
The Future of the Legal Profession in the EEC Context

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The Times

Mr David Edward QC, President of the CCBE (the Consultative Committee of the Bars and Law Societies of the European Community) has recently delivered two important addresses to members of the English legal profession, first on the future of the legal profession and second on the role of the CCBE as spokesman for advocates, barristers and solicitors in the United Kingdom and their equivalents in the EEC Member States, not only on matters concerning professional practice but also on the wider question of harmonisation of laws. Mr Edward, a Scottish advocate, has been a member of the United Kingdom delegation of the CCBE since October 1972, having taken the place of Lord Mackenzie Stuart, one of the judges at the Court of Justice of the European Communities. He became president of the CCBE for a two-year term in January 1978, and at the unanimous request of the CCBE delegations earlier this year has agreed to serve for a further one-year term to the end of 1980. The following is an abridged version of his address delivered to members of the Commerce & Industry Group and the Solicitors European Group on 25 June. The talk to the Solicitors European Group and Bar European Group, which preceded it in March, will appear in the next issue of the *Guardian Gazette*.

Let me say at once, that when I use the expression 'salaried lawyer', I mean a lawyer who is remunerated by way of salary, rather than by way of fee, and whose function is wholly, or mainly, to provide legal services to his employer. Nothing I say is in the least intended, and it

would be absurd if it were, to imply that the salaried lawyer, *vis-à-vis* the lawyer in private practice, is some lower form of life or that I regard the salaried lawyer in the United Kingdom as having anything other than a full, equal and honourable status in our profession.

Against that background, I turn to the title of the talk which is, 'The Future of the Legal Profession in the Community Context'.

I propose to deal with each element and consider, first, the Community context, starting from the base document, the Treaty of Rome.

Freedom of movement

Title III of the Treaty deals with the freedom of movement of persons, services and capital. Within that title, freedom of movement of persons and services is dealt with in three chapters: ch 1—(arts 48 to 51) 'Workers', which means, in the terms of the Treaty, wage and salary earners; ch 2 (arts 52 to 58) 'Freedom of Establishment', which includes, as it is put, the right to take up and pursue activities as self-employed persons and the right to set up and manage undertakings in other Member States; and ch 3 (arts 59 to 66) 'Freedom to Provide Services', defined in art 60 as being services normally provided for remuneration in so far as they are *not* governed by the provisions relating to free movement of goods, capital and persons. Specifically, it is said that services include activities of 'the professions'. There is an important distinction here between the English text and the text in other languages, because the English text speaks about activities of 'the professions', but the French text talks of activities of '*les professions libérales*', and all the other language texts talk about 'the free professions'.

As to exclusions, art 49 excludes from the scope of ch 1, workers employed in the public service, and art 55 (applied to services by art 66) excludes activities connected with the exercise of public authority.

The Treaty deals in various stages with the steps which are to be taken. Arts 53 and 62 prescribe that no Member State shall introduce any new restrictions, and arts 52 and 59 require the abolition of existing restrictions based on nationality. The matter is not put quite so emphatically and distinctly in the chapter relating to workers, but the position is the same. Arts 52 and 60, lay down that the freedom to establish and the freedom to provide services shall be on the same conditions as for nationals of the host country. This has been extended by the court, in *Van Binsbergen* and other cases, where the court has said that it is not simply discrimination on ground of nationality which is to be removed, but discrimination based on residence or anything which prevents freedom of movement between Member States.

Finally, there is art 57 (applied to services by art 66), which requires the Council of Ministers to pronounce directives of two types: (a), *Directives for the mutual recognition of diplomas*,

certificates and other evidence of formal qualifications. Again, note the difference of language between the English text and other texts. In the French text, 'other evidence of formal qualifications' is *'autre titres'* (other titles) and that may be important in considering what is the effect, for example, of the first directive on the provision of lawyers' services, and (b) *Directives for the co-ordination of the provisions laid down by law, regulation or administrative action concerning the taking up and pursuit of self-employed activities*. Here again, let me mention the French text—'provisions laid down by law, regulation or administrative action' is in French *'dispositions (which means any kind of provision having legal effect) législatives (that means made by the legislature) réglementaires et administratives'*, and that brings into play the important role of administrative law in French law and in the law of other continental countries.

As to the 'taking up and pursuit of activities' (in French *accès et exercice*), the distinction is between the conditions under which a person may enter a profession as a form of self-employed activity (what are the qualifications necessary to get in in the first place?) and *'exercice'* (what are the conditions which control the performance of that activity once you have got in and are allowed to exercise it?). 'Self-employed activities' in French is *'activités non-salariées'* (non-salaried activities).

You will see, therefore that the Treaty envisages certain fundamental distinctions: (a) the distinction between wage and salary earners and those who take up and pursue non-salaried, self-employed activities; those who set up and manage undertakings and those who provide services, including those of the free professions; (b) between 'activities' and 'professions': the emphasis is on what people do, rather than how they are qualified or how they style themselves; (c) between activity in the public service, or involving the exercise of official authority, and other activities; and (d) between 'paper' qualifications, or diplomas (to be dealt with in one set of directives), and conditions of access to and exercise of non-salaried activities (to be dealt with in another).

Looking at the matter another way, the emphasis is on (1) the relationship between the beneficiary of the freedom (*ie* the person to whom freedom of movement is given as a right by the Treaty) and the person who pays him (the State, the employer who pays his salary, or the client who pays his fee); (2) what the person does, rather than his qualifications or his professional affiliation; and (3) a positive duty to (a) remove obstacles, (b) create mutual recognition of diplomas, certificates and other titles or evidence of formal qualifications; and (c) co-ordinate the rules of whatever kind which govern the exercise of non-salaried activities. The purpose is to remove obstacles. The corollary is that there is no need to remove obstacles where no obstacles already exist.

Meaning of 'profession'

Let me deal now with the word 'profession'. In English, it can have two connotations. The wide one, according to the dictionary can mean any form of trade or vocation by which a person earns his living, but it may also, and normally does, have a more narrow connotation, meaning a form of activity which implies one or more of the following things: (1) that one requires an initial qualification to be able to exercise that profession; (2) that, when one exercises it, there is a continuing offer to the public of competence, integrity and answerability for what one does, which may be in various forms; normally through submission to professional rules and discipline and sometimes, but not always, through compulsory membership of a professional body which lays down the rules and exercises the discipline; (3) an element of 'independence', in the sense of freedom from direction either from the client or from the employer as to how one is to do one's job: normally the law is that the employer is, within legal limits, entitled to direct the workman how he is to do his job, but not the professional man;

this connotation is to be seen in use in the phrase 'using one's professional judgment'; and (4) financial independence, inherent in the idea of 'the liberal profession'.

The analysis, in other words, may be by reference to function or what a person does; to qualification; to submission to rules and discipline; to membership of a professional body; to independence of direction; or to financial or fiscal status, and, in this country, social considerations also come into the question of whether a particular form of activity is in the narrow sense to be described as 'professional'.

The legal profession

What is 'the legal profession'? Does it mean everyone who makes his living by practice of the law? Is the teacher of law at a university, who is not a member of one of the professional bodies but is from time to time asked to give legal advice, a member of the profession? Are court officials, who do not happen to be solicitors or barristers, members of the profession? Are bailiffs and such officials members of the profession? Does it depend on the context in which you use the words 'legal profession'? In certain contexts, the legal profession includes the judges, and it includes lawyers in the employment of government, national and local. But it may, in other contexts, be used in a much narrower sense to mean only lawyers engaged in private practice. On balance, it probably means all those who have the qualification of solicitor or barrister and who, in some fashion, earn their living in the practice of the law, no matter what

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they actually do, but now let us examine some of the other peculiarities of the profession in this country.

It is a necessary qualification to be a professional judge that one is first a solicitor or barrister, and, having become a judge, one remains a solicitor or barrister, but by necessary definition, the activity of a judge is *not* the activity of a solicitor or a barrister. However, lay-magistrates are not 'judges' in our terms, and a person can be in practice as a solicitor or barrister in the narrow sense, but can also sit part-time on the bench.

His two activities are distinct. Finally, a judge in the lower court may be *either* a solicitor *or* a barrister and it does not matter which for the purpose of being a judge.

De facto I think that, in most cases, those who wish to employ lawyers to do legal work for them on a salaried basis in this country would opt for somebody who has the qualification of solicitor or barrister. It does not matter which in most cases, except where the employer wishes the salaried lawyer to undertake reserved activities. And that, in truth, means the activities reserved to solicitors, because the salaried barrister is specifically excluded from those very activities which are the reserved activities of the barrister which nobody else may perform.

Therefore, to say of somebody or to say of oneself, 'I am a solicitor' or 'I am a barrister' may tell you what I do, but it may simply tell you what my qualifications are. However, whether

one is a solicitor or barrister, whether one is a salaried lawyer in private practice, or a judge, one is a member of some kind of professional brotherhood, with a common outlook, a common sense of purpose and common loyalty.

One continental view of the profession, which is probably the most different from ours is the French, and because it is the one which is most familiar to British lawyers, it is thought to represent the continental outlook, but it is a good one to take because it really represents the diametrical opposite of ours.

In French the word '*profession*' means profession in the wide English sense. Thus you have, in a recent opinion of the Advocate-General at the Court of Justice dealing with the profession of *avocat*, a reference to 'the profession of welder' as a comparison. The narrower English meaning of 'profession' is implied by the words '*profession liberale*', but that also includes some references which are not always present in the English use of the word, 'profession' in the narrow sense. It implies, in particular, financial independence.

There is a tendency, in the French system, to categorise by reference to function: that is by reference to what a person does in particular. There is also the element, particularly in the legal profession, of territoriality: that one is a member of a local Bar, the Bar of London, the Bar of Bristol, the Bar of Leeds, the Bar of Nottingham, each of which has its own system of rules and discipline.

So, 'I am an *avocat*' tells you much more specific things, than 'I am a solicitor' or 'I am a barrister'. It tells you that I have certain qualifications, that I am subject to the continuing rules and discipline of a local Bar, that I am entitled to do certain things which others may not do, in particular, that I may plead in certain courts. It also tell you, quite specifically, that I do not, and may not, do certain other things. I am not and may not be a notary. I am and may not be a judge. I am not a court registrar, nor a '*juriste d'entreprise*', that is, a salaried lawyer in full-time employment in industry or commerce, and I am not a lawyer in the public service, whether in national or local government. It also tells you that I am a member of a '*profession liberale*', that is to say, a member of a non-salaried profession, or a profession exercising non-salaried activities. All these are implied when you use that phrase. In contradistinction to the situation in this country, the only shared qualification of people who perform legal work in France is their initial university degree, which is a compulsory qualification, unlike the position here. Beyond that, there is no shared membership of a common profession and no shared outlook or loyalty. As the French constitution provides that any person may advise any other person about his rights in law, there exists another profession (recently regulated) of '*conseil juridique*' or legal adviser. University professors also exercise an important role, in the giving of opinions, not only to clients, but also to lawyers and to the courts.

The sharp edges of definition in the French system and the lack of a common outlook, organisation or discipline, are characteristic of most French institutions. On the other hand, it is a system in which professional control can be tighter and which avoids certain tensions which are present here: between, for example, those who are in private practice, and those who are in salaried employment. These tensions do not and cannot arise, because there is not the same combination of interests in the same body.

Now, in Germany, the basic qualification (at least *de facto*) for activity as a judge, as a salaried lawyer or as a lawyer in private practice, is that one becomes, at State expense, a deputy

judge. The qualification of 'assessor' is the basic qualification. Therefore, one can, in Germany, talk about 'the legal profession' in some sense, because it goes beyond the university degree. On the other hand, once again, there is no shared membership of a common professional body.

Application of the Treaty of Rome

As to application of the EEC Treaty, initially, there were three possibilities. The first argument was that the Treaty does not apply to lawyers at all. That was an argument based principally on art 55 of the Treaty, but was answered in the negative in *Reyner's* case. The second approach is that the Treaty is simply concerned with removing obstacles, and leaves national structures untouched, but that is an inadequate analysis, because it ignores the important point about art 57, which calls for directives co-ordinating the provisions for the taking up and pursuit of self-employed activities.

The third thesis which may, or may not, affect the salaried lawyer, is that, even if art 57 is applied, even if the conditions for taking up and pursuing activities of a professional nature, are co-ordinated, the extent of these changes is limited to what is necessary to remove obstacles *but no more*. In my view, that route is the route to metrication. It must be a route which proceeds on a strict analysis of the Treaty, which, in turn implies a strict analysis in terms of what people do, of whether they are wage or salary earners, or self-employed, and all the other distinctions mentioned earlier, including the distinction between whether they are employed in the public service or not.

Further, it leads to innumerable arguments such as to whether a particular state of affairs is 'established' or whether this is 'employment', or that is 'non-salaried employment'. All these distinctions come in, aggravated by the fact that six languages and nine different cultures are involved.

The most hopeful way, in my view, is to recognise that the Community is a new legal order, that it is genuinely something new, which we must help to build. We must first recognise that the categories of the Treaty are not mutually exclusive and that many of them are quite inadequate as a basis for analysis or construction in the last quarter of the 20th century.

Does it, for instance, make sense any longer to talk about establishment and services as if they were distinct, thinking it important where a person has his office and is established, in a situation where he can be giving advice face to face in London in the morning and in Washington in the afternoon, where he can have an office in virtually any part of the world and communicate by telephone, telex or telecopier, with any other part of the world simply by dialling, and where, in truth, a person frankly does not need an office and establishment, to conduct a world-wide practice of law?

We also have to recognise that what we are talking about in the Community are not Community problems, they are world problems and world trends.

Specialisation is not a problem just for England, just for solicitors, just for the Community. It is a world problem. The law becomes more complex, and it becomes increasingly difficult to pretend that one is omniscient, that one can be omniscient on issuing from a law school and articles, or whatever other form of practical training there is.

Law is becoming internationalised. The fact is that the Member States of the Community are taking steps to harmonise the law on many important aspects and so, let us remember, is the Council of Europe, although rather more slowly. Computers are going to have an enormous effect by the end of the next ten years, if it be the case

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that, by plugging into the computer data bank, the lawyer in Halifax is going to have access to precisely the same data as the lawyer with a large office in London and an enormous library.

There are attacks on the concept of our profession, on professional standards and on the professional organisations.

We have to ask ourselves, therefore, whether our existing structures are adequate, both for the protection of our clients and for the protection of ourselves. The special merit of the Treaty, and of the fact that we are in the Community, is that, because the Treaty involves a co-ordination across six languages and nine systems, we cannot proceed on any other basis than by facing facts. We have to face what are the realities of what people do and how they actually behave and how they ought to behave, rather than cling to pre-conceived notions.

Position of the salaried lawyer

Furthermore, we have to do it in the context of mutual respect for each others' systems and

mutual recognition of each others' fears. The fears of loss of status, of recognised points of reference, of standards. Specifically, as regards the position of the salaried lawyer, is it not time that one asked whether it is realistic simply to say that a salaried lawyer is just the same as a lawyer in private practice, except that he has just one client? That may be, and indeed is, true in many cases where the employer respects the independence of those whom he employs as lawyers. Is it true in all cases? Do salaried lawyers, and can salaried lawyers, always behave in the same way as lawyers in private practice? Think of the position of some lawyers in local government recently.

Should we not perhaps ask the question: 'Does the lawyer, the salaried lawyer, need a special set of rules: not to control his conduct but to guide it and most particularly to protect him from improper pressure?'

The bars and law societies of this country have an obligation to recognise and support the status

of salaried lawyers. There is a corresponding obligation on salaried lawyers to observe the obligations which go with membership of the profession. No professional body can protect the status of salaried lawyers just by asserting that they are members of a particular professional body. It is essential that we assert the need for salaried lawyers to share in and contribute to the common standards and the common professional outlook of the profession. Therefore, I would say to the salaried lawyers here: your future in the Community is in your hands. There is no prospect of our being able, in the Community context, to assert that legal professional privilege attaches to the communications of the salaried lawyer who does not behave with the independence of mind and conduct which is the justification of legal professional privilege.

To all of you, I simply say this: we have the opportunity to create something new, and we have nothing to lose but our pre-conceived ideas.