Why advocacy matters – what matters in advocacy?*

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ADVOCATES through history have been disparaged, even demonised. David Pannick reminds us that the 1669 Constitution of Carolina prohibited the profession of barrister, providing that it is 'a base and vile thing to plead for money or reward'.[1] Thomas More's *Utopia* had no advocates, 'to be over-ingenious about individual cases and points of law. They think it better for each man to plead his own cause, and tell the judge the same story as he'd otherwise tell his lawyer. Under such conditions, the point at issue is less likely to be obscured, and it's easier to get at the truth …'[2]

And so one can go on – Robespierre, supposed to have said that he would not rest until the last lawyer has been strangled with the bowels of the last priest; Camus, with the same comparative antipathy, that lawyers and priests both must wear robes – or ordinary people would see straight through them.

Of course advocates often expose themselves to dislike and ridicule. Sometimes it is because our kind are pompous – sometimes fatuous. No better illustration than when Sir Thomas Inskip (Attorney-General, 1928–9 and 1932–6) in an appeal told the Law Lords that roulette is a game played with cards. He justly received what a great member of the Faculty, Lord Macmillan, described as 'a devastating monosyllabic correction from the Woolsack'.[3]

Fortunately advocates are not alone in the predicament of appearing foolish. Judges join us, from time to time. Thus in 1980 three members of the Court of Appeal concurred in the important conclusion that it was not unreasonable for a wife to ration her husband to sexual intercourse once a week. This of course interested the media considerably. Lord Hailsham, as Lord Chancellor, said he could not complain about the banner headline the next day regarding their Lordships' conclusion: '*Once a week is enough*'. But he did object, he told the House of Lords, to three newspapers trying to interview the wives of the judges concerned.[4]

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So on occasions like this, when there are high-minded things to be said, we should remember our foibles.

Advocacy matters first for a reason that sounds grand, but is true. It concerns function. Our job most fundamentally is to be a pleader in courts (however much time we spend in preparation, or in averting the prospect of having the case actually decided by judges). That in turn entails coming between the subject and the executive, or between antagonists in civil disputes. In doing so we have two remarkable duties, uneasily balanced and discharged with difficulty. We are bound by a simultaneous obligation to the court as well as to the client; and we are bound to take on the latter, as Erskine took on Tom Paine, both against our private views and public pressures – in his case, the menaces of Lord Loughborough.

Lord Neuberger, President of the Supreme Court in a recent address mooted the end, not of the function of advocacy, but of the advocates' profession. His address, entitled 'The Future of the Bar,' was delivered to the Bar Councils of Northern Ireland and Ireland in Belfast three months ago today. He said:

> '…a fearless, independent and outspoken group of independent advocates can *exist and thrive perfectly well within a single legal profession*: it does not *need* to be a separate profession'.[5]

HE invoked in support the American Trial Lawyers Association, which he described as a 'sub-group' of a single lawyers' profession. It is, said Lord Neuberger, 'every bit as effective as the Bar Council of England'. (He did not go so far as to say the same about the Faculty of Advocates).

It is difficult to speak about why advocacy matters without engaging at the outset with Lord Neuberger's observations regarding the end of a separate referral Bar. Advocacy certainly is not confined to advocates. But would it, and its role, be advanced by the prospect Lord Neuberger explores? Is the test in either regard truly whether advocates 'need' the Bar 'to exist and thrive'?

There can be little doubt that an estimable degree of independence is to be found both in the fused profession and in societies of attorneys or solicitors in a number of constitutio-

nal democracies. It is also true that a function which can be traced back in many legal cultures (including of course the civilian one I share with you) will not die with the quill and the wig. But I offer two forms of experience which militate against viewing with equanimity the prospect of the Bar mutating to a 'sub-group'. (Whether it is thought that this 'sub-group' would be entitled, or able, to conduct its own training, examinations, have its own ethics, conduct a level of at least first-instance discipline, raises other questions, not for today).

My point is that the professional independence we accept as vital to the functioning of the courts, and so to constitutionalism itself, may not be destroyed by fusion – but it is weakened by it. The first experience in this regard is historical, the other current.

The historical example is the Bar in South Africa before democracy. There can be no suggestion that it was without fault or failing.[6] But there can be no doubt, as Sir Sydney Kentridge QC has pointed out before, that the more consistent and outspoken public opposition of the South African Bar to legislative and executive excesses, compared with that of the law societies, was rooted in the Bar's inherently greater independence. Unlike most attorneys, advocates of the time had no partners to whom they were accountable. Firms of attorneys were far more vulnerable to the loss of established clients. They did not have then, as they do not have now, a cab-rank rule. The independence of the Bar is simply inherently stronger. This is not because advocates are stronger people, but because they are at once constrained and supported by their simultaneous duties to take clients and towards the court as its officers. They *can* be freer of political and social constraint.

THE second experience relates to where exactly what Lord Neuberger holds in prospect for the United Kingdom – fusion, with a tolerated continuance of a subgroup – has happened. This is also in Southern Africa (Zimbabwe and Namibia are examples, and South Africa under its new Legal Practice Act is set to follow). Indeed referral practitioners have continued in a material sense to 'exist and thrive', as he puts it. But their separate institutional voice has been stilled. The law societies do on occasion speak out on issues pertaining to the rule of law and the administration of justice. But not without the constraint of interests of partners and loyalty to a particular client base. Governments, State organs and State-controlled enterprises commonly account for the majority of instructed work, in Southern Africa as elsewhere. The inhibiting effect of this is obvious. Representatives of, and firms in, the fused profession in the countries I know are aware of the consequences of the fiercely independent conduct Lord Neuberger himself extolls. They have no cab-rank rule. Their firms and partners are far more on the line. It is to their great credit that often they rise above this. But – the question Lord Neuberger has not posed – their institutional independence has not been *enhanced* by what he holds out as a prospect in the United Kingdom too.

As against these two experiences there is another phenomenon to be noted. The current has actually reversed in some legal cultures. New Zealand and Western Australia are two examples. Bars have emerged even where the historical system is fused. Why? For clear reasons of a perceived – and fulfilled – social demand for it. Both the markets and the courts in these societies have welcomed the development from a fused profession of highly independent Bars – choosing to practice on the referral basis, specialising in court work, offering bespoke training and examining. So there would seem to be nothing inevitable, or irresistibly attractive, about the prospect Lord Neuberger holds out.

The end of a separate referral profession does not mean the end of independence within the legal profession. But if that is Lord Neuberger's point, it is with respect a straw man. The true question is surely: would the Bar in the United Kingdom becoming a 'sub-group' enhance the independence of lawyers? The answer to that must surely be, no. Advocates' duties to the court and to take briefs puts them in a particular relation to the independence of the courts. There is no net societal gain in an attenuation of that role. Independent courts require the highest degree of independence compatible with practice. Continuing 'to exist and thrive' is a downbeat societal ambition.

It is, then, inexplicable why governments and public figures are so taken by what Lord Neuberger holds out: a thriving group of independent practitioners being driven against their will into becoming a 'sub-group' of others. It cannot be to regulate them, because they are already regulated by both professional and external agencies (in Scotland and South Africa, at common law by the courts too). Reflecting on an indifference to the autonomy of universities and to academic freedom itself, JM Coetzee (winner of a Nobel Prize for Literature) suggests that 'this may simply come out of a defensive reluctance to sanction sites of power over which it [South Africa's ruling party] has no control'.[7]

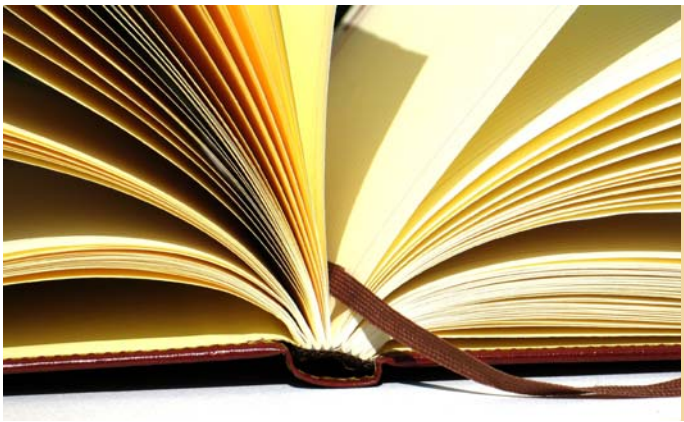
There are other reasons why, beyond what it does for the rule of law, advocacy matters. Recall Sir Thomas More's notion of *Utopia*: the lack of pleaders, the bucolic spectacle of lay people engaging with courts. Why is More wrong? Any adjudicator who has to deal with the dystopian reality of unrepresented people knows why: advocacy interposes a pleader who, properly qualified and trained, is able to cut to the relevant and the compelling.

Good advocacy is a great discipline, in both senses of that word. It is a struggle for the clear thought, the exact word, the compelling delivery. Say things simply, Einstein is supposed to have enjoined – but not more simply than they are. In itself advocacy is an arduous intellectual exercise. What advocate who is any good has not tossed in any bed afterwards: *this* is how I should have put it?

THIRDLY, advocacy entails more than skilled dissection and persuasive conveying. At its best, again it involves a knowledge of law, the distillation of essential principle – the *recta ratio* advanced from Ulpian to Grotius and Lord Mansfield – the exposure of cant and the demonstration of irrelevance.

So I believe advocacy matters. That is not to say it is inherently heroic – or, indeed, at all enduring. It was a very great advocate, Sir Patrick Hastings KC, who said that 'a barrister builds up nothing that he can leave behind him, his practice dies with him, even he himself is soon forgotten.[8] Another great advocate, Sir John Simon KC, said that what we do does not fall within 'the higher ranges of human achievement'.[9]

That may be so, but advocacy matters – unless one believes with Arthur Balfour that nothing matters very much;



… the professional independence we accept as vital to the functioning of the courts, and so to constitutionalism itself, may not be destroyed by fusion – but it is weakened by it.

hardly anything matters at all. Anyone who, just now and then, heard great advocacy, or witnessed in particular the moments when it has diverted an injustice, will know that it matters.

But can all this still be true in the world Richard Susskind describes? That of '2.2 billion Internet users, 800 million subscribers to Facebook, 3.5 billion email accounts … more than 5 billion subscriptions to mobile phones,' and every two days according to Google's Eric Schmidt, 'we create as much information as we did from the dawn of civilisation up to 2003.'[10] He accepts that the work of the oral advocate 'at its finest is probably the quintessential bespoke legal service.' He further accepts 'that very high-value and very complex issues will continue to be argued before conventional courts in the traditional manner.'[11] He must be right, though, that the effects on the spectrum of advocacy, and the way we present cases, are rapid and will be extensive. Read Susskind's analysis – and the aphorism (that of the inventor of the telephone, Alexander Graham Bell) he quotes: 'When one door closes, another door opens, but we often look so long and regretfully upon the closed door that we do not see the ones which open for us.'[12] Advocacy must find its medium in a different time; it always has, from the tablets Moses brought down from Mount Sinai to those made by Samsung now.

THAT leads us from why advocacy matters to what matters in advocacy.

There is no one way to address a court, orally or in writing. We all have different voices, styles, accents, characters. But just as clear thought and diction are the viaducts of oral argument, so legal writing has its requisites – if it is to serve.

The point of departure must be the thought, not the word. Too often lawyers let the word dictate the thought. You near the end of a piece, and a comfortable archaism like 'in the premises', slips into mind, rather than 'it follows.' Or you wish, in some vague way, to couple two things or to bring a wandering sentence to an end, so you end with a flourish – 'thereanent', or 'hereinabove.'

All too awful – for words.

Picture *yourself* reading the consequential guff. Picture the morose judge who receives your skeleton argument, and with a sigh starts to read. First, it is hardly skeletal, but morbidly obese – after all, why use one word where six will do? Second, it recites who the parties are and every conceivable foothill of the case. Third, it flows – but lava-like, without helpful, visible, tight structure. Last and worst, it shows no critical rereading. The sentences are without cadence and the words seem to have fallen haphazardly into place.

It was Lord Neuberger who on the same occasion in Belfast said that reading some legal writing 'one rather loses the will to live – and I can say from experience that it is particularly disconcerting when it's your own that you are reading'.

George Orwell in his essay, *Politics and the English Language*, offers these simple rules:

i Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
ii Never use a long word where a short one will do.
iii If it is possible to cut a word out, always cut it out.
iv Never use the passive where you can use the active.
v Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.
vi Break any of these rules sooner than say anything outright barbarous.

WHAT is good legal writing? It conveys, exactly, the clear thought. That thought chooses the words, not the words the thought. The words are elegantly arranged in sentences with rhythm. No more is said than is needed, and the whole demands attention. Remember, too, Cicero: 'the very cardinal sin is to depart from the language of everyday life, and the usage approved by the sense of the community.'[13] (That is why we should no longer 'crave an indulgence' from a court.) And if all this seems hard, remember Robert Browning:

A man's reach may exceed his grasp
Or what's heaven for? **A**

Endnotes

1 David Pannick *Advocates* (1992) 241.
2 Idem.
3 Lord MacMillan 1934 (5) *LQR* 215 at 276 (and Pannick *op cit* 214–5).
4 Pannick *op cit* 245.
5 *supremecourt.uk/docs/speech-140620.pdf* (my emphasis).
6 The General Council of the Bar of South Africa *Submissions to the Truth and Reconciliation Commission* (unpub three vols Oct 1997).
7 Foreword to John Higgins *Academic Freedom in a Democratic South Africa: Essays and Interviews on Higher Education and the Humanities* (Wits Univ Press 2013) xi.
8 Patrick Hastings KC *Cases in Court* (1949) 334.
9 Lord Birkett *Six Great Advocates* (1949) 41.
10 Richard Susskind *Tomorrow's Lawyers: an Introduction to your Future* (2013) 10.
11 *Idem* 58.
12 *Idem*, x.
13 Cicero *De Oratore* 1.iii.12, quoted by Pannick *op cit* 214.