ten skins of parchment, containing idle and impertinent matter for the purpose of putting the plaintiff to unnecessary trouble and expense to the derogation of the Court."[2]

There are however happily still among our lawyers some bold spirits who, when the occasion arises, are prepared to rebuke the timorous souls and try to rouse them from their state of studied somnolence. Such a bold spirit was Mr. Justice Brennan of the U.S. Supreme Court who in the course of an address in 1967 to the Harvard Law School Convocation held on the 150th Anniversary of the founding of the School had this forthright statement to make about our conservative bahaviour:–

> "The practising bar has remained largely aloff – where it has not been affirmatively obstructive, as in some unduly literal and inflexible applications of the Canons of Ethics to novel methods of affording legal representation to disadvantaged individuals. Justice Stone's warning 33 years ago was prophetic: 'Our Canons of Ethics for the most part are generalisations designed for an earlier era.' Not only has little been accomplished within the profession to prepare to meet the challenge of today's problems but the obsolescence of our code of ethics and institutions has been drastically compounded. Institutional framework designed for the service of the law's traditional clients, with their ready access to legal services, cannot now satisfy the profession's responsibility to the client born of more recent social upheaval, a task that implicates quite different and practical considerations. The profession must indeed purge itself of the inbred precepts of another day, rethink its code of practice and reshape its internal mechanisms for meeting its public responsibilities."

Justice Breman's statement is a timely appeal when we contemplate our public responsibilities as we approach the twenty-first century. There is no doubt whatever that our new independence and associated statehood constitutions impose heavy duties upon us. We have in the past fifteen years seen the beginnings of a growth of judicial review in our courts and our profession will be busier pursuing these matters in future; for there is a veritable rights explosion in our midst and the citizen has become sensitive to the testing of his rights if necessary before our highest courts. Guyana Trinidad and Jamaica have begun to give urgent attention to administrative justice and an Ombudsman in each of these countries has already been appointed. More and more of our law graduates are entering the field of administration and the profession is therefore destined to play quite a role in administrative justice in future. We live in an era of industrial courts, public service boards of appeal, rent tribunals and commissions of enquiry (even into the activities of former governments). Our practice must therefore adjust itself to these new institutions and we must re-orientate our thinking to meet these public and professional responsibilities.

We as lawyers also owe it to our societies to press upon governments the dire need of legal aid in the Caribbean in the years ahead. We must not shirk this responsibility; and where on financial grounds governments are unable to provide it we must with the aid of our associations do something about it. I know in this connection how much this Organisation has tried to promote legal aid in the area and I take this opportunity to commend it on its contribution. I was so pleased to be present at the Fifth Commonwealth Law Conference in Edinburgh last July to hear our colleague Norman Hill put the case for legal aid at that Commonwealth forum. Our local bar associations must now assume the burden of seeing to it that something concrete is done throughout the area to provide the poor and needy as well as persons who are not necessarily destitute with legal aid. Our changed circumstances dictate that we look urgently into this matter.

There is however one thing that I hope, for our profession's sake, change will never do; and it is this: to make the law so esoteric that it becomes too remote from the ordinary individual. It will be the bounden duty of all of us who practise the profession to see to it that this gap is bridged. The lawyer must cease to live in an ivory tower and must come down from his pedestal: developing a special empathy with the affairs of the society of which he is a part. He must keep step with what is going on around him and, as a learned attorney-general friend of mine said recently, the lawyer must not only know what the law is but he must get to know what the law is becoming; I hope too that change will never cause us as a profession to abandon the sacred duty we owe our clients and the society. We will of course have to reconcile that duty with courtesy and respect for the judges in our courts. But at the same time some of the judges will have to be less sensitive of what are sometimes referred to as

"affronts to the Bench" when a lawyer is simply endeavouring to represent his client with zeal. I hope that our judiciary everywhere will remember that members of the bar have a special commitment as well to those who pay their fees.

One very interesting development for the future is the number of women who are joining the ranks of our profession and in this regard it is good to note that our President over the past two years belongs to the fairer sex. We all, I am sure, foresee that the ladies – some of whom are already even serving in judicial capacities in the area – will have in the years ahead a great part to play in giving greater stature to the profession. They will, I know, join their male brethren in making the law cheap where they found it dear and in making it the inheritance of the poor instead of the patrimony of the wealthy.

Your Excellency, Ladies and Gentlemen, from what I have said, I am sure you will concede that we live in a world of problems and instability. Many of our clients come to our offices in doubt and confusion about the profession. The public at large tends (sometimes quite unjustifiably) to distrust us. We for our part live in the midst of paradoxes: we are universally described as members of an "honourable profession": yet some of us are anything but honourable. Our brethren are addressed as "learned friends", but few are learned and many are not genuine friends. There is inevitable inequality: in the sense that many are called but few are chosen. Many of us preach the ethical word, but do not practice what we preach.

I ask you on this the Tenth Anniversary of this Organisation to join me in re-assessing our contribution to our societies and particularly in taking stock of ourselves as lawyers. How can we adapt for the morrow? Remember that the inn that shelters for the night is not the journey's end. We must be ready for tomorrow. And how do we make ourselves ready? By a realisation – I am persuaded – that the law is a life study and that we must, as long as we continue to practise it, be students of the law :the law being (as we sometimes say) a jealous mistress.

As I conclude this address and as I think of the turbulence through which we are likely to pass over the next half century and of the contribution which we can make to temper that turbulence, I can only describe the situation in anticipation as Charles Dickens described the era of the French Revolution in A Tale of Two Cities: "It was the best of times, it was the worst of times; it was the age of wisdom, it was the age of foolishness; it was the epoch of belief, it was the epoch of incredulity; it was the season of Light, it was the season of Darkness; it was the spring of hope, it was the winter of despair."

Whatever difficulties may be ahead of us in the Caribbean, and whatever polarities we may encounter, OCCBA and the legal professions in all

the territories will have a very specific role to play. Working together, a great deal can be achieved and I hope that this Organisation will take the lead in many other regional activities as it has so far done in the field of legal aid and in the study on a Caribbean Court of Appeal. The lawyers must seriously regard themselves as commissioners of the public interest rather than simply as conveyancers and advocates of the private sector. Despite the fact that we may encounter seasons of darkness, our intervention and our determination will hopefully turn them into seasons of light. It is only in this way that we would be doing our duty to our respective countries and to posterity.

Your Excellency, Ladies and Gentlemen, it would be superfluous to remind you that the good that lawyers do lives after them. In that very humorous book "Confessions of an Uncommon Attorney" by Reginald Hine, the point is well made that the work that lawyers do affects the lives of generations yet unborn. It is a sobering thought that for decades after the lawyer's demise the instruments he draws continue to affect the lives of his former clients; the wills to govern their estates; the opinions to direct their activities. Reginald Hine puts it in this very pointed way:[3]

> "The lawyer is dead; long live the law. But in a sense the lawyer does not die. Clients will come flocking into the office as of old, feeling somehow that his friendly spirit is still there. His room may be taken by another, but his mantle will have been taken too. The partner will bear the same impressed stamp of office personality. The advice given will be the advice that he would have given. In all confidence, landholders will leave their deeds and cottagers their "writings" in his strong room, for his clerks will watch over them still."

Your Excellency, Ladies and Gentlemen, I can only earnestly hope that as we look ahead we approach our task in the future with a consciousness of the enduring nature of the impact we as lawyers are destined to make on the lives of others; that we contemplate the all important role our profession is expected to play as we near the twenty-first century. If we indeed take our responsibility seriously we should become filled with awe; but it is that awe which should impel us to go forward uplifted in spirit and fortified in our resolve to uphold the integrity of our profession.

FOOTNOTES

2. C. D. Bowen, Francis Bacon 122 (1963)
3. Reginald Hine, Confessions of an Un-Common Attorney, J.M. Dent & Sons, London, 1946.