The Bar at the brink*

The independence of the judiciary will find itself on shaky ground with the introduction of a new law, wrote Jeremy Gauntlett SC, chairman of the GCB, in the Sunday Times, *7 January 2001. Originally entitled "The Bar at the brink" that newspaper reproduced the article in full. The text of his article reads as follows:*

What's bad for the Bar bodes ill for the Bench

"For 250 years, an independent advocates' profession has flourished in South Africa. However, if the policy unit of the Minister of Justice, Penuell Maduna, has its way, 2001 will mark the end of the road for the Bar.

The unit has produced a draft Legal Practice Bill intended to change both the way the profession is controlled and how it works. Although the unit has been at pains to call it a "draft working document" and "for discussion purposes only", this is not true: some weeks ago, the cat was let out the bag. The unit directed a letter to the Competition Commission on behalf of the minister of justice declaring his commitment to the policy reflected in the Bill. This at a time when the unit was still supposedly consulting the profession on the draft.

Two of the Bill's features strike at the very heart of an independent Bar.

The first is that the Bill embodies top-down governmental control through a 20-person statutory council to be headed by a judge, or, in the bizarre formulation of the drafters, "a person of similar calibre". Fewer than half of the members will represent South Africa's 13 000 attorneys, 4 000 candidate attorneys and 2 000 advocates. (Our 2 850 prosecutors are completely disregarded.)

The Minister of Justice will even decide who these representatives of the profession are: the Bill says he will select them from nominations. In fact, the minister will select no fewer than 17 of the 20 members.

What will this state-run council do? Quite simply, it will control the legal profession in a way it has never been controlled before. The council – and not, as now, the High Court – will enrol ... legal practitioners. It will also decide whether to accredit professional bodies, determine professional rules and decide the length and the content of vocational training, whether examinations are necessary, and how arduous the standard should be.

South Africa's ten Bars have expressed their united opposition to this proposed control of the legal profession by the government. So has the Law Society of South Africa, representing South Africa's attorneys.

Why this opposition? Because we believe it will destroy first our independence and then that of the judiciary.

Reflecting on similar threats of government control made in an earlier era, Sir Sydney Kentridge QC put the problem this way, "During the years of apartheid in South Africa, there were frequent threats from the government to place the Bar under the control of a central council with government-nominated members. This proposals was consistently and successfully resisted by the whole of the Bar, including those many members who normally supported the government in policies and legislation.

It is well understood that to remove the control of the profession from the provincial Bar Councils and General Council of the Bar would have meant the end of the independence of the profession. What was also well understood was that the independence of the Bench was inextricably linked with the independence of the Bar."

Four years ago the General Council fo the Bar opened up its records and those of all the Bars to the truth commission. It made a three-volume submission to the commission and, led by George Bizos SC and Jules Browde SC, appeared before it. Like the churches, the media and the universities, we could have done better in challenging executive and legislative abuses in the past. Still, much was done.

Time and again, courageous South African advocates stood up to the government, not only defending unpopular causes as a daily job in the courts, but publicly criticising the incremental attrition wreaked by the State on the rule of law.

We could do so then because we were free to do so. Although some of our members were under banning orders, some were threatened and harassed and others lost work or hope of judicial appointment, the independence of the Bar itself remained uncompromised. And although from our ranks some lessable and independent senior counsel were made judges, many appointed to the Bench made what former President Mandela recently described as a "dedicated contribution, even at the worst times in our own history."

Most South African judges are still drawn from the ranks of the Bar. The late Chief Justice, Ismail Mahomed, declared that he was emphatically in favour of this continuing, because of what he described as "the pursuit of forensic excellence and unremitting discipline which barristers have always been expected to apply in the discharge of their briefs."

But it is not only because of this long forensic training that advocates form the most natural pool for judicial selection. It is also because of their independence. If that is lost ironically after the attainment of a constitutional democracy entrenching the rule of law then, as Sydney Kentridge has warned, the independence of the judiciary is itself at risk.

The second blow to the Bar is this: the Bill seeks to regulate in a unitary way all "legal practitioners". As it levels, so it wrecks for it requires all lawyers to take work directly from the public. It explicitly prohibits any professional rule to the contrary.

The recent submission on behalf of the minister to the Competition Commission attacks two High Court decisions – one of which is to be considered soon by the Supreme Court of Appeal – which hold it to be the law of South Africa (drawn in turn from Roman law, the law of Holland and English law) that advocates can practise only on a referral basis.

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It is hard to understand this sudden anathema. The referral system is not the only one in the world, but it is a respected one, shared by several Commonwealth countries, including Britain.

It allows functional diversity; it permits a pool of practitioners who choose to specialise essentially in court work, in free competition with each other. Nothing compels a member of the public to use their services; for five years, attorneys have had rights of audience in every court in the land. What advocates as referral practitioners (rather like medical specialists) have to offer is not a broad range of client services but dedicated time for specific forensic tasks for which, by aptitude and focused vocational training, they are suited.

Why abolish this? The acid test must be what is best for the availability of skilled legal services to the South African public. Drawing on 45 years' experience of legal practice in South Africa, Bizos has warned of the repercussions for access to justice if the Bar is swept away. At present smaller attorneys' firms have access to the skills of all South Africa's advocates. Each counsel is ethically bound (by the cab-rank rule, which says advocates must take a brief if available) to do the work in which he or she is versed. Each competes for that brief with his or her neighbour.

However, the policy unit (in the letter it prepared for the minister) insists that this is wrong. Advocates should form partnerships. The proposition is mystifying. How can this promote competition? How can it promote access to justice? Some advocates (if the Luddite ambition is attained) will be absorbed by existing large and flourishing attorneys' firms. Others – inevitably groups of the most established advocates – will form their own specialist partnerships. The briefing of one partner will sterilise the others from involvement in the same case.

The sadness is not just the potential destruction. It is that the thinking is wildly out of touch. It reflects no understanding – or practical experience – of the realities of legal services in South Africa.

The challenge for South African lawyers is clear. In the memorable image of Judge Johann Kriegler, lawyers cannot be islands of privilege in a sea of misery. There must be transformation, but it must be transformation in the rigorous sense used by Australia's High Court Judge Michael Kirby – not simply change, but change for the better.

This means a profession more representative of the face of South Africa, offering the South African public and its institutions internationally competitive skills, and doing so efficiently as well as affordably.

The changes proposed by the Bill must be seen against the backdrop of a justice system in a deep and worsening crisis. The Portfolio Committee on Public Accounts and now the independent inquiry by former judge Mervyn King castigate its mismanagement. It lacks resources, and it is badly run.

The Bill's crass surgery will take away capacity, not enhance it.

At our own costs, we in the Bar train aspiring advocates, conduct examinations and advocacy training, administer disciplinary inquiries and legal aid defences, and fund bursaries. We scrutinised 132 parliamentary Bills last year and criticised 97. We provide (in acting appointments) up to a third of some High Court Benches, and now we staff (without being paid) regional courts too.

Are we seriously expected to continue to do all this when deprived of our independence and the way we practise? Does the minister really believe he has alternative resources to offer with which to carry out the broader work that the Bar has tried to do?

The policy unit has always admitted that there are none.

To destroy the Bar as an independent referral profession is to destroy a sinew of our constitutional democracy. It will send an unmistakable message to those who would invest in South Africa, and who monitor closely the quality and independence of its professions. It will hurt, not help, the public. We will not be party to it." 🕮

It is in the public interest

In a reply to Gauntlett's article in the Sunday Times, *Dr Penuell Maduna, Minister for Justice and Constitutional Development, writes that the purpose of the Bill is to promote the public interest. He makes these points:*

- Our Constitution guarantees every citizen the right to choose their trade, occupation or profession freely, but provides that the practice of these may be regulated by law.
- Given that the proposed legislation will regulate corporate, public-service and paralegal practitioners, the proposal that eight out of 20 council members be nominated by advocates and attorneys in private practice may well be seen as erring on the side of generosity. Other sectors have only one representative and, despite the fact that the purpose of the legislation is to protect the public interest, provision is made for only two members to be appointed to represent consumers of legal services.
- The allegation that the council will "control the legal profession in a way that it has never been controlled before" is misleading. Almost 90% of private legal practitioners are attorneys and they have always been strictly regulated by societies established by and operating in terms of legislation.
- Large numbers of advocates practise without being regulated by any professional body.
- An important difference between the law societies and Bar councils and the proposed council is that the members of the former are entirely elected by advocates and attorneys. This presents a problem when they are tasked with protection of the public interest. Public perceptions that these societies tend to favour attorneys in conflicts with clients have been frequently documented in the media.

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