PRIME MINISTER

17 March 1989

LEGAL REFORMS

This week's forum on the legal reforms organised by "The Times" has highlighted lines of battle between supporters and opponents of change.

"The Times" forum

Wit was on the side of the reformers, and they used it to good effect. James Mackay opened with a speech which was shrewd, pointed and completely lacking in pomposity (see report at Annex A). It went down well even with an audience of 800 lawyers largely in favour of the status quo.

The opponents of change sounded humourless and stuffy. "Market forces" were dismissed with disdain as inappropriate for the legal profession, particularly the Bar, which one barrister likened to a priesthood.

The audience responded warmly to the argument that any defects in the provision of legal services could be remedied by more legal aid. It was odd to see such a group baying so loudly for increased public expenditure.

Summing up, Lord Ackner described the Green Paper proposals as threatening the quality of an independent judiciary. He suggested that this might be the Government's aim (see Annex B). This argument is now being pushed hard by a Bar which is desperate to resist change as far as possible. The judges have also joined in (see Annex C).

Sir Frederick Lawton said something different (see Annex B). He argued that the Bar was being very foolish. They had completely underestimated the strength of political

and popular support for the reforms. Change was bound to come, and the Bar would do well to stop talking in terms of the end of civil liberty and concentrate on improving the details of the Green Paper proposals.

The lines of battle

Small solicitors, particularly country ones, have formed an unholy alliance with the Bar. They are worried about losing conveyancing to the building societies and banks. Many are not particularly interested in wider rights of audience.

The Bar is terrified that if the proposals go ahead, it will no longer be able to attract good people because young law graduates would have the less risky option of joining a firm of solicitors and practising advocacy. The senior members of the profession are clearly appalled that their cosy and familiar world might change. Some younger barristers are said to be much more open to change, but few dare to speak up (the hymn sheet point). Only one youngish barrister spoke in favour of the reforms at "The Times" Forum.

Both sides of the profession were worried before the Green Papers appeared. The best law graduates are inceasingly joining large City firms as solicitors, at starting pay of around £25,000 per annum. Small solicitors, and the Bar, cannot compete. One reason for the almost hysterical reaction to the Green Papers is that many established solicitors and barristers fear that things will never be the same again anyway - even without the proposed reforms.

The key issues

Four are now emerging:

(a) The proposal to establish an Advisory Committee on legal education and conduct is portrayed as Government control of the Bar and the judiciary (or nationalisation of the legal system). The real objection is to the proposed majority of lay, as opposed to legal, members.

(b) The proposal to allow banks and buildings societies to employ lawyers to carry out conveyancing is seen as a major threat by many solicitors. This is virtually a re-run of their opposition to licensed conveyancers in 1982 and 1983.

(c) Allowing solicitors to plead in higher courts cannot be attacked head-on in this day and age. But the Bar see it as leading to their demise, or at best, to a reduction in their numbers and quality.

(d) Allowing multi-disciplinary practices is not an essential part of giving solicitors wider rights of audience. But it is part of the Government's general approach to restrictive practices. Gordon Borrie has argued strongly for legislation to remove the present barrier to solicitors joining multi-disciplinary practices (though oddly he does not take the same view in the case of barristers).

Comment

(a) Advisory Committee

The Government could change the proposals on (a) without losing anything of substance.

The proposal to establish a committee with a majority of lay members to advise the Lord Chancellor on the education and codes of conduct appropriate for lawyers is designed to let in a breath of fresh air. Left to themselves, a committee composed entirely of lawyers would never be able to agree on change, as the Marre Committee showed.

Criticism focuses on the fact that members of the committee would be appointed by the Lord Chancellor; and he would have the last word on its recommendations. This is portrayed as executive dictatorship. Such an argument can and should be defused. At present it is attracting critics who hold no brief for the Bar, but who are worried about the executive encroaching on the judiciary.

One option would be a standing legal commission answerable to Parliament. The important thing is to retain an independent lay voice on matters too important to be left to the lawyers alone.

James Mackay would not oppose such a modification.

(b) Conveyancing by banks and building societies

(b) is the cause of much opposition from solicitors who might otherwise have been neutral, or allies. But it is the proposal likely to be of most immediate benefit to consumers.

Many people want the convenience of 'one stop shopping' when buying a house. The reforms will not prevent people from using a solicitor unconnected with a bank or building society if that it is what they prefer.

It is true that this proposal is likely to lead to a change in the present pattern of small firms of solicitors. The advent of supermarkets changed the pattern of corner shops. But who would deny that supermarkets have brought infinitely wider choice, and considerably higher standards, to many consumers, particularly those in rural areas? And corner shops have not disappeared.

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Many people have little or no need to use a solicitor throughout their entire life, except when buying a house, making a will or dealing with inheritance. All three tasks can often be conducted quite satisfactorily by correspondence. It is not necessary to have a firm of solicitors within a mile or so of everyone. Overall, there will be no unemployment among solicitors: they will have plenty of openings in banks, building societies and multi-disciplinary practices. The present grumble is that firms cannot secure enough qualified staff, given the lure of City salaries. Despite the advent of licensed conveyancers, and the reduction in the cost of conveyancing, many small firms of solicitors seem to need more staff. This suggests that trade is not dying.

The removal of the restrictive practice which prevents banks and building societies from offering conveyancing services was foreshadowed in the Building Society Act 1986. It seems inconceivable that the Government could back-track on it now.

(c) Wider rights of audience for solicitors

(c) is the very heart of the legal reforms. It may be that relatively few solicitors currently in practice will want to act as advocates in the higher courts. But it is intolerable that the law should prevent them from doing so, especially when arrangements are proposed to ensure that those who practice advocacy have suitable experience and qualification.

England and Wales are virtually unique in having a legal system based on a de jure split of the profession. Those who argue that the independent Bar must be preserved at all costs in its present form confuse two things:

- the organisation of advocacy work;
- the ethical standards of those who carry it out.

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The organisation of advocacy work is not immutable. Other Common Law countries organise it differently. If it is true that barristers in chambers can offer a cheaper and better service than advocates working in firms of solicitors, then a market for their services will continue.

The independence of advocates from political or other interference depends on their own ethical standards. It is not a matter of organisation.

There is a strong argument for allowing future judges to gain the wider experience which would come from working in a solicitor's office as well as doing court work. It is important that the judiciary should be drawn from people with some knowledge of life beyond the cloistered world of the Inns of Court.

(d) Multidisciplinary practices

Wider rights of audience for solicitors would put us on a par with other countries, both Common Law and Roman Law. (d) will take us beyond them, putting us in the van of the attack on restrictive practices.

The proposal to change the law to allow solicitors to join multi-disciplinary practices was recommended by the Director General of Fair Trading two years ago. The rationale for the whole Green Paper package is the Government's belief that restrictive practices which cannot be justified on grounds of public interest or safety should go. Multi-disciplinary practices are seen as a threat to the continued existence of the Bar. But there are good grounds for believing that the Bar, or something like it, will continue, although possibly with fewer members. The answer must be to let multi-disciplinary practices and independent barristers exist side by side, thus providing choice.

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Conclusion

The extreme reaction of the Bar, aided and abetted by some solicitors, means that this will be a hard and bitter fight. But the press and most of the public will be solidly behind the Government. Six barristers, five of them senior Conservative back benchers and one Labour, have tabled an Early Day Motion welcoming the Green Paper proposals, and deploring the response of the Bar.

If the Government were to cave in now and to drop its proposals, it would be pilloried mercilessly as too feeble to take on the middle class equivalent of the National Union of Mineworkers. The Government should not get into this position, particularly since it will be tackling restrictive practices in other fields.

Recommendation

- We should press on with the reforms.

- But we should defuse the criticism that these proposals represent executive interference with the legal process. This could be done by making the Lord Chancellor's Advisory Committee answerable to Parliament.

CAROLYN SINCLAIR

ANNEX A

THE TIMES FRIDAY MARCH 17 1989

Frances Gibb on the case for a change of tactics by the Bar

Mismanaging Mackay

The clash between the Lord Chancellor and members of the legal profession has taken on a new and acrimonious note. After weeks of being the butt of vitriolic criticism, Lord Mackay of Clashfern left an audience of 800 lawyers and others at *The Times* Forum this week in no doubt as to his strength of purpose.

For the first time since he published plans six weeks ago for ending the profession's monopolies, Lord Mackay hit back at his critics in similarly forthright terms. He accused the Bar, in effect, of stifling opposition within its ranks, of living in an unreal world, and of parading such principles as the "cab-rank rule" as of critical importance to justice, when barristers do not always follow it.

The pressure on the Lord Chancellor, understandably, is starting to show. He is irritated with what he sees as misrepresentation of his proposals. Much is being made, for instance, of the tight timetable for action. But he argues that many of the issues have been aired in the past two years. When the legal profession produced its own report last summer, it was "hopelessly divided" on rights of audience, protesting that to allow solicitors to appear even in the crown court would be the beginning of the end of the administration of justice itself.

That impasse is to blame for the package of wholesale reform the profession now faces. Somebody had to do something, Mackay was quoted as saying recently. His "something" has prompted unprecedented criticism. Never before have so many senior judges spoken out so stridently. Nor has the once unworldy, low-profile Bar gone in for news management and marketing, which (advised by Saatchi and Saatchi) rivals that of any political party machine.

The popular view is that the Bar's response is entrenched and predictable self-interest. But it is not just gut reaction to change. Many judges and lawyers genuinely believe the system works well and have real fears that its survival is in jeopardy.

Of chief concern is the proposal to end the Bar's monopoly of rights of audience in the higher courts, coupled with measures to let barristers and solicitors, by tradition two distinct branches, form partnerships. Sooner or later, Bar leaders argue, this will mean the death of the Bar. But many barristers disagree. "Few of us," one said, "now believe exclusive rights of audience are defensible."

Many more draw the line at mixed partnerships. They say barristers will be bought up by big City and regional firms for in-house advice and advocacy departments. But again, that view is not universal. Many in the specialist and commercial bars believe they will survive and come out stronger in the face of competition.

There is no doubt that, despite disclaimers from firms to the contrary, that some barristers will be recruited and "lost" to the lay client. Against that, solicitors want to go on briefing the independent Bar. Most smaller firms do not wish or want to set up advocacy departments. It will usually be more expensive, because the Bar has much lower overheads. Demand, therefore, will remain; and many barristers – arguably the best – will stay freelance.

Other firms clearly want to make good use of rights to take cases in the crown court; and the criminal Bar, particularly in the regions, could be reduced in size. Yet 18 months ago David Cocks, QC, warned that the growth of the criminal Bar had led to a drop in standards. There were too many part-time judges and recorders without the experience to control "manipulative, dishonest or incompetent counsel".

Those firms who will use advocacy rights say that if, as proposed, such rights are based on training and experience, standards can only rise. It will also help them attract and keep lawyers in struggling legal aid practices. And even they will still use the Bar, both for adequate cover of magistrates' courts and weightier crown court work.

There is the question of recruitment. Who will go to the Bar if they can enjoy its advantages from the financial security of a solicitor's office? There might be a shift here to the New South Wales system, where most lawyers start in a solicitor's office. But it is likely then that solicitor-advocates who have a taste for the work will go off at a later stage to the Bar, where they can enjoy a regular and varied supply of the heavier cases.

It is the other proposals where fears seem more justified. Enabling banks and building societies to do conveyancing for their customers could drive small firms out of business and reduce the spread of legal services. Lord Mackay wants competition to be fair – the "level playing field" – but will it prove possible to enforce? It is true that some corner shops have survived in the face of the supermarkets, but many have not.

More contentious is the plan for a lay-dominated advisory body to set standards of conduct, training and education and also advocacy under the system of licenced advocates. It is here that fears of executive control of the legal profession and the judges have prompted the strongest attacks. On this, Lord Mackay is clearly open to persuasion. One solution, as David Ward, the Law Society vice-president, said, might be to enshrine principles of conduct in statute, not subordinate legislation. A Legal Affairs Commission (or Ombudsman), with power to recommend parliamentary action, could make proposals and the professional bodies themselves draw up the rules.

In the meantime, with a clash on the reforms coming in the House of Lords, there is a real danger that if critics persist with the rhetoric and full-frontal attacks, Lord Mackay will dig firmly in. As Sir Frederick Lawton said, critics would do better to home in on the weaknesses in the Government's case rather than – unrealistically, as he saw it – seek to have them jettisoned in their entirety. On the issue of self-regulation and the profession's independence from government, lawyers across the board could unite. It is an issue, Ward said, more important for the nation than "preserving an outdated way of life for the benefit of the few".

Friday, March 17, 1989

on closed minds

Be constructive and be rational, he tells critics

The Lord Chancellor, Lord Mackay of Clashfern, yesterday made clear to *The Times* forum on the future of the legal profession that his mind was not closed to criticism of his green papers, but he called on his critics to be rational and constructive.

He declared to the 800 lawyers and other professionals at the National Theatre on the South Bank: "I am listening and shall continue to listen to what those responding to the papers have to say. If those responding to the green papers convince me that the proposals are bad and need to be modified, modified they will be. But it goes without saying that this process will be infinitely easier if those responding do so in a rational and constructive way."

Lord Mackay, who answered questions for three-quarters of an hour, predicted that under his plans there would be a demand for the services of an independent Bar that would strongly continue. Where demand existed, the Bar would be there to satisfy it.

In his opening address to the forum, the Lord Chancellor said:

"Mr Wilson, Sir Robin Day, my lords, ladies and gentlemen, I am delighted to have been asked to give the opening address at *The Times* Forum on the Future

Competition forces economy to respond to the consumer

of the Legal Profession. I am sure that this conference, like the one organized by Westminster and City Programmes last week, will provide a useful means of clarifying and perhaps widening the terms of the debate on the three green papers on the legal profession and the provision of legal services.

In its response to Benson in 1983, the Government accepted the Royal Commission's recommendation that there should be no further general extension of rights of audience. Some of my critics seem to have difficulty understanding why the Government appears now to be suggestng a special and limited extension of rights of audience. It may assist if I remind them of some key events affecting the legal profession since 1983.

Let us start with legislation. In 1985, the Administration of Justice Act removed the solicitors' conveyancing monopoly by creating the new profession of licensed conveyancers. In 1986, the Building Societies Act allowed the Lord Chancellor to recognize building societies and other institutions as suitable to provide conveyancing services.

Let us move on to recent statements of Government policy. The 1987 Conservative manifesto prepared and issued when I was a judge and taking no part whatever in politics, devotes nearly a page to the subject of competition. I think that it would be helpful to remind you of what it said:

'Competition forces the economy to respond to the needs of the consumer. It promotes efficiency, holds down cost, drives companies to innovate and ensures that customers get the best possible value for money.'

There then follows a list of de-regulatory measures achieved by the Government. The removal of the monopoly on conveyancing of houses in England and Wales is specifically mentioned. The manifesto states clearly thatthe Government intends to continue its de-regulatory approach. But, and it is a very important but, the manifesto states quite clearly that 'competition must be supplemented by legal protection for consumers'.

Then in March 1988, the Department of Trade and Industry published its Green Paper, *Review of Restrictive Trade Practices Policy*. This suggests a general prohibition on agreements which have the effect of restricting or distorting competition. There are provisions for granting exemptions, but on economic grounds only. The Government has concluded that the professions should be subject to the new legislation and that the rules of professional bodies should be subject to the same tests administered by a new competition authority as other sectors of the economy. I pause to mention that it is to this competition authority that the legal profession will have to justify many of its professional rules. In particular, the green paper on the legal profession makes it clear that this will be the case in respect of direct access and the internal rules and methods of organisation of the Bar.

Let us leave government policy for a moment and turn to the legal profession's recent efforts to examine its structure and practices. What I have had to do is deal with the results of the Marre Committee. I would remind you that this committee was set up by the Bar and the Law Society themselves in 1986 to examine the structure and practices of the legal profession to see whether these met the needs and demands of the public; and to make suggestions for change accordingly. The committee gave three main reasons for its establishment so soon after Benson. The first reason was the increasing emphasis placed by successive Governments, particularly the present one, on the need to dismantle restrictive practices and allow market forces to operate in relation to the supply of services. The second reason was the growing awareness of the need for realism about the limits of public funding. The third reason, and it is a particularly interesting one, is because both the Bar and the Law Society thought that the time had come to reappraise their traditional views. And what was the result of the Committee's deliberations after two years? Very little. In particular, they were hopelessly divided on the question of extending rights of audience; the Bar, true to history, protesting that to allow solicitors to appear even in the Crown Court would be the beginning of the end not only of the Bar, but also of the very administration of justice itself.

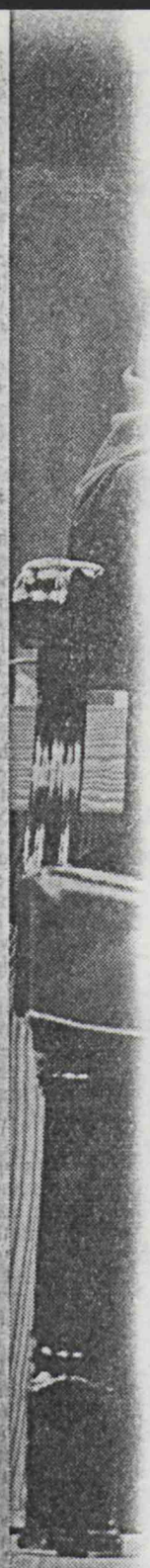
It seemed to me that the way out of this impasse, for there is no other way of describing it, was to go back to first principles. To ask, what is the justification for a restriction on rights of audience in the courts? First, it seemed to me that the key to the answer lay in requiring of those with such rights a standard of education, training and qualification required to make them competent advocates to represent clients. Second, standards of conduct are necessary in order that the advocates appearing in court continued to be men and women of integrity who knew that their paramount duty must always be to the

Quality of service...not a matter of clocking up hours

court. It was necessary, in other words, to balance the need to ensure the maximum availability of advocates to the public with the need to ensure that proper standards of competence and conduct are maintained.

What we are really talking about here is quality of service. Having sat as a judge myself, I quite agree with my colleagues who say that the quality of advocacy is crucial to the administration of justice. That is why advocacy is the only specialism which the green paper restricts to those who can show that they are properly qualified both by training and experience to undertake it. Nobody, I assure you, is more aware than I am of the need to ensure that rights of audience are given – particularly in the higher courts – only to those who will not only give the right quality of service to the parties involved in a case, but who will also enable the quality of justice and the standards of judgements following on their advocacy to be maintained.

It is because of my concern with quality that the green paper proposes that rights of audience for all advocates should be dependent upon a certificate of competence. The green paper makes it perfectly plain that rights of audience in the High



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Questions to the Lord Chancellor

Law will not be left to market forces a

After completing his opening address, the Lord Chancellor answered questions, the first of which were put by the conference chairman:

Sir Robin Day: Do these proposals have the support of the Attorney General (Sir Patrick Mayhew QC)?

be applied to the administration of justice.

Lord Mackay said the Bar was already operating in the market place. It was for that reason that there had been complaints that it was no longer getting the best people who were, for economic

shopping" in answering a later question, Lord Mackay said that he acknowledged that people wanted quicker and simpler conveyancing and that some of the delays came in dealing with the land register, due in part to the increase in its business.

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Lord Mackay of Clashfern: If the proposals are bad, they will be modified.

Court and above will be restricted to those will full advocacy certificates. The requirements for obtaining these certificates will be matters for consideration by the advisory committee; but it is envisaged that their holders will have to undertake academic, vocational and practical training in law and advocacy. They will also 'need to have held a limited certificate for a minimum period and within a set period of time to have completed a prescribed minimum amount of actual advocacy in the magistrates' court, the county courts and the crown court'. This matter is relevant to quality of service. It is certainly not intended that progression from a limited to a full advocacy certificate should be simply a matter of clocking up hours; it is a question of spending at least a certain proportion of one's time in actual advocacy over a given period. The required proportion is obviously a matter for consideratin

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It is to ensure that quality of service
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Why? Because rights of audience affec
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made clear last week that neither
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has any intention of being involved in
actual issue, suspension or revocation
advocacy certificates. Such matters will
entirely for professional bodies concern

Last Friday, Lord Devlin published
article in *The Times* claiming that the ri
of audience is a procedural matter; and

Consultation with the B a pleasure rather than a bother

such, that it should be left entirely to
judges. That is all very well, but I wo
just like to remind you that rights
audience in the magistrates' courts,
county court and, to an extent, the cro
court are already regulated by statute.
relevant provisions are set out in annex
to the green paper. Incidentally, it is righ
emphasize that Parliament actually had
legislate in 1836 in order to give barriste
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thus overruling the Court of King's Be
which held that the magistrates sho
decide who could appear before them.
those to whom this comes as a revelati
may I commend to you paragraph 3
Annex E which sets out the history.

It may also interest you to know that t
decision to give solicitors as well
barristers rights of audience in the n
county courts in the nineteenth centu
met with bitter opposition from the B
Speaking in the House of Lords, Lo
Lyndhurst commented, 'you would ha
them (solicitors) quoting chicanery a
encouraging litigation, for no other obje
than to recompense themselves by th
multitude for the small amount of the
fees, and thus you would degrade the leg
profession from its highest members to
lowest'.

Well, it has not happened has it? Neith
has the Bar withered and died as a result
the competition. In fact, in all courts a
tribunals where the Bar shares rights
audience with solicitors it has prosper

I wish particularly to emphasize that t
three green papers are consultation pape
I said this because I meant it. I have be
accused of not taking soundings before t
papers were published. This is to confu
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Government, with consultation on wheth
the policy is appropriate, which is th
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Lord Ackner has suggested that I have n
bothered to consult the Bar. I can assu
him, Lord Devlin and Desmond Fenn

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Continued from page 13

that consulting the Bar is not a bother; it is a pleasure. I have had many meetings with the Bar since I became Lord Chancellor. I have enjoyed every one of them. The meetings have been very useful; they have been conducted in the relaxed atmosphere of mutual trust which should exist between fellow lawyers. But, so far as the green papers are concerned, consultation could take place only after publication. To have had the results of consultation with interested parties mixed up with government proposals in the papers themselves would have been a recipe for confusion. Whose papers would they have been. The Government's or the Bar's?

Lord Devlin talks in his article in *The Times* about the meaning of the independence of the judges. He seems to think that judicial independence is in some way bound up with sole control of rights of audience. Taken to its logical conclusion this would mean that our judges are less independent now than they were in the nineteenth century when Parliament intervened to regulate rights of audience in magistrates' and county courts. I do not believe that this is so. I think that we might do better if we look at the concept of judicial independence as it relates to the Bar; for it is, after all, from the ranks of the Bar that most of our judiciary are currently drawn.

What better place to start than the definition of independence given by Lord Devlin, when he was a puisne judge, in **Potato Marketing Board v Merricks** [1958] 2 QB, 316 at 335.

He said: 'I agree with counsel for the respondent that independence ordinarily denotes financial independence, but I do not think that is the only sense in which the word can be used. I think that the word may be used to refer to a person who is permitted — and, perhaps, indeed required — by the man who employs or retains him to bring an independent mind to bear on a particular problem; for example, a solicitor.'

Let us leave aside the solicitor for the moment and look at the first part of the definition: financial independence. What does this mean for the Bar? Let us look in particular at paragraph 8 of the Code of Conduct. This prohibits partnerships between barristers; it also, however, permits what are known as "purse-sharing" arrangements. I think that it is worth reading this out in full. Paragraph 8.3 provides: 'It is permissible for all barristers practising in a set of chambers to agree (a) to share their professional expenses either in proportion to their receipts or in any other way; and/or(b) subject to paragraph 8.4 to share their professional receipts or a proportion of them in such manner as they think fit.'

Paragraph 8.4 refers to other provisions of the code which deal specifically with the conflicts of interest to which these financial arrangements inevitably give rise. For instance, it is provided that a barrister may not appear as a barrister before another barrister who is a party to the purse-sharing arrangements in his chambers. Neither may such a barrister appear against another barrister in the same chambers without the consent of both the lay and the professional client.

I am listening and shall continue to listen

Now, it seems to me that there is a clear possibility of conflict of interest in being fee-dependant, as indeed the code recognizes. I am certainly not against such arrangements. Quite the contrary. They are a recognition by the Bar, are they not, that the ideal of total financial independence may be incompatible with survival. After all, it is the saving provisions of paragraph 8.3 of the code which enables some chambers to provide much-needed financial packages to attract pupils who might otherwise be lost to the Bar. I have heard of at least one set of chambers which takes this further and operates a purse-sharing arrangement between the tenants. What I think we need to ask ourselves is this: Are not those benefiting from purse-sharing arrangements fee-dependant? And, if so, how does this affect their ability to act as independent advocates? Is there any difference between the independence of those barristers who practice from chambers and the independence of those who are employed? Would there really be any difference between the independence of barristers practising on their own and those in formal partnership with others? And do you really believe, for example, that the independence of the present holder of the office of Director of Public Prosecutions — a distinguished and much respected member of the Bar — is compromised in any way now that he is a member of the Civil Service. I would very much doubt this. I think his independence remains as strong as ever. The reason, I think, is that the most important meaning of independence is encapsulated in Lord Devlin's other meaning of the term — an independent mind. My understanding of an independent mind is a mind which is open; a mind which listens to the other side; a mind which is susceptible to reason and argument and makes decisions on the basis of these; a mind which has the courage of its convictions and is prepared to fight for what it believes to be right, however unpopular the cause may be. This might, might it not, have something to do with that judicial quality which Lord Devlin identifies in his article, namely the capacity to do justice.

What I want to ask you now is this: Are the leaders of the Bar currently showing in their public reaction to the green paper independence of mind in the sense which I have just outlined? Or listening to other views about the green papers? And do they represent the whole Bar? On March 6, the *Financial Times* published an article quoting the reluctance of some dissentient barristers to make their views on the green paper public for fear of being labelled scabs. In fairness, the article says that Mr Desmond Fennell was dismayed to hear this. I understand Gerald Levy suggested at the Inn on the Park conference last week that barristers who do not agree with everything that the leaders of their profession are saying are being prevented from attending meetings of specialist Bar associations to put their views. Not only that, but the March issue of *Bar News* makes a particular point of stressing the importance which the Bar attaches to ensuring that, and I quote, "everyone sings from the same hymnsheet".

Well, I do not have a hymnsheet. I can assure you that my mind is not closed. When I say that the green papers are consultation papers I mean it. I am listening and shall continue to listen to what those responding to the papers have to say about the proposals. If those responding to the green papers convince me that the proposals are bad and need to be modified, modified they will be. But, it goes without saying that this process will be infinitely easier if those responding to the papers do so in a rational and constructive way.

It goes without saying also that it would be helpful all round if the Bar in particular ceased living in an age of wish fulfillment and dealt with the Bar as it actually is, rather than the Bar as they would like it to be. I am thinking in particular of their approach to the cab-rank rule. This rule has its classic expression in the speech of my fellow-Scotsman, Thomas Erskine in his defence of Thomas Paine in 1792 following publication of *The Rights of Man*. This was an attack on the monarchy and Erskine must have realized that his defence of Paine might cost him his position at Attorney-General to the Prince of Wales. He said: 'From the moment that any advocate can be permitted to say that he will, or will not, stand between the Crown and the subject arraigned in the court where he daily sits in practice, from that moment the liberties of Engand are at an end'. The cab-rank rule is designed to ensure that none is deprived of representation before the courts however unpopular his or her cause may be. An admirable tenet with which few would disagree. The current version of the rule is perhaps a little less ringing in tone. It is set out in paragraph 13.4.1(a) of the Bar's code of conduct. This provides that 'A barrister is bound to accept any brief to appear before a court in the field in which he professes to practise (having regard to his experience and seniority) at a proper professional fee having regard to the length and difficulty of the case and to his availability. Special circumstances such as a conflict of interest or the possession of relevant and confidential information may justify his refusal to accept a particular brief. A brief (including a legal aid brief) may be refused if the expenses which will be incurred if it is accepted are likely to be unreasonably high in relation to the fee likely to be paid and are not paid additionally to such a fee.'

The Bar should cease living in an age of wish fulfilment

Well now, there is nothing that I can find in that paragraph to entitle barristers to refuse legal aid briefs. But they must be doing so because the Bar state categorically in their "consultative document" issued on February 17, that 'Every barrister should be under a professional duty to accept briefs or instructions in legally-aided matters in his or her field of practice.' Interesting isn't it?

What I find even more interesting is *The Times'* report of the Bar Conference of September 1987. According to this report, David Cocks regretted that 'There has been increasing departure from the cab-rank rule with many barristers refusing to prosecute.' By way of anecdote, I do not know how many of you watched the first television programme in the current series on Marshall Hall; I did not see it myself, but I have been told that Marshall Hall stormed out of his room in a rage when his clerk tried to give him a brief in an unpopular and apparently hopeless case which had, in the time-honoured phrase, 'been hawked around the Temple'. In fact, he went so far as to throw the brief on the floor of the clerk's room. It is true that he did take the brief in the end, but it was only after much cajoling by the solicitor who assured him that the case was the road to fame. Everyone has his price, I suppose. I do not know about you, but speaking for myself, I think that the Bar should explain exactly what sort of cab-rank rule it is talking about before it claims, as it does in its 'consultative document' that it is a critical factor in the reputation of British justice. My own definition of an effective cab-rank rule would be that a person who holds himself out as a practising advocate should be bound, whether or not he belongs to a partnership, to act for any person who offes a proper professional fee and the advocate should not be able to make it a condition of giving his advocacy services that he, or anyone connected with hm should provide any other service, for example those services normally provided by solicitors.

Well, I had originally intended saying a few words about the other two green papers on conveyancing and contingency fees. But, I think that our time would be better spent if we now proceeded to questions."

17/3/89

THE TIMES

Bar launches campaign against reform

By Richard Ford, Political Correspondent

A big advertising campaign opposing the Government's controversial proposals to reform the legal profession is launched today by the Bar with a two-page advertisement in *The Times*.

The launch comes amidst criticism that the Bar's opposition to the far-reaching proposals outlined by Lord Mackay of Clashfern, Lord Chancellor, has been strident and ill-judged.

In the advertisement, the Bar lists 12 things which it says are wrong with the Green Papers on the legal profession and urges the public to make their view known in letters to MPs.

It is the first time the Bar has launched an advertising campaign. Mr Desmond Fennell, QC, chairman of the Bar, said: "We want to alert the public to the very real dangers which lie in the Green Papers, dangers which will undoubtedly reduce choice and make it more difficult to obtain independent legal advice".

He said: "The public should not be taken in by the Government's idea that unrestrained market forces will cure the ills of our legal system".

Mr Fennell said he hoped the advertisements would show the Bar shared the public's concern in wanting a legal profession providing quality of service, real choice and a cost-effective service. "The Government's proposals will damage these three elements and impose worrying political controls", he said.

In the advertisements, designed by Saatchi and Saatchi, the Government is accused of acting at breakneck speed to change the legal system.

They say it is wrong that a system that has taken 700 years to develop should be given only 12 weeks to justify itself and respond to the proposals for change.

The Bar advertisements predict that under the proposals legal delays will get longer, barristers working for big law firms will be more expensive and consumer choice will be reduced.

THE TIMES

Secret circular asks 400 judges to join attack on legal reforms

By Frances Gibb, Legal Affairs Correspondent

Government reforms of the legal profession have been strongly attacked on constitutional grounds in a circular enlisting opposition to the proposals which has been sent out privately to more than 400 circuit judges in England and Wales.

The confidential circular, which comes with a six-page questionnaire, is an unprecedented move by the the Council of Her Majesty's Circuit Judges to bring together the views of all judges on the proposals, "whether on the active or retired list."

The Government's Green Paper, the council says, "ignores the constitutional propriety of taking a learned profession concerned with the liberty of the subject under government control."

It asks judges whether or not they agree that the proposals will diminish the power of Parliament, "but increase the power of the Lord Chancellor"; and whether "in the name of increased freedom the control of the whole legal profession will pass into an extended Lord Chancellor's Department."

In a covering letter signed by the secretary to the council, Judge Mark Dyer, judges are called on urgently to respond

Mismanaging Mackay,18

to the questions. It says that if only small number replied, "then we will be told that all those who did not were in favour of the proposals or indifferent to them."

The move comes amid mounting public opposition to the Lord Chancellor's reforms among senior judges of the House of Lords, Court of Appeal and High Court, who are expected to make their views known in a Lords debate next month. The questions to the circuit judges are phrased in strong terms and in the context of court proceedings before the judges themselves might be criticized as "leading" and ruled out of court.

Examples are: "Do you agree/disagree [if the proposals are implemented] that the constitutional independence of the judiciary will have have been substantially diminished?"

"That a profession whose system of education, operation and promotion is controlled by others is effectively neutered?

"That in the name of increased freedom, the control of whole legal profession will pass into an extended Lord Chancellor's Department?" Judges are also asked among questions on general competition policy, if they agree, or disagree, whether the Bar is competitive "in the sense of being in almost daily competition with the members of the professsion and often with solicitor advocates in magistrates' and county courts. Another issue is whether they agree or not with "the extraordinarily wide definition of legal services" in the Green Papers: and whether a bank or building society "properly come within a true definition of "provision of legal services."

Other areas covered are legal education, codes of practice – "Would it be better or worse that the control over the codes should be with government and not the professions?" – and advocacy.

Judges are asked, for instance, if they agree or disagree that the proposals for extended rights of audience "mean the establishment of a district attorney type of prosecutor" and if that a good idea or not.

16/15

Proposals 'threaten quality of judiciary'

The Government's proposals threatened the quality of an independent judiciary which was increasingly scrutinizing the executive, Lord Ackner, Lord of Appeal in Ordinary, said. This was perhaps what the executive wanted.

Thirty years ago, Lord Devlin had complained that the law no longer had the strength to control the executive. Since then, there had been a new growth of judicial review whose main purpose was to protect the citizen from abuse of power by, in particular, government departments. A strong and independent judiciary had been a thorn in the Government's side. This position was threatened by the proposals.

He opened his summing up of the forum by reminding his audience of findings of the Royal Commission which reported in 1979. Its unanimous view was that merging the two branches of the profession would reduce choice and availability of legal services. It would increase the cost and reduce the quality of advocacy.

The commission recommended against giving solicitors rights of audience in 'run-of-the-mill cases in the crown courts. It considered advocacy a specialist occupation. In 1983, the Government had accepted both recommendations.

The Government now proposed that, subject to obtaining a licence, solicitors should be entitled to practise advocacy in the crown courts, High Court and House of Lords. This had never been suggested before.

If implemented, it would probably destroy the Bar. But matters did not stop there. Not only would partnerships be permitted within the Bar, but partnerships between barristers and solicitors.

Lord Ackner, who summed up feeling against the proposals, with his fellow protagonist Sir Frederick Lawton in the background.

Lord Mackay had not been at his frankest when he said last week that he did not understand why leaders of the Bar said that his proposals would spell the end of the Bar. He knew well that it was not only leaders of the Bar who said this. It was said by his predecessor, Lord Hailsham; by Lord Benson, chairman of the Royal Commission; Lord Scarman; and Lord Rawlinson.

A report by Sir Gordon Borrie to ministers in 1977 had said that partnerships between solicitors and barristers would be a substantial step towards fusion.

How could Lord Mackay express this view after what had been quoted? It was because the moment he conceded that his proposals involved a substantial risk of the destruction of the Bar, he would not be able to proceed.

The green paper had been subject to no prior consultation, it did not identify the benefits it was intended to create, made no comments on previous debates and gave no explanation for change of mind. Unseemly haste should now give way to full and proper inquiry.

The destruction of the Bar would reduce the quality of advocacy which was one of the central supports on which liberties were based and on which law depended. In the name of consumer choice, the man in the street was in danger of losing a vital protection against abuse of power by the executive.

Bar's tactical errors likened to Bannockburn

The standards of advocacy shown by the Bar in its own defence were strongly criticized by **Sir Frederick Lawton,** former Lord Justice of Appeal.

He criticized leaders of the profession for failing to recognize the political strength of the Lord Chancellor and using inappropriate tactics to counter him.

They had failed to fulfill elementary rules of advocacy: to assess properly the political strength of the Lord Chancellor's case, and to appreciate their own weaknesses. They had over-stated such strengths as they did have and had indulged in general waffle instead of keeping to the facts.

Politically, the Lord Chancellor's stength was considerable. The Government had a large majority in the Commons. Peers in the Lords were not especially sympathetic to lawyers. The Lord Chancellor also had powerful supporters in the press. Many members of the public sided with the Lord Chancellor. Barristers and solicitors deluded themselves if they thought they were popular with the ordinary man in the street.

What the Bar lead by Desmond Fennell had done was assemble its troops, call out judicial trumpeters to sound the alarm and then charge in a full frontal attack. "In the circumstances, they would have done well to remember Bannockburn (laughter).

"It seems to me in the exercise of what political judgement as I have that there are going to be changes in the organization of both branches of the legal profession. I would say that that there is no possibility of the Bar persuading the Lord Chancellor and Parliament that there be no changes at all."

Advocates were advised to adopt tactics to ensure the best possible settlement at the end. That was what the Bar should have done instead of talking in such general terms about threats to the judiciary and the independence of the legal profession.

If the Bar had come to him instead of to Saatchi and Saatchi, he would have advised a confidential letter to Lord Mackay asking for more details of his proposals. Then, having got some answers, the Bar could have attacked him on the weak points.

There might have been a Scottish defeat. But there was not going to be, because of the second serious criticism of the Bar's tactics. It had failed to increase salaries for those entering into the profession in line with salaries for solicitors' articled clerks. The result was a trend away from the Bar which meant that the number of independent advocates would decline and the inevitability of some arrangement for getting competent advocates in the higher courts.

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