THE CASE FOR THE FREE MARKET PROVISION OF LEGAL SERVICES

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This essay aims to consider the case for the delivery of legal services by the free market. It will set out the way in which the present system does not conform to the free market model. In doing so the essay will show the policy options needed to bring a free market in legal services to fruition, and the likely consequences of this.

PROFESSIONALISM AGAINST THE FREE MARKET

Professionalism was the process by which producers of special services sought to constitute and control a market for their expertise, founded on the achievement of socially recognised expertise or more simply a system of education and credentialising.[1]

In America, by contrast, traditional warrants of professional status were weak, and the opposition to entrenched privilege explains the Jacksonian and post-Jacksonian elimination of entry require ments. Today American legal services remain more competitive.

Professionalism is also associated with the growth of the state. Just as industry has been increasingly regulated to curtail competition so were certain services turned into professions.

There is an ideology of professionalism which stresses the independence of the profession. It claims that there is a diagnostic relationship between the consumer and the professional. This gives dominance to the professional, which is justified on the grounds that the practice is too complex and important to be regulated by the self-interest of the consumer; the professional has superior knowledge.

This ideology has its roots in the sociological thinking of the 1930's, which argued for the necessity of establishing new moral communities based on occupational membership to replace a traditional moral order which had allegedly broken down in the industrial revolution.[2] In saying that lawyers put the common good before self-interest the profession is saying that the principles of the market place do not operate for legal services. The profession, in this view, operates to protect the public against incompetence and subscribes voluntarily to standards of ethical conduct higher than that required by law, hence justifying their special privileges. This corporatist philosophy still lingers today in the profession, and in certain political circles.

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A different view sees the professional ideology as representing a pre-capitalist mode of production by craftsmen.[3] The latter enjoy a degree of immunity from the capitalist mode of production by being insulated from the market. Professionals take pride in the quality of their work without being driven to maximise profit. This entails not just a notion of altruism, but also the need to protect the public against incompetence. The pre-capitalist traditions stand for "community", opposition to competition and for craftsmanship and the intrinsic value of work.

It is clear that a reduction of competition is justified by this professional ideology. The input of state intervention aids the entrenchment of this by facilitating the continuance of monopoly control of the provision of legal services. Thus the profession has accepted the expansion of legal aid and law centres under their aegis. The profession has solicited state protection and state enforced penalties against unlicensed competitors.

What would rightly be called 'restrictive practices' when displayed by trade unions suddenly becomes a 'professional code of ethics' in the hands of the professions. The defenders of the system of professional privilege never cease to talk of the alleged benefit for the public, yet it is themselves who are manifestly the beneficiaries.

RESTRICTIVE PRACTICES AND MONOPOLIES

At present there are four main areas of restriction in the English and Welsh legal system.[4]

1. *Restrictions that regulate the legal organisation and structure.*

(a) The division between barristers and solicitors:

Barristers have a virtual monopoly over right of audience in the higher courts, whereas solicitors have the monopoly of direct relations with the client. Neither can practise in each others offices. Barristers generaly work more as specialists and consultants. This division took place in the nineteenth century as the professional ideology took root. Those in favour of it stress the fact that it ensures that advocacy is done by the most skilled.

(b) The division between Queens Counsel and Juniors:

The function of the Queens Counsel (QC) is to provide even more expert advice than is available from the Bar generally.

2. *Restrictions that regulate entry into the profession.*

Restrictions on entry into the legal profession combined with a monopoly on certain legal work is a form of occupational licensing.

3. *Regulation of the work that can be done by the professional members.*

There exists both demarcation lines between members of the profession; and between lawyers and non-lawyers

(a) Rights of audience:

Barristers have a monopoly over most work in the higher courts,[5] and barristers and solicitors have equal rights of audience in proceedings in the lower courts. While barristers, solicitors and legal executives have equal rights of audience in proceeding in judges chambers and before Masters and Registrars. Though the courts

have the discretionary power to admit any person as an advocate, this is usually used to permit Police Officers to appear in Magistrates Courts. There are no restrictions for Tribunals.

(b) Statutory monopoly over conveyancing and probate work:

This is a self-evident set of monopolies.

(c) Monopoly over the initiation and handling of court cases:

Solicitors enjoy a partial monopoly in regard to litigation and other court work. The monopoly over the issuing of writs, the prosecution or defence of any action in any civil or criminal court and the preparation of, "any instrument relating to ... any legal proceeding."[6]

The ordinary citizen can handle his own case but no non-solicitor may do court work for someone else. Unless the court itself exercises discretion to give such a person a right of audience. In *O'Toole v. Scott* [7] the House of Lords held that the inherent power of the courts to regulate their own procedure included who appears before them.

The Law Society in its submission to the Royal Commission[8] said it was justified as professionals had the necessary expertise and were subject to a code of conduct, strict accounting rules and the control of the court. They were also covered by compulsory insurance and the compensation fund.

4. *Restrictions on the way the services can be provided.*

(a) Promotional advertising by individual firms and solicitors:

Such advertising is not allowed by the Law Society's own rules. The traditional view is that, as with other forms of 'touting' for clients, advertising is fundamentally inconsistent with the public interest and professional ethics. It would allegedly undermine the relationship of trust between lawyer and client, while competition is irrelevant in the context of professional services. Self-advertisement may result in the consumer being misled. Finally it is claimed that advertising would not affect the supply of the service.

(b) Other restrictions:

There are other restrictions on the way lawyers may operate. For example, solicitors may neither share office space with, nor form a partnership with, a member of another profession.

THE FREE MARKET ALTERNATIVE

The Monopoly Commission Report on restrictive practices in relation to the supply of professional services[9] held that the basic principles of competion which should be applied to industry should also be applied to the professions. The fact that restrictions on entry and on competition were influenced by a concern for standards did not dispense with the business element inherent in the transaction. Restrictive practices, it argued, resulted in higher prices, less efficient uses of resources, less innovation in forms of service to customers and less responsiveness to changes in consumer requirements.

In *The Pharmaceutical Society of Great Britain v. Dickson*,[10] the House of Lords held that the professions were covered by the Common Law doctrine of restraint of trade. Such practises would be void unless shown to be justifiable as being reasonable from the point of view of both the parties and the community as a whole.

The profession in its evidence to the Royal Commission[11] claimed that it was not providing a business service. The professional was expected to subordinate his self-interest to that of the client, and the client, it was argued, was a bad judge of his own self-interest.

In reply, I would argue that the 'professional' relationship does *not* in itself justify such restrictions. The existence of higher standards does not justify consumers being denied the right to opt for lower standards together with lower prices. The restrictions are clearly in the self-interest of the professions and yet are defended on the ground that they protect the public interest.

There will always be confidence tricksters, but market competition protects the consumer better than regulations and so-called professional standards. The consumer is not at present protected because lawyers are altruistic, or even because they are competent, but because it is, in some degree, in their self-interest to provide a good service. (Although professional reluctance currently prevents consumers from gaining proper recompense or protection from professional misconduct - contrary to the claims of the profession.)

The consumer should be free to choose from whom he purchases legal services. The law should, of course, exist to prevent fraud. The consumer should be able to choose between a more expensive highly qualified lawyer and a less expensive, less qualified one. The full efects of competition, advertising and publicity would have the same benificial effects in the provision of legal services as they do in the provision of baked beans, motor-cars, hi-fi equipment or any other product. The argument that the poor would be forced to use the cheap service ignores the fact that those on lower incomes (except for legal aid provision) are, in any case, at present excluded on cost grounds from using legal services.

To create a free market in legal services the following policy changes are essential:

1. *Ending restrictive practices*

(a) The division of labour between barristers and solicitors:

If there was a fusion of the professions, customers could approach a firm of lawyers and take a 'total package' of legal services, including all the necessary skills a case required. The present system is inefficient by having double (or more) manning of one job, and by perpetuating small and cost inefficient solicitor firms.

(b) The division between Queens Counsel and Barristers should be ended:

This division has a distinct inflationary effect on fees with QCs able to earn much higher fees than, for example, more experienced senior Juniors.

(c) Restrictions on entry into the profession:

It is acceptable that the Law Society should be able (like any private body) to restrict entrants to its membership, and to market and advertise its special qualifications or standards. *Voluntary* 'professionalism' is not objected to. However, *combined* with other state-granted restrictive practices and monopolies exclusive membership becomes a form of occupational licensing. Many legal services, it should be noted, are of a routine nature and need not be provided by individuals with a higher level of training and knowledge. Legal practice encompasses many services that can be performed by people with less extensive schooling and at lower cost since their prices do not include paying for the 'value' of a more advanced and specialised education.

The requirements of qualification are related to a genuine concern with protecting the public against incompetent lawyers. However the relationship between these requirements and competence in practice are tenuous since many dimensions of legal performance are not tested in the education and examination process. Less restrictive alternatives would be to require lawyers to disclose their level of qualification, and allow the consumer to choose a less qualified lawyer (or a lawyer with the level of knowledge necessary for the clients specific requirements). The right to become a lawyer hould not be controlled by the Law Society or the Bar. (Although, we should emphasise we have no objection to the Law Society, or other bodies maintaining exclusive membership, specific levels of qualification, and advertising such attractive qualities to the public).

As Chris Tame has argued: "The impact of professionalisation and licensing creates an ossified society placing countless obstacles in the way of individuals and groups climbing the economic and social ladder. The mania for paper and 'formal' qualifications replaces the real object of the economy, serving the consumer. The Law Society for example raised its entry requirements in 1980. Its report for that year stated that there were "too many" people be-

coming practising solicitors. So it sought in classic restictionist style to keep the supply down in order to keep the price up."[12]

(c) All restrictions on advertising should be abolished, including the rule against touting:

It is claimed that consumers could be misled or 'brainwashed' by advertising.[13] This of course is an argument which suggests the public are ignorant and cannot make a rational choice. It also ignores the evidence of numerous expensive advertising fiascos in other fields, for example the failure of cigarettes containing tobacco substitute.

The extent to which the client is not well placed to evaluate either the quality of service provided or the accuracy of any self-advertisement is the same for *any* good or service where the technical knowledge of the consumer is less than that of the producer, i.e. hi-fi manufacturers, manufacturers of motor cars, etc., etc.. *At present the client is, allegedly unable to judge the quality of service but is nevertheless required to select his lawyer!* With advertising the consumer would be protected by competition, and by provision of information - subject to the law of fraud - on the record of sucess and the specific skills of the lawyer. Furthermore, those lawyers who wished to remain combined in a professional organisation (which would be independent and able to restrict its own membership) could offer that as an advantage to the consumer, which he would be free to pay for. At present a client has no information about a firm's competence in a specific field, and little information about whether its charges are reasonable compared to other firms. There is less incentive for lawyers to be dishonest or unreliable under a system of competition.

The prohibition of advertising reduces the flow of information to the public concerning their legal rights, impairs their ability to choose a lawyer intelligently and reduces competition among lawyers. The rule against 'touting' also denies lawyers an important entrepreneurial role in the service. If consumer deception is a serious problem, the ban on promotional advertising can only, and does, aggravate the consumer's lack of information. Private consumer organisations (like *Which*) would also be a source of information to the public about those legal services which are well provided at a reasonable price.[13]

In 1976 the Monopolies Commission proposed that solicitors be allowed to advertise in any form, subject to a number of safeguards.[14] The Commission correctly saw too main objections to the ban: it deprives users and potential users of helpful information; secondly it reduced the stimulus to cost-saving, to innovation and to the setting up of new practices and to competition.

From the 1st October 1984 the Law Society permitted individual advertising by solicitors. Although a step in the right direction this move was subject to stringent conditions. Advertisments must not refer to the quality of the service provided, refer to competitors, or claim any special expertise! In other words, the specific functions of advertising are still forbidden.

2. *Ending Monopolies*

(a) Statutory monopoly over conveyancing and probate work:

These should be ended imediately and the public should be left with the choice to use the cheaper and more accessible service, even though it entails risks.

Fortunately after much public pressure the present Conservative Government has agreed to take some steps in this direction. It intends to remove the monopoly of conveyancing work to allow licensed non-lawyer conveyancers to compete with solicitors. However the present monopoly covers only the "drawing or preparing" of legal documents the new duopoly will cover preparatory legal work, i.e., the drawing up of contracts and advice. Furthermore, prosecutions for breaches of the new law will be in the hands of the police and the attorney General, as opposed to the Law Society's private 'policing' of the current monopoly.

The probable effects of even a small change, however, can be seen in the recent setting up of property centres in England through which solicitors offer their clients a combined estate agency and conveyancing service, a service which already exists successfully in Scotland. Some solicitors have calculated potential savings in house buying fees of up to one third, and that is before the conveyancing monopoly has been abolished.

(b) Rights of audience and the monopoly over the initiation and handling of cases:

The Law Society has recently demanded the removal of the barristers' monopoly of rights of audience in the higher courts, and this was rejected by the Bar Council. The Bar Council used exactly the same arguments which Solicitors used to defend their conveyancing monopoly! The solution involved exactly the same arguments being used by those who wanted to end the conveyancing monopoly!

The monopoly over the initiation and handling of cases prevents free competition. Private organi sations could provide cheap, quick and specialised legal advice. For example a case was reported[15] where the Law Society had brought a successful prosecution against a person running a non-profit organisation called Assistance in Divorce, which helped people prepare documents to get undefended divorces. The general law applies to prevent consumer frauds, and if people wish to pay less to get less service and to take the risk of being uninsured so be it.

3. *Alternatives to Lawyers*

The effective handling of legal problems does not necessarily require the use of lawyers. The English legal profession only enjoys a monopoly over certain spheres of legal work and not over the giving of legal advice. There are many different kinds of non-lawyers who handle matters that require legal knowledge. Accountants and finance planning experts compete with solicitors in the tax field.

There has been a recent explosion of lay advisory agencies including Citizens Advice Bureaus. Many of these agencies are financed by the State and cannot be considered to provide a free market expansion of legal services. Some specialist oganisations have been set up by private charities, such as MIND's Legal and Welfare Rights Service[16] and other civil liberties groups.

There are also unqualified Lawyers in solicitor's offices; legal executives provide about 25% of the profession's total manpower for work on legal matters.[17] However Legal executives are themselves becoming a regulated 'profession' with their own Institute of Legal Executives, entry to which depends upon examination and qualification.

Lay advocates, particularly in Tribunals where there are no restrictions on rights of audience are also another alternative. Trade Unions and other private organisations (like the Freedom Association) provide representation, as do family or friends or Citizens Advice Bureaus representatives. The Court of Appeal held in *McKenzie v. McKenzie*[18] that "any person whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice".

Another approach is 'Do It Your Self'. Simplification of legal procedures or provision of official assistance could make it easier for people to handle their own cases.

Such alternatives will be more readily available if the monopolies and restrictive practices are swept away. It is notable that where lawyers have a monopoly status the costs of using them have been rising faster than for other services. Evidence from other countries where the legal professions have *more* monopoly power also underlines the reality of professionalisation. Legal costs become so high that certain jobs will not get done, or will be done only for the rich. Sometimes a shadowy 'half-profession' will grow up to do law jobs at a cut-rate price. The latter has happened in various countries. In India there are so-called "sea lawyers", in Indonesia "bus lawyers", who have no law degrees but who work in the courts. In Brazil there are underground lawyers who are also unqualified, called "despach antes" ("expeditero"). The Yellow Pages of Rio in 1971 listed over 300 of them.[19]

LEGAL SERVICES FOR THE POOR

The question of legal services for the poor is often tied to the view that there is unmet need for legal services amongst the poor. The high cost of litigation does mean that the legal system remains inefficient in resolving legal disputes, because the cost of legal dispute resolution prevents the plaintiff from making a credible threat to litigate.

However, reducing the cost of litigation will not increase the demand for legal services as a whole. If litigation were inexpensive we might encourage recourse to litigation as a substitute for more cost effective means of resolving legal disputes. Lower costs for legal services will not therefore be achieved by the State reducing the cost of litigation. The important point is that the practise of law is subject to a web of regulations that make legal fees higher than they would be in a free market economy.

There is perhaps one justification for retaining criminal legal aid. That is that the rule of law in criminal proceedings requires that the defendant should have an opportunity, if necessary at the expense of the State, for a meaningful trial. Procedural rights under the rule of law requires a proper defence of the poor person's valuable property right, 'his freedom of action', which could be arbitrarily removed without realistic representation.

Until the populace is convinced that private charity (and insurance provision) would suffice to protect the very few unable to afford market rates for legal defence, the following transitional proposals might be found appropriate. The present system of free legal aid to the poor is in fact a benefit-in-kind form of welfare. This method of assistance actually prevents many poor people from achieving their most effective pattern of consumption.

The cost to the poor person of being entitled to receive £100 in legal services is the benefit that he would have derived from receiving £100 of some other good, service or cash. In many cases that cost would be greater than £100. Many poor people never need a lawyer, but since the service is "free" they will use him unless the value of the service to them is nothing. Faced with an excess demand the lawyer will limit his services to those who he judges are in greatest need. If much legal aid work is channeled through Law Centres, Housing Advice Centres and other welfare centres manned by radical lawyers then cases will be chosen wth regard to political rather than legal criteria.

When the price of a good is made nothing the poor person cannot evaluate the worth of the good to him, and there are no neutral means by which lawyers can allocate the resources. The waste involved in these circumstances will be avoided if poor people were given the cash, that is to say if the benefits were monetised through a negative income tax. Then the poor would use the £100 to hire a lawyer only when the value of the legal services was at least £100. There is hope that the review now being instituted by the government of the whole social security system will be extended to the implementation of a negative income tax.

In the short term if legal aid was given in the form of a voucher for legal services the programme would serve the interests of the poor legal consumer through granting him a choice. Instead of the whip hand being given to the professionals who operate the existing system, a voucher is tied to consumer rather than producer interests.

CONCLUSION

It is the free market which protects consumer interests through competition. Producer orientated practices, in legal services as elsewhere favour precisely the producers, and not the consumers. Much legal work is of a routine nature and could be done at a lower cost in a more market orientated system. The public should also be protected by laws against fraud and negligence (against which the current system actually shelters the legal profession). The poor would benefit through lower legal costs and legal services available from non-professionals. A free market in legal services is a real possibility if the policy options outlined in this essay were introduced.

NOTES

1. M. S. Larson, *The Rise of Professionalism: A Sociological Analysis*, University of California Press, 1977.
2. P. Thomas, "The Royal Commision on Legal Services", *1 Windsor Year Book of Access to Justice*, Faculty of Law, University of Windsor, Canada, 1981.
3. R. Abel, "The Rise of Professionalism", 6, B.J.L.S., 1979.
4. Michael Zander, *Legal Services For The Community*, Maurice Temple Smith, London, 1978.
5. 1925 Judicature (Consolidation) Act S.32 and S.103.
6. Solicitors Act 1974 S.20 and S.22.
7. [1965] AC 939.
8. Benson Royal Commission Report on Legal Services in England and Wales, Cmnd. 7648 1979.
9. 1970 Cmnd. 4463.
10. [1968] ALL E.R. 686.
11. See note 7.
12. Chris R. Tame "Conservatives and the Closed Shop", *The Free Nation*, Vol 9 No.2, 1984.
13. The Benson Royal Commission argued that with advertising "there was a greater potential for deception and was more difficult to control effectively".
14. Service of Solicitors in England and Wales in Relation to Advertising (1976).
15. *The Guardian*, 28th January 1978.
16. The National Association for Mental Health.
17. See Note 4.
18. [1970] 3 W.L.R. 472.
19. On all the facts above see L. M. Friedman, *Law and Society*, Prentice Hall, New Jersey, 1980.

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