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## **Regulation at home, but not abroad Transcript**

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## **Regulation at home, but not abroad**

Professor Sir Geoffrey Nice QC

My lectures to date have been about perpetrators of crimes in war, international war crimes tribunals, their lawyers and judges. This lecture is about regulation as it operates for lawyers, especially barristers, and judges and viewed from different angles but allowing questions or conclusions at the end. Personal experiences will, I hope, bring some of the problems to life.

### **GENERAL SETTING**

Regulation – like law itself – is by a set of rules with sanctions for those who break them. But regulation is not just a question of forbidding things from being done. It also requires and encourages action.

Recent regulatory changes for barristers have sought to make the Bar more available to the public, freeing barristers to work in organisations that are much like solicitors firms. But the complexity of regulation – with a ‘super-regulator’ overseeing the work of eight regulators each regulating a segment of the legal profession by Boards that have to have majorities of lay members – has proved uncomfortable to many and drawn criticism from the practitioners involved and the ‘subordinate’ regulators themselves.

Exploring successes and failings of regulation of our barristers’ little profession leads to thinking about what law and lawyers really do. There is much to learn.

### **WHAT WE WANT OF PROFESSIONALS AND HOW WE GET IT**

We regulate professionals because we need to be able to trust them: the doctor who says you will live not die, or the architect who says that the house he designs for you will not collapse on your head, both need to be trusted. Curiously different from the priest: Priests are beyond regulation; like the doctor they have much to say about death but we tend to take them on trust. Our own legal system - the best in the world as is often enough claimed - has been regulated by judges controlling barristers since Edward I’s time. For the last seven years the Bar Standards Board, has dealt with discipline and regulation.

41 years ago when I came to the Bar it was a small profession of about 6,000 practitioners, mostly men and most working as self employed referral barristers in cooperative organisations known as ‘chambers’. I can recall nothing of formal education about regulatory rules – as they would now be described. There was a rule book handed out when we were ‘called to the Bar’. I found mine. It is as if unread, because we mostly picked up ethics from our pupil masters and ‘on the job’. The profession is now much larger – 16,000 with 5,000 working as employed barristers for government departments, industry, solicitors firms etc.

When I started much control of barrister and judicial conduct was informal – this is how it worked. First, a profession of a few thousand barrister advocates in independent practice was gossipy. Make a mistake in Swansea today and tomorrow it could be the talk of the profession in robing rooms in Norwich or Newcastle. Make an ethical blunder or do something perceived as dodgy or dishonest and your name could be muddied for life with your career damaged or even destroyed. Barristers were aware of what would happen to their reputation if they did put a foot out of line and as they had only their reputations to sell and behaved, generally, well; simply in their own interest. Today’s larger Bar may have made this mechanism less effective.

Second there were the rules – there still are – that allow a barrister in uncertainty or difficulty to check what he should be doing without fuss.

Third we were – maybe still are – a form of elite. The profession was not exclusively bourgeois by background as 1970s Local authority grants saw us through university without debt and paid for the one compulsory year at Bar school. I, for example, got through university to pupillage without a penny of debt and was able to earn a reasonable living after six months, courtesy of then expanding legal aid in many areas of work. The first six months of non-working pupillage could be covered if not by an Inn of Court scholarship (in part at least) then by teaching or other work.

There were few women and they often found it extremely hard to be treated as equals. But the elite society to which I refer, once entered, was not marked by wealth - earned or otherwise - or even merely by intelligence (although a disturbing percentage of public school and Oxbridge educations from forty-odd years ago still grace our judicial and advocate benches). If we were elite it was by being elite in the way that especially daring military groups are described as ‘elite’ or ‘crack’:- the SAS or the imperial guards of nasty dictators are all described as ‘elite’. Elite defined by a particular ethos of the group that members would be ashamed not to honour. Where elitism of this kind exists in a ‘good’ group, if I am roughly right, the member cannot face herself / himself in the mirror if s/he fails to meet the standards of the group, even if not caught out for any failings. When this spirit operates well and in the public interest it should be encouraged, harnessed, bred from.

My reckoning was that it did operate when I first came to the Bar, at least to a significant extent. Pride at being members of an elite meant we had to honour its code if we were to be happy with ourselves. I will return to this idea as I consider real experiences.

### **HOW THE LAW HAS CHANGED**

Before doing that, however, I should acknowledge that the legal system when I started did feel different from how it seems today. A masculine profession with many who had served in the war, robust, red blooded, sexist often enough and racist with some real shockers of judges on the bench along with very many very decent judges.

The shockers might enjoy destroying counsel for sport or, more commonly, controlling a jury to be sure the

defendant was convicted – ‘potted’ had always been the word, by the way. In criminal courts there could be the sense that the judge and the prosecution were on the same side.

I have sat as a part time judge for nearly 30 years in various capacities and felt it change. All judges go to residential training courses every year, now. And yet within the last 20 years at one such course a recently retired Lord Chief Justice repeated someone else’s joke about a fictional rapist at Oxford or Cambridge in a mock sentencing exercise being given not five or six years but a ‘blue’. I don’t think he understood quite how the world had changed. But then one of his predecessors within my lifetime had written a report into Bloody Sunday that could generously be described as a Greywash favourable to the army and adverse to the IRA that it took decades and millions of pounds to put right and that led, so some would say, with increased in terrorist recruitment and violence. What would we say of a legal system with such a history south of the Sahara? In truth the system was OK – it was far from perfect. Legal systems – even the best in the world – need time like large ships to change course and these bad things may now be largely of the past, and for a few reasons. Selection, as well as training, of judges has become much more professional and systematic and – for the most part – judges with inappropriate views should be eliminated at detailed interviews by interviewing panels of lay and legal members. And there are many underemployed barristers and solicitors for those panels to choose from these days.

Second, some at least of the motivation for getting defendants ‘potted’ was a belief that some procedures and some law benefitted those who were, or may have been, guilty but who got acquitted under the proof beyond reasonable doubt rule by reason of a ‘technicality’. Over time many of these procedures and laws have been abolished, as a matter of policy, and there may be less sense of the legal system being loaded in favour of the guilty than once there was.

For example: the seven peremptory challenges each defendant had to jurors from the panel meant that in the 1970 Mangrove 9 trial involving racial allegations against police, 63 challenges were available to ensure the jury had two black jurors – the right to challenge jurors was progressively whittled away and finally abolished altogether. The right to silence when interviewed under caution and in a trial has been reduced to almost nothing as comments can be made about exercising the right in either setting. Corroboration required in cases involving sex and cases where children were witnesses has been abolished.

Third, perhaps, jurors have become less in awe of courts and more willing to ask questions. Although judges are trained to discourage too many jury questions it may be one feature among many that makes judges actually more and more happy to leave verdicts fairly to jurors. It is a long time since I recall any judge bemoaning a jury’s decision (until the surprising outburst from the bench in the Vicky Price trial).

As long as these changes were under way and the profession was growing in size much regulation and control of behaviour remained informal. Let me explain how it operated, first with regulation of a judge.

When a fairly junior barrister I was in Huntingdon to defend a professional burglar who was going to plead guilty and for whom I was to mitigate. Huntingdon Crown Court then sat in the charming old Guildhall, a muddled building, dark and full of Cromwell’s past. Waiting for the trial to start, standing in one of the few available spaces I was aware of two large men standing outside the door that led to the judge’s private room. One of them approached me asking if I was representing – let us call him – Burglar Bill. ‘Well yes’, I replied. ‘Now look, sir,’ said the mountainous suited man with the London accent ‘you know how sometimes a barrister starts a mitigation saying’ there’s no way I can stop this man going to prison’ – ‘Yes’ I acknowledged. ‘Well it would be embarrassing was (sic) you to say that when you start mitigation for Bill’ – at which point the two men – who I had come to assume were up from what is called the ‘Met.’ (and not the N Y opera) entered the judge’s private area. Prosecution counsel opened the case at the baize covered table that in those funny old courts often was where we sat and I did the best I could to mitigate. The judge retired – a very nice, gentle man, an academic from Cambridge sitting as a part time judge at Huntingdon in line with a long standing tradition; but not immensely experienced. Prosecution counsel – who was effectively the local attorney general for the county – confidently predicted four/five years and even bet on it. Inexperienced as I was I bet 50p on a suspended sentence. Which is what the defendant got even if I did not get my 50p. What should I now do? The judge had clearly been approached privately and improperly by met’ police officers; Bill was presumably an informer and a private deal had been done. Such things were not unknown and later they were to become the subject of strict control. But then? My chap having a benefit that could not be denied him (his sentence would not be increased) I spoke to my head of chambers, a very senior QC. He spoke to the presiding judge of the circuit and the very nice academic was told that what he done was a bit unwise. No doubt he never did it again.

Was anyone harmed by an approach that would now be unacceptable? I doubt it. Did the informal method work? I think so. Where there was good will and one member of the legal fraternity – in this case a judge – got something wrong unwittingly there was no need for rules, regulations, pages of complaint forms or whatever might now be expected.

More commonly, of course, advice went the other way from a judge through a head of chambers to a barrister – in the nature of things other barristers would not hear about such things.

That old fashioned Bar that was passing can be seen in echo or reprise in outposts of empire, or rather nearer, in Jersey where I was a part time judge a few years ago. What I experienced showed several things about regulation of lawyers. Jersey has a rather different system for trials where two Jurats – the Island’s most senior elected officials – sit with the judge. The Jurats are effectively professional jurors (even if more or less unpaid) who will have read the papers in advance – in the case we were dealing there were 12 lever arch files. The judge deals with procedure and directs the Jurats publicly about the law but then has to retire with the Jurats while they consider their verdict. But the judge has no part to play in the determination of any factual issue unless the two Jurats are ‘split’ on their decision(s).

Another part time judge working there told me that retiring with the Jurats gave you an opportunity to ‘help’

them with their decision – i.e. to indicate what they should decide despite their independence. I had already started to wonder how, when it came time for me to retire with my Jurats, I could avoid the situation – the temptation described – where I would be drawn into the factual decision making process and verdict; but apparently I was not allowed to leave them alone much (although in fact I did, to ensure they could discuss the case absolutely freely). I devised a scheme – no doubt little liked by counsel as it involved additional work and maybe especially disliked by the prosecution were they to have assumed that ‘good’ judges ‘helped’ the Jurats – where for each of the many allegations on the indictment a chart should be prepared by the advocates. Most criminal offences have two constituent elements: what was proved to be done (actus reus); what was the proved state of mind / intent of the accused at the time (mens rea). Advocates on each side set out on the chart their half dozen, or so, best points of argument. They were asked to do this in addition to the oral and written closing arguments they presented. If, in deliberation, it became clear that the Jurats were stuck on any count in the indictment and minded to turn to me for guidance I could reflect their independence and my genuine disengagement from their factual decision making by inviting them simply to remind themselves of the route to decision that each side had proposed.

I cannot tell you what happened in the retiring room; I can say, on the basis of my experience, that this was a scheme I would unhesitatingly recommend for any similar trial and am sure it can work very well indeed. And this – of course – tells us something else about regulation, this time regulation of a judge and Jurats but of general application. Systems can easily deflect well-intentioned people subject to temptation from taking a wrong step. It is not at all different – extremely similar in fact – to the practice with summings up to juries in England and Wales where judges are expected to refer to, and to use or adapt, standard approved forms of words for particular offences or particular modes of liability. Judges are, in addition, encouraged in all but the simplest of cases to provide a jury with directions that constitute a logical route to verdict, one way or another. These devices have, of course, rendered it harder for any judge to ‘pot’ a defendant by a slanted summing up and encouraged him or her to do his own job, not the jury’s.

#### REGULATION AT WORK – OR NOT

A second example of regulation at work – or not – comes from my personal experience defending someone charged with causing death by reckless driving.

He had been one of a group of youths stealing and driving cars through a long night of high danger that ended with a passenger in one of the cars getting killed. All the young men ran away and many of them later told the police my chap was, indeed, at the wheel. He denied it. At court a prosecution barrister with a very successful practice in prosecution for the county and also for the Customs and Excise applied what pressure he could through me to get the defendant to plead. Apart from the evidence of the other boys there was nothing but my client’s protestations of innocence to save him. Forensic scientific evidence didn’t help him. But he resisted and the case was adjourned for a full trial. I noted that the prosecution counsel did not seem that keen to fix the case for a hearing date convenient to him. On that adjourned date another barrister approached with a witness statement in his hand. ‘Have you seen this?’ he asked. I had not. It was a statement made by the aunt of one of the other young men – now prosecution witnesses ‘fingering’ my chap – who explained that her nephew had arrived on the morning of the death and exploded when the television recorded the fact that someone had died in the last car accident (there were many cars wrecked) ‘Oh \*\*\*\* I was driving. The aunt threw the boys out and went straight to the police to make her statement.

The Defendant was acquitted and a couple of points about the regulation of conduct arise. The second barrister in possession of the statement apparently available to the first barrister knew his duty and performed it, at whatever embarrassment to police or counsel. However, the inquiry that followed was – in those days – timid. Probably could be described as a near whitewash. Yet there was no explanation as to why the first prosecutor chose, if he did, to suppress the statement. Maybe we have to accept some people cannot follow rules. That prosecuting counsel left the country a few years later to live abroad when allegations that he had committed a VAT fraud himself surfaced.

#### ELITE – OR NOT. HOW IT ACTUALLY WORKS

A third case – not favourable to me – comes from shortly before the time when I was about to receive the envelope from the Lord Chancellor saying whether I had – or not – been appointed a QC, a real highpoint in barristers life if the answer is Yes. I was prosecuting a man charged with serious sexual offences against two young children, both of whom gave evidence. The judge was, I fear, one of those who liked to ‘pot’ a defendant. He summed the case up and the jury convicted. Muffled bells started to sound: had the judge summed up the children’s evidence correctly? Well the judge thought he had got it right and Defence counsel took no point. But the muffled bells would not go away. The letter arrived. YES! I had been successful. But by now the pleasure diminished by anxiety and doubt. Effort to silence the bells failed. And so, eventually, I sent for the transcript, checked the law, found out that the bells had been right and the judge had erred. I wrote to the defence counsel who thanked me and mounted an appeal that had the man released. Had I checked a known risky judge more carefully at trial I could have corrected the summing up and the man might have remained in custody. Why, in the end, did I guarantee myself some weeks or months of misery and self-doubt until the appeal court hearing was done? Was I worried about being found out? Maybe; I hope not but it is always impossible to be sure. This was probably a case where there was little or no chance of the issue emerging unless I raised it. So why did I do it? Maybe in part for that reason I gave at the start – the inability to face myself in the mirror if I do not do what I knew I had to – even late and especially now to be a QC.

TAKING STOCK AND WHERE WE ARE

Effective overall regulation of a profession is not a simple question of having a rule book. Rules made are part of a collection of forces that determines how well a profession serves its public. In a way the rule book is the last force in line – the long stop. First in line should be the culture established by the body itself, maintained perhaps over centuries.

Once in the profession the culture should be more significant than the rule book that should – for the most part – reflect what the culture would itself dictate. It would be a poor profession where instinct often went one way and the rules the other. The professional culture changes with time, as should the rule book. For the Bar at present there is much change, some of it imposed by the Legal Services Act. But the Bar – although probably not the main target when the reforming legislation was drafted – has never been that good at change and its culture has been determined significantly by the bodies representing it. Its four Inns of Court – to one of which each barrister must belong – find it hard to think and act as one despite the solicitors being out to swallow the Bar's work. A combined university type body with four colleges would be a stronger body to represent the Bar's interests and defeat the solicitors. Although the Bar serves a public interest function there are no lay members on the Inns governing bodies so far as known to me, no clear methods for electing the people who run the Inns and no equalizing of funds held by the Inns. All Bar and Inn positions, except those on the BSB, are annual appointments despite it being obvious that even a Napoleon will have difficulty establishing publicly recognised leadership in twelve months. These structural things matter and the barrister in a modern world is affected by the environment and approaches taken by the bodies that run his profession. It is hardly surprising that barristers have been slow to reform if those bodies themselves need reform.

When pressed to accept that publicly funded barristers need to be assessed and that that assessment had to be done by judges in front of whom they appear (despite pretty obvious problems of conflict) there was and is very strong resistance. Although inclined to accept the changes in business practices that may be reflected in financial gain, quality assessment and even Continuing Professional development (CPD) demands tend to draw strong negative reactions. How differently might the Bar be regarded now if its professional body had been actively pressing for methods of assessment – voluntary or compulsory – given that other professionals like doctors and surgeons all have to be assessed annually?

There is also the real difficulty with fees. At one end there are barristers taking millions of pounds every year and at the other very many serving the criminal and family courts doing publicly funded work at rates if pay that is insufficient to live on. It is hard to reconcile these groups or for them to find common ground from which to launch a defence of their current position or to establish a new and sustainable identity.

For the very highly paid barrister who exercises the right to negotiate freely whatever s/he can get and not simply to ask for a standard fee there must always be temptations and is there not ultimately a problem with the barrister being in some way affected by the character of the money he receives if it came from unsavoury sources?. In litigation for some time in CFA – no win no fee – cases some barristers have done extremely well by backing winners. But it would be foolish to think that there is no temptation to settle a case with certainty of income to the date of settlement doubled from what it would otherwise be than to advise the client sincerely as to the prospects of success at trial – where loss would mean no income of any kind for the barrister however long the case had lasted. All these factors – helpful and unhelpful to the proper administration of justice have to be recognised for what effect they have.

BACK TO JERSEY

Before turning to what we can learn from overseas courts I must return to the Jersey case, but for a different reason that throws light on regulation, but from an unusual point of view.

The Jersey case lasted several weeks and ran smoothly enough. If you read the transcript you may be forgiven for thinking that were several issues that the court – the two Jurats and I – needed dealing with in evidence and that many relevant issues were not being dealt with on either side so far as the main defendant – an accountant – was concerned. There was no complaint of my conduct of the case in a very intimate court where had there been cause for concern you would have expected it to be raised formally or informally (and there were English Counsel there sitting beside the Jersey Advocates, the only ones allowed to speak) The main defendant was convicted – his co-accused office manager, a woman, was acquitted. By the Jurats, of course.

In the court of appeal – unknown to me – complaint was made about the number of questions I had asked and the tone or manner of my asking them. Sarcastic and all sorts of other things were alleged. The court of appeal – that sits in Jersey and included one of those senior judges of the island who probably knew the Accused's counsel and with whom I spoke on a daily basis throughout the trial – had nothing to say about the allegations of offensive manner but said I had asked too many questions. They dismissed the appeal nevertheless. Questions by me were for the reasons given – namely the failure to address obvious issues by counsel – and were asked on my behalf and on behalf of my two colleague Jurats.

The Second stage of appeal was to the Privy Council composed of the country's most senior Supreme Court judges – Lord Phillips, Lord Neuberger, Lord Brown and Baroness Hale. They were addressed by two advocates neither of whom had been in the trial court, one of whom was the attorney general of the island [for the prosecution] . The allegation of offensive tone was revived and – probably – enhanced by advocates who were probably known personally to the judges of the court – none of those judges knew me.

I cannot know what precisely was said because the Privy Council declined to provide me with a transcript or a tape recording. In its judgment – published in a newspaper without warning – I was condemned as the worst known form of judge and the appeal allowed. The Judgment – in the pen of Lord Brown – was so fashioned as to destroy the judge – me – and could so easily have led to tragedy. I chose a different course and wrote to the court stating that they were completely wrong.

I was told that the judge affected – me – had no part to play, that they acted on submissions and had nothing to say.

I wrote again setting out in detail the many obvious points that should have alerted them to reasons why they should have been more cautious about what they were being told. Again I was told to go away as procedurally there was nothing they were able or willing to do.

And there was nothing I could do - for a time. The Defendant had to be left to have his retrial and any further correspondence or efforts by me to understand what had gone so completely wrong could harm his interest. Eventually I discovered that he had pleaded guilty at his retrial and would not be in front of the Privy Council again. I wrote to the only person who might be able to offer a detached view. Counsel for the co-accused. She - woman who had been an academic in Ireland and England before a couple of decades as an advocate in the courts of Jersey, appearing in one court or other pretty well every day of the week, had represented her client with industry, always prepared, always asking pertinent questions and being able to answer the questions asked of her by the court. Apart from seeing her in court I had no knowledge of her. She wrote back, clearly relieved at being approached. The case as described in the Privy Council judgment was unrecognisable as the case she had sat through. The judgment was a character assassination. She said quite a lot that could explain how it was that the Jurats and I had been left to ask questions that could / should have been asked by counsel for the other parties. She explained that I had conducted the hearings with absolute courtesy from first to last. She was happy for her letter to go to the Privy Council - at obvious risk to her own career - and indeed to speak to them if asked. They never asked although they did receive the letter.

To which the reply was much as before save that they acknowledged her view of the proceedings was much as mine. They did not acknowledge the possibility of error or identify a mechanism for putting error right. I was able to circulate her letter to lawyers and judges known to me. Some of them in very senior positions were concerned and wrote to the Privy Council. After a long time they received an answer that procedures could not change but that if she [Miss Fogarty, the defence advocate] was right, they were wrong. The nearest they ever got to an acknowledgement of fallibility. Two of the senior lawyers then wrote an article published in the Times that corrected the history.

I wrote once more setting out all the manifest errors revealed in the process to date and suggesting steps that might be taken including referring the whole unhappy history for review to the Ministry of Justice. Lord Philips eventually replied saying that he had consulted the other top judges in Scotland and N Ireland who - perhaps unsurprisingly - did not think the finality of judgment of such courts as theirs should be subject to review. I have no doubt where the truth lies and there are many very obvious arguments about substance and procedure that can be advanced in criticism of the Privy Council's conduct; they are set out in some detail in the correspondence that I will publish. But the two most obvious are first that the Privy Council was prepared to leave unresolved a possible injustice without checking on the evidence available to them - Miss Fogarty whom they had no reason to doubt or the tapes that they did not listen to! Second, the Privy Council - just as the Supreme Court composed of the same judges for the most part - is infallible and beyond regulation of any kind. Is this important apart from to me and to other judges consigned to outer darkness by incorrect judgments of this kind? Well yes.

Supreme Courts are very important places for their citizens - ours typically deals with vital issues of life, death, health, liberty of the subject and so on.

With politicians unable to deal with some critical issues - in particular the ever widening gap in wealth - such top courts around the world may find themselves becoming even more important if and when they are asked to deal with separation of citizens by wealth in the way the American courts dealt with separation of citizens by colour. They need to be properly equipped for a modern age.

They cannot expect to sit at the top of a machine that is subject to review and regulation in various ways without being in any way themselves exposed. Lower level judges are regulated - required to train, susceptible to review by higher courts as I was - but unsatisfactorily.

SUPREME AUTHORITY - SUPREME FALLIBILITY

To have them exempt is extraordinary, especially when they recognise their shortcomings in at least two ways. Baroness Hale, one of the judges said of the Supreme Court (effectively the same for these purposes): 'We are not final because we are right - we are right because we are final' - i.e. they may make errors but those errors cannot be corrected. She also said in a recent interview that judges who have risen through the Bar, the Temples and other parts of the "establishment" are not always ideally placed to cast judgment on the complexities of modern life, observing that "If the life-blood of the law is experience and common sense, then whose experience and common sense are we talking about? Surely it cannot only be the experience and common sense of the judges, many of whom have led such sheltered lives? In my case application of common sense would clearly have alerted the court as a minimum to their being at risk of being unfair.

And, in another case concerning Jersey the Privy Council itself observed that the written transcript of a trial - the only actual evidence to which the Council turned - is not necessarily something to be relied on.

Well, the Supreme Court is regulated to the extent that judges have to apply - they are no longer just 'tapped on the shoulder' (Although I have heard that making a written application to be promoted meant, for one court of appeal judge, writing a letter saying 'I am available' - old presumptions probably do die hard).

HOW TO REGULATE THE INFALLIBLE

There seem to me several steps that could be taken to avoid my particular misfortune happening to others: First, just as Lord Sumption was recently promoted straight from the ranks of the Bar to the Supreme Court the Appointments Committee should encourage more applicants from barristers and solicitors of diverse backgrounds (Baroness Hale is the only woman on the Supreme Court that includes no one from an ethnic minority) especially those with more radical approaches to the law. The committee - at least the lay members of it - would probably be both astonished and delighted to find, say, a high street solicitor - especially if with a non-

white non-Anglo Saxon background – having the qualifications to sit as Supreme Court judge bringing common sense and an entirely different perspective to the major legal issues of the day. Another way to secure some form of control on the over homogeneous bench might be to have lay assessors – not unlike jurors – sitting with them. Selection would be difficult and, of course, they would not be able to ask questions directly or to be involved in the writing of the legal judgment – but the lay view with an ability to prod the Justices into asking questions not asked by counsel could be invaluable for justice – after all, the people who have dared to challenge the establishment view and speak to me about the case concerning me have commented: Why weren't you asked? Why weren't the tapes listened to? Why wasn't Miss Fogarty approached? Obvious enough to most lawyers, schoolteachers, university lecturers etc – but not to our legal leaders in chief.

#### INTERNATIONAL COURTS

Enough. But as I turn to the new international criminal courts we may see all these problems appearing, but in different settings.

International Criminal Courts all have infallible courts but as the top of only two tiers except for the ICJ that has a single unreviewable court of 15 judges.

The single top level courts of the Yugoslav, Rwanda, Sierra Leone etc tribunals are not subject to review on fact or law. Thus if one court renders a decision in law moderating a test of criminal liability – as was thought to happen recently on the issue of aiding an abetting and / or defence of superior orders - the other courts are free to disagree. What should the soldier do who wishes to act within the law?

And what if a top tier court makes a decision in law because of local political pressure? Should the rest of the world's jurisprudence be affected by the local interest?

But other perhaps greater problems exist that may need regulation. These courts are staffed on the basis of 'geographical spread', as the UN describes it. No two judges from the same country. Lawyers and other staff all selected to ensure as many countries as possible have their nationals engaged at the court. On the bench, judges sit in threes, fours or fives having no shared background and often no common first language. There have been many rumours of benches of judges being barely on speaking terms one with another - hardly surprising.

Many – most – lawyers will have re-located often with families from thousands of miles away. What is their response if, as happens, they are asked or pressed to do something improper or ethically wrong by their office? How would their experience compare to what happens in jurisdictions that have only independent sole practitioner - 'hired-gun' - advocates, as used to be the case here? The Independent lawyer may be tempted, even sorely tempted, to yield but knows that if he does he risks his one saleable item – his reputation – if caught out. And provided he is not living at the limit of extravagantly high fees, and has a reasonable flow of other possible work, he can walk away from temptation and turn to the next job.

For the employed lawyer – probably in any office not just in institutions like the UN – different considerations apply. If pressure is applied through the boss then the lawyer resists at his peril and his family's peril: job, promotion, children in school, return to whence they came if internationally relocated but with no guarantee of a job to return to. It may not be that surprising that when ethical issues cropped up at the ICTY the hired-gun advocates from common law jurisdictions were more comfortable challenging the management - even at personal risk and suffering sanctions - than those from other backgrounds. But then we, in theory, could walk away to other work. Let me tell you about the worst such problem I faced.

Seven days from the end of the prosecution's case in the Milosevic trial it became clear that the presiding judge, Sir Richard May from England had a serious medical problem. He was persuaded to go to the doctor and it was confirmed how ill he was. Indeed, very sadly, he died shortly after.

The ICTY's rules allowed a panel of three judges to sit with one member absent for up to five days if but only if his absence was likely to be of short duration ; otherwise the hearings had to stop forthwith. All three supposedly independent parts of the Tribunal – Judges, Prosecution, Registry – thought it would be a good idea to close the prosecution case by squeezing seven days evidence into five without alerting Milosevic to the gravity of Judge May's illness or, thus, to the illegality of the proceedings before only two judges. We all knew there was no possibility of his condition fitting in the 'short duration' category and the hearings simply had to stop. But it was thought a PR coup to get to the end of the prosecution case. Silly. Another judge would have to read into the case – as Judge Lord Bonomy from Scotland later did, and admirably – and it would have been better for him to hear the last 7 days of prosecution evidence. In fact the plan went further: there were to be written submissions made by the Amici Curiae on Milosevic's behalf about the sufficiency of some counts in the indictment after the close of the prosecution case and it was thought they could be completed before the judge's actual state was revealed. Astonishing. Ironically, had Milosevic been informed that the hearing might have to stop he would probably have said he could not care less and the court could carry on with two judges and some member of the animal kingdom, such was his respect for the court.

I had no choice but to say that was plan was wrong. I was subject to extreme pressure, not just from the Prosecutor's office, to shut up. I declined. I was advised by another UK lawyer there to do what I knew was appropriate, namely to contact my own professional body's ethics body for a ruling. Unsurprisingly I was told by that body that I had to get off the case unless I could put things right. There was nowhere in the UN to turn to for assistance. There is no effective code of conduct for prosecuting lawyers. I contacted the FCO's top lawyer who had been much involved in these tribunals and whose predecessor had pressed me to take up a post there. I found him in Arusha and explained what was happening asking him somehow to persuade the court to behave in accordance with its own rules. 'You're on your own' I was told. Senior lawyers in the Prosecutor's office were asked for written opinions. The majority were clear as they dared be in saying that what was planned was contrary to the rules and had to stop. The overly ambitious may have supported the plan! There was a meeting of all lawyers. I was told that to seek advice from my professional body was blackmail – not a term I welcomed. I

explained that I had no choice but to take particularly robust action to compel the Tribunal to act in accordance with the law and left the room. No other lawyer had the courage to follow me. They stayed – they said – to temporise.

From then on – although it was not possible to remove me from the case - much though that was contemplated and tried – I was detested for having put the law above short term exigency. Such is the reality of working in frontier legal systems that are neither accountable nor regulated. The lessons from this account are obvious – but let me deal with them in this second and concluding stock-take:

#### CONCLUSIONS

Regulation – like law itself – is about getting people to behave well – to be ‘good’.

It is never easy to know who or what is good but most have within us a personal sense of goodness from which we should not be separated. Clever law - and clever regulation - activates that sense of goodness to achieve what society wants, but not necessarily simply by having a law or a rule book. Rules are, after all, to be broken. It may be worth thinking of the way we regulate human interaction – and professional advice or representation is a human interaction – as an arc. At one end the limited instances where there is almost no regulation of behaviour beyond what a nation’s laws provides – queuing for buses, swimming in the sea, perhaps playing games in a park – circumstances where we feel we can trust each other. At the other end the fiercest of regulation, and I do not have in mind laws about murder or rape or crimes against humanity. More interesting are drink drive laws. For decades we have known how dangerous it is to drive drunk. Laws have been introduced, sometimes quite tough even on the almost blameless. We may now kid ourselves that a cultural shift has happened and that our children - and even we - would not drive drunk. Wrong. Take the laws away tomorrow and we would return to the dangerous fool’s confidence of driving with 2/3 pints of beer or half a bottle of wine swilling around our insides. The law has to be fierce not just because of the damage caused by the drunk driving but because the citizen needs to be deterred from falling to irresistible temptation likely to be experienced by many.

It works - but it manifests distrust in ourselves and is probably never the best form of regulation. You can see a very similar type of extreme regulation for barristers and solicitors - and all professionals - with continuing professional development (CPD). We all know we should keep up with developments in the learning of our chosen profession but we also know that without a rigid regime we would fall to the temptation of putting off this year’s CPD to next year or the year after. The ‘offence’ is comparatively slight; fierce regulation is required because we cannot rely on internal goodness driving the individual to do what is wanted. It is an example of enforcing recognition of the rule book, like it or not. On issues more central to a professional’s conduct rule book regulation may be ineffective and less fierce regulation will be in everyone’s interests.

Note that in the examples I gave no-one, except possibly the innocent judge letting the police officers into his room, needed better acquaintance with a rule book. Those who behaved wrongly knew what they were doing was wrong. The judges in international courts breaking court rules for political purpose knew what they were doing was wrong; just like the barrister who failed to hand over the exculpatory statement. Reading the rule book to them would achieve little or nothing.

Similarly with international advocates facing political or other improper pressures to break the rules in an institutional setting where yielding to pressures would serve the institution. Just like the pressures some barristers will inevitably experience when the new Alternative Business Structures (ABS) allow them to ‘incorporate’ like solicitors and to face the very different pressures of solicitors offices or international institutions.

Something else is required for the public interest and to ensure the Bar – for that is the focus of my interest – will want to comply with rules.

We have, I reckon, a perfect example of regulation not working from which to learn. Hundreds – probably over a thousand – parliamentarians had their expense claims examined. Apart from those caught and punished many, many others were very anxious. And why? The arc here starts with those confidently blameless because they made no claim or really only charged 2nd class rail tickets and cleaned their own moats. At the other end have been those knowing clearly that they were defrauding the public. But in the middle? Worried parliamentarians seeing their images tarnished because they acted when Bob Mellish MP suggested they add to their MPs salaries by expenses and thought it Ok – or did as advised by officials and thought it questionable, but went ahead with a goose house regardless. And all other shades of shame, embarrassment and guilt by which their profession was tarnished - and the country too.

Yet there was – from the beginning – a simple way of regulating this problem. If the day Bob Mellish said whatever he did it was announced, as practice, that all expenses claim forms would be publicly available (saving for details of addresses or ill health if turning up) no one would have been caught because no-one would have offended. The practice would either have frightened the claimants into good behaviour or played on their sense of goodness to persuade them to honour the public’s money – the precise mechanism doesn’t much matter. The outcome is what would have been required and our parliamentarians would have been enjoyed enhanced not reduced respect. I am not sure that the lessons available from this category of behavioural control are recognised in today’s regulatory world.

In the recent bulge of regulation with the super regulator supervising the other 8 lawyer’s regulatory boards that super regulator – the LSB – has I think made substantial errors as has the Bar.

First, the LSB has required Lay majority on all subordinate Boards – something completely inappropriate if you want a profession you can trust. Having a lay majority announces that the profession is not to be trusted. Lay representation on all boards – and at the Inns and the Bar Council – would have been invaluable and would have saved the Bar from several of the problems it now faces, having looked inwards not outwards for so long. Lay members – invaluable on the BSB – bring external experience that challenges inbred preconceptions



(perhaps over the importance or lack of importance of youth courts, as one example) Additionally the presence of lay members implies – or perhaps threatens – that the public more generally may know how the body concerned works – or doesn't. Bad practice can no longer expect to be cloaked by forms of self interest. Second, insufficient technical and cultural knowledge of the profession has allowed the LSB to embrace referral fees despite it being obvious that trading in cases – with a percentage for the trade – will increase the overall cost of obtaining legal advice and representation and inevitably limit the client's true freedom of choice of the best advocate.

Third, failure to understand or appreciate the value of the 'cab rank rule' by which the client chooses the lawyer and the lawyer does not decline work s/he does not like if otherwise qualified to act. Often said to be honoured in the breach. Much more difficult to honour with 'incorporated' (ABS) structures that are coming but a principle of considerable significance and theoretical purity that is attractive both to the public and to lawyers. It is not for the lawyers to decide on cases – it is for juries and judges.

On the other hand, unhappily, the Bar has brought problems on itself that are now, many think, threatening its future as a separate profession. The immediate problem is quality assessment, something required by the Legal Standards Board (LSB) and nearly in place for lawyers doing criminal cases. Resisted by the Bar – including for good arguable reasons – it has in fact shown nervous hostility to the scheme from the start. Yet it should have appreciated for decades that the public would want lawyers – like doctors and teachers – to be checked for performance. Why should they be different? Would they ever have maintained the arrogance of being a profession apart had they had the advantages of lay members – say teachers, trade unionists and doctors as examples – sitting in on their deliberations.

Instead, I fear, much concentration has been on fees – of course understandable now that cuts have been made and drastic further cuts threatened.

But concentrating on fees year after year – as Bar associations have – but not being willing to publicise what barristers earn in at least general terms (bands perhaps) for the very highly paid has not encouraged trust. Lay representatives on the Bar Council who could have alerted them to their own insularity.

I have already spoke of the Inns that have no lay members on their governing bodies Not appreciating the opportunity in their grasp.

Not having open systems for appointment of their annual Treasurers. The consequence of which is that Barristers exist in a woefully out of date environment and can, perhaps, be forgiven for behaving as they have done.

#### FURTHER CONCLUDING REMARKS

The Bar has had a difficult few decades and may now seem less than happy. It lost its near monopoly of rights of audience, it saw Legal Aid work rise and fall in amount and in rates of pay; it has seen much of the work it used to do pass to institutions (like the CPS); it now finds itself obliged by the Legal Services Act to accommodate new systems of working that may never have been what the barrister when student contemplated.

It is hardly surprising that such a profession will be finding it difficult to identify a coherent single ethos to unite its members. But that is what it wants, as does society. Practices / procedures of one type or another – actual or possible – that I have considered are probably what would return the Bar to its own control. Advancing voluntarily in step with the public's expectations would always have been – and would now be – better for the profession and for society than imposition of rules that will tend to dilute any instinctive activation of the professional's personal sense of good or worth.

Doing things publicly – assisted at all stages by openness in general and lay representation in particular – is more likely to reduce the burden of the rule book.

Being a barrister – any form of advocate – is to have the enormous privilege of representing another human being at a point of distress. It is a privilege shared with doctors and priests. It is a privilege that should reflect – by the conduct of the professionals and by the regulation to which the profession may have to be subject – that lawyers and judges work in the service of the citizen, not the other way round.