MASTER OF THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MR

25TH ANNUAL BAR CONFERENCE

THE TYRANNY OF THE CONSUMER OR THE RULE OF LAW

6 NOVEMBER 2010

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1. It is slightly daunting to find oneself talking about core values and opportunities on a Saturday morning, and all the more so when one is kicking off a day's very high level discussion on those issues in the context of the Bar. However, I am not complaining: the issues thrown up by these topics are both important and interesting, and it is a great honour to have been asked to deliver the keynote speech to this year's Bar Conference[1].

2. Over the 116 years of the Bar Council's existence, the Bar has undergone a great deal of change. Of course, the Bar itself has a far longer history, and, like any entity that has a long history, it has evolved. And, in the past fifty years, it has grown exponentially – from under 2000 practising barristers in 1960, it has swelled to some 15,000 in 2010. This is, I think, symptomatic of the national explosion in prosperity, and therefore in the professional and other reasonably well off classes in that period. That growth raises serious questions about the next fifty years. In particular, how do we manage financial and social expectations, given that this rate of growth, in the prosperous middle classes generally, and the size of the bar in particular, is most unlikely to continue.

3. But this growth has other implications for the professions: agreeing on and enforcing ethics, core values, was much easier when there were far fewer barristers, and with similar backgrounds, and when there were far fewer and less diverse opinion-makers. These difficulties are compounded in part by the technological revolution, which has led to a greatly accelerated pace of change and communication, which has impacted on opportunities, and even perhaps on core values. Further, Government policy has changed very significantly in that period, and in two fundamental ways. From being protective of the professions, perhaps above all the law, the official view has veered towards the view that the consumer is king, and all fetters on free markets are to be scrutinised. On the other hand standards and discipline are now properly given far greater importance, with a consequent plethora of standards councils and disciplinary

[1] I should thank John Sorabji for all his help in preparing this address.

bodies. The consumerist approach appears to give rise to opportunities, whereas the standards and discipline are perhaps more concerned with core values.

4. Accordingly, one of the most pressing questions for the Bar over the coming years is neatly encapsulated by the title of this year's conference: Core Values ***v*** Opportunities. On the face of it, the title suggests that the two concepts are in opposition to each other: 'v' standing for 'versus'. But to a lawyer, the title is suggestive of a different interpretation: 'v' standing for 'and', as it does in case citations: Core values and Opportunities. So, are we to interpret them in opposition, with one triumphing over the other? Or are we to see them working together, and, if so, are we to see them as working together in the public interest?

5. The reforms enacted by the Legal Services Act 2007 place these questions to the fore. They do so now because we stand less than twelve months from the introduction of Alternative Business Structures – ABSs. The Lord Chancellor is reported to have said recently that, with the introduction of ABSs, the legal profession could well be facing its '*equivalent of [the financial sector's] big bang*'[2]. When it does, and the final piece of the reform programme ushered in by 2004's Clementi report[3] and its product, the 2007 Act, falls into place, we will be living in the wake of that big bang.

6. We will live in a world of, as John Flood of Westminster University put it, both Tesco Law, Goldman Sachs Skadden law[4], and many variants in between. Will this brave new world be a better one? And if so better for whom: the consumer, the citizen, society as a whole? Will this brave new world be one where, as Bridget Prentice MP suggested might be the case in her evidence to the parliamentary Joint Committee on the Draft Legal Services Bill, we create a '*the tyranny of the consumer*[5]' by placing consumers at the '*heart of legal services*', or will the current reforms make a virtue of law, of the rule of law and a just society?

7. It is of fundamental importance that, particularly when it comes to the professions, above all the legal profession, society does not adopt what might be called a form of unreflective consumer fundamentalism. George Soros suggested that the 2008 credit crunch resulted from the financial service sector's succumbing to a form of market fundamentalism, which may well have resulted from the financial big bang of 1986, to which the Lord Chancellor referred. We must be careful that the legal big bang of 2007, culminating in ABSs, does not result in an equally devastating loss of respect for the legal system and the rule of law.

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[2] Clarke LC, cited in *The Law Gazette*, 07 October 2010 (http://www.lawgazette.co.uk/news/ken-clarke-predicts-legal-services-big-bang).

[3] Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report* (December 2004) (http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/report-chap.pdf)

[4] Flood, *Will There Be Fallout from Clementi? The Global Repercussions for the Legal Profession after the UK Legal Services Act 2007*, Jean Monnet/Robert Schuman Paper Series Vol. 8 No. 6 April 2008 (http://ssrn.com/abstract=1128398).

[5] Prentice, evidence to the Joint Committee on the Draft Legal Services Bill (First Report) at [115] (http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/23207.htm#a29)

8. In the field of legal services, consumerism is an important factor, but it is not the only, or ultimately even the most important, factor. You cannot treat the supply of legal services by lawyers like the supply of baked beans by a food retailer. There is a very significant difference between a commercial supplier of goods, or even services, and a professional supplier of services, particularly legal services. A professional has clients, not merely consumers, and a professional therefore occupies a very special place in society. In this connection, lawyers occupy are particularly special place in society because their field of practice is part of the very fabric of society. The rule of law is of the essence of a modern democratic society: it is meaningless to talk about the rule of medicine or of accountancy. So too you can talk about the law of medicine or of accountancy, but you cannot meaningfully refer to the medicine, or the accountancy, of law.

9. I am not saying that consumerism has no part to play in the administration and structure of the legal profession, but I am saying that care must be taken to ensure that it does not overshadow, let alone, drive out the importance of the professional-client relationship, or the wider, public interest in the rule of law.

10. Consider the many ethical duties imposed, for instance, by the Bar Code, by the Solicitors' Code of Conduct. We could call them core values, or we could call them public interest duties. But, whatever we call them, they are all duties which require the consumer interest to take second place to the public interest. It should also be said those duties not only flow from our commitment to the public interest, but equally from our commitment to the constitutional principle of the rule of law. The rule of law would be little more than a phrase for idle moments, if lawyers – in the interests of the consumer – acted as if anything goes. The rule of law is a rule of integrity. It supports the foundations of our society, without which reference to the consumer interest would be utterly empty of content and meaning. It does so in exactly the same way that the proper maintenance of national security supports the foundations of society; as Karl Popper so wisely put it, without security we would have no freedom and without the rule of law and a robustly independent legal profession committed to its core values and the public interest we would have no civil society.

11. In this context, we should remember that an open, liberal, democratic society is underpinned by an independent judiciary and a system of justice readily accessible to all, not just accessible to all consumers of legal services, and run for the interest of society as a whole, not just for the benefit of consumers. The difference was recently underlined by Mr Justice Tugendhat in *Grey v UVW*[6], when he said this:

    '*[A]n order providing for anonymity and reporting restrictions cannot be made by the consent of the parties. "When both sides agree that information should kept from the public, that [is] when the court [has] to be most vigilant": Guardian para [2]. The Court has to consider the rights of the public under Arts 6 and 10, and not just the rights of the parties. Parties to civil litigation can*

[6] [2010] EWHC 2367 (QB)

waive or give up their own rights: they cannot waive or give up the rights of the public[7].'

12. The consumer interest in that case would no doubt have been served by the court simply agreeing to the order. If the parties consented, why not? A system committed to the consumer interest would have concluded why not indeed, and granted the order without further ado. But the justice system is not simply, or unreflectively, committed to the consumer interest. It is, above all, committed to the public interest. All members of society have an interest in the proper administration of justice. The tyranny of the consumer, just as much as the tyranny of the professional, or any other form of tyranny, is entirely inimical to the public interest and the rule of law.

13. The 2007 Act introduced many reforms which are properly consistent with furthering the public interest and our commitment to the rule of law. In doing so they seek to further the consumer interest, rather than to introduce an unreflective approach to the consumer interest. The reform of regulation which it ushered in was long overdue. A regulatory system which had evolved over many centuries and was reflective of society in those centuries had long become out of date. Just as our justice system, which evolved to reflect an agrarian society, was no longer capable of carrying out the proper administration of justice in the industrialising and then industrialised 19th century, so the regulation of the professions stood in need of reform towards the end of the last century. Separation of powers (between standard-setting, discipline, and the professional bodies) is as important and necessary a means of furthering the public interest as is separation of powers (between legislature, judiciary and executive) in government. We need not look back to Hamilton, Madison and Jay for that lesson.

14. Regulatory reform has then to be viewed through the prism of the public interest. It has to further the public interest, which means, in the field of law, the promotion of a vibrant, independent, honest, transparent legal profession. It achieves this if it does not act in accordance with any special interest or listen too closely to any form of special pleading. It does not achieve this if it sidelines proper debate and reasoned argument by denigrating it as special pleading. To damn reasoned, cogent argument when advanced on behalf of the professions as special pleading is a particularly egregious form of advocacy, and one which furthers neither the public nor the consumer interest.

15. Promoting competition and the opportunity to operate in new business structures are again consequences of the 2007 Act, which are intended to benefit both the public interest and the consumer interest. But again, the latter, consumer interest, must to a proper degree, be limited by the former, public interest. Just as the courts, as Tugendhat J noted, have to consider the rights of the public, of society as a whole, the promotion of competition and the operation of new business structures must properly be limited by our commitment to the public interest and the rule of law. Let me refer to something David Edmonds, Chairman of the LSB has recently said to illustrate this point. In a recent speech, he noted

[7] *Ibid* at [33]

how the introduction of ABSs would '*free up the existing players to innovate, to create new partnerships and to be free to act in a less restrained way*.[8]'

16. The qualification at the end of that sentence – to act in a less restrained way – could have a number of meanings. It is clear to me which way Mr Edmonds meant it: that is to say, that legal professionals could innovate, could create new business structures in a manner no longer constrained by forms of practice more suited to times past than times present. No longer would solicitors have to work only in partnership with solicitors. No longer would barristers have to work in chambers, or in employed practice. No longer would solicitors have to structure their businesses as if they were 19th century partnerships. Lawyers would be able to structure their practices in many new and different ways. They could draw investment and ideas from non-lawyers. They could draw their partners from other professions or from no profession. In this they could both serve the consumer interest by increasing competition, by reducing costs through innovative practises, such as legal outsourcing, and so on. In this, I think that he is probably right.

17. There is however another way in which 'act in a less restrained way' could be interpreted; one inimical to the public interest. It could be interpreted as meaning that lawyers, and regulators, could place to one side their commitment to their core duties; to ethical rules, to their professional duties. It might be interpreted to mean that, in the consumer interest, lawyers could act in ways which previously they had not because previously they were restrained by those duties. For instance, it might be taken to mean that lawyers could coach witnesses or their clients in order to assist them in securing a favourable judgment.

18. It might for instance be taken to me that lawyers could avoid drawing precedents unfavourable to their client's case to the attention of their opponent and the court. Such conduct would be in the immediate consumer's interest. But it equally plainly would not be in the public interest: such conduct would undermine confidence in the ability of the justice system to deliver justice. It would undermine public confidence in the rule of law. And it would be self-defeating from the broader consumer's perspective as it would ultimately result in a situation where justice, if it could still be called that, would be the preserve of the highest bidder. The irony is that an unreflective commitment to the consumer interest, if it is simplistically equated with securing the lowest possible cost for the provision of legal services, is that it would engender the opposite. And that is in no one's interest.

19. It is of course clear that that interpretation was not the intended one. But in changing regulatory environment care has to be taken to ensure that words are not misinterpreted. I am sure that the regulatory bodies will continue to ensure that they do. And will ensure that their commitment to securing the consumer interest is, as it must be, properly informed by the overriding interest in securing the public interest and our commitment to a legal profession which supports the rule of law. I say overriding because unless we continue to pay proper heed to the

[8] Edmonds, (speech in Riad, 11 October 2010) at 3 (http://www.legalservicesboard.org.uk/news_publications/speeches_presentations/2010/2010_10_11_davids_speech_to_riad.pdf).

public interest the commitment to the consumer interest will become devoid of content and meaning. The maintenance of the justice system, and as part of it, a vibrant legal profession committed to its core values and developing innovatively within their framework, provides the foundations of a society in which we can be consumers. We are citizens first and individual consumers second. We are only consumers because we are citizens.

20. With this in mind I want to turn to one area of particular concern at the present time: Quality Assurance for Advocates. Advocacy, whether oral or written, is a skill. As with all skills it takes time and practice to master. Some master it well and quickly. Some do not. For some mastery comes with time and effort. For others it never comes.

21. A good, skilled advocate is someone who furthers the client's interest, the public interest, and, hence, our commitment to the rule of law. A skilled advocate follows George Orwell's rules: they never use a long word where a short one will do; wherever it is possible to cut a word out, they always cut it out[9]. Their submissions are well prepared. They know their brief. They know which points have merit. They concede where concession is proper. They serve their client well. They serve the administration of justice well by assisting the court in deciding cases justly. In that they serve the public interest.

22. I could give you a list of what the poor advocate does. I would run the risk of breaking George Orwell's rules. I'll take that risk. The poor advocate is: ill-prepared and unpersuasive; can mislead the court by accident or design; labours bad points and elides good ones. They serve their client ill. They serve the administration of justice ill. They fail to assist the court in deciding cases justly and ultimately they undermine the rule of law.

23. Quality advocacy, and the proper training and assessment of advocates, is both essential to the proper administration of justice and of fundamental importance to the judiciary. Without quality advocacy our adversarial system cannot operate efficiently, effectively or fairly. The court cannot carry out its duty to ensure that justice is done. It cannot act consistently with the obligation placed on the courts by section 6 of the Human Rights Act 1998 and Article 6 of the European Convention on Human Rights to secure fair trials. It cannot function as a branch of government.

24. It should be entirely unsurprising then that judges strongly support the quality assurance scheme and strongly support judicial involvement in the assessment process. If we are to talk of consumers, judges are the consumers of advocacy services too. They are supplied with those services everyday and are well-placed to tell which advocates are good and which are not. As such they are essential to the quality assurance process.

25. Historically the judges controlled rights of audience. It is not difficult to see why. They still do where unregulated individuals are concerned. Now, of course, the regulation of advocacy is split across a number of regulatory bodies. Frankly the continued existence of a number of regulators all regulating the same activity is

[9] Orwell, Politics and the English Language (1946).

ridiculous and cannot possibly serve either the consumer or public interest. If the 2007 Act does not lead to activity-based regulation it will have failed. In the absence of a single advocacy regulator – and this is not a disguised suggestion that the BSB should be that regulator – the QAA scheme is the next best alternative. The judiciary will work to ensure that it works.

26. Quite apart from any question of principle, there is the question of practicality. It is obviously desirable that the high reputation of the English advocate is maintained. Just as eternal vigilance is the price of liberty so it is the price of maintaining high standards of advocacy. Who is better placed than the Judges, who hear and should listen to the advocates, to assess them? Particularly in the present cash-strapped times, who but the Judges will in practice actually carry out the assessments? Of course, there is a risk that some Judges may not be as fair, as assiduous, or as perceptive as others. But that would be true of any group of assessors.

27. I am also aware that there are concerns that some members of the judiciary may display a degree of bias against solicitor advocates. Bias is unacceptable, and has no place in a quality assurance scheme. It is entirely inconsistent with the public interest and with securing the proper administration of justice. A poor barrister is as inimical to the public interest as a poor solicitor advocate, as a poor ILEX advocate and so on. Ability and skill are relevant. The name of the profession where the quality of advocacy is being assessed is not. If judges do not act in this way they themselves will undermine the public interest and the rule of law. That is something that no member of the judiciary can afford to do.

28. I'd like to conclude this morning by looking at the end point of Ronald Dworkin's *Law's Empire*. Concluding that seminal text he said this,

"*Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.*[10]"

29. Law's attitude is constructive; it aims, through the application of principle to practice, to show the best route to a better future. It does so whilst keeping faith with the past. By focussing on our core values, our commitment to the rule of law, to the public interest, we give proper weight to the consumer interest without sliding, unwittingly, into making a fetish of the market and of consumerist language and attitudes.

30. It is a constructive attitude which hopefully will try to ensure that the opportunities created by the 2007 Act are properly underpinned and informed by those core values. Those values should provide the framework, and therefore the limits, within which opportunities can properly arise and develop. They are inextricably linked together. Only a fool, I think, would choose to sever them. If we do, we run the risk of walking down the same road which, some see, as led the

[10] Dworkin, *Law's Empire*, (Fontana Press) (1986) at 413.

financial services sector to the present economic crisis. The consequences of big bangs are not always benign as we have over the past years discovered.

31. It is a constructive attitude because it is not based on a misplaced protectionism, of vested interest pitted against vested interest. It is one which recognises that business as usual is a thing of the past. Business will properly be carried out in different ways. Those who think otherwise should take their heads of the sand now. Most importantly, it is an attitude which is the essence of the people we want to be, as lawyers, as judges, as citizens, and of the community we aim to be. It is this attitude, one committed to an open society's core values, which should properly shape our approach to future opportunities, and which will better enable us all to serve the public interest; and in doing so ensure that we are not left with nothing more to do than, as Marianne Faithfull sang, sit and watch as tears go by. If we fail, those tears would not just be for our commitment to an independent, ethical profession. They would be for our commitment to the public interest and a society governed by the rule of law.

32. Thank you very much.

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