One Bar: Threats, Challenges and Opportunities

The theme of this Conference is **One Bar: Threats, Challenges and Opportunities** but threats to the Bar did not begin in the 21st century. There have been perceived threats to the very existence of the Bar in virtually every decade since I qualified in 1972.

To name just a few:

In the 1970s changes to divorce law and procedure led to predictions of the death of the Family Bar.

In the 1980s the Royal Commission on Legal Services was set up to examine the structure, organisation training, and regulation of the legal profession. Its report led to the Courts and Legal Services Act. The Act broke the solicitors' monopoly on conveyancing (that in turn led to their looking, not surprisingly, for other areas of work) and at the same time the Bar's monopoly on rights of audience in the higher courts was removed. Bar leaders predicted the end of the publicly funded Bar.

In the 1990s the Lord Chancellor's Advisory Committee on Legal Education and Conduct was set up to assist the Lord Chancellor in the maintenance and development of standards of education, training and conduct of those offering legal services. It considered, among many other issues, how to advise the Lord Chancellor on extended rights of audience for solicitors and members of the

CPS. It also expressed concern at the large numbers of students passing the Bar Vocational course saddled with huge debt and unable to find a place to practice. Sound familiar?

In the late 1990s, the Treasury announced the dramatic change in the way barristers were taxed, from receipts to earnings. Those of us doing publicly funded work, (and who often had to wait years for our fees), feared for our future and the future of new entrants.

In 2003 Sir David Clementi was asked to review the regulation of Legal Services. This led to the Legal Services Act and dramatic changes to the regulation of the profession, (changes that we were assured by the then Lord Chancellor would amount to light touch regulation) and to the introduction of alternative business structures, heralded by some as the end of the chambers system as we know it.

In between we have had numerous reviews and consultation papers: so many reforms proposed and or implemented. One might have thought we had a legal profession with a reputation for corruption and incompetence instead of a legal profession with an enviable reputation around the world for integrity and quality.

Yet the Bar has survived. Why?

1. Its quality and integrity

2. Its resilience and adaptability

I assume the theme of this year's conference was chosen to address the current threats and consider the ways in which the Bar can maintain its quality and integrity by showing that resilience and adaptability.

I have time this morning to focus on just some of the issues.

The practice of law as a profession

Forgive me if I begin with one of my hobby horses, about which I have spoken many times: the down grading of the legal profession and the domination of what some call the "great god Competition". Protecting the rights of the consumer or client, (as I prefer to call the so-called consumer of legal services), is an important issue and one very properly addressed by regulators. However, regulation of the legal profession is not just about protecting the rights of the individual client, it is about protecting the public interest.

An independent legal profession is the cornerstone of a free and democratic society. We talk a lot about the independence of the judiciary, but an independent judiciary can only survive, if it is served by an independent legal profession. The Rule of Law can only flourish in a state where there is both. Those who see the legal profession as just another trade supplying legal services have been described, rightly in my view, as "constitutionally illiterate".

There are two main areas of threat under this heading: the total removal of regulation from the hands of the profession and the continuing pressure to treat the profession of law as a trade, with the potential for excessive emphasis being placed on the rights of the so-called consumer of legal services, at the expense of the public interest.

Most responsible international bodies recognise that self-regulation of the legal profession (with an appropriate level of independent lay input) underpins independence. If an autocratic state wishes to control its citizens it must first seek to control the legal profession and the judiciary. The great Sir Sydney Kentridge QC (who practised in South Africa during the apartheid years), when the Legal Services Act was introduced, described the threats from the South African Government to place the Bar under the control of a Council with government appointed members.

Yet, we have seen calls to remove regulation even further from the hands of the profession. This may not be a threat, today, but what about the future? The more regulation moves from the profession, the more opportunity for abuse by a less than benign state. All a future government irritated by a pesky legal profession, standing up for peoples' rights and opposing oppressive legislation, would have

to do is appoint compliant nominees to the regulatory bodies, just as the South African government threatened.

It couldn't happen here in a civilised European democracy? Who would have thought that in Poland, once hailed as a model of democratic transition, would face accusations that it is moving towards political control of the judiciary?

But it is not just political control one should fear – it is a free for all in the legal services market. The legal profession has been an easy target, with little popular support. Bodies promoting free trade and opposed to what they see as 'restrictive practices' have long had the legal profession in their sights and have pressed to amend "regulations no longer consistent with a globalised economy and secure the provision of legal services in an efficient manner and at competitive and affordable prices". Some of their aims may be worthy, but little or no mention is usually made of the constitutional role of the legal profession, the public interest and the fact that the lawyer is more than a provider of legal services. Too little consideration is often given to the reasons why our legal profession in this country is of such high quality and too little analysis made of what is worth preserving.

Rule of Law and Brexit

Is there an opportunity to challenge this trend? Possibly: in the increased recognition of the importance of the Rule of Law and therefore the legal profession. For decades, we have been arguing for politicians and the media to understand the role played by the judiciary and the legal profession in the social and economic success of this country. Our words have not always fallen on receptive ears, despite the billions of pounds the legal system contributes directly and indirectly to this country. The legal system has been seen by some as an add on, almost as a luxury. A country that prides itself on the Rule of Law and a functioning democracy cannot afford to take the justice system, without which there would be no Rule of Law or democracy, for granted.

Now with the Brexit vote, I detect a greater willingness to recognise the importance of the legal system. Maybe we have an opportunity to re-position the Justice system, where it belongs, at the heart of our democracy.

Whether a Brexiteer or a remainer, we all want to see this country flourish. The USP of UK plc is its stability and the integrity and quality of its legal system. UK plc will need its independent and thriving legal profession more than ever on leaving the EU. By an independent and thriving legal profession I mean one

that plays its part in providing access to justice for all, not just to international conglomerates that choose to do business or litigate here.

It is not enough to protect and promote the Business and Property Courts, as extremely important as they are. It is essential to protect and promote the whole system. Our competitors are not stupid. Any sign of weakness is seized upon. If there are too many reports suggesting a denial of access to justice, or a failure to bring offenders to justice, they will be quick to argue to potential "consumers" and investors that the UK is not as stable or secure as it claims.

Public funding of litigation

Successive cuts to public funding over the years have always been a threat to access to justice and a threat to the survival of the Bar- but I must tread carefully on this issue for fear of treading on a political path. I shall stick to general principles. The state has an obligation to provide proper access to justice. That means adequate public funding for those who wish to enforce their rights or defend themselves and do not have the means to do so. However, it does not mean the state owes publicly funded lawyers a living or that, however trivial your grievance, the state should pay for you to air it.

The challenge, therefore, is to acknowledge that fact and to pitch the argument with government in the right way and with the right tone, as I know the leaders of the Bar have been trying to do. If the review announced by the Lord Chancellor into the effect of LASPO is to be a genuine review into access to justice, as I hope it will be, the profession will have that opportunity.

I suggest (and I have not been paid to say this) that the profession needs to unite behind its professional bodies like the Bar Council and the Law Society to take advantage of that opportunity. It needs to take back the moral high ground. From that lofty position, it is far easier to argue for proper public funding of litigation and access to justice.

The Bar Council and the Law Society are so much more than trade associations, they are professional bodies. They actively promote and fight for the Rule of Law, for fair treatment and diversity as well as for the interests of the legal profession. They fight to maintain the highest possible standards of integrity and quality in their members. They know better than anyone the importance of training and proper regulation. They speak out for judicial independence and independence of the legal profession in this country and abroad when others are slow or reluctant to do so.

The profession as a whole should work with them, and others such as the Inns of Court and the judiciary, to engage the public and to promote a far greater understanding of the law and of the role of lawyers.

We could also explore other means of funding litigation. I have long been a proponent of a CLAF and raise the issue whenever I can. At my invitation the profession -the Bar, the Law Society and Cilex- set up a working party to consider the viability of such a scheme. If it is viable, it could revolutionise access to justice in this country by ensuring the funding of meritorious claims and by removing from lawyers the financial interest in the outcome of litigation; something that many consider anathema to the ethics of a profession. It might also see an end to those extraordinarily irritating cold calls. Ambulance chasing in all but name, not only irritating, but bringing the profession into disrepute.

Diversity

Cuts in public funding may not only deprive the vulnerable of legal representation, but may also have a disproportionate effect on female and BAME lawyers. That brings me to another area in which the legal profession is potentially vulnerable, namely diversity. The figures on entry are improving for women and BAME lawyers, but it is difficult to gauge how good they are for social mobility. The problem facing us is how to recruit and retain lawyers from a non- traditional background and ensure they achieve their potential. If the

legal profession and the judiciary are to continue to command the respect and confidence of the public, they cannot be seen as the preserve of the privileged white male at any level.

There are numerous diversity initiatives throughout the profession to recruit and retain barristers from diverse backgrounds. The opportunity exists for any barrister to join one or to start their own, as for example women barristers are doing around the country, replicating the success of the Temple Women's Forum in London. Here too, involvement with local communities, schools and faith groups can help. Improving their understanding of the law, and of the role of lawyers and encouraging those from non traditional backgrounds to think about a career in the law, is a win win situation. The individual lawyer benefits as a person and in their career prospects (being in a position to show awareness of diversity issues and a commitment to society), the system benefits, and public confidence increases. I see that as an opportunity.

Numbers

However, in pushing for increased diversity in the legal profession and ensuring a flow of talented new entrants - there are some who have questioned rigorous qualification requirements. This is a potential threat to the Bar and to the public interest. Flooding the market with cheap and cheerful lawyers is a recipe for

disaster. The Bar has already increased hugely in numbers since I qualified in the dark ages and since I was Chairman in 1998.

If there are too many advocates fighting for too little work, the likely result will be:

i) they get paid a pittance;

ii) only a minority will get the experience in court they need to hone their skills;

iii) only a minority will get the opportunity to watch others more experienced do the job and learn by example.

If this trend continues - standards will fall and able candidates will be deterred from specialising in publicly funded work, where the problem is most acute. The use of in house and solicitor advocates is a fact and they are here to stay; it is no good railing against them. All the Bar can do is fight to ensure all advocates operate according to the same rules and same high standards.

Traditionally, the Bar was small; there were several levels of control from the Head of Chambers (responsible for a couple of dozen members at most) up to the Chairman of the Bar (responsible for less than ten thousand members). Furthermore, the Circuit system and the Inns of Court gave the Bar the inestimable advantage of a close relationship with the judiciary and senior members of the profession and provided access to high quality education and

training at little if no cost to the recipient. The relationship promoted collegiality, integrity, the maintenance of standards and the ethos of the profession. In recognition of that fact, when standards and ethics began to drop in the USA, a group of concerned lawyers and judges introduced the now flourishing Inns of Court movement dedicated to the cause of professionalism.

Now, I detect a distance growing between the Bar and the Bench in this country, which if I am right, would be unfortunate. I have also seen examples of conduct towards judges that I would not have expected from the Bar. I have seen examples of conduct towards an opponent (playing the man or woman not the ball) I would not have expected from the Bar. This is not a new phenomenon, but I fear it may be on the increase.

As traditional methods of maintaining standards disappear, and as the number of advocates grows, it becomes even more important that advocates and judges mix professionally and socially. The more they meet and talk and share experiences, the greater the chance of reducing the threat to standards and ethics and the greater the chance of improving understanding. We should be enhancing the role of institutions like the Inns of Court and the Circuits rather than undermining them.

The other side of the numbers problem is the number of students leaving the Bar course each year, saddled with eye watering levels of debt and not a hope of finding a place to practice as an employed or self employed lawyer. If they do find a place -what chance do they have of developing a good practice and acquiring the experience they need in an overcrowded market? If able candidates see the attrition rate and the cost of qualifying– will they be deterred from even trying?

In 1998, when I was Chairman of the Bar, only seven institutions were validated to provide Bar Finals as we used to call it. We monitored the courses they offered and physically inspected them. The validated institutions were allowed to take a limited number of students per year. That all changed when the "great god Competition" was allowed to rule. The markets had to be opened up to provide legal education at a cheaper price.

That went well…What is the cost now of the Bar Finals? Over £19000 just for one year's tuition at some institutions?

When I was in the middle of preparing this address, I heard John Grisham on the radio talking about what he considered the horrors of some "for profit institutions" in the US grossly over charging law students for inadequate education. He was particularly concerned for the students, as am I, but I am also

concerned for the public interest. We have some admirable institutions providing good training, but can the present situation be allowed to continue?

One answer to the debt problem would be to make the course cheaper. I understand the idea of the Inns, (who have such excellent education and training departments) running at least part of the course is being explored. Another answer is obviously the provision of bursaries and scholarships.

But, would a better answer be to revisit the issue of restricting numbers and insisting on stronger filters for those wishing to study for the Bar? A filter that does not discriminate on the basis of background, race or gender, but does screen out those who do not stand a chance of qualifying or succeeding and encourages the able student to consider a career at the Bar because they stand a realistic chance of succeeding.

One thing we must **not** do is lower requirements. Much as I fight to improve diversity and improved social mobility in the profession, I firmly believe it would be in no one's interests and certainly not in the country's interests to dumb down the qualification requirements to become a lawyer, in the name of making the profession more accessible. We must maintain and improve quality not reduce it. Standards must remain high and the Bar must be proactive in

ensuring it can continue to boast of the high quality advocacy and advice it provides.

Court Reform

Next Court Reform. I must tread carefully here. I am on the Judicial Executive Board that signed up to and promoted the court reform programme. I know many barristers see it as a threat. It should not be. First the positive - a billion pounds worth of investment. For years the courts and tribunals have been underfunded- for the Government to agree to such an investment in a time of austerity shows some sign of the legal system being taken seriously.

I appreciate many will be hostile to various initiatives that are part of or accompany the reform programme- flexible operating hours, court fees, virtual hearings, fixed costs and court closures to name but five. Having been a working mother practising on Circuit miles from home, as the Chair of the Diversity Committee of the Judges' Council and as the newly appointed president of the Association of Women Barristers, I understand the concerns on flexible operating hours. As a firm believer in the adversarial process, access to justice and the delivery of local justice, I understand the concerns about virtual hearings, court closures and fixed costs.

I know that when lawyers see judges working closely with HMCTS officials to improve efficiency there is a tendency to spot a conspiracy to cut costs at the expense of access to justice. My advice is do not become paranoid. There is no conspiracy afoot. In response to any pilot project, gather the evidence, marshal your arguments and express your concerns constructively. I am confident that you will find a receptive audience in the judiciary (and I believe in HMCTS) to a well reasoned argument. The judiciary will not agree to any change (and HMCTS insist they do not wish to promote any change) that will have a significant adverse impact on diversity and or on access to justice.

The Court Reform programme is intended to make things better not worse. That is what the judiciary has signed up for. The challenge is to ensure that it does. May I take one example: IT. A good IT system can make a huge difference to litigants, advocates, judges and officials and at last we are seeing improvements to the IT available to us.

I usually sit in the CACD where we can, on occasion, now receive submissions from counsel via a video link, saving the barrister the time, cost and trouble of travelling to London. It is not ideal, hence its rarity, but it is adequate for some hearings. It is not ideal because oral advocacy can make a real difference to the

outcome of a case and, in my experience, advocacy is usually more powerful and persuasive in person.

Also, in the CACD, as our default setting, we have a video link with appellants in prison. Video links have their place for criminal appeals, where it is not necessary to take instructions or in largely procedural hearings for defendants or appellants (who often prefer to "attend" without leaving their prison); they obviously have their place in taking the evidence of vulnerable witnesses. But they too have their limitations.

The challenge is to use technology in such a way that we improve our processes and make them more accessible, without undermining the quality of the service we offer. We cannot move towards a system where it becomes the norm that witnesses or defendants attend trial by video link, that defendants are denied the opportunity of adequate face to face contact with their lawyer and that trials are divided up into too many pre-recorded segments. Any move to online justice should not involve the denial of a fair hearing with legal representation, and before a judge, *where that is necessary*. To be clear – that is **not** what is planned but, as ever, it is essential the profession remains vigilant.

Conclusion

This has been something of a canter through just some of the threats and possible opportunities; forgive me for saying little if anything new. Many threats have been around a long time. If it is of any consolation, my experience leaves me confident that the Bar will survive. It is adaptable – as one door closes another opens. Most importantly, as described by Sir Bill Jeffrey in his independent review of criminal advocacy, it is a "substantial" and "precious national asset". It deserves to survive and I, for one, will join you on the barricades, if necessary, to ensure it does survive.