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978-1-107-01253-0 - Lawyers and the Public Good: Democracy in Action?

Alan Paterson

Excerpt

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Introduction: determining
the public good

Miss Hamlyn, a not particularly well to do but widely travelled spinster and daughter of an English solicitor, bequeathed the world a startling bequest – a bequest so far-sighted that her trustees immediately sought guidance as to whether it was void from uncertainty since the beneficiaries were that indeterminate category ‘the Common people of this Country’. Fortunately for the legal world, counsel was of the opinion that this meant the UK public and the judge in Chancery, a mere six years later, agreed.¹ Bleak House this was not, however, since the capital of the trust remained largely intact. The novelty of the bequest was twofold. First, it was to fund public legal education – a concept which was not invented for another fifty years. Secondly, the lectures were *not* to instil in the public an awareness of their rights so much as to heighten their consciousness of the responsibilities and obligations imposed on them from living in a country that believed in the rule of law. I have no doubt therefore that Miss Hamlyn would have approved of ‘Lawyers and the Public Good’ as a title for the lectures – and also their iconoclastic theme – namely, that legal institutions are too important in a modern democracy to be left to lawyers alone.

¹ I am indebted to the *History of the Trust*, penned by Chantal Stebbings which appears on the Trust website.

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But first a word of explanation. The honour of being only the second Scots academic to deliver these lectures (Professor Sir T. B. Smith was the first) should have fallen to Sir Neil MacCormick, but his untimely illness and death prevented this, and the mantle fell to me. I think I was Neil's first doctoral student, since in 1969 he became the co-supervisor of my D.Phil at Oxford. It was on the Law Lords – and partly at Neil's suggestion the Law Lords will feature strongly in my lecture on the judiciary. Neil shared my fascination in the process of judicial decision-making and was the ideal supervisor for a young person in need of confidence and reassurance whenever writers' block came to call. His enthusiastic optimism has stayed with me throughout my professional career.

In the lecture series I grappled with how to determine the public good – the best interests of the public² – in relation to three key institutions in a democracy: lawyers, access to justice and the judiciary. It follows that in the chapters to follow I will focus on different facets of lawyers, access to justice and the judiciary. In the case of lawyers, I shall be asking whether professionalism is now in terminal decline; for access to justice I will discuss the current crisis in legal aid and what or who will determine its future; and in relation to judges, I shall examine possible mechanisms for judicial accountability. I will argue that in the past lawyers and judges have

² For a discussion of possible meanings of the public good and the public interest see Legal Services Institute, *The Regulation of Legal Services* (London: College of Law, February 2011). For my purposes there is little difference between the two terms. They refer to 'that which is for the collective benefit of the whole community' as opposed to 'all consumers', 'minorities' or 'individuals' in society.

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assumed that the determination of the public interest with respect to questions such as these has been for them to decide in a process of (usually) benign paternalism. In recent decades, however, these assumptions have come under challenge from other bodies claiming to represent the public interest with respect to legal institutions, such as the consumer movement, the competition authorities, regulators, politicians and the Government.

Taking first the legal profession and professionalism. From around the start of the twentieth century the solicitors' branch of the profession in England and Scotland had begun to see professionalism as akin to a tacit concordat with the state by which in return for high status, reasonable rewards, limited competition (including the monopolies) and self-regulation they would deliver expertise, a service ethic, access to legal services and public protection. As the century drew on, the clearer it became that the profession had had much the best of this 'bargain', and in the last thirty years the concordat has been re-negotiated at the hands of the state and the consumer movement in order to deliver more from the profession in pursuit of the public interest. The debates over alternative business structures (ABS) were but the latest manifestation of this, with the Scottish Bar (the Faculty of Advocates) spectacularly negotiating a deal whereby it was exempt from the reforms on public interest grounds, providing that it allowed free transfer between the status of advocate and that of solicitor advocate.

As for access to justice, from the earliest times the legal profession has set the terms of engagement. Its members have determined the nature and scope of the services that

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they were prepared to deliver to those of limited means,³ and those that they were not.⁴ For a long time they were successful throughout the United Kingdom in resisting or co-opting new modes of delivery (such as law centres), since it was they who determined what was in the public interest. Again, only in the last twenty years have dialogues with the state and the legal aid boards produced a publicly funded legal assistance market that owed as much to external stakeholders' views of the public interest as to those of the profession.

Finally, judicial independence and judicial accountability. Over the centuries, perhaps inevitably, the judiciary have placed the emphasis on the former rather than the latter, through their ability to determine what was in the public interest in their judgments and public pronouncements. The last decade, however, has seen a dialogue with the state and other stakeholders over issues such as complaints, discipline, training and appointment, in the shape of concordats.

It is easy to forget that these dialogues between the profession and the wider world in relation to each of these legal institutions are of comparatively modern origin. The result, as Miss Hamlyn would have understood, is that when it comes to legal professionalism, legal aid reform and judicial accountability others now have a role to play in determining the public interest. The days of legal paternalism have not come to an end, but they have, perhaps, begun to be numbered.

³ Primarily assistance in the fields of crime, personal injury and family law.

⁴ Typically social welfare law (including housing and debt).

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Professionalism re-assessed: what now for lawyers?¹

This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul.²

For the first time in fifty years or more a real battle is being fought to determine who controls professions and professionals ... I refer to this struggle as a crisis in professionalism.³

The crisis of legal professionalism. The future of professionalism in England and Wales is uncertain.⁴

In this chapter I will examine how and why professionalism in lawyers is said to be in decline, and in so doing I will explore the contemporary understanding of what it means to be a member of the profession for the twenty-first-century lawyer. And, for those impatient to get to the end, I shall conclude by arguing that, despite everything, professionalism has been,

¹ The original working title for this chapter was 'Whither the Legal Profession(s)?'. However, as one learned senator of the College of Justice remarked to me, 'don't you mean: "Whether the legal professions?"'. On reflection, he had a point.

² Anthony Kronman, *The Lost Lawyer* (Cambridge, MA: Harvard University Press, 1993), p. 1.

³ Gerald Hanlon, *Lawyers, the State and the Market* (London: Macmillan, 1999), p. 1.

⁴ Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales*, 2nd edn (Oxford: Hart Publishing, 2008), p. 56.

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and remains, a socially constructed concept that is the product of dialogues involving more than lawyers.

Solicitors: a profession in crisis?

Wherever you go in the English-speaking world, commentators have greeted the new millennium with the gloomy assertion that for lawyers the era of professionalism is in crisis, if not at an end. However, closer scrutiny of these jeremiads reveals that their apparent unity is indeed only apparent – they are not saying the same thing:

- (1) At one end of the spectrum are the commentators, like Richard Susskind (though in fairness there is no one quite like Richard), who anticipate the possible demise of the profession itself and presumably professionalism with it. His latest book, *The End of Lawyers?*, focuses on the inevitability of an increasing commoditisation of the work of lawyers and with it a degree of de-professionalisation, but adds somewhat ominously, ‘For those lawyers who cannot [adapt] ... I certainly do predict that their days are numbered ... The market ... will increasingly drive out ... outdated lawyers.’⁵
- (2) At the opposite end of the spectrum is a critique that paradoxically is a product of the continued success of professions. Its complaint is that the coinage of ‘profession and professional’ is being debased, since there are

⁵ Oxford University Press, 2008, p. 3. In fairness to Susskind he sees the decline in lawyers as being concentrated among those involved in routine and repetitive work that can be done by others.

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more professions than ever, at least 130 at the last count according to the Panel on Fair Access to the Professions report,⁶ and allegedly one in three of the current workforce is now in a professional or managerial job. After all, if we are all professionals now, then in the words of Gilbert and Sullivan, ‘when everyone is somebody, then no one’s anybody’.⁷ If successful, this usage will mark the death of professionalism in an exclusive sense,⁸ ironically thereby removing part of the cachet responsible for the rampant pursuit of professional status in the last century. It is as though the older meaning of a professional – ‘a member of learned vocation’ – has been replaced by a newer one – ‘one who earns a living from an occupation as opposed to the amateur who does it on an unpaid basis’. A similar, but less obvious, dilution of the meaning of ‘professional’ can be seen in descriptions of behaviour as ‘unprofessional’, for example, habitually turning up to work late, or not taking a ‘professional’ pride in what one does, in one’s appearance, courtesy or personal hygiene. In these contexts ‘professional’ has not lost all of its content of being ‘a good thing’, since it contains an explicit reference to standards, but such a usage strips out much of

⁶ Panel on Fair Access to the Professions, *Unleashing Aspiration* (London: Institute of Career Guidance, Cabinet Office), p. 14, available at: www.icg-uk.org/article607.html.

⁷ Act 2, ‘The Gondoliers’.

⁸ See Herbert Kritzer, ‘The Professions are Dead, Long live the Professions: Legal Practice in a Post Professional World’, *Law and Society Review*, 33 (1999), 713.

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the other content from the term that once distinguished certain occupations from others.⁹

- (3) The rising numbers of lawyers has troubled other commentators and, indeed, doubtless existing practitioners who fear that it will lead to an over-supply of lawyers, a decline in profitability, a shortage of work and ultimately the decline of the profession. Rick Abel, the foremost thinker on the legal profession in the Anglo-American world in recent times, of course, viewed the dramatic increase in UK lawyers over the last twenty-five years as a loss of market control by the occupation¹⁰ – in his eyes the death of professionalism as we know it.
- (4) The expansion of the profession has been accompanied by an ever increasing specialisation within the profession,¹¹ and with it a diversification of work settings. The traditional image of the lawyer as an independent practitioner has given way to a world in which the significant majority of lawyers now work either as employees in larger law firms or as in-house lawyers.¹² This dramatic shift

⁹ For a slightly different take on definitions of professions and professionalism see Kritzer, 'The Professions are Dead'.

¹⁰ R. Abel, 'The Decline of Professionalism', *Modern Law Review*, 49 (1986), 1; R. Abel, *English Lawyers between Market and State* (Oxford University Press, 2003), p. 475.

¹¹ See Richard Moorhead on specialisation, 'Lawyer Specialization – Managing the Professional Paradox', *Law and Policy*, 32 (2010), 226.

¹² Some critics have asserted that this development has undermined the independence and autonomy of the profession, a view that has received support from the ruling in the European Court in the *Akzo* case, denying the clients of in-house lawyers the right to legal professional privilege. A variant on this critique can be found in the writings of those

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stimulated the ‘death of the profession’ doom-smiths to posit the replacement of a collegiate model of the profession with a factionalised, heterogeneous and fragmented, but curiously non-diverse model.¹³

- (5) Perhaps the most sustained critique of today’s profession, however, relates to the twin threats posed by consumerism and commercialism¹⁴ as the deregulation of the legal services market which began over twenty years ago steamrollers on. Anthony Kronman, the Dean of Yale Law School, is but one of several contemporary commentators to claim that the modern profession has lost its traditional ideals, its public spiritedness and its moral compass as our opening quote revealed. The fear is that

lamenting the impact of the ‘new managerialism’ on the professional autonomy of NHS doctors or legal aid lawyers. See, e.g., Hilary Sommerlad, ‘Managerialism and the Legal Profession’, *International Journal of the Legal Profession*, 2 (1995), 159; Simon Caulkin, ‘Are the Real Pros being Managed out of Existence?’, *The Observer*, June 2006; Hanlon, *Lawyers, the State and the Market*.

¹³ See R. Nelson *et al.*, *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (New York: Cornell University Press, 1992).

¹⁴ See e.g., ‘In the Spirit of Public Service’, Report of the American Bar Association’s Commission on Professionalism (Chicago, IL: American Bar Association, 1986) and the swathe of commentaries that it spawned. The ABA has returned to the topic of the decline in professionalism again and again, see Dane Ciolino, ‘Redefining Professionalism as Seeking’, *Loyola Law Review* 49 (2003), 229. The threat from commercialism is not new, however, as Justice Brandeis observed in 1905: ‘Able lawyers have become adjuncts of great corporations and have neglected to use their powers for the protection of the people.’ From the speech ‘Opportunity in the Law’, to the Harvard Ethical Society in 1905.

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when consumerism forced open Pandora's de-regulatory box what flew out was not sin, but one deadly sin in particular: greed.

What are we to make of such divergent diagnoses, apart perhaps from concluding that professionalism is a 'feel good' concept that everyone can sign up to as a 'good thing', even though not everyone may understand the concept in quite the same way? As the eminent professional ethicist Deborah Rhode put it in 2001, 'I have long argued that a central part of the "professionalism problem" is a lack of consensus about what exactly the problem is, let alone how best to address it.'¹⁵ Certainly, a great deal of effort has been devoted to trying, and failing, to reach some kind of agreement as to what the concepts mean. Part of the problem stems from the fact that, 'profession' and 'professionalism' have a range of meanings and usages that bedevil easy analysis.¹⁶ However, this in turn reflects the fact that they are social constructs whose meaning has varied over time, and inevitably reflect the social and economic context of the time. The vision of a homogeneous occupation with consensual values serving as a bulwark between the individual and the state clearly emanated from the post-war era, while the heterogeneous, factionalised body with divergent ethics was as clearly a 1960s stereotype. Again,

¹⁵ Deborah Rhode, 'Professionalism', *South Carolina Law Review*, 52 (2001), 458 at 459. See also Deborah Rhode, 'The Professionalism Problem', *William & Mary Law Review*, 39 (1998), 283.

¹⁶ This is as true in the medical world as with lawyers. See, e.g., Delese Wear and Julie Aultman (eds.), *Professionalism in Medicine: Critical Perspectives* (New York: Springer, 2006).