A MATTER OF JUSTICE

The Legal System in Ferment

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The Economist

Michael Zander

Includes a Postscript on Lord Mackay's Green Papers

MICHAEL ZANDER

A MATTER OF JUSTICE

THE LEGAL SYSTEM IN FERMENT

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Preface to the Paperback Edition

The Introduction to the original edition of this book suggested that writing about the legal system is like attempting to hit a moving target. The book was completed in October 1987. This revised edition was basically completed in October 1988. The changes that took place even in the few months between those two dates were considerable. We acquired a new Lord Chancellor, the Legal Aid Bill was introduced and went through all its stages to Royal Assent, the Civil Justice Review produced its final report, the Marre Committee on the Future of the Legal Profession reported, the Criminal Justice Act 1988 became law, the Government decided to take the controversial step of abolishing the Right of Silence. All these, as well as many other less major developments, have been included in this paperback edition.

Where it was not possible to accommodate changes to text pages, the reader is referred to the Postscript on pp. 307-15. We hope that this will prove to be a tolerably satisfactory method of bringing the book up to date.

At the end of January 1989 the Lord Chancellor published three major and unexpectedly radical Green Papers on the legal profession. These are treated in a Postscript on the Government's Green Papers (pp. 317-24).

I thank the staff of OUP for seeing this revised edition safely through the production process — and especially for coping so efficiently with the last-minute problem of the Green Papers.

Michael Zander
London 1989

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Introduction

It is a commonplace that the post-Second World War era has been a period of unprecedented change in Britain. But has the legal system remained impervious to this process of dramatic transformation? After all, lawyers and judges are thought to be deeply complacent and conservative, and the ways of the law are old-fashioned. The public's image of the law is that of the quill pen, Dickensian chambers, barristers and their wigs, briefs tied in pink ribbon. And with some reason. The processes of the law are slow, complex and costly. Laws and lawyers alike are stilted and long-winded. So is this not one area in which life goes on unperturbed as it always has done?

In many ways the picture is accurate. Lawyers and judges *are* mostly conservative and the law developed by the courts, being based on respect for precedents, is backward looking. No one would deny that the process is costly and slow. Yet, to judge at least from the number of official inquiries into every aspect of the system, it can hardly be said that the gibe of complacency is fair. Just about every aspect of the legal system has in recent years been subjected to independent inquiry. Since the 1960s there have been official committees to look into legal services, restrictive practices in the legal profession, the organisation of the courts, the rules of evidence, the prosecution system, police powers, jury trials, civil procedure, the condition of the statute book and the interpretation of statutes, to name only a few.

Moreover, the serried ranks of official reports issued by committees set up by Government are greatly outnumbered by the much larger number of studies and reports issued by private and non-official bodies. The representative organs of the legal

profession (the Bar Council in the case of the Bar, the Law Society in the case of the solicitors' branch, and their sub-committees), for instance, have produced a mass of proposals on reform of the law, of the legal system and of the organisation of the profession itself. The solicitors' conveyancing monopoly, advertising rules of the two branches of the profession, monopolies over rights of audience, the internal organisation of the professional bodies, the machinery for complaining against lawyers, legal aid, the remuneration of lawyers, the rules on costs — each of these topics has been and remains in a state of upheaval. The ordinary member of the legal profession going about his avocation could be forgiven for losing track of the bewildering series of reports with their recommendations and decisions implementing some of these proposals. The momentum of events has been astonishing. The professional journals such as the *Law Society's Gazette*, the *New Law Journal* or the *Solicitors' Journal* have almost weekly carried accounts of some new development. Simply to keep abreast of events has been no easy matter.

Plainly, the fact that there has been so much restlessness about the law and the legal system signifies a measure of discontent. If, as many people say, the British* system is the best in the world, how is it that there has been such an outpouring of reform proposals? In truth, the international comparison made in statements that one system is better than others is largely meaningless. There is no way of evaluating a system as a whole in the international context without minute comparison of its component parts — a study that no-one has ever attempted, and that is too complex to be undertaken. It is difficult enough to form a view about the comparative merits of different systems on a single topic. To try to make such an assessment for so diffuse an enterprise as a legal system as a whole is impossible. Moreover, even if it could be done and even if one discovered that one's own system stood highest in the international league table, there would be little cause for complacency, since there would always be ample room for improvement.

The recent manifest concern for improving the legal system has been a feature of Governments of both Left and Right. Both

* There is in fact no such thing as a British legal system. The system is somewhat different in England and Wales, Scotland, and Northern Ireland. This book deals essentially with the system in England and Wales — styled for the sake of brevity as the English system.

Conservative and Labour Governments have set up major inquiries into aspects of the system and have implemented their findings. On occasion, a government of one party has even implemented proposals of an inquiry established by its predecessor of the opposing party. So the Heath Conservative Government gave effect to the recommendations of the Beeching Royal Commission which had been set up by Mr Harold Wilson; the Philips Royal Commission on Criminal Procedure was established by the Callaghan Labour Government but it was the Thatcher Government which implemented its proposals.

The fact that an inquiry is set up does not, of course, mean that it will result in proposals for reforms, nor that, if such proposals are made, they will be implemented — nor that, if they are implemented, things will necessarily improve. But the fact that in the past twenty or so years there have been so many major inquiries, official, semi-official and unofficial, into aspects of the legal system speaks for itself.

The purpose of this book is to trace and assess the great range of recent developments in the different parts of the legal system and to consider the present 'state of the art'. How is the system working? What proposals for making it work better are on the table? What are the prospects?

The aim has been to write for three distinct audiences — lawyers, law students and the lay reader who takes an interest in public affairs. This has created certain problems. The subjects covered are very broad — civil and criminal justice, the legal profession, judges, the legislative process, the jury, access to justice. Each could justify a whole book. To try to deal with such broad and complex topics each in a single chapter demands an uncomfortable degree of selectivity. Yet it seemed worthwhile to paint on a broad canvas and to try to identify the main themes of the contemporary picture. Inevitably much detail had to be overlooked. Even so, the layman may feel that sometimes there is more than he wants, whilst at other points the lawyer, and particularly the specialist, may have wished for more. Attempting to satisfy the different needs of readers with varying degrees of interest and knowledge is not entirely an easy matter.

The manuscript was finally completed in October 1987. Thanks are due to the publishers for getting the book out with such uncommon speed, and especially to Mrs Margaret Cornell for her painstaking and most efficient editing. This was particularly valuable since developments in the legal system occur at such a pace that writing a book about the system is like attempting to hit a rapidly moving target. I would also thank

my secretary, Angela White, who somehow found time, in addition to all her other tasks, to render the manuscript into a fit state.

Michael Zander
London

1

The Legal Profession at Bay

The cry 'hang all the lawyers' has been a familiar refrain for centuries. Lawyers have never had a good press. But in the past two decades they appear to have had a particularly difficult time, and at present the profession seems in greater disarray than at any stage in the post-war era.

Paradoxically, at the very same time, the profession in England and Wales appears to be booming as never before, expanding its work in new directions, growing rapidly in size, and generally showing every sign of shaping up tolerably well to the rigours of a new, more competitive, era — whilst being castigated from without and tearing itself apart from within. This, in other words, is a period of great and unparalleled travail.

The extent of the recent and continuing boom in English legal services may be judged from the spectacular growth in the size of the profession. For most of this century there were approximately 2,000 barristers and 20,000 solicitors. But from the mid-1960s the numbers on both sides of the profession started to grow exponentially. In 1960 there were 1,919 barristers in private practice and 19,069 solicitors with practising certificates. By the time the Royal Commission on Legal Services reported in 1979 the number of barristers had more than doubled to 4,263 and the number of solicitors had grown to 33,964. By 1987 the respective numbers had swelled to 5,642 and 47,830. The increase in the size of the Bar has been mainly fuelled by an explosion in the number of cases in which legal representation has been available. In 1960, for instance, there were a mere 5,000 grants of legal aid for cases in the magistrates' courts; in

1987 the equivalent figure was 453,600. In 1960 there were some 12,000 grants of legal aid for trials in the higher criminal courts; in 1987 the figure was 125,000. In the case of the solicitors' branch of the profession the increase had more to do with the rise in the proportion of the population owning their own homes and the consequential rise in the numbers of conveyancing transactions. The number of building society mortgages granted rose from 387,000 in 1960 to 1,046,000 in 1987. The proportion of people owning their homes rose in the same period from 44 to 64 per cent.

In recent years most of the increase in numbers of solicitors has been accounted for by women recruits to the profession. Women rose from 6 per cent of admissions to the Roll in 1965 to 41 per cent in 1985, an astonishing change. In 1983/4, one in four assistant solicitors were women; a year later the proportion was one in three. By 1987 overall, 18 per cent of practising solicitors were women. In 1986/7 the number of women passing the Solicitors' Finals examination was for the first time greater than the number of men, and women's share of new articles registered reached exactly 50 per cent. But evidence was beginning to emerge that the career pattern of women was distinctly different from that of men.*

There has been a similar increase in the number of women at the Bar. In the early 1980s the Law Society was warning of the profession being overmanned, but by 1987 there was talk of a serious recruitment crisis. New admissions in the profession peaked at 3,500 in 1980. The five-year average from 1980 to 1985 was 2,700. But that seemed insufficient. By all accounts, the profession was still expanding and could absorb even more recruits.[1]

This period of remarkable growth has also been the period of greatest trauma for the profession. The modern period in which it has had to face a barrage of sustained and informed critical opinion began in the 1960s. Reflecting on this development in 1967, the late Morris Finer, QC (as he then was) said that the tide was running strongly against the legal profession but that it was wrong to think of it as a revolt of the masses. It was rather, he thought, a protest by politicians, social workers,

* Figures published in the Annual Statistical Report for 1987 showed that the proportion of women solicitors with practising certificates declines rapidly after the first year of admission to the Roll, with 36 per cent not holding a certificate after ten years as compared with 12 per cent of men. Also three times as many women as men *pro rata* remain as employed assistant solicitors ten years after admission (see *Law Society's Gazette*, 3 September 1987, p. 2446).

journalists, university teachers — in short, the makers of opinion.[2]

> They are in reaction against what they are coming to regard as the unjustified pretensions of the legal profession: its incompetencies in the role in which it has for centuries claimed a supremacy of abilities; its unwillingness or its ignorance of the means to adapt itself to the demands of modern life in general and the claims of the citizen of the welfare state in particular.

An echo of this was to be heard in an article published in July 1986 in which Dr Yvonne Cripps, of Emmanuel College, Cambridge, reported on her study of criticisms of all the professions commissioned by the Inter-Professional Group.[3] The professions, she said, had been dilatory in putting their case to the public. There had been a tendency simply to hope that the forces acting to change them would disappear, but instead they had intensified and increased. The published responses from the professions had been weak and 'the public might be forgiven for believing that the professions are more concerned to fight for increased fees and improved working conditions than to answer criticisms about their conduct and organisation'. They had so often focussed their arguments on issues which might seem to augment the well-being of professionals rather than of consumers. They had an excellent case to put to the public but they had to demonstrate the importance of their special role and status in the community. An analysis and revision of their own practices in the light of the public interest was an essential feature of this process.

The case for the lawyers is that they act as an invaluable resource for clients, steering them through their difficulties, mitigating the rigour of the law, mediating, fixing, negotiating, taking up the cudgels where cudgels are needed, but reaching compromises in disputes where that seems the wiser course. A good lawyer is not simply facilitator, counsellor, advocate, and general adviser, he may see ways of doing things and opportunities that would not have occurred to the client. His role can include a constructive and creative function, though most lay clients probably see little evidence of this. The legal profession in this country has not had as good a reputation for initiative and ingenuity as that, for instance, in the United States — and has paid the price of losing much business to competitors, notably accountants. On the other hand, it is probably true that although the profession as a whole tends to

have a poor press, the relations between individual clients and their own lawyers are usually good and the client normally expresses himself as well pleased with the work done for him. The survey of use of lawyers' services done for the Royal Commission on Legal Services showed 67 per cent of clients expressing themselves 'completely satisfied', 17 per cent 'fairly satisfied', 7 per cent 'somewhat dissatisfied' and 6 per cent 'very dissatisfied'. This pattern of response is typical of the results of most such studies, although a poll of 5,000 businesses and companies in Sussex published in July 1987 produced 35 per cent of respondents dissatisfied with the quality of service from solicitors and 55 per cent who said they did not get value for money. In both respects accountants fared better with 20 per cent and 30 per cent dissatisfied.[4]

Traditionally, the legal profession has set great store by its independence and on the whole it has been left to get on with its own affairs. In the recent past, however, it has had to endure the indignity of repeated external inquiries. Between the mid-1960s and the end of the 1970s there were no less than four statutes dealing with aspects of legal services, the report of a committee on criminal legal aid, three reports of the National Board for Prices and Incomes and four reports of the Monopolies Commission, culminating in a Royal Commission on all aspects of the profession and legal services set up by Mr Harold Wilson in 1976.

The Royal Commission was chaired by a layman (Sir Henry, later Lord, Benson) and had a majority of lay members. It reported in January 1979 following the taking of voluminous evidence and lengthy consultation and deliberation. The profession viewed the whole process with the utmost disfavour and anxiety. From its point of view there were three crucial issues: the Bar's monopoly over the right to appear as an advocate (the 'right of audience') in the higher courts, the solicitors' monopoly over conveyancing work, and the division of the profession into barristers and solicitors. To its intense relief (and surprise) the Commission concluded not only that it was generally serving the public well but that in relation to the three issues of its concern the public interest would in each case be best served by a continuation of the *status quo*. It seemed that the profession had weathered the storm. When in 1983 the Government announced its acceptance of the report, both the Bar and the solicitors must have thought that, essentially, the long ordeal of external review and criticism was over. The Commission's report would be forgotten. (Amazingly, it was never debated in either House of Parliament!)

CONVEYANCING: AUSTIN MITCHELL'S BILL

Nevertheless, almost before the profession had had time to congratulate itself on what seemed like a miraculous escape, the battle began again. This time the onset of the series of threatening developments can be traced to a particular event on a particular date which will for ever be marked as a critical day in the history of the profession. In the autumn of 1983, Mr Austin Mitchell, Labour backbench MP for Grimsby, won a high position in the annual ballot for private members' legislation and was persuaded by the Consumers' Association and its legal adviser, Mr David Tench, to adopt its bill to allow licensed conveyancers to undertake conveyancing in regard to residential property in competition with solicitors. The Bill had its Second Reading on 16 December 1983. During the Second Reading debate, the then Solicitor-General, Sir Patrick Mayhew, announced that the Government opposed the Bill, though it did intend to set up a committee to see if anything could be done to simplify conveyancing procedure. However, to the dismay of the Law Society and to general astonishment, Mr Mitchell won a majority of 96 to 76 on the Second Reading. The Law Society had failed to mobilise its supporters.[5]

The Government then had to decide how to react. The then Lord Chancellor, Lord Hailsham, urged that the Government oppose the Consumers' Association's bill, but Mr Norman Tebbitt, the hard man of the Right, and the Prime Minister persuaded the Cabinet to reject this advice. A deal was done with Mr Mitchell. Accordingly in February 1984 it was announced that Mr Mitchell would withdraw his bill and that the Government would instead bring forward its own bill to achieve broadly the same objective. It first set up an expert committee under Professor Julian Farrand, a Law Commissioner, and its first report[6] formed the basis for Part II of the Administration of Justice Act 1985. This provided for licensed conveyancers to undertake conveyancing work, subject to control by a new Council responsible for the code of conduct, prescribing educational and other qualifying requirements, and devising rules relating to insurance, compensation for victims of fraud, and disciplinary procedures*. Considering that Mr Mitchell's

* In August 1986 the Council announced the general education and training requirements and the transitional arrangements under which those with appropriate experience as conveyancers could obtain licences from the spring of 1987. Experienced conveyancers would be exempted from the full education and

Bill was the brainchild of the Consumers' Association, it was appropriate that the first chairman of the Council should be Mrs Rachel Waterhouse, Chairman of the Association.

With the announcement in February 1984 that the Government would implement the Austin Mitchell Bill, panic set in in the Law Society and the whole solicitors' branch of the profession. For many years conveyancing has accounted for something like half of all solicitors' income. The proportion varies between different types of firms; the smaller the firm, the greater the dependence on conveyancing. The Royal Commission found that single practitioners earned 60 per cent of their gross fee income from conveyancing, two to four partner firms, 54 per cent, five to nine partner firms, 49 per cent, and firms with more than ten partners, one third.[7] A survey carried out more recently by Messrs Peat, Marwick and Mitchell for the Law Society confirmed that, although the percentages had changed somewhat, loss of conveyancing income would be liable to have a devastating impact on the bulk of the profession. Domestic conveyancing was 46 per cent of the income of single practitioners and 41 per cent of two to four partner firms, compared with only 10 per cent for firms with more than ten partners — most of whose conveyancing is commercial and therefore not affected by the advent of licensed conveyancers.[8]

The Royal Commission had recommended by a clear majority of ten to five that the monopoly should continue. For the Commission the chief argument was that conveyancing represented the citizen's largest single consumer transaction, and it was vital that the legal work should not be botched. The safest thing was to leave it in the hands of the solicitors. Mrs Thatcher and the majority of her Cabinet, on the other hand, had been impressed by the argument that competition would bring down charges and that the work could be done with a sufficient degree of competence by persons specially licensed to do conveyancing.

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training requirements but only if they could pass a two-part examination on law and conveyancing. They would also have to take a separate paper on accounts rules. (Of the 399 who sat the first examinations only 175 passed!) All licensed conveyancers would have to be properly insured and the Council was making appropriate arrangements for negligence and fraud compensation. (See *Law Society's Gazette*, 3 September 1986, p. 2530). For an assessment of the rules, see P. Kenny, 'How much licence do the new conveyancers have?', *Solicitors' Journal*, 17 July 1987, p. 958.

ADVERTISING

The almost immediate response by the Law Society to the Government's announcement was to abandon its long-held and deeply felt view that advertising by individual solicitors was unprofessional conduct. In 1977 in evidence to the Royal Commission the Law Society had said that the special relationship of trust between the lawyer and his client required the lawyer to refrain from practices acceptable in the market place.

> In particular, while professional men constantly compete with one another in reputation for ability, they do not compete by way of advertisement and other methods familiar and unobjectionable in the business world. The Society believes that self-advertisement by individual solicitors is wholly inconsistent with the proper relationship between solicitor and client.

Like all the professions the lawyers resisted marketing themselves for fear of damaging their image.

In reality, in spite of these protestations, the Law Society had over a number of years gradually moved away from the strictest interpretation of this position. Already in the 1960s it started to engage in institutional advertising by printing some 13 million leaflets on what solicitors do, and in the succeeding years it financed several expensive television campaigns to tell the world how useful solicitors were. It persuaded the Government to publish annual regional directories of the firms undertaking legal aid work and tens of thousands of copies were distributed free of charge to public libraries, Citizens' Advice Bureaux and other referral agencies. These directories, which since 1984 have been produced by private publishers, Waterlows, and which are no longer confined to firms undertaking legal aid, contain a mass of detailed information about firms, their addresses, opening hours, members, and the work they do. From November 1983 the Law Society permitted local Law Societies to place 'tombstone' advertisements in the local press restating the information from the directory. But it was only with the impending debacle of the loss of the conveyancing monopoly that the Law Society abandoned its basic opposition to individual firms advertising.

On 21 June 1984, only a few months after the Government stated that it would implement Austin Mitchell's Bill, the Council of the Law Society announced that as from October

solicitors would for the first time be permitted to advertise the range of services they offered to the public, and their charges. (Conveyancing fees used to be based on scales which were, in effect, both maxima and minima. In 1973 scale fees were abolished and solicitors were permitted to charge 'reasonable' fees. But price competition was dulled by the prohibition on advertising.) The press statement referred to the Government's announcement and added sourly that those who supported the decision 'could probably thank the Government for their success in the Council vote'. Advertising was not to be allowed on television, but radio and the national and local press as well as other means could be used, provided the advertisement did not bring the profession into disrepute or use 'knocking copy'.[9]

The profession did not easily acquiesce in the dramatic change of policy. At the AGM in July 1985 a resolution was moved that 'individual advertising by solicitors is contrary to the interests of both the public and solicitors'. The motion, which also called for a ballot, was defeated by the narrowest of margins — 3,420 votes to 3,407. The ballot which followed was almost as close — 13,528 for advertising, 11,246 votes against. The profession was clearly deeply divided on the issue. But it appeared to adjust reasonably quickly to the new situation and only a year later, in December 1986, the Council of the Law Society approved a wholescale further relaxation of the advertising and touting rules. The basic principle of the new Publicity Code is that a solicitor may now publicise his practice provided that he does not attract clients in a manner likely to impair his independence or integrity, or the client's freedom to instruct the lawyer of his own choice, or the solicitor's duty to act in the client's best interests, or the good repute of the profession or proper standards. Subject to these very general qualifications, he can use any form of media — television, direct mail shots, tee shirts, or, for that matter, sky writing. Firms may not, however, make unsolicited visits or telephone calls (as in promotion of double glazing); 'knocking copy' is still not permitted, nor can one mention success rates or even the names of clients without their consent. Otherwise just about anything goes.[10]

For the moment, however, the profession has on the whole reacted very cautiously to the new rules — though detailed descriptive articles in the legal press about firms and their individual members are now beginning to appear[11] and many firms have produced brochures about their operations. Some have been a little more adventurous. Pictons, a 17-partner firm in the Chilterns area, have used an advertisement on local radio