The Independence of the Profession

A reply to Michael Zander

Mr Zander's article, 'The Independence of the Legal Profession—What does it mean?' deserves an early reply. Like Agag, I must walk delicately upon the marbled halls of English legal politics, but the *Gazette* has a (limited) circulation in the law-booths of the savages and one such may perhaps be allowed to bandy words with the self-appointed scourge of the English profession.

I believe, not to put too fine a point upon it, that Mr Zander's technique of argumentation is intellectually disreputable and that his conclusions are either trite or nonsense.

Mr Zander's technique is as old as politics, and no cleaner. The elements of it are these. First discredit your opponent either directly or, preferably, by innuendo. Next, attribute to him a series of propositions which he never uttered. Then

show these propositions to be false, naive or dishonest. In the course of so doing, introduce your own ideas as if they were truths too plain for argument. Your own 'conclusion' is then able to rise, Phoenix-like and self-evident, upon the hot air of a wholly artificial combustion. Whether this is what Mr Zander set out to do, I do not know. I have no doubt that it is what he has done.

The process begins in the first sentence of his article where 'the independence of the legal profession' is brought to our attention as 'one of the great slogans of the moment'. The word 'slogan' at once devalues the words used—they become a mere self-interested advertising gimmick, ripe for logical destruction. Do not be surprised to find that, three paragraphs later, Mr Zander declares himself ready to spring to the 'barricades' in defence of this slogan. By that time he has identified himself with the forces of light which are ranged against those of cant and reaction. These are, respectively, the Royal Commission and the 'leaders of the profession'.

The leaders of the profession use the phrase 'the independence of the profession', according to Mr Zander, 'in virtually every public pronouncement'. The Royal Commission being more perspicacious, enquire 'What does this mean?' I hope to show, later, that in truth this is an almost meaningless question which would demonstrate the perspicacity neither of the Royal Commission nor of Mr Zander who takes it seriously. What does not appear (except to the careful student of the inverted commas in Mr Zander's text) is that the Royal Commission asked no such question. Such pedantries are, however, of no consequence. The assumption has been introduced, on apparently good authority, that the phrase ('the independence of the profession') has, and can have, a definable 'meaning'.

The Royal Commission are then given heart to probe further. They will, we are told, 'be warned not to entertain ideas that might endanger the quality of independence'. To 'entertain ideas' is, of course, something to be avoided except by those who are perspicacious and brave. Therefore the Royal Commission *will* entertain ideas and will not be diverted by the pontifications of the leaders of the profession who, by the end of the first paragraph, have thus been accused of intimidation as well.

The next paragraph converts the arrogant pontificators into frightened kitchen-maids—anxious that 'something dreadful could be about to happen'. That nothing dreadful will be brought about, by Mr Zander at least, is clear since he, too, is a lawyer as he now demonstrates. He asks, lawyer-like, for the *evidence* to justify the anxiety and we all know that that for which there is no evidence is a chimaera. 'Why,' he asks, 'is the profession in so great a state of alarm?' (Note: 'alarmists' are to be distrusted, especially in England.)

At this point, Mr Zander might have paused to wonder whether the fact that the profession *is* in a state of alarm is not, in itself, evidence that there is, or at least may be, something to be alarmed about. The members of the legal profession are not, after all, notorious alarmists. Has not complacency been their chief characteristic according to Mr Zander himself amongst others? He cannot turn back and say that the profession is *not* in a state of alarm since he has just said, more than once in different ways, that it is.

Mr Zander avoids this dilemma by not facing it. Rather he now portrays himself as both reasonable and an idealist. He would, we are informed, 'be on the barricades with Sir Peter Rawlinson himself to defend the independence of the profession'. If that is to be the consequence of the Royal Commission entertaining ideas, Sir Peter may indeed be alarmed. He need not worry. Mr Zander offers elucidation, not companionship.

And so to elucidation—the process by which a series of home-made Aunt Sallies (the seven 'meanings' of independence) are set up in order to be cut down by the ruthless logic of the crusader. It would be wearisome to examine in detail the extent of the holes in the crusader's own armour. Indeed, it is questionable how far the exercise is profitable at all since, like the Emperor, he has not much on. In the end, Aunt Sallies all cleared away, he reaches the remarkable conclusion that 'independence is more a matter of values than of organisation'. Whoever said it was anything else? Not, as far as I am aware, Sir Peter Rawlinson or any of the other leaders of the profession. The person who said it, for the purpose of showing it to be untrue, is Mr Zander himself.

The article then becomes little more than a porridge of Mr Zander's own ideas—often enough expressed, in all conscience—served up as if they were the logical answer to an idiot's anxieties.

Thus, apparently, 'all professions must be fully accountable to the public interest'. What does *this* 'mean'? It would, by Mr Zander's technique, be possible to attribute to the phrase not less than seven meanings and to show that each is absurd. Reading, as far as is consistent with my eyesight, between the lines of the *Gazette*, Mr Zander seems to attribute to his phrase the meaning that 'the affairs of the profession are as much open to government scrutiny and intervention as the affairs of any other institution in the public domain'. That they are open to government scrutiny is true. It is also trite. That they are, or ought to be, open to government intervention is what the real argument is about. Of course, the government has *power* to intervene as, in theory and sometimes in practice, it has power also to intervene in the private domain of the private citizen. The important question is whether, in the absence of a written constitution, a Bill of Rights and a developed system of administrative law, the government *should* exercise that power and, if so, within what limits.

Cant about 'public accountability' is none the less cant, and it is no excuse for Mr Zander to produce it that he believes himself to be exposing cant in others.

'Few would accept that there is any realistic danger of a slide into totalitarianism in this country.' The Prime Minister would, for one—see his recent speech at Blackpool. It is not, at any rate, a view which is confined to *Private Eye's* 'Great Bores of Today'.

'It is difficult to think of any society where the real threat of dictatorship has been defeated by lawyers.' This is cheap. Lawyers do not claim to be better or stronger than other men. They must try to operate within the system imposed upon them, otherwise they run the risk of depriving the citizen of the chance to assert those rights which are left to him. This indeed (as Mr Zander would know if he had spoken to those who have had to face it) is one of the most agonising dilemmas of the ordinary practising lawyer in a totalitarian state. Should he go underground, as one of the present leaders of the profession in Europe did? Should he speak out, as Popovic has done? Or should he remain where he is and try to maintain a semblance of decency and order where it lies within his power? When the lawyer is faced with this choice there is sufficient evidence that totalitarianism has arrived. That totalitarianism has arrived is the fault, not particularly of lawyers, but of all those who would not heed the warnings of its approach.

'If government money is itself the indication of loss of independence the profession succumbed a long time ago. The legal aid scheme is a vast source of revenue to both branches of the profession.' The argument being knocked down is that 'independence means not taking government money'. Who said that it does mean that? No one. Mr Zander does not point out, as he could have done, that 'taking government money' is a phrase capable of covering a number of different 'scenarios' (to borrow his vile jargon). Any person selling goods or providing services who is paid for them in money which derives directly or indirectly from public funds is, in a sense, 'taking government money'. The owner of the corner shop who sells cigarettes to old-age pensioners is in the same boat as the lawyer. Must he, too, be 'publicly accountable', and if so, how?

Legal aid is merely a form of subsidy designed to give those who require legal services, but cannot afford them, the opportunity to have them on the same terms as those who can. It is a scheme designed to put the poor on a footing of equality with the rich. The fact that the scheme is of no assistance to an increasing number of those in between is an indictment of government, not of the profession. As Mr Zander recognises, governments are subject to financial constraints and the question is then a question of priorities—do we subsidise justice or cheese? A subsidy to the consumer does not presuppose the right to control the supplier. Such control must be justified by other arguments.

And so to Mr Zander's main proposal—or what, at least, appears to be his main proposal—that there should be a Legal Services Commission which would not only run the publicly financed legal services but would also have 'under its general sway' all the 'existing committees (the Senate, The Law Society, etc)'. Note, incidentally, that the Senate and The Law Society have now been covertly demoted to become 'committees'.

Mr Zander is a great searcher for evidence. What evidence is there that the plethora of Boards and Commissions, which are now run at vast public expense and provide employment for innumerable bureaucrats and out-of-work politicians, actually *achieve* anything very much, if at all? There is at least as much evidence that they only serve to gum up the works of ordinary human activity and output as there is that they perform a function commensurate in value with their cost.

William of Occam, in the early fourteenth century, tendered certain advice which could well be heeded by modern governments and, if I may be permitted to say so, by Royal Commissions. 'Entities,' he said, 'should not be multiplied unnecessarily.' The *onus* is on those who wish to create new bodies to justify their existence in advance, to tell us (not in outline but in detail) what they will do, how many people will be employed and what will be the cost. It is then worth asking whether the game is worth the candle—whether the people might not be more profitably employed elsewhere and whether the money not spent might be used to improve access to justice, for example by raising the financial limit of legal aid or by extending its benefits to those who wish to be represented before administrative tribunals where their rights and well-being are in issue. Might not the same result be achieved by modification or adaptation of existing institutions or, for that matter, by trusting them to recognise a danger signal when they see it?

What Mr Zander wants, I suspect, is a profession sufficiently under control that it can be forced to do what he wants and to do it in the way which he thinks best. He *does*, for all his protestations, wish to see the end of the independence of the profession as we know it. He does not 'plot' it—another accusation falsely put into the mouths of those he seeks to answer. But like the zealot in every age, he believes that 'true' freedom consists in being faithful to his doctrine whereas I would prefer to follow Sir Isaiah Berlin in believing that 'freedom' means no more and no less than being free from constraint. Some constraint upon individual freedom is necessary in the interests of society, but all constraint is necessarily and logically a curtailment of freedom.

So, I believe, 'independence' means no more and no less than the opposite of being in a state of dependency, however created and whoever the person or body upon whom one is dependent. Mr Zander is right to point out that lawyers and their profession must, to some extent, be dependent upon government and others. But the fact of their being so dependent is a measure of the extent to which they are already not independent. There will not, as Mr Zander seems to suggest, be a magic moment at which the erosion of freedom or the imposition of controls will transform a profession which is independent into a profession which is not—the moment just before which Mr Zander will fly to the barricades. *Every* new constraint, *every* new control, destroys some degree of independence. The question in each case is whether that loss is sufficiently counter-balanced by a corresponding gain. That is the only question worth asking in the long run. The question asked by Mr Zander, and imputed by him to the Royal Commission, 'What does it mean?' is itself a meaningless question in so far as it expects an answer longer than the first sentence of this paragraph.

It would, for example, be as meaningful or meaningless to ask, 'What is meant by "the liberty of the individual"?' As a phrase, it means what you want it to mean—as much or as little, depending on the circumstances and your own motives in using it. It is in one mouth a slogan, in another an ideal. At best and at worst, it has led to the rack, the gallows and the guillotine.

When the leaders of the profession (not only in Britain but, in my experience, throughout Western Europe) are alarmed about threats to 'the independence of the legal profession', I believe that they use the phrase, not as a slogan, but as an expression of an ideal. If and in so far as they use it as a mere slogan—as a means of intimidation—I would dissociate myself from them. There is no more reason for resenting or resisting an inquiry into the workings of the legal profession than, for example, there is for resisting a searching inquiry into the forms and practices of Westminster, Whitehall or the London School of Economics. (The first two, at least, do not appear to have worked all that well recently.) What is alarming about any inquiry is when it takes the form of a witch-hunt, or is made to appear like one; when the result appears to be a foregone conclusion and the inquiry procedure is merely a cosmetic method of imposing a predetermined solution.

If 'the independence of the profession' is simply the expression of an ideal, incapable of more than the most basic and simple definition and if, as Mr Zander has shown, the profession is already not independent in a number of ways, wherein lies the danger? Or, to put it another way, what is the point of this ideal for which Sir Peter Rawlinson and, apparently, Mr Zander would man the barricades?

The point, I think, is this. The essence of the lawyer's function lies in the fact that what he does is what the client would do for himself if he had the training, the experience and the time. The lawyer is a projection of his client in his relations with the State, with more powerful organisations and

with others of equal or less power than himself. In that respect, a threat to the lawyer's independence—*any* threat, whether psychological, legal or physical—is ultimately a threat to the client's independence. The citizen who cannot find a lawyer who is independent and willing so to act, cannot himself be independent. Left to himself, he cannot fight the greater power of the state, the powerful corporation or simply the complex machinery of the law. But that is not enough, since the lawyer must be independent of his client too. He cannot blindly do what his client wishes and he must constantly seek to strike a fair balance between his duty to his client and his duty to the courts and to others.

The need to strike this balance, not generally, but daily and in relation to each specific transaction, is one of the distinguishing features of our (and perhaps of any) profession. Professional rules and discipline—which are sometimes regarded as a mere piece of middle-class mystique—are a means of offering to the citizen (the consumer) a minimum guarantee that the balance will be fairly struck in his case. That, in some cases, the balance is not fairly struck is only partly a criticism of the profession—it is a consequence, and an inevitable consequence, of human inadequacy, moral and intellectual. No amount of government intervention, no overburden of boards, commissions, committees and such like can eliminate human inadequacy. The danger is that by multiplying the 'subtle pressures' to which Mr Zander refers, they will stifle originality and the genuine spirit of independence.

Of course, it is true that all independence can be destroyed at a stroke, although this is very rarely true. Even the dictator usually has to work by stealth. But if we accept that independence is a relative term and that we are not, and cannot be, wholly independent, it is possible to reach a stage, without noticing it and without meaning it, at which independence is, for practical purposes, destroyed. This can as easily be achieved by a series of well-meaning reforms designed to cope with individual problems or abuses but effected by generalised remedies, as it can by direct intervention. The innocent and the efficient are subjected to an excessive and unhealthy control which is designed only for the guilty and incompetent.

It is here that the Royal Commissions must themselves try to strike a balance. They will have to weigh the merits of superficially attractive remedies designed to meet real, but possibly transitory problems, against the dangers of adopting them which can, in the nature of things, only be guessed at. They will have to find out whether these remedies have been tried elsewhere (most of them have), whether they have been successful and, if not, why not. They will have to come to terms with developments in the European Community which challenge the most elementary assumptions with which we have grown up, lawyers and laymen alike. If their study is as profound as it deserves to be, it will take years and the legal profession will probably have moved a long way under its own steam in the meanwhile. Their task is not likely to be made easier by the pressures of zealots, of whatever persuasion.

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