Square Pegs and Round Holes:
Can the Legal System in a "Developing Society" ever satisfy the Demands of the Public?

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> **Litigation cannot promise reparations for the wrongs that cut most deeply . . . . The law can do many things. But the law can't repair wrecked lives. At best, it can only offer limited compensation to those who have lived them.**

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Members of the Advocates' Society –

I welcome you to The Bahamas and wish you every success in your convention.

I thank you for the invitation to share some thoughts with you and I apologise for the clichéd nature of the topic around which I will meander. When I received your invitation back in June and was asked to indicate a topic, this appeared to me a useful working tag which I could always revise later but I confess that, in the months that have followed, my lack of creativity leaves me, and you, stuck with that tired, If well tried, phrase.

I note that your invitation indicated that one of your themes would be how the Canadian legal profession can contribute to the development of the legal system and advocacy training in "less developed countries".

The observation with which I began was taken from a note on "The Pro Se Litigant" written by Bonnie Walker for the 20 July 2007 newsletter of The American Bar Association. It was subtitled "Sometimes justice is constrained by the law"

While you would be correct in assuming that The Bahamas, with its poorly developed system of legal aid, has more than its share of litigants in person, my observation is that such litigants are but the conspicuous expression of the general disconnect between the judicial system and broad sections of the community at large.

This disconnect is rooted in the reality that our training as lawyers is directed to ensuring our fidelity to **process** and **procedure** while "normal people" are oriented towards **results**.

Yet, if the expectation of the public arises out of lack of knowledge of the limitations of the system, what excuse is there for the press, politicians and others who have the public ear and have a duty in forming and informing the broader society, to not assist in educating the public rather than feeding on their unawareness and erroneous preconceptions?

While, as a matter of the constitutional organisation of the society, the legal system is assumed to be the indispensable component that ensures that a Darwinian "survival of the fittest" order does not determine the result for persons in their family affairs, their business dealings and their relations with the political directorate, both in its coercive and regulatory capacities, if one listens to the ubiquitous radio call-in talk shows and the pronouncements that pour from press pundits, pulpits and political podia, one would conclude that judges, both in their methods and their results, function in a manner that is, at best, inconsistent with and, at worst, inimical to, the true interests of the society. What are the reasons for this disconnect? There may be several but I propose three.

First is the reluctance, or inability, of large segments of the society, even among the educated elite (and, I dare say, from some of the arguments pressed before me, including persons trained in the law), to accept what we as judges know as part of the fibre of our judicial being, namely, that judges are appointed not to "do justice" but to "do justice according to law". Philosophically, of course, the reason for this is obvious. What constitutes "justice", apart from being susceptible to subversion by the personal preferences of the person who pursues it, can shift and shade according to what is currently popular and fashionable. The judicial oath is premised on the abstract moral notion of "justice" being deliberately subordinated to the objective rules of law which the society has evolved.

Secondly, the popularity of dramatic presentations of the legal system, usually for entertainment, especially on television, has created the expectation that all matters that present themselves for solution before the courts can be conveniently distilled to simple propositions readily resolved in an hour. Litigants, nurtured in this expectation cannot understand why, when they become parties in real disputes before actual courts, the process of the marshalling of witnesses and presentation of evidence and the deliberative process does not yield results

before the sun sets on that day. Their frustration is voiced in the cry that the judges do not know what they are doing.

Thirdly, as I am wont to caution young lawyers when I preside at ceremonies for admission to the Bar, of all the professions which one might choose to follow, there is probably none so subject to ridicule and general adverse comment than is the legal profession. Why do we attract such opprobrium? It cannot simply be explained away by the misbehaviour of some lawyers (which reminds me of a taunt that I read recently: *the trouble with lawyers is that ninety eight percent give the others a bad name*!). After all, there are mercenary men of medicine, predatory pastors, incompetent engineers and crooked craftsmen of all sorts; yet none of these occupations are disparaged and derided in the way that the legal profession is.

Why is it that if an alleged robber and a police officer are wounded in an exchange of gunfire and a physician gives priority to treatment of the alleged robber because he is in more urgent need of medical treatment than is the police officer he is lauded for his fidelity to the ethics of his profession, yet the lawyer who zealously represents that alleged armed robber, ensuring that he is not convicted save upon legally admissible evidence, is accused in the popular press of encouraging criminals and murderers to make war on the community? Why is it that a lawyer who takes a fee for defending the rights of a person labelled as a "major drug lord" accused of encouraging or benefiting from drug trafficking while nary a whisper is raised against the architect and builder who are paid from the same source of funds as is the lawyer to produce a mansion in which that person lives nor against the car dealer who sells him luxury automobiles? Why is the lawyer who goes to court to secure financial security for a woman in a deteriorated non-marital relationship attacked for undermining the family and condoning immorality but no criticism attaches to the pious matron who runs a flower shop and knows full well that those extravagant and over-priced arrangements delivered to many offices (the recipients would not dare take them home) are expressions of that phenomenon which we as Bahamians refer to as "sweethearting"?

Some lawyers have explained this intellectual and emotional dissonance as a generalised envy of lawyers. I, respectfully, think this explanation too simplistic. I believe the answer to be much more subtle and complex and that it is rooted in the fact which most people find uncomfortable and embarrassing, namely, that lawyering is a profession, a means of making a living, out of the inconsistencies, the contradictions, the untidiness, the ugliness all of which are part and parcel of what it means to be human – imperfect beings at work and at play in a society of other imperfect beings. Lawyering involves work which everyone prefers that it is not necessary to be done and which, indeed, would not be necessary if greed, dishonesty, violence, sexual exploitation, economic oppression and governmental high-handedness were not part of the "warp and woof" of life as it is lived, as contrasted with how we would all wish it to be.

The work of the lawyer often involves doing what is unpopular. While personal integrity is a given as a principal precept for all lawyers, it tends to be overlooked that courage is also among the virtues which lawyers are called upon to exhibit. In the context of the responsibilities inherent in being a lawyer, I am wholly unable to appreciate the stance which some lawyers who hold themselves out to be practitioners of criminal law take when they announce that they would never represent anyone accused of rape or drug trafficking. If you claim the expertise to practice before the criminal courts in a system which fixes where the burden of proof lies and the standard which must be attained, how can you adopt a position which implies a presumption of guilt on the part of anyone accused of certain offences?

In a similar vein, lawyers are often called upon to do their duty in an atmosphere suffused with romantic notions of "justice" as being preferential to the "have-nots". As the book of Leviticus cautions (ch 19, v 15), justice demands neither partiality to the weak nor deference to the mighty. Hence, industrialists do have legal rights as against workers; as do large property owners against squatting farmers and manufacturers in relation to consumers and the legal profession must be at the service of any of them.

The "Rule of Law" is what lawyering is all about: an ordered society being a safe society. While all members of the society have a duty of adherence to the rule of law it is the peculiar province of the lawyer to bring justice according to law home to the day-to-day problems of real people. As lawyers, we will probably never be loved. However, we will always be needed.

Today's lawyer continues the highest traditions of a profession which has its origins in the earliest forms of social organisation (another dig at lawyers: *"law is the world's second oldest profession and is as honourable as the first"*.) Law takes its character form the structure of the society in which it is practiced for the simple and obvious reason that each society formulates its rules for social well-being, the principal of these rules being "law".

Put another way, the organisation of society is political. Here, I do not mean the narrow practice of party politics or the competition for places in the legislature. I refer to the dynamic eddies and currents of economic and social forces created by families, academics, students, trade unions, merchants, religious groups, and all the energies which form, inform and reform the way in which we order our lives and decide who operates the levers of economic and social power and how, as well as for whose benefit, power is employed in the society from moment to moment or over lifetimes. The norms which these, oft times conflicting, forces -- by a process of refinement -- determine to be necessary for social order are the "laws" and we who develop the skills of interpreting and applying them are the "lawyers" but, unlike the work of physicians who treat the human body which is the same regardless of the accidents of place or time of birth or the engineer

who, in any portion of the planet, applies universal laws of physics, our work is an expression of how our particular society addresses its areas of conflict in the pursuit of the moral ideal of “justice”.

All law – including “judge-made” law – is the product, by distillation, of this political process.

If you accept this premise, you would have to agree that laws exist for the service of society and you would agree that laws and lawyers are deserving of criticism when they appear to be unresponsive to the needs of their societies by catering to narrow and immediate interests to the exclusion of the broader needs of a society which must continually evolve standards of fairness as it seeks to achieve justice – that regime in which each person receives his due.

While, although I am a lawyer, I am apprehensive about what was derisively described in post-colonial India as a “barristocracy”, I have no desire for the tyranny of a “clericocracy”, or the caprice of a “merchantocracy”, or the cloud-cuckoo-land of an “academeocracy” either. Lawyers are but part of the pattern of social organisation which constitutes the political matrix

The nature of litigation is that it compels parties, even claimants, to participate in a process that they would prefer to have avoided and the culmination of the process leaves one, sometimes both, of the parties unsatisfied. This residual resentment often translates into the dissatisfied party feeling that he did not receive “justice”, not because of the demerits of his case, but because the fountain of justice had, somehow, been polluted by the opposing side.

In all modern societies, it is the unenviable task of those of us who are judges to do our jobs in this, often hostile, environment. In our region, referred to as the “Commonwealth Caribbean”, being comparatively small countries which function more as large villages, we bear the added burden of living in cultures where popular wisdom holds as an article of faith that all services for which the State is responsible (and the legal system is not exempt) is dispensed on the basis of “who you know”.

The frustration of which I complain is the fact that the expectations, sometimes quite unrealistic which the public tends to have of the judicial system too easily translates into demands made by the electorate on the political leadership, and, to express it most charitably, it is charmingly naïve to expect that a sense of nobility would not permit that leadership to “pass the buck” to others, in this case the judiciary, which is limited in speaking in its own defence.

The modern dogma of “participatory democracy” – too often nothing more than “talking heads” going on interminably to no real effect (locally, I received some mild criticism for my description of this as “rhetorical onanism” in my traditional remarks at the opening of the current “Legal Year”) or well funded, or at least well

organised, single issue pressure groups manipulating the media who, having long gone “down market”, find it easier to titillate and entertain, rather than inform and educate their consuming public – presumes that the judiciary would have shed its traditional reserve and partake in the rough and tumble expected of all those in public life.

Resistant to criticism, too often the press pompously declares that its role is “to speak truth to power” or “to comfort the afflicted and afflict the comfortable”, completely ignoring the fact that it is more “powerful” and “comfortable” than most of the other players who occupy patches on the broad social quilt. I have always been amazed that the press, in the West, a for profit business, has over the past 300 years been able to implant deep into the public psyche and vest with a sacral sanctity the creed that the freedom of expression intended to be enjoyed by every member of society confers on their enterprise rights which the purveyors of real estate, stocks or hardware have never had the audacity to advance under the aegis of the equivalent right to hold property.

Most of you would be familiar with the principles embraced by judges around the Commonwealth as articulated by the Lord Chancellor of England, Lord Kilmuir, who, in 1955 wrote a letter to Sir Ian Jacob, the BBC's Director-General, regarding judges, media, and broadcasting, which became known as the “Kilmuir Rules”:

> ... the overriding consideration ... is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would, moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment. . .
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> [A]s a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or to appear on television.

It is probably an understatement to describe this view as quaint, from the perspective of the world in 2007. However, I prefer to adopt the aphorism – coined by the English novelist L P Hartley in the opening lines of his novel, ***The Go–Between***: “The past is a foreign country; they do things differently there” to separate us from post-war England in which Lord Kilmuir wrote.

The great contradiction concerning the judiciary in a modern democracy is that, while “independence” and “impartiality” mean that its adjudicative duty can never be influenced by the whim and vagaries of “public opinion”, the authority of the judiciary to effect “justice” in the society is wholly dependent on continued public confidence.

The obvious means whereby the public whom we serve can become familiar not merely with **what** we do but **why** we do what we do, is to visit the courts to observe them in action – despite the boredom and tedium –across the array of legal work. Since this is impractical, in reality, the public receives its education about the system of justice from the press. Unfortunately, in the increasingly competitive environment of modern litigation, advocates have adopted the science of “spin” to ensuring that proceedings are presented for public consumption through a prism most favourable to the side which wins the sprint to the microphone or camera.

For some time in The Bahamas, the press has consistently run stories suggesting that the unacceptably high rate of offences against the person was the direct result of the judiciary failing to bring persons to trial speedily and, worse still, admitting persons charged with serious offences on bail. In vain has the judiciary pointed out the press’s failure to separate, and, therefore, apportion responsibilities, as between police, the Office of the Attorney General, the Bar and magistrates and judges, often referring to all as all being part of “the Judiciary”; that the courts stand to hear matters brought before it and have no responsibility to bring anyone to trial and certainly accused persons cannot bring themselves to court and that no matter how heinous the transgressions of terrorists, drug traffickers, murderers and rapists are, it is not sufficient to simply accuse someone of these crimes; that it is by the process of trial, not popular denunciation, that guilt is established and it is the work of the courts to conduct the process and, when the State fails in its obligation to proceed in a timely fashion against those in respect of whom accusations are made, it is the duty of the courts to deal with such failures. I have, fruitlessly, challenged the press to educate themselves in these matters so as to better inform the public and, to no avail, urged that elementary fairness requires that, when next they are minded to parrot anyone’s assertions on delays in the criminal justice system, they exercise the initiative of investigating **why** the accused persons have not been brought before the courts to be tried “within a reasonable time” as is mandated by the Constitution.

While I prefer to believe, despite my frustration at the distorted views conveyed in the press that, in most cases, when the press gets it wrong it is as a result of misinformation rather than malice, how is that misinformation to be corrected? If only to be a reliable source to whom responsible agents of the press can have recourse, has it become necessary for judges to become directly accessible to the press? Still haunted by the ghost of Lord Kilmuir, I confess a large measure of personal apprehension about this because judges must hold fast to the

principles that preserve the fairness of proceedings and the dignity of the processes and an insatiable press whose appetite has been whetted will never be satisfied with the limited comments which judicial officers can properly make when they do engage with the press.

Justice Geoffrey Eames, of the Court of Appeal of Victoria, Australia, in a speech to the Melbourne Press Club, in August 2006, “The Media and the Judiciary”, observed:

> It has become a catch-cry that judges are out of touch with the community. If that is said to be attributable to our level of education and our income then it is also true for editors and media proprietors. Judges and magistrates are not out of touch; they are part of the community, but when we decide cases we are bound by our oaths to do what our conscience, and our training and experience, tells us is right, not to deliver a verdict that will have popular support, which is inevitably based on ignorance of the law and of the relevant facts.
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> Informed, balanced, journalism, like sound, fair, decision-making by judges, requires experience and, at times, courage. Given the time constraints and other pressures that attend both tasks, errors will be made from time to time, but the integrity of the practitioners in both fields ought not lightly be denied. We need each other, in the public interest, and we ought learn from informed and balanced criticism that each proffers to the other from time to time.

Earlier, in a speech delivered in Dublin, Ireland, in October of 2003, “Should the Media and the Judiciary be on Speaking Terms?” Lord Woolf, then Lord Chief Justice of England and Wales, had acknowledged:

> [T]he position is that the judiciary are dependant, at least in part, on the media...
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> The judiciary and the media therefore have interests in common and they should certainly be on speaking terms. But alas, the position is still not straightforward. The involvement of the judiciary in making rulings on the ability of media to perform its basic activity of publishing news does at least sound warning bells as to the possible dangers of too close a relationship between the judiciary and the media. The judiciary must not forfeit its independence in its dealings with the media. The media has its own agenda. Conflict between different arms of Government provides good red meat for a media that has an insatiable appetite for news. As the judiciary is regularly required to adjudicate on issues involving the media, the judiciary must be circumspect about having a relationship with the media that will raise questions as to the judiciary's impartiality. Obviously there is no difficulty in the media speaking to judges; the problem is judges

> speaking to the media. A litigant is entitled to have his case decided not only by a judge who is impartial, but by a judge in relation to whom there are no reasonable grounds for saying that he might be impartial.
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> A judge who has publicly expressed his opinions too vigorously, may not be seen as impartial if he is required to adjudicate upon the issues about which he has commented to the media.
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> Certainly, a judge should not have any communication with the media which suggests that he or she covets the approval of the media. All too often, judges are required to make unpopular decisions in order to perform their duty. To hesitate in that duty would be a derogation of that duty. A judge must avoid any situation that could even give a hint that being popular with the media or the public was more important to the judge than coming to a just decision.
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> It is when the judge has to make unpopular decisions that his independence and integrity are most important.

On behalf of the judiciary of The Bahamas which I am privileged to head, I take you up on your offer and invite your assistance in how we, in this developing society, can reach the public we serve through engagement with, but not entanglement by the media.

I thank you.

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* The Honourable Sir Burton Hall has been Chief Justice of The Bahamas since September of 2001.