I happened to be in the Chamber on 21 July 2009 when the House of Lords paid tribute to the Law Lords and bade them farewell on the occasion of their last appearance there before departure to the Supreme Court across the Square. It was an unexpectedly moving occasion, not only because of the loss of the presence of judges of distinction and wisdom who could, at the appropriate stage, make a great contribution to the work of the legislature; but also because of the keen realisation that their distinction is recognised worldwide, in part because of their former inclusion in the Lords and of course because of the part they play in the shaping of the common law, their judicial work being accepted as amongst the finest in the world. Their departure was another example of the way in which the legal profession has been reconfigured to suit theories, rather than reality, in recent years. It also reminded me that the Bar, which I regulate as Chair of the BSB, is the main supplier of judges and that the quality of the Supreme Court’s development of the law is and will be inextricably linked to the quality of the young barristers who join the profession.

The Legal Services Act 2007 facilitates the relaxation of the structures of working that lawyers have known for decades and governs the regulation of all branches of the legal profession. New ways of working together in future may be sought not for their own sake, but because they are inevitable under the Act and because of the economic pressure on the Bar, not only from the recession, but because central government controls the purse strings of legal aid for many of the most socially valuable members of the profession. The tail of legal aid cuts is wagging the dog of British justice.

Now that I am in the position of administering parts of it, the LSA seems to me to be a rather unsatisfactory piece of legislation. It is grounded in the 2004 report by Sir David Clementi, a former deputy Governor of the Bank of England. (Report of a Review of the Regulatory Framework for Legal Services in England and Wales http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/index.htm). He was concerned with the then over complex existing regulatory framework, a mixture of oversight by professional bodies and government departments, largely self regulatory and without sufficient regard to the consumer; he was concerned about the complaints system and the restrictive nature of business practices, though it would be fair to say, and accurate, that these two issues were more relevant to the solicitors’ branch of the profession than the Bar. His recommendations differed somewhat from the eventual legislation of 2007, but this statute addressed the problems that he had identified.

The profession was no longer to be self regulating, but overseen by a new Legal Services Board; its powers were to some extent to be devolved to the current front line regulators, for these purposes the Bar Council and the Law Society, but they are both obliged to separate out their regulatory and representative functions (just as the GMC and the BMA are separated). So we have the Bar Council representing the Bar and the BSB regulating it, the Law Society representing the solicitors, and the Solicitors Regulation Authority regulating it. Not to mention the Council of Licensed Conveyancers, the Chartered Institute of Legal Executives with a regulatory arm, ILEX Professional Standards Limited, the Chartered Institute of Patent Attorneys, and the Institute of Trade Mark Attorneys, the Intellectual Property Regulation Board, the Association of Costs Lawyers and the Cost Lawyers Standards Board, and the Master of the Faculties (Notaries). For the purposes of this hour, I will concentrate on the best known branches of the legal profession, the Bar (about 15000) and the solicitors (about ten times as many.)

The second major change was the introduction of new ownership structures for legal firms and chambers, in particular allowing non lawyers to own and manage firms (alternative business structures and legal disciplinary practices, or multidisciplinary practices, lawyers with other professionals, a one-stop shop, sometimes nicknamed Tesco law). The third is a new portal for complaints about lawyers’ poor service, the Legal Ombudsman, although charges of professional misconduct are still reserved to the professional body, the BSB in my case. The two types of complaint have to be disentangled.

It does not take much description to see that rather than sorting out the maze of regulation that Clementi identified, the statute adds to it; it may result in over-regulation, duplication of regulation and competitive regulation, none of it cost capped. The cost of the LSB and its demands are serious issues, for the Bar would have to contemplate rises in the practising fee to fund it, were it to go up, at a time of constraint, and it also has to fund the new scheme of quality assessment of advocacy, the OLC, an education review and diversity data collection. More than that, it is arguable that the Bar was caught up in the slipstream of the criticisms that were levelled at the handling of complaints by solicitors, and the heavy structure of the 2007 Act is not suited to as small a profession as the Bar. Or one might even surmise that there was a hidden plot to crush the Bar out of all recognition. If we are to have a fused profession, then let us at least be upfront about it, and start with training that is common to intending solicitors and intending barristers, allowing them the freedom to specialise a few years along the line when their professional talents are more clearly developed.

Another problem is that the new working structures are backed by no practical evidence at all to show that they will offer improved services to clients. The biggest problem with the law is its non affordability, multiplied many
times over by recent cuts in legal aid. The welfare of the users of the Bar has to be our first consideration. We have not heard much from the public about what they want, despite the proliferation of consumer panels and surveys; maybe the issues are just too complex and variable depending on the economic climate and the simple desire of the public, I guess, for direct affordable legal advice is thwarted more by that than by the lawyers themselves.

Clementi was trying to reconcile at least three different drivers of regulation. To liberalise, allowing competition to flourish and access to be more visible; to protect the public through careful and independent regulation with especial focus on complaints handling, which had been the *bête noire* of the Law Society (solicitors); and to move on from the failures of the big bang in the financial markets. The lessons from that still do not seem to have been learned, or even spelled out. The motivating principles – competition/consumerism – behind the Legal Services Act were formulated in about 2000, a different economic climate altogether. There was a report from the OFT about competition in the professions - http://www.oft.gov.uk/OFTwork/publications/publication-categories/reports/professional_bodies/oft328 - and in relation to barristers it criticised them for restrictions such as not being permitted to form partnerships, not permitted much direct access to clients or the conduct of litigation. But this was all before the big bang in the financial world and its dreadful results. In the era of Mrs. Thatcher, the cry went up that the professional divisions between stockbrokers and stockjobbers in the stock exchange should go, between clearing banks and merchant banks, that there should be a free market of unfettered competition and de-regulation and that computer technology was to be king. There was established the FSA and light touch regulation. I am no economist, but would not be alone in pointing out that meltdown and bank collapses resulted and the FSA seemed to have no power to prevent any of this or stop any innocents from losing. Indeed the FSA is about to be dismantled. Without any regard to this history, a similar attitude has been taken to legal regulation.

There may well be risks in the ABSs: the influence of outside ownership, profit over professional standards, commodification of legal issues, fewer firms in rural areas and in high streets, and unacceptability of our legal practices abroad where other nations have more careful professional rules. ABSs are not allowed in the USA and Germany has urged an international stand against them. Barristers in an entity will be conflicted out once one party to potential litigation has engaged someone in the entity, whereas at the moment there is no conflict when one barrister in a set of chambers is engaged. This could greatly restrict justice and choice in small towns where there are not many barristers, especially those who specialise in e.g. family law.

The client is obviously important to the barrister. But from the barrister’s perspective, the client is not just the man or woman who comes off the street seeking legal advice. The Bar’s clients include solicitors, judges, big corporations, government departments, foreign governments, anyone who seeks the support of English law. It seems to me that the preservation of a distinct profession of barrister is actually in the interests of the public, because the barrister can and will defend those clients whom commercial legal outfits might ignore, because the barrister’s duty is to the court, to assist in the development of the law and protect the needy. Sometimes that duty involves telling the court about matters that the client would rather not be revealed. Barristers are bound by the cab rank rule, which means that they take the next one who comes along, regardless of acceptability. And it is accordingly recognised that the barrister is not himself or herself to be identified with an unpopular client. Clients in future will need to know that in-house advocacy in ABSs is not the only option: in their interests, the access of regional solicitors’ firms to the Bar needs to be kept open, and clients should be protected from the corralling of barristers in big firms that have in house advocates, reducing their availability at large.

Many might have thought that the Act was designed simply to usher in modified ways of working for the Bar. But it is panning out amongst modern and generally accepted perceptions of how a profession should operate, not least of which is diversity. There is a range of altruistic activities of the Bar, such as the *pro bono* work, and the attention paid to ensuring that the most able young pupils can come to the Bar with financial assistance from the Inns and chambers. In an age when social mobility is a trope: when it has been impeded by government policies in education, such as university fees, and yet is demanded of the professions, the Bar of England and Wales has a proud record. The most recent figures indicate that around 15% of new pupillages are taken by BME graduates and that women, as in other professions, form a good half of the entrants. Retention is another matter, and its shortcomings are not confined to the legal profession. The Bar is one of those professions that operates almost 24/7 and therefore, like medicine, not family friendly.

The Bar is not a unitary profession any more, nor is it under single control.
The Importance of Independence
Lest it be thought that I am suffering from regulatory capture, let me first list why it is so widely believed that the governance of the Bar should be taken out of the cloisters of the Inns and the Bar Council and led blinking into the daylight of Westminster and Whitehall. First of all, legal advice is too expensive (although cost is not a regulatory matter). It has moved out of the reach of the middle classes. The advice of a top barrister is affordable by government, by corporate bodies and by wealthy individuals, especially women in divorce. This has been and is even today ameliorated by legal aid, insurance, pro bono, conditional fees and better use of technology, but there is still a void. Legal aid has been cut and will be cut even more in the management of the UK budget deficit, and I will return to this issue as it bears on the independence of the legal profession. So there are many, perhaps the majority of the population, who could never contemplate accessing the individual advice of a barrister or a city solicitor. It is reported, often with pride (certainly by the journals of the solicitors’ profession) that partners in city firms make £1m a year, and that some barristers make similar sums from criminal legal aid[1]. We know that there are barristers, many of them women and BME, who undertake publicly funded work in criminal and family issues and make only the most modest of livings, but their pleas are undermined by the excesses at the other end. In the past, the need for wealth in order to secure or become a lawyer was conveniently overlooked in protestations of universal justice and independence.[2]

The calls for change
Turning to the critical aspects, there is no doubt that over the last few decades the Law Society was not only tardy in handling complaints but unresponsive. Solicitors have also been tainted by the outcome of the monopolising of work by a few firms representing unionised claimants, for example, miners suffering from lung diseases caused by their work in the mines. Those firms succumbed to temptation by taking more for themselves than for their clients and even in a few cases taking what was not theirs at all. The reports of those failings made an indelible impression[3]. It is clear that referral fees should be banned, and on welcomes the recent ban relating to them in personal injury cases in the Legal Aid, Sentencing and Punishment of Offenders Act 200912. An example is the practice of e.g. solicitors paying estate agents to send them clients, for they take away choice, cost more and reduce competition.

Quite rightly, the call has gone up for affordability, access and competence in the legal profession. It has been asked why the changes that have affected business globally should not transform the business of the lawyer. IT, flexiworking, outsourcing should make advice more readily obtainable and cheaper. Other businesses have been affected by, or improved by deregulation, free market competition, the dominance of client choice and consumer sovereignty. So too should the provision of legal services change. This is, of course, to ignore the financial crises of this century, the reasons for and the results of which are still working themselves out, and where the part played by liberalisation of the market has yet to be analysed. It also sits uneasily with the demand, voiced on
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recognition of the overriding duty to the court: otherwise the very system that the client is relying on will not
and advice of the highest order, skill and integrity, comparable to the expectations of the patient who is referred
ever after, have had recourse to the Bar, but they want their case advocated to the best of the barrister’s ability,
also comments that there is no evidence that employed barristers’ independence is compromised.
demand of the Bar in the last 20 years for more direct access (simply in order to compete with solicitors). He
her client in order to meet conflicting obligations to adversaries and the legal system, this is inconsistent with the
articulates human rights. He points out that while the Bar claims to need a distance between the advocate and

Even Richard Abel, a writer who casts a critical eye over this high-minded approach
accepts the need for a profession that mediates between citizen and state, redresses civil wrongs, manages family disputes and articulates human rights. He points out that while the Bar claims to need a distance between the advocate and her client in order to meet conflicting obligations to adversaries and the legal system, this is inconsistent with the demand of the Bar in the last 20 years for more direct access (simply in order to compete with solicitors). He also comments that there is no evidence that employed barristers’ independence is compromised.

What does the client want from regulation? They may know nothing about the law and may never before, or ever after, have had recourse to the Bar, but they want their case advocated to the best of the barrister’s ability, and advice of the highest order, skill and integrity, comparable to the expectations of the patient who is referred to a consultant or surgeon. And the barrister needs recognition of the nature of his or her duty. That is recognition of the overriding duty to the court: otherwise the very system that the client is relying on will not
support him or her. Law needs a measure of predictability, and the notion of duty to the court is vital because it ensures impartiality, that all proper disclosures are made, that the law applies to everyone, the opponent, the criminal and the victim, or those he does business with, win or lose. In other words, the barrister’s behaviour is at the essence of the rule of law. As Lord Denning said, quoting Fuller: “be you ever so high, the law is above you.” And by that he meant not the hierarchy of regulators but the rule of law. And that is why fusion with the solicitors may not be for the best of all possible worlds. When it comes to the new notion of the legal profession undertaking business in different legal structures, boringly known as entities, the BSB will be looking to regulate those who want to do advocacy and sign up to their standards. It will not compete with the regulation offered by the SRA. The BSB entities will not handle client cash and will have restrictive rules about outside investment. It would be contrary to the spirit of the LSA if it did not give free rein to various models of entities. Let a 1000 flowers bloom. The bar and the solicitors should agree on differentiating their professions. They, the solicitors, will have in their remit a mixed bag - the magic circle of City firms, and the mixed disciplinary ABSs. The Bar will regulate entities that offer, as entities, what the Bar offers as individuals – specialist advice (including that given by the employed bar) and advocacy.

Sometimes it is asked why there should not be one legal profession, with no differentiation. There is one legal profession, but different sectors of it serve different demands in the justice system. The advocate, usually a barrister, is court-facing, supporting the civil and criminal justice system as administered in the courts, giving advice as a preliminary to, or as an alternative, to going to court, owing a duty to the court above the demands of the client, if they clash, and thereby assisting in the development of the law by the judges and their ability to do justice impartially. That is why the modish “outcomes focused regulation” (which I will look at in more detail in my next lecture) is largely not relevant to the advocate who appears in court. The English legal system is procedure-oriented, rather like a serious game that has to be played by the rules. The rules are not merely means to an end, they are an end in themselves and intrinsic to the rule of law itself. Thus while we may all for example, deplore the delay in the deportation of a terrorist, we do not deny that he has the right to lodge an appeal against his deportation within three months, whatever that may mean, because those are the rules and they are designed to do justice.

The judiciary
A very important product of the independence of the Bar is the consequent independence of the judiciary, both in terms of mindset and in action. Each protects the other, and neither can be independent on their own, contradictory though that sounds. In fact, in the current legal climate the judges face state disparagement as a result of their decisions in cases involving immigrants and terrorists, and protection of their independence is especially important. It should be of assistance that the Inns of Court surround them as they defend the citizen from the government or from ill thought out legislation. The connection is vital as long as the judges are appointed from the Bar. The independence of solicitors is equally important as and when more judges are appointed from that branch. Their independence is less frequently mentioned but has occasionally been regarded as under threat, in particular since the reforms brought about by their own past conduct. It may be that it has irretrievably gone, because solicitors’ actions are circumscribed by the need of their firm to make a living for all its members. That is why it is legitimate to be concerned about the possible move of many lawyers, barristers, solicitors, conveyancers, legal executives, into corporate entities, where the corporate personality ensures impartiality, that all proper disclosures are made, that the law applies to everyone, the opponent, the criminal and the victim, or those he does business with, win or lose. In other words, the barrister’s behaviour is at the essence of the rule of law. As Lord Denning said, quoting Fuller: “be you ever so high, the law is above you.” And by that he meant not the hierarchy of regulators but the rule of law. And that is why fusion with the solicitors may not be for the best of all possible worlds. When it comes to the new notion of the legal profession undertaking business in different legal structures, boringly known as entities, the BSB will be looking to regulate those who want to do advocacy and sign up to their standards. It will not compete with the regulation offered by the SRA. The BSB entities will not handle client cash and will have restrictive rules about outside investment. It would be contrary to the spirit of the LSA if it did not give free rein to various models of entities. Let a 1000 flowers bloom. The bar and the solicitors should agree on differentiating their professions. They, the solicitors, will have in their remit a mixed bag - the magic circle of City firms, and the mixed disciplinary ABSs. The Bar will regulate entities that offer, as entities, what the Bar offers as individuals – specialist advice (including that given by the employed bar) and advocacy.

A short history of regulation
Independence has a history, and it took centuries to reach its peak, which is past. Given the controversial part played by lawyers and, in particular the impact of modern business methods, it is not surprising that the arguments rehearsed here are not new. The tussle between independence on the one side and on the other cost control, anti-competitiveness, consumerism and government regulation, goes back some decades. Or it may be termed “professionalism” versus “the market.” The Royal Commission on Legal Services (1979)[12] considered all these issues. Its report ruled out partnerships, came down in favour of a two-branch profession and stressed independence and self-regulation. But the perception of lawyers by the public and in the media remained adverse, little though that may matter. Reform has been formulated expressly to curb the independence of the legal profession, building on the feeling that it is a self serving gentlemen’s club.

The genesis of change, as with so much of English law today, was partly European. The European Commission Competition Directorate wanted to make the professions more competitive[13]. And the Office of Fair Trading wanted the same, both organisations aiming at existing restrictions on forms of business organisation and conduct.[14] I note that there has been no similar onslaught on the practices of doctors, (unless one counts the new powers to be devolved to GPs to organise commissioning of services) albeit that their effectiveness has been weakened by the European restrictions placed on their working hours and the inability to test their working command of the English language. As the proposals for regulation developed, there came to be taken into account not only the clients’ interests, but also the legal system and consumerism, allegedly for the benefit of society.

The legal profession was changing in any case. It had grown, and more barristers were working in employment, competing with solicitors for the business of price conscious clients. Many depend on a few large firms for much of their work, or on legal aid. The curbs on the Bar are, in reality, shrinking legal aid, lower remuneration, more young people seeking to come to the Bar and the possible reduction of reserved services, that is services that only lawyers can undertake. Insurers, too, have great power because the rise in premiums might prevent...
Despite the very real responses of the Bar to the needs of clients, the government has played the consumer card (if you wish to be cynical). Some argue that the claim to regulate in the interests of “consumers” is a ploy to enable the government to curb the freedom of the Bar ostensibly in the interests of society, and this is evidenced by disagreement over who the consumer is. On the governmental side, she is depicted as the woman in the street needing advice about a divorce or her tenancy. On the professional side, the consumer is seen as a broader group of those with an interest in, or affected by the law— the judges, the government departments, business, solicitors, the rule of law itself. There is a genuine need to make legal services more widely available in terms of price, method and competence. This may militate against lawyer independence, because the fees they charge are their own business unless and until they come under the control of the state through legal aid and fixed fee regulations. The Legal Services Board however has put the consumer first (in practice, although there are seven objectives for regulators to follow in the Act, following the report by Sir David Clementi,[15] Lord Neuberger in a recent speech[16] drew attention to the uneasy compromises, saying that: “the ethos of consumer society is not necessarily ethical.” The Bar prefers to prioritise the public interest as a regulatory objective, as well as to pay significant regard to the “professional principles” listed in the same section of the Act. They are that lawyers should act with independence and integrity, maintain proper standards of work and act in the best interests of their clients; that advocates should comply with their duty to the court to act with independence in the interests of justice and that the affairs of clients should be kept confidential.

The Legal Services Act 2007
The Clementi recommendations are, by and large, enacted in the 2007 Act and carried out by its creature, the Legal Services Board (LSB), which is non-lawyer dominated. Having a lay majority has its benefits but also its drawbacks in lack of knowledge of how practice works. For example, the LSB has required every barrister to give his client, on first meeting, a document informing the client how to complain about the barrister. The client may well only first meet the barrister in the cells before trial. The client may not speak English, may be in considerable stress and about to face a long sentence. Hardly the moment at which to undermine confidence in the professional relationship by emphasising the possibility of complaint, all the more so as if the client is found guilty, he is bound to want to object in one way or another.

The mechanisms of government control are now in place. The LSB and its Consumer Panel are appointed with the approval of the Lord Chancellor, who is now firmly a politician himself after his removal from the woolsack.[17] The Consumer Panel and the OFT are to advise the LSB on the appointment of approved regulators of the new legal entities. The LSB can cancel the designation of an approved regulator, such as the Bar Council, and the Lord Chancellor could appoint the LSB as an approved regulator, so the LSB could seize control of parts of the profession with government approval. The LSB can recommend cancellation of designation as an approved regulator if the regulator has not observed the regulatory objectives listed in the Act, which include the interests of consumers. It is not clear from the Act whose view is to prevail if the LSB and the front line regulators disagree over the meaning of those objectives. This is important, given that the LSB has the power to fine, and to levy fees for its support from the profession, which has no way of challenging the budget, save through – a central government department! There is therefore a real threat, with only the wafer thin possibility of judicial review as a shield. Moreover the LSB has stated that it supports the MoJ in its work, not for example, putting the rule of law ahead of the department. It therefore has every facility to be the tool of government policy.

The two branches of the legal profession
There is also a move to fragment the professions within themselves and against each other. This takes the form of gradual obliteration of the dividing lines, while solicitors have high court advocacy rights. So the Bar wishes to move to more direct access and the ability to undertake litigation. The boundaries between the two branches of the profession are now perceived to be shifting to meet the new needs of clients, albeit that fusion is not on the agenda for the moment. If barristers work in entities with solicitors, the distinction will be hard to perceive.

Balancing the needs
Self regulation used to be totally appropriate because of the relatively small size of the Bar, its concentration in London and a few other centres, and the constant surveillance by peers, judges and solicitors. This obviated the need for outside regulation. Now self regulation has a bad name. Self regulation, if left unchecked, can become self interest. That is the risk that must be guarded against. We need appropriate checks and balances in place to ensure that self regulation does what is necessary to reinforce independence, that is, organise the profession to ensure that its members genuinely support the rule of law and the proper administration of justice. It was thought in England and Wales that self regulation had indeed got too close to being self interest in practice. Arguably, the LSA reforms go too far to control self interest in that they may restrict independence. The pendulum may swing too far in the opposite direction. At a conference of European lawyers 18 months ago, I was asked by the delegates from a state newly liberated from Communist rule whether the English legal profession had not lost its famous independence . . . Proper self regulation ought to be possible and effective if the profession follows the Nolan principles of integrity in public service and above all controls misconduct swiftly and decently. Nevertheless barristers are now in a minority on the Board of the BSB. The Bar has firmly separated the representative and regulatory arms of its governance, and did so even in advance of the 2007 Act. The BSB has achieved a satisfactory level of independence from the Bar Council and it needs to get this message over to the public. The Bar still controls who becomes a barrister, through the Inns and by the BSB’s
The future

Hopefully Bar regulation will protect its independence, and preserve what is distinctive and best about it in the interests of the rule of law and of society, while allowing it to modernise, indeed to survive. It is, after all, one of the stated objectives of the LSA 2007 to encourage a strong diverse and independent legal profession. If we ever become downhearted, we have but to remember what Erskine said on representing Tom Paine in 1792: “From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject in the court where he daily sits to practise, from that moment the liberties of England are at an end.” We have very good reason in the current climate to be grateful to the Bar for its ability to defend the citizen from her government in many countries of the world. And we hope that the spirit of independence is infectious.

[1] The amount is disputed and sometimes refers to fees earned over a period of years or shared between several legal professionals.
[2] In passing, I suggest that the legitimate complaints by the Bar Council that legal aid is being devastated with ill effect on the young bar and on clients, might be more persuasive if chambers helped each other out. From my own experience, I cite the way in which the richer Oxford and Cambridge colleges help the poorer, the latter group being poor not through any fault of their own but simply because they came relatively late on the scene. The poorer colleges in general came into existence in the 19th century to educate those whom the older colleges would not – graduates, non-conformists, women – and thus the newer colleges which carried out those useful purposes were not the ones to whom had been bequeathed great tracts of valuable land by grateful alumni of the middle ages. They deserve help, and they receive it. There are parallels here.
[3] For example, solicitors taking far more in fees than the miners received in compensation: http://www.timesonline.co.uk/tol/news/politics/article1657755.ece.
[5] Subject to the limited provision of pro bono work.
[7] All persons [should] have effective access to legal services provided by an independent legal profession. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.
[12] Cmd 7648.
This change was made to effect the separation of powers: Constitutional Reform Act 2005. The Lord Chancellor is no longer the Speaker of the House of Lords but functions as the head of the Ministry of Justice.