INNER TEMPLE LECTURE SERIES

The independence of the profession and the rule of law

NOTES FROM A LECTURE BY **PETER LODDER Q.C.** AND **Master DEECH**

**Peter Lodder**: In a lecture in 2006 Lord Bingham identified the core principle of the rule of law as: “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws, publicly and prospectively promulgated, and publicly administered in the courts.”

He set out a series of sub-rules, the fifth of which is that means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve.

As he commented: “The rule of law plainly requires that legal redress should be an affordable commodity.”

At the moment the single most important issue for this profession is the government’s reaction to the current fiscal crisis. Severe cuts in public expenditure are planned to have a significant impact on the justice system, most notably in terms of the scope of legal aid.

The Ministry of Justice’s recent consultation on the reform of legal aid was undertaken with the declared aim of achieving a fair balance between the need to reduce public expenditure, the need to protect the interests of justice and to satisfy the wider public interest.

However, critics of the most recent proposals raise profound concerns about the effect on the protection of the interests of justice and the wider public interest. These concerns have been characterised as a threat to access to justice.

This is a topic which has dominated my time as chairman of the Bar. This review is far more wide-ranging than any that have gone before. And the regulatory context in which the current debate is taking place has changed significantly.

In 2007 parliament enacted the Legal Services Act. Its provisions were designed, broadly speaking, to liberalise the arrangements for the delivery of legal services and to place the interests of consumers at the centre of those arrangements.

So what is the background to the cuts? Under this government the Ministry of Justice is seeking cuts of £350million in its budget, of which £96million will be further cuts to the criminal legal-aid budget.

The Council of Circuit Judges has said in its response to the Ministry of Justice: “The proposed cutbacks in fees for publicly-funded work will provide a further disincentive for advocates to undertake this type of work.”

There is a real concern that the pool of skilled advocates willing to undertake the work will diminish, to the disadvantage of litigants and to the detriment of the efficient running of cases.

In civil and family legal-aid cases the position is equally if not more bleak. The ministry proposes to take many classes of case out of scope so no legal aid would be available, subject to certain exceptions.

The economics of this approach are questionable. Moving an area of legal redress from scope does not resolve the original problem; it merely pushes the problem onto another public service such as the police, education or mental health where the resultant overall cost may be higher.

But, more importantly, these steps will disenfranchise whole sections of society in terms of access to justice. Only as litigants in person will they be able to get in front of a court at all.

It is also proposing 10% cuts to all fees paid under civil and family legal-aid schemes.

The Council of Circuit Judges comments: “One of the major concerns is that the proposals would lead to a huge increase in the incidence of unrepresented litigants, with serious implications for the quality of justice and for the administration of the justice system at a time when courts are having to cope with closures, budgetary cutbacks and reductions in staff numbers.”

The legal-aid paper says lay clients would be able to obtain representation under a conditional fee agreement (CFA). But the civil litigation consultation proposes changes to CFAs which mean that many are unlikely to be undertaken.

An example is clinical negligence. These cases often require extensive investigation at an early stage. They need to look at the issues of negligence and causation. Medical experts’ reports need to be obtained.

Conditional fees are unsuitable because often it is only when the early investigations are complete that lawyers can form a view as to whether the claim is one appropriate for that basis.

Legal aid plays a crucial part in ensuring access to justice in this field. Because of the restrictive financial criteria at the moment, these claimants are necessarily those of modest means. The reality, we fear, is that many of these cases will simply not be pursued.

Since 2006 the Bar Standards Board has been the independent, ring-fenced regulator of the Bar. In 2007 the Legal Services Act established a new overarching independent regulator, the Legal Services Board.

The arrival of regulators in our profession was not universally welcomed. Some felt that external regulation was not needed.

But an important part of the Bar Council’s submissions to the Ministry of Justice consultation on legal aid considered the impact of the cuts on the regulatory objectives set out in the 2007 Act.

The second regulatory objective specifically refers to support for the constitutional principle of the rule of law. But it is worth recognising the other objectives, which identify issues which are vital constituents for the rule of law.

Under section one they are: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of the citizen’s legal rights and duties; and promoting and maintaining adherence to the professional principles.

In responding to the consultation paper the BSB, with Master Deech’s fair hand at the end of it, made this observation: “We have not, regrettably, been able to identify any single proposal which we think might have a positive regulatory impact. Rather we have identified a range of areas where we believe there are risks of negative impacts.”

The Bar Council has argued that the government’s proposals for reform of legal aid undermine the regulatory objectives laid down by the Act.

We say they run counter to the public interest. They will inhibit rather than improve access to justice. Far from protecting and promoting the interests of consumers, the so-called reforms will undermine these interests.

Given the acknowledged discriminatory impact of the proposals, the legal profession will not emerge independent, strong, diverse and effective. In fact the reverse is likely to be the case since countless women and BME practitioners, whose practices tend to rely more extensively on public funds than their professional colleagues, will be forced away from the work.

Over recent years there has been a reduction in the number of pupillages available. This drop is almost entirely attributable to fewer offers at the publicly-funded Bar. The indications I receive are that the number will drop further.

When the structure of the LSB was being debated in parliament there was much concern about the need for the new regulator to be independent of government. You may think it ironic therefore that we should now be looking to the statute and the LSB to reflect the independence that we so clearly cherish.

If the LSB, as regulator, is serious about demonstrating its independence and standing up for public and consumer interests, we look forward to it entering the debate and commenting on the serious issues at stake for access to justice.

**Ruth Deech**: I was taken aback at a recent European-wide legal conference to hear delegates from newly liberated Eastern European countries suggesting that the English Bar had lost its independence.

In a nutshell the concerns were the intrusion of the super regulator, the Legal Services Board, appointed – as they saw it – by government.

In response I say that there is a new commercial spirit in chambers, whereby the independent Bar can continue to serve the public and the administration of law without losing its focus on advocacy and the special responsibility that that identity brings with it.

I am mindful of the regulatory objectives with which the body I chair, the Bar Standards Board, is charged under the Legal Services Act 2007. Those principles must mean the continued separate profession of the Bar.

The Bar justifies its separate existence by its commitment to its special duty to the court above all else, and its reaching out to all sorts of new pupils knowing that part of the strength of the Bar is its diversity.

The Bar Standards Board thinks that the Bar Council and the profession as a whole can be proud of the fact that over 20% of new pupillages recently have been taken by black and ethnic-minority pupils.

As a non-practitioner but former teacher of law and charged with regulating the profession under the Act, my impression is that there is great merit in the existing division.

It allows for the most advanced development of the skill of advocacy.

It ensures, through the cab-rank rule, that even the most unpopular of clients has representation, providing a system whereby a barrister may stand up to the government on behalf of, say, an alleged terrorist without being identified with the client.

It fosters the highest standards because each barrister is the object of her fellow barristers’ inspection and competitive spirit.

It provides the collegiality and protection of the Inns.

It supports the rule of law because loyalty is to the court and not to the earning capacity of the entity - although in this regard we must be alive to the dangers ahead for ethical standards if barristers start working in regimes that are focused on a form of corporate profit.

The separation of the legal profession’s objectives from those of the government is vital for this reason: if you accept that the legislature should ensure that in its lawmaking all citizens should be treated equally by the law and be given notice of what is allowed and what is forbidden, then this needs to be backed up by separate interpretation and application of the law by the profession. Otherwise the government could manipulate its laws when it feels it is necessary.

The courts have to decide impartially, in a known way of reasoning, and not be influenced by current government policy. The courts depend on the Bar to present cases in such a way that judges can form the best view of differing interpretations of the law and the facts, relying on the advocate’s first duty to the court.

Let me list why it is widely believed that the governance of the Bar should be taken out of the cloisters of the Inns and the Bar Council and led blinking into the daylight of Whitehall and Westminster.

Legal advice is too expensive. It has moved out of the reach of the middle classes. Perhaps the majority of the population could never contemplate accessing the individual advice of a barrister or a city solicitor.

It is reported – often with pride – in the journals of a solicitor’s profession that partners in city firms make £1million a year and that some barristers make similar sums from legal aid, let alone from private work.

We know that there are barristers, many of them women and minorities, who undertake publicly-funded work in criminal and family issues and make only the most modest of living. But their pleas are undermined by the excesses at the other end.

There are many ways in which the richer end of the Bar could subsidise the less well-off end.

The image of the legal profession was also severely dented by the scandals of solicitors’ firms making more for themselves than for miners suffering from lung disease on whose behalf they were claiming damages. This was a major factor in the recent overhaul of the complaints system.

Does the Legal Services Act 2007 help or hinder that vital independence of the Bar?

Under the statute, the LSB and its consumer panel are appointed with the approval of the Lord Chancellor. But he is now firmly a politician after his removal from the woolsack.

Under the Legal Services Act, the Lord Chancellor has many powers to decide who can regulate and how lawyers must conduct themselves.

This situation could become difficult if the Legal Services Board and the front-line regulators disagreed over the meaning of the eight objectives in the Act. It is not clear from the statute whose view would prevail.

It is therefore vital that there should be no apparent conflict of interest in the structure of the Legal Services Board. There must be a clear division between its supervision of the regulators and the Legal Services Commission or whatever mechanism is used to distribute the small pot of legal aid to lawyers.

There are four types of independence: there is the independence of the self-employed Bar, so valued by them and by the students who want to join them.

There’s the vital independence of the legal profession from government, no matter how well-meaning and unthreatening that government may be.

The statutory separation of the representative and regulatory arms of the Bar Council is designed to ensure the independence of the Bar and end any appearance of self-serving self-regulation.

Fourthly, the independence of the legal profession as a whole could equally be threatened if another regulator overwhelmed it by the imposition of one type of economic theory, without regard to quality of service and the virtues of some self-regulation.

Looking to the future, you should be aware that the BSB, which I chair, will be important in your professional lives and that we care very much about your education and your prospects.

As a law teacher for many years myself, I watched at close quarters the agonising of students over which branch of the profession to join and the obstacles they faced in funding; which will now be even worse with the hike in tuition fees. And down the years I watched my women pupils trying to juggle family and work.

All of these conundrums remain to be resolved and may be examined by the new overarching education review about to be carried out by all the regulators. This broad review is not one that we sought and we must watch where its tentacles spread.

We do not want barristers to melt away from the Inns by joining solicitor-regulated entities because there is no alternative if they wish to change their business practices and become more corporate.

We at the BSB might at one extreme reject entity regulation altogether and bank on the continued existence of the self-employed Bar; possibly with reduced numbers.

We might, at the other extreme, decide to regulate all legal entities including non-lawyers, although there seems to be no desire for that on the part of the Bar.

It may be that our way forward, bearing in mind the need to preserve the Bar’s independence and identity while still modernising practice, is to regulate entities that are advocacy focused: i.e. not ones that wish to offer conveyancing, management of clients’ affairs and so on.

A barrister-flavoured entity might also offer litigation and be constructed so as to avoid handling client money; that being the source of many of the disciplinary actions faced by solicitors.

The Inns may wish to see their mission as bringing into the fold and training all those advocates who decide to join the Bar in order to pursue advocacy at the highest level.

The history of the Inns shows that they have thrived by flexibility, inclusiveness and focus on the core mission of education and advocacy; in my view that should be the strategy for the future.

I also see regulation of the Bar as having a social purpose. Barristers do a great deal of *pro bono* work and most stay in the profession and agree to become judges for reasons other than earnings.

They give voice to the underprivileged and the oppressed, here and abroad. They are there to uphold the principles that have made English law and freedoms a model for others for centuries in the past and to come. I have no doubt we will find a way through. Things can only get better.