Legal Practice by Academics

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This article (in which references to men embrace women) examines the impact of the Lord Chancellor's Green Paper entitled 'The Work and Organisation of the Legal Profession' (Cm 570) on academic lawyers who wish to be able to offer the public their legal services, defined by the Green Paper as services 'concerned with the advice, assistance and representation required by a person in connection with his rights, duties and liabilities' (para 2.1).

At present it is scarcely possible for an academic lawyer to offer full legal services. If his qualification is that of a barrister he comes up against the multifarious practice restrictions laid down by the Code of Conduct for the Bar of England and Wales (4th edn, 1989). If on the other hand he is a solicitor he finds himself impeded by the restrictions imposed on advocacy in the higher courts. It is little use being permitted to give legal advice if one is prevented from later implementing the advice by argument addressed to the court. The advocate who does appear may not take the same view.

Should academics be free to practise?

Many law teachers are content to exercise their talents entirely within the groves of academe, but this does not apply to all. Moreover the public interest urgently requires that academic lawyers, on the continent known and respected as jurists, be given a direct input to the courts of England and Wales. This will raise the intellectual level of argument and judgment there, which is not what it was and certainly not what it needs to be, and could be. It must be remembered in this connection that if an academic is permitted to practise law he need not necessarily do so as an advocate. A barrister academic, for example, could be briefed as one of a team lead by a QC with the function of advising his leader.

As long ago as 1932 a Cambridge law professor, H C Gutteridge, remarked to Lord Atkin that 'the University lawyer is regarded with benevolent contempt in England'. Atkin rejoined that though ideally there should be no difference between academic teaching and practice, in fact there is. Gutteridge had lamented, in terms still applicable, the lack of contact between the practitioner and the academic lawyer in England-

'The gulf between the two is very wide - much wider than it is in America or on the Continent. The reason for this is no doubt the historical development of the teaching of English law and the fact that the Universities were late in the field, but it has led to the development of an inferiority complex on the part of the teacher which is bad for the teaching of law and also inimical to thefutureof English law.' (G Lewis, Lord Atkin, p 225.)

On the continent, where Roman law was received, the jurist and his opinions (responsa prudentium) are

honoured throughout the profession. La doctrine is in Europe the central body of law furnished by the writings of its jurists. Here in England the superior court judges, drawn entirely from the practising Bar, look almost exclusively to the opinions of their brethren.

The European practice derives from classical Rome. Buckland identifies the jurists of the Augustan age as 'the real builders of the great fabric of Roman law' (W W Buckland, A Textbook of Roman Law (2nd edn, 1950) p 20). The jurist's interpretatio was a source of law, along with rescripts and edicts. He pondered the general principles of the law, taking an overview. Judges, busy with day-to- day affairs, sought his advice. He counselled the advocate on points of law, as well as instructing pupils. He acted as assessor to judges, and even dictated their judgments.

The current English judicial attitude is illustrated by Lord Wilberforce's warning of 'the dangers ... of placing reliance on textbook authority for an analysis of judicial decisions' (Johnson v Agnew [1979] 1 All ER 883, 892). Lord Diplock is similarly dismissive-

'It may be that greater reliance than is usual in the English courts is placed on the writings of academic lawyers by courts of other European states where oral argument by counsel plays a relatively minor role in the decision-making process. The persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend on the cogency of their reasoning. Those to which your Lordships have been referred contain perhaps rather more assertion than ratiocination ... ' (Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, 708).

Academics have riposted that modern judges themselves have a tendency to engage in mere assertion (see eg Murphy and Rawlings, 'After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980 Part I' (1981) 44 MLR 617). Lord Diplock's dictum understates the true European view, which is illustrated by Article 167 of the Treaty of Rome. This places jurists on a level with judges by saying that the qualification for appointment of judges to the Court of Justice of the European Communities is that they-

' ... shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or whoare jurisconsults of recognised competence ...'
Unless English academics are able to gain practical experience in the courts they are unlikely, even under a reformed system, to qualify for appointment to the bench. Yet their knowledge and acuity are needed there as well as among those persons at present practising advocacy. Will the Green Paper clear the way?

Before attempting to answer this question we need to examine the present restrictions in more detail. They fall into two categories, restrictions on advocacy and practice restrictions.

Present restrictions on advocacy

Subject to practice restrictions (see below), a barrister has a right of audience in all courts and tribunals in England and Wales.

A solicitor holding a practising certificate has an unlimited right of audience in a magistrates' court, county court or tribunal, and a limited right of audience in the Crown Court. The latter extends to appeals or committals for sentence from a magistrates' court and cases in remote areas where solicitors traditionally had full rights of audience before Quarter Sessions. Except in emergency, a solicitor has no right of audience (except in chambers) in the High Court, Court of Appeal, or House of Lords.

An EC lawyer may appear before any court or tribunal in England and Wales provided he acts in conjunction with a barrister or solicitor who is entitled to practise before that court or tribunal.

Bar practice restrictions

The restrictions that currently inhibit from practice an academic whose legal qualification is as a barrister are numerous. They are set out in the Code of Conduct referred to above.

Status of Code The Code was adopted by the Bar Council following its approval in principle by the Bar in General Meeting (s 2.1). Amendments and additions may be made by the Bar in General Meeting or the Bar Council (s 2.2). This produces the anomaly that a majority of barristers acting alone can introduce new or tightened practice restrictions whereas appeals against findings of breach of the restrictions are determined solely by Judges of the High Court (Annex 18 r 9(1)). Moreover rules as to rights of audience, when not imposed under statute, are formulated solely by the Judges: Abse v Smith [1986] QB 536.

Power of waiver The Bar Council have power to waive the duty imposed on a barrister to comply with the provisions of the Code, in the circumstances of a particular case, either conditionally or unconditionally (s 3.4). The Code does not specify the rationale of this power of waiver, or the basis on which it is to be exercised. Nor does it give any right of appeal against a refusal of waiver.

Bar practice to be full time In general, a barrister is required to make Bar practice his primary occupation (s 6.1). Any 'supplementary occupation' can be engaged in only with the permission of the Bar Council (s 6.3.1). General permission has been given for lecturing, for writing, editing and reviewing books and periodicals, and for 'coaching students' (Annex 1). It is clear that this general permission is geared to the sort of incidental work an ordinary practising barrister might wish to undertake. It is not an adequate description of the work of an academic lawyer.

Restrictions on employed barristers It might be thought that most academic lawyers would fall within the Code's term 'employed barrister', but this is not the case. The term is defined as 'a barrister who, in return for the payment of a salary, is employed wholly or primarily for the purpose of providing legal services to his employer ...' (s 4. 2(a)). The term 'legal services' is defined as including legal advice, representation, drafting and conveyancing (s 4.5.8). Persons who are employed mainly to carry out law teaching and independent research, in other words academic lawyers, are accordingly outwith the Code's restrictions on employed barristers and no more need be said about the restrictions here.

Chambers system The Code prevents a barrister (other than an 'employed barrister') from practising at the Bar unless he is a member, or is permitted the use, of 'professional chambers' (s 7). This term is not defined by the Code. Uncertainty as to its meaning is compounded by the fact that the Code contemplates that in some exceptional circumstances (unspecified) 'a barrister's private residence or any part thereof' may be regarded as professional chambers (Annex 2 para 15). Further uncertainty arises from the reference in s 10.1(c) to 'squatters'. This term is undefined, but apparently means barristers who are anomalously permitted to practise from certain chambers without being members thereof.

Elaborate restrictions surround the opening of a new set of professional chambers. Outside Greater London this requires the consent of the Circuit (s 7.2.2).

Circuit system It is often necessary or at least desirable for a practising barrister to belong to one of the six Circuits: South Eastern, Western, Midland and Oxford, Northern, North-Eastern, and Wales and Chester (s 14.1.1). Yet these continue to be run like private clubs. To join, a barrister needs to be proposed and seconded by existing members of the Circuit who know him well. If no member of the Circuit happens to know him well, his application will probably be refused. He then has an appeal to the Bar Council (s 14.3.2), but is scarcely likely to be welcome on the Circuit if his appeal should succeed. Substituting for Circuits in certain cases are specialist associations respectively concerned with the Chancery Bar, the Patent Law Bar, the Local Government and Planning Bar, and the Revenue Bar (s 14.1.6). Similar provisions apply to these.

Clerking system It is assumed by the Bar authorities that a practising barrister must conduct his practice through the medium of a barrister's clerk, though this requirement is not spelt out in the Code. It centres on

the rule that except in Legal Aid cases 'a barrister's fee should normally be fixed by arrangement between his clerk and the professional client' (s 28.9). Even here there is a let-out however, since a barrister is expressly authorised to discuss the amount of the fee personally with the professional client (s 28.9).

The Code does not define what it means by a 'clerk'. In his book on the subject, Flood remarks on the difficulty of defining what constitutes a barrister's clerk (John A Flood, Barristers' Clerks (1983) p 4). In its evidence to the Benson Commission on legal services the Barristers' Clerks Association divided the clerk's functions into three: administrative, handling relationships with solicitors and courts, and advising the barrister on career questions. In the first category it identified 42 tasks ranging from negotiating brief fees to taking messages.

No doubt a clerk in the usual Bar sense is often very useful to a busy barrister, but it is curious that a barrister should be forced, as he is at present when entering chambers, to make an arrangement, with a person he does not know and has not chosen, to provide him with personal services he may not need (at least from that person) at a fee he may well consider exorbitant. Flood says-

'... the barrister has very little control over the progress of his or her career in the early stages; it all depends on the barrister's clerk.' (John A Flood, Barristers' Clerks (1983) p 3.)

Or as it was put by a well-known barrister's clerk, A E Bowker-

'The wise young man at the Bar, and the man who is likely to get on in the profession, is he who does not interfere with his clerk's arrangements, but goes where he is sent without question, and does pretty much as he is told.' (A E Bowker, Behind the Bar (1947) p 11).

No other learned profession requires its members to operate under the control of unlearned clerks. Clerical and secretarial services are undoubtedly needed, but all other professions leave them to be arranged by the principals concerned in the manner they judge most convenient. This includes the solicitors' profession even though the administrative arrangements of solicitors must, since the principals are officers of the court, be beyond reproach. Only at the Bar are clerical services made the subject of professional discipline.

Government reform proposals

The Green Paper begins by stating that the Government's objective in publishing it 'is to see that the public has the best possible access to legal services' (para 1.1). Because of the limitations on rights of audience the public at present has severely restricted access to the legal services of lawyers who are solicitors. Equally, Bar practice restrictions deny the public access to the services of many barristers who find themselves, through no fault of their own, unable to comply with them. Where the solicitors or barristers in question are academics the public are especially harmed by these unnecessary barriers, since the quality of service of which they are deprived is likely to be exceptionally good.

Here it will be retorted by those who have a vested interest in retaining the restrictions that a person cannot be an efficient advocate who does not practise in the courts daily. This point must be addressed, because there is truth in it. Certainly one may more easily become a competent practitioner in any field if one practises daily in that field. A well-known book by an experienced advocate has defended the professional restrictions on this very ground: 'The real justification lies in the intimacy which exists between the barrister and the courts before whom he appears' (R du Cann, The Art of the Advocate (1964) p 30). Even the Green Paper subscribes to this view, saying that the presentation of cogent legal argument 'is a highly skilled task requiring not only knowledge of the law but also constant practice in advocacy' (para 5.5: emphasis added).

Yet there are dangers to the public here. Tricks of advocacy, perpetrated by the old hand, have long been the cause of disquiet. People remember Dean Swift's gibe that lawyers are a society of men bred up from their youth in the art of proving by words multiplied for the purpose that white is black or black is white,

according as they are paid.

A point overlooked by those who justify the present system is that to be what the Americans call a trial lawyer is not merely, or even primarily, a question of skilled advocacy. Before one can be in a position to present an argument to the court, one must first have prepared it. This requires not so much a knowledge of the tricks of advocacy as a knowledge of law. The law becomes more and more complex as time passes. People who are in court every day lack time to research the law thoroughly and keep abreast of its developments. This is the province of the academic.

Particularly in civil cases, the modern tendency is against oral argument. Jury trials in civil cases are now extremely rare. Much evidence is given by affidavit. Courts more and more read the papers beforehand. Skeleton arguments, handed in and read before the hearing starts, are becoming the norm. All this reduces the importance of advocacy and strengthens the case for allowing academics to practise occasionally in the courts if they wish to do so (and the public wish to retain their services). It is time to let fresh air into that closed courtroom which bears such a suspicious resemblance to a closed shop.

Detailed Government proposals

The Government proposals regarding the restrictions outlined above are as follows.

Rights of audience Rights of audience for all advocates, whether barristers, solicitors, or others, will depend on possession of a certificate of competence known as an advocacy certificate. This will be granted by the relevant supervisory professional body (for example the Bar Council or the Law Society). The certificates will be of two types, a full certificate (covering all courts) and a limited certificate (corresponding to the rights of audience currently enjoyed by solicitors). In each case there will be the following subdivisions: general (covering both civil and criminal work), civil only, and criminal only. To obtain a certificate, training and experience will be needed. This will comprise an appropriate academic course in law, a vocational course which includes advocacy training, and a period of at least six months' practical training in advocacy (paras 5.15, 5.18). The supervisory body would have power to revoke or suspend a certificate for good cause (para 5.16).

Bar practice restrictions The Green Paper says that the internal rules and methods of organisation which govern barristers' practices are a matter for the Bar, although it will need to be able to justify these to the new competition authority which it is envisaged will be set up in accordance with the Government's proposals set out in the consultation paper 'Review of Restrictive Trade Practices' which was published by the Department of Trade and Industry in March 1988 (para 11.1).

Bar practice to be full time The Green Paper does not directly address the rule that practice at the Bar should be a full-time occupation. However it seems that once an advocacy certificate has been acquired it will remain valid regardless of breaks in practice.
Chambers system Many barristers who wish to practise, particularly those at the beginning of their career, are unable to procure a seat in chambers. No other learned profession dictates to its members as to the premises they use for their work, and the Green Paper is rightly critical of this restriction. No qualified barrister should be compelled to operate under the chambers system if he does not wish to do so. Still less should he be forced out of practice if the system is unable or declines to accommodate him.

The Green Paper includes the following criticisms of the chambers system-

'It is absurd that entry to a profession depends on whether a person can obtain accommodation' (para 11.8).

'The ... present requirements ... are unnecessarily restrictive and not needed to protect either the barrister or the client. There is no obvious reason why barristers ought not to be allowed to practise where they choose' (para 11.10).

'The ... profession should take active steps to find suitable accommodation for barristers outside the Inns' (para 11.12).

These echo criticisms which have long been made. For example Professor Zander argued more than 20 years ago that the chambers system is contrary to the public interest on at least three counts: it makes entry to the profession depend on whether one can secure accommodation, it produces overcrowding of barristers which is so bad as to affect the quality of their work, and it restricts the places where barristers' services are available (M Zander, Lawyers and the Public Interest: A Study in Restrictive Practices (1968) pp 71-72). In 1966 the Wilson report on legal education stated that many students experience difficulty in finding chambers when they have no previous personal or family connections with the Bar (9 Journal of the SPTL (1966) p 72). Racial and sex discrimination in selection of tenants of chambers is a longstanding problem.

Certain Code rules that support the chambers system will need to be reconsidered if the requirement to practise from chambers is abolished. Thus a barrister is forbidden to collect papers or instructions from his professional client's office (s 20.6) or take part in conferences held in that office (s 23.2).

Circuit system The Green Paper asks the Bar to consider whether the rule that every barrister (other than one whose chambers are in Greater London) should be a member of a Circuit or specialist organisation serves any particular purpose (para 11.25).

Clerking system Professor Zander has said that the power of the barrister's clerk is disturbing, particularly since he plays an important role in selecting members of chambers and 'exercises an influence over the distribution work amongst his supposed principals which is out of all proportion to his qualifications or other attainments' (op cit pp 83-85). The Green Paper says that the clerk's role in a barrister's life is a powerful one because every barrister must have a clerk and the solicitor must normally negotiate with the clerk rather than the barrister about fees; furthermore the fact that barristers are a collection of individuals 'may impede their collective control over their clerk' (para 11.21). It adds, in agreement with the Benson and Marre reports-

'Barristers will naturally need to have office staff to organise their practices, but this should be a matter for them alone to settle ... barristers should not be compelled to have a clerk. Rather they should be able to negotiate their own fees, if they so wish. Moreover they should simply be under a professional duty to ensure that their own particular practices are managed in an efficient and effective manner' (para 11.23).

Appointment to the bench The Green Paper proposes that all advocates who have held the relevant advocacy certificates for the appropriate length of time should be eligible for judicial appointment (para 10.1). It adds: 'our adversarial method of administering justice requires the judges at least at trial courts to be recruited from among seasoned advocates' (para 10.2). However, 'it does not necessarily follow that advocacy and advocacy alone in the higher courts should be the only route to a judicial career in those courts' (para 10.6).

Conclusion

If implemented, the Green Paper proposals, in conjunction with the work of the new competition authority to be set up in accordance with the consultation paper 'Review of Restrictive Trade Practices', will go a long way to ensuring that in England and Wales the academic lawyer or jurist will be enabled to take the place he occupies on the continent. This can only be to the benefit of our legal system and the public generally.

Academics should not hesitate to take advantage of the reforms, and play their full part. They will need to have the same initial training in advocacy as the ordinary trial lawyer. After that, they will remain qualified even though they do not constantly practise in the courts.

It will prove best however if academics do keep in touch with court practice, and do not allow themselves to become rusty. In that way not only will the work of the courts benefit from an academic input, but the work of university and polytechnic students will benefit from the fact that their tutors have recent first-hand knowledge of how the law actually works in practice.