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THE LEGAL PROFESSION — BACK TO THE FUTURE[1]

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I must confess to a concern. Alfred North Whitehead, the philosopher, in one of his more profound moments said, ‘Where all men think alike, few men think at all' and gave hope, comfort and licence to many who register for conferences and then conveniently avoid sessions after the first day on the grounds that they have heard it all before. It is reassuring to see such a large gathering. I suppose the comfort I can draw is that being the first speaker, I have the privilege and advantage of getting the first word in. Human thought is never original but since history is preventive in nature, ideals, principles and concepts need to be restated from time to time, if nothing else, to remind ourselves of what lawyering is all about.

The title of my address ‘Back to the Future' has within it both a seed of hope and growth and a caveat. The seed of hope and growth will, I hope, reveal itself, over the next 30 to 40 minutes. The caveat is this — that in talking about the legal profession, about ourselves, we avoid the pitfall of embracing grotesques. A caveat, a danger, a warning that we not use this valuable time over the next three days to look into the legal profession mirror and preen and smugly reflect on what has been, over our own greatness, over international reputations. Or look into the same mirror and see what we want to see. A danger that we not bask in the warmth of our own invincibility and make our embraces so self-centred and stifling that we mutate truth and reality into grotesques.

Let me tell you about Sherwood Anderson's theory of grotesques. This American novelist writing in the

1920's proposed in his book, Winesburg, Ohio, a theory which he called the theory of grotesques. The theory is all about what happens to people sometimes as they strive to give value and meaning to their lives. According to Sherwood this is how the theory works: that all about us in the world are many truths to live by, and they are all beautiful — the truth of candour, of self-reliance, the truth of loyalty, of honesty, of service, and so on. But as people come along and try to make something of themselves or of the world or of society around them, they snatch up a truth and make it their own predominating truth to the exclusion of all others. That truth so embraced becomes a lie and the person turns into a grotesque.

A caveat that we do not by navel-gazing become inactive, reflective and unconcerned about the changing world around us, unaware that by holding onto our grotesques, if they be so, we remain rooted to the spot, unable to progress, unable as a body or as a Council to move the profession towards the 21st century because progress is not within the capacity of the Bar or the Council alone.

Ladies and gentlemen, first a truth. It is perhaps difficult at the beginning of a Malaysian Law Conference in which there will be delivered a collection of important papers on various topics of concern to the Malaysian community, to appreciate the stark reality of that same Malaysian community's negative attitude to the law and the legal profession. If our discussions about the law and the legal profession are to be genuine and constructive, we cannot ignore the harsh reality that there is in the community at large a widespread sense of dissatisfaction with the legal system and the legal profession which is part of it. This sense of dissatisfaction is everywhere. It extends from the board rooms of large companies to the man in the street. If you ask the ordinary man in the street what he thinks of the legal system, more often than not his response will be a shrug of the shoulders. It is irrelevant to him. At best the average Malaysian is apathetic. At worst he is antagonistic to the system and the profession.

Recognizing that the very existence of a free society in Malaysia depends upon that society being governed by rules of law interpreted and applied by an independent judiciary operating through an independant court system, the need for and support of an informed Malaysian public opinion is vital.

We should not, therefore, underestimate the seriousness of the prevailing state of public opinion. The chain and development of events relating to the judicial crisis of 1988 on issues affecting the independence of the judiciary is a recent example of the apathy of public opinion and those who form public opinion.

We need that public support. We must recognize that only with that support can we hope to withstand threats to the public system and in particular to the independence of the judiciary and the legal profession.

The greater question then is how do we harness and garner that public support? How do we change the public image of the Bar? The answer I believe lies in the service we provide the public as members of the legal profession, individually as lawyers and collectively as a body. We must not lose sight of the fact that eventually we produce a service; a service that has as its basis professional obligations to a particular client and to society at large.

I believe that the legal profession will have to deliver a far better service than it is doing at present. The public has come to expect more from lawyers and that is an expectation we have to meet. To be a successful and well-regarded profession, we need to revisit, and remind ourselves of our intended role in society, to be fully conversant with change; to find a position for ourselves in a complex and competitive environment.

It would not, in the circumstances, be amiss to review the traditional functions of a lawyer and consider the impetus necessary in these traditional functions to deliver that better service expected of the profession.

What then is lawyering all about? What are the functions of a lawyer? I believe there are five.

First of all, a good lawyer is a wise counsellor to all types of clients who in the varied crises of their lives seek disinterested advice. Effective counselling requires a thorough knowledge of the principles of law both as they appear in the books and as they actually operate in fact. In equal measure counselling calls for a wide and deep knowledge of human nature and of modern society.

Now consider the actual state of affairs. Law graduates leave university or complete their academic training by the age of 23 or 24 and then in most cases spend an ineffective nine months in pupillage where the luck of the draw determines the quality of the practical training available. Immediately after call the hapless young lawyer is permitted to practise on his own and literally learn his craft at the expense of helpless clients. Can we safely say that this young lawyer, however brilliant he may have been in his academic studies, is at 24 the wise counsellor with a wide and deep knowledge of human nature and modern society that the client so desperately needs?

Next, the good lawyer is a skilled advocate, trained in the art of prosecuting and defending the legal rights of men (and women) both in the trial courts and on appeal.

Unless a lawyer has had experience as an advocate, it is difficult to see how he can be a thoroughly competent counsellor, for, he will not be able to evaluate his client's cause in terms of the realities of the court room.

For all intents and purposes, it is in the court room that the law is applied to concrete facts in specific cases, and it is the advocates who, with the judge, in the final analysis set the course of law.

It is, in the circumstances, a frightening and chastening indictment of the training of lawyers in this country when we produce advocates who stand up in court and blithely submit that since all their

evidence is set out in their statement of claim, they need call no further evidence in support of their client's claims. Does the unsuspecting public deserve this?

I am afraid it is time to come down to earth with a bang from the flights of fancy that we have been taking the last few years.

To return to advocacy for the moment. It is the most intensive work a lawyer is called on to do. It is not a gift of the gods. In its trial as well as in its appellate aspects it involves several distinct arts, each of which must be studied and mastered. No law school in the country, so far as I know, pays much attention to skills training. Clearly somewhere in the course of his professional training, the lawyer must learn the art of advocacy.

In planning for the future, therefore, one of the major areas for consideration has to be legal education. The profession has to maintain a high interest in the area and seek to ensure that the changing needs of the profession and community are being met by the various legal education establishments that serve as the training grounds.

We should draw up a curriculum to reflect the view that advocacy and its ancilliary activities are specialized skills which require specialized training.

Any such venture has to overcome the ingrained scepticism of many members of the Bar. They did not receive any such training and are, in their view, none the worse for it. Such views are generally held from the vantage point of mature success and with the benefit of selective amnesia which has suppressed the more shameful moments of the first two or three years in practice. These, however, are the years at which a skills training course should be aimed. The training cannot, and should not try, to give students in the classroom the equivalent of experience painfully gained over many years of practice. It can and

should teach them elementary skills which the young Bar quite often seem to lack. The course should enable them to profit better from their pupillage and emerge as reasonably competent beginners.

For the purposes of effective teaching, the course must be divided into three parts. First, the knowledge which the student must acquire; secondly, the skills they must learn and thirdly, the practical exercises in which they can deploy both knowledge and skills.

The knowledge subjects to be taught should be confined to evidence, procedure and professional conduct. It will have to be assumed that the student comes from his academic studies with enough knowledge of substantive law to be able to recognize a legal problem.

The skills training may be divided into legal research, information, management and problem solving, opinion writing, interviewing, negotiating, drafting and advocacy.

Most of the lectures and classes will have to be given by full-time teaching staff. Some members of the Bar may well doubt the competence of teachers, who are not themselves in practice, to instruct pupils in advocacy skills. There are several answers to this criticism. One is that teaching something at a basic level is not the same thing as doing it at an advanced level. Many experienced members of the Bar would be hard put to explain exactly why they do things in a certain way or break down their techniques in ways which could helpfully be passed on to beginners. Teaching is a separate art.

Another is that members of the Bar in full-time practice cannot be expected to take on teaching on any substantial scale.

The answer lies in the entire course being devised and the materials written with the advice and assistance of the practising Bar. But it has to be borne in mind that skills teaching is a very labour-

intensive activity. It requires the smallest possible ratio of students to teachers. The demand for members of the Bar to assist will be insatiable and will have to be met by the profession.

I would like to digress here for a moment. Although the need to improve the efficiency of lawyers through appropriate skills training is frequently mentioned, there have been relatively few calls for the provision of similar systematic training for judges and court administrators.

This is surprising bearing in mind that it is widely recognized that skilled or balanced judicial intervention in cases usually contributes materially to sound and efficient disposition of cases.

Sir Neville Faulks explains in his autobiography how, after a successful libel practice at the Bar, he was appointed in 1962 to be a judge in the Probate, Divorce and Admiralty Division of the High Court of England. The only training that he had was to spend the Christmas vacations ‘reading very carefully' the leading textbook on divorce law.

How often has that happened in Malaysia? Can we not eliminate the danger of the judge learning his craft — and, in some cases, learning the content of the law in subjects which were far removed from his practice or position before appointment — at the expense of the first litigants to appear in court. The more a judge is skilled in relevant techniques the greater is his or her ability to dispose of the case quickly.

The aim should be, therefore, to improve judicial skills in that area and to ensure that appropriate facilities are provided to judges to enable them to put these skills into effect.

This applies particularly to newly-appointed judges. Experience as counsel teaches much which is essential; it forms a basis on which to build skills for the efficient disposal of cases. As far as I know, there is no structure in place in Malaysia which teaches or familiarizes new judges with the techniques

involved in controlling and disposing of cases. As things stand, judges must gain such knowledge from their own experience and effort. In the process, they acquire many skills which could have been taught to them at an appropriate workshop or seminar, thereby effectively avoiding learning at the expense of litigants and lawyers.

What sort of judicial skills or techniques can be made the subject of appropriate courses or seminars? There is probably no single course that can be devised that will assist all the judges to an equal extent, bearing in mind their different backgrounds, levels of experience, skill, ability and willingness to learn. Some may regard such courses as no more than a restatement of obvious principles. But I would suggest that the majority of judges could take advantage of well-designed courses which deal with solutions to practical problems commonly confronted by the courts.

Having regard to experience here and overseas, one can say with relative confidence that useful skills training can be provided in areas which include the following:

(a) Writing of judgments, including techniques of drafting findings of fact, and conclusions of law.

(b) Techniques to be applied in dealing with applications for urgent relief such as an interlocutory injunction, a winding-up application, bail, and so on.

(c) Techniques involved in systematically organizing the progress of a case.

(d) Establishing a blueprint for controlling and reducing the size of complex cases and the time needed to complete them.

(e) Making maximum use of the mediation or arbitration process or other alternative dispute resolution processes.

(f) The approach to the evaluation of conflicting evidence, particularly that of experts, including ruling on the admissibility and credibility of such evidence, ruling on common evidentiary objections and facilitating settlements between the parties, and so on.

That ends my digression and I return to my good lawyer whose third task is to do his part individually and as a member of an organized Bar to improve his profession, the court and the law.

In this context let me turn to a consideration of justice in the Malaysian courts. In a democratic society the enforcement of law finds its justification not in the interests of authority but in the maintenance of respect for law proceeding from the people.

Respect for law in Malaysia must be a sportsmanlike regard for the rules of the game. We must endeavour to define the fundamental needs in the administration of justice as being simplicity and expertise.

Simplicity is a matter for administration and simplicity or the lack of it, in Malaysian procedural requirements, is deserving of comment perhaps on another day. Suffice it to say for the moment that our procedural requirements at both trial and appellate level are in need of simplification.

But of greater concern to the Bar is expertise. The development of expertise in the administration of justice will flow from maintaining proper standards of legal education for admission to the Bar and appointment to the Bench. We must never be guilty of putting the community in bondage to the ignorant. We must recognize that the chief losses of society are due to incompetence. The consequences of ill-informed lawyers and judges are too high. The first duty of the Bar and the Bar Council must be to see that the unfit as to knowledge or character are not admitted to practise. High standards of admission to the Bar will mean less ill-advised litigation and fewer hardships for trusting clients and a trusting community.

And surely by the very same token we need to constantly stress to the people at large the need and importance of obtaining for the judiciary the best possible representation of an expert Bar. And for this I

include within the definition of Bar the wider body of trained expertise found within the judicial and legal service.

We must recognize that a poor judge, an inept or ill-equipped judge is an indulgence the community can well do without. You can refuse to patronize the shopkeeper who does not carry a good stock of goods but you have no option if you are brought before a judge whose mental or moral goods are lacking in quality. We must thus ensure a selection process that secures a high grade of ability in our courts and one that will command respect.

I will be so bold to say that the proper choice of judges has to be the special concern of the Bar not in isolation but in tandem with the others concerned in the selection process. This proposition is not with any intention of restricting the power of choice of the people but that it, the body, should choose well.

The Bar must strive to change the present secretive way in which judges are appointed to the High Court. They should be chosen from a wide social and legal background and the excessive emphasis on recruitment from within the judicial and legal service must end. For too long, as in England, the system of appointing judges here has been ‘too tied up with the old boy network'.

What is needed is a more open selection process, a move away from the present capricious system. There is a case for removing the power of appointment away from an individual and giving it to a commission which will publish reports on the criteria it is adopting and give a brief explanation of why a particular person is chosen.

Lord Chancellor Campbell observed in the 19th century ‘nothing can be more fantastical than the distribution of prizes in the lottery of legal promo-tions'. That is true today as it was then but surely suggests a practice not befitting a modern judicial system.

Let me now consider another aspect of this third function of our model lawyer. The Legal Profession Act 1976 in s 42(1)(d) seeks to place an apparent limitation on the role of the lawyer and the profession in the improvement of the law to those occasions when it is requested to do so. These requests have been far and few in between.

We must recognize that we as individuals and as a collective whole because of our training, work experience and exposure are in a unique position to effect law reform. We are in a position to recognize shortcomings in the law and to participate meaningfully in law reform exercises.

Law reform as a concerted ongoing programme is non-existent in Malaysia. What law is enacted comes in fits and starts and is more often than not an ad hoc solution to a pressing problem with legislation copied en bloc from other jurisdictions. The Civil Law Amendment Act 1984 was a classic instance of imported law which had no local input to determine its suitability to the Malaysian need.

With a rapidly changing and developing Malaysian society I see a need for a Law Reform Commission with adequate representation of the legal profession on it. There are so many basic issues that need review but let me for now consider the grander issues — the world's changing attitudes to life and death and the legal questions that arise from these changing attitudes.

Medical advancements now enable life to be prolonged, shortened and even enhanced. Life is now created outside of the mother's womb and stored for indefinite periods. What happens to that potential offspring should the parents divorce or remarry? Who has the power to decide? What of the premature baby — barely living thanks to a life support system — who will, if it survives be a vegetable? Can the parents turn off the life support system?

What of attitude to the AIDS sufferers? Must they be treated differently by the law? And do we need anti-discrimination laws in Malaysia?

We have to come to terms with these and other issues and questions and soon. They will search our legal and our social and ethical conscience. But they are issues that require thought by our profession. The community will look to us. We are the craftsmen who can and should help formulate the decision making process.

How can we help? Notwithstanding s 41(1)(d) of the Legal Profession Act 1976 there is a pressing need for the Bar to set up a Law Reform Committee in which there can be the active participation of experts from various fields to help create a forum to enable society to decide on the answers.

And with that moulding of public opinion, our good lawyer would have met and served his fourth responsibility — that of acting as an intelligent, unselfish leader of public opinion.

Finally the fifth function. Every lawyer must be prepared to respond to and answer the call for public service when it comes. I want to take this function firstly in terms of legal aid. A principle lies at the foundation of law in a free society. That principle is the simple truth that justice may be called justice only if it is denied to no man, however unpopular his case, however reduced his circumstances and however heinous the charges against him.But like all simple truths it is one that is easily forgotten. And when it is forgotten, putting it bluntly, the blame must lie with the legal profession itself. Legal aid is an inescapable charge on the legal profession.

I recognize that the Malaysian Bar, alone amongst the professions, has set in place a self financial structured programme to assist the needy of the community. But we cannot afford to stop at our annual

contribution of M$100 a piece. The legal profession in Malaysia needs to look anew at its basic role to see whether it might not be losing sight of the wood for the trees.

I have yet to meet a lawyer who voiced outright opposition to the idea of legal aid. But an actual examination of the day-to-day running of our legal aid programmes shows that a great majority of our colleagues at the Bar are hopelessly apathetic about this whole exercise. Many of us think of legal aid as merely another form of charity, a kind of generous dispensation of a small amount of service from the Bar to some troubled unfortunate. We fail to realize that legal aid is much more than a form of charity, that it stands as both a symbol and instrument of the vitality of our profession. I think all of us need to go deeper than the necessity for legal aid in terms of individual cases at any given time. Indeed we ought to go right back to the foundations of law itself and take a fresh look at that to which we are devoting our professional lives.

Fredicks Von Savigny, who founded the historical school of jurispudence, in constructing a convenient image, defined law as ‘the rule whereby the invisible border line is fixed within which the being and activity of each individual obtains a secure and free space'.

We must recognize that it is the business of the legislature to set boundaries of that ‘secure and free space' but boundaries that will constantly be expanded. It is the duty of the courts to preserve the boundaries that already exist. But it is up to the profession to make access to that ‘secure and free space' as broad and inclusive as possible. And that is what legal aid is all about — the broad and inclusive provision of legal services.

Have we done so? The frank and honest answer has to be ‘no'. But that is not through want of trying.

I believe that the need for an effective national legal aid programme can only be met by a publicly-funded legal aid system. The financial resources of the profession are too limited to permit extensive

provision of legal aid services. But we have the expertise and the will. So perhaps what is called for is a partnership with the government. We can commit the resources on our side. We should be prepared to join with the government in running a national legal aid system which will meet the needs of that sector of the community which cannot afford the full cost of legal services. Such a national scheme will need to consider payment perhaps of a capped or standard fee to the participating lawyers.

But until that happens the Bar's scheme needs the greater input of senior members of the Bar.

The other aspect of the call for public service may involve a call to hold public office.

When that call is accepted stand tall because it is odd how easily men of undoubted power and sincerity can deceive themselves. Let me explain. Through the study of jurisprudence we have watched the discovery and slow strengthening for centuries of great principles growing out of human association. We have seen these principles tested and purified in momentous struggles between men, between nations, between races. We have seen them being written into the public acts of organized society. We feel and justly feel, that out of the centuries of struggle and experience these principles have come as a product of permanent helpfulness and value. We are prepared for new applications and new interpretations of those principles to meet changing conditions, but we are not prepared to see them flouted and overthrown and treated as mere historical curiousities rather than living principles of morals.

Yet this is exactly what happened before our eyes in 1988. The precepts of liberty and dictates of justice were treated lightly and unconcernedly when they appeared to stand in the way of some immediate interest, some individual ambition or group privilege.

There are, to my mind, two other factors in the progress equation. Both concern the Council and its workings and need to be stated. The Council, as you know, consists of 34 members of the Bar, 12 of whom are elected on a national ballot, 20 represent the ten state bodies with the immediate Past

President and Vice-President making up the remaining two. The Council meets once a month on an average for about three hours. It further functions through various committees and at the last count there were 27 such committees. The law requires that two-thirds of the committee members must come from within the Council itself. Each committee has on it between 4 to 12 Council members. Simple arithmetic will show the workload on the Council members. But they are all busy legal practitioners.

The Bar on the other hand is growing at an unprecedented rate. Everybody wants to be a lawyer. The annual growth rate is presently at some 20% and the profession doubled between 1981 and 1985 and then again between 1985 and 1990. If the present growth rate is maintained we will have between 7,000 to 8,000 lawyers by the mid-1990s.

With this massive growth, the increased demands of professionalism by the community and the rapidly changing scenario of legal education, the demands on the time of the Council will progressively grow. The question the Council will have to ask itself, if it ever intends to play a meaningful role in the future, is whether it is poised and ready and prepared to meet this massive drawdown of its time. At the risk of repeating myself and offending my fellow Council members, though no offence is meant, we are amateur Council members and professional lawyers in sense of time.

I cannot in this short space of time suggest all the answers but I do feel that in the near future the Council's workload will be such that the Bar will need the luxury of asking its principal office bearer to take a sabbatical year off from practice.

The other factor (in the progress equation I referred to earlier) is the Bar's or, should I say, the Council's image. The reality of the situation is this — we can come up with the grandest of schemes, of immense benefit to the profession and the community at large, we can have the will, the determination, the heart and the resources but, and it is a big but, we will get nowhere without the backing and support of the government of the day. The reality of the situation is this — that we have a reputation and an image with

the government that scuttles our plans so soon as we propose them. The reputation and the image is not deserved but it is there.

Consider the new disciplinary procedures, involving lay participation, which took years to be even considered. The Bar's interest in legal education and the CLP programme and its link up with a local university to run the programme with all the commitment of the Bar's resources that will bring, is meeting with obstacles. Presumably the authorities would rather see private institutions with limited resources and even more limited intentions run such courses than permit the professional body which has the right interests at heart to be involved in it.

But then that is the state of play at the moment.

Progress, with the present state of affairs, will be depressingly slow. We have a role to play but we are not going to be allowed to play it.

Again I pose the question but do not know the answers. Do we work within our confines or do we break free? If we break free, how do we do it? What are the priorities of the Bar and community at large? Are they the same? You answer these questions and give directions to the Bar. It is after all your chosen profession.

Back to the future. A reflection that only by constantly re-examining our institutions can we ensure that they meet the demands of an everchanging society. We must not be blind to change. We must guard against complacency. But on the other hand we must not permit justice being tampered with for the sake of expediency.

The ultimate challenge, I suppose, will always be combining justice in its many aspects with the rule of law. If we as a profession fail at that, the rule of law will crumble and the public will pay the price.

I take you back to my philosopher. ‘Where all men think alike, few men think at all.' With that thought I wish you a good conference, with differing thoughts, of course.

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This is the text of the Keynote Address delivered at the 9th Malaysian Law Conference at Kuala Lumpur on 12 October 1991, at which time Mr Manjeet Singh Dhillon was President of the Malaysian Bar Council.

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