

## ADVOCACY – WHAT IS THE FUTURE?

Advocacy has traditionally been at the heart of a barrister's professional function. However, that independent advocacy function, which has been dependent upon the Bar's traditional monopoly of audience rights in the courts, has increasingly become subject to challenge as a result of developments such as the establishment of the Crown Prosecution Service; the increase in the jurisdiction of the county courts, thus, enabling solicitors to conduct cases that were formerly conducted by barristers in the High Court; and, the granting of audience rights in the Supreme Court to solicitor-advocates. The competition that the Bar is now facing is that which advocates in other jurisdictions, where the profession is fused, have faced for generations. As a result, the question of whether the Bar will remain as an identifiable separate part of the legal profession has emerged as a critical issue within the current debate surrounding the future of advocacy in England and Wales.

However, the case in favour of maintaining an independent Bar is a strong one. From a practical perspective, the Bar currently provides advocacy services at a level consistently higher than any other part of the legal profession or any other group providing such services. Moreover, on a constitutional level, the Bar constitutes an important part of the system of the administration of justice, serving the needs of the public and upholding the Rule of Law and the maintenance of civil liberties. Both the practical and constitutional strands of the case in favour of maintaining independent advocates demand some further scrutiny.

First, as a specialist advocate, the barrister is freed from managing a large number of cases so he can concentrate on advocacy and the presentation of cases to tribunals. A corollary of this expertise in advocacy is that the barrister is also necessarily a better legal adviser because his experience places him in a better position to advise on the likelihood of success before a tribunal of a particular argument or case. In effect, the barrister, in his independent advisory role, prevents unmeritorious cases and arguments from occupying precious judicial time. At a time when the costs of the administration of justice are of great

concern, this function of screening unmeritorious arguments and cases assumes great importance. The experience of other jurisdictions which have a fused profession clearly demonstrates that without an independent Bar unmeritorious cases are not effectively screened. As a result, the justice system, and ultimately the public, will have to pay the resulting burden in costs. The United States is a prime example where unmeritorious and even frivolous cases frequently clog the justice system and needlessly waste judicial resources.

Proponents of a fused legal profession may argue in response that the demand for specialists in oral advocacy will decline as the courts move away from orally presented submissions and towards written arguments as is prevalent in Europe and the United States. Not only does this argument implicitly acknowledge that the Bar possesses special expertise in oral advocacy, but it is also hyperbole in that it assumes that oral argument will become redundant in court proceedings. The use of skeleton arguments can certainly reduce the time necessary for oral argument, allow more cases to be heard, and hence, reduce legal costs. However, the value of oral argument, oral evidence and even oral judicial opinions as elements in a legal system should not be minimised. After all, you cannot cross-examine or question a document. In addition, if the experience of the United States is any comparison, restrictive time limits on oral argument, merely result in increased legal and judicial costs being incurred by the preparation and consideration of voluminous and often burdensome written submissions. On this basis, it is highly unlikely that oral advocacy will cease to be an important part of English judicial proceedings.

Secondly, one of the Bar's most valuable attributes is its independence. Thus, a barrister is not tied to a particular firm or client, but is available to provide expert advice and advocacy on referral to solicitors and their clients all over the country. This has at least two important implications.

First, the small or even middle sized solicitors' firm is unlikely to ever develop the expertise in advocacy which the Bar presently offers. Therefore, the existence of the

independent Bar is necessary to enable the smaller solicitors' firm to compete with the mammoth financial resources of the large City firm, who are actively developing their advocacy departments.

Secondly, the existence of independent advocates available to all is necessary for the existence of freedom of expression, which is vital to the maintenance of a free society, and also to the Rule of Law and justice. It is important that the public understand that it is desirable to maintain a legal system in which the lawyer has a duty to argue cases on behalf of those whose conduct he may find unwise, upsetting, or even reprehensible. The public may not be currently aware of the reality that without independent advocates who are prepared to act on behalf of anyone, irrespective of the nature of their cause, justice will become difficult, if not impossible, to obtain for unpopular causes. It is unlikely that a fully informed public would tolerate the abolition of the independent Bar if such risks were known.

Many an advocate, including the great Roman orators, Cicero and Quintilian, have looked to Aristotle's *Rhetoric* for some insight into the art of persuasion. In that book, Aristotle teaches that a persuasive speech not only convinces through argument; it must also evince the right "ethos" or character of the speaker and bring the audience into the "right state of feeling". In order for the Bar to effectively persuade the public of the necessity of its continued existence, it must certainly utilise the practical arguments available. However, the Bar should also evince the right "ethos", and this process may be begun by explaining to the public the invaluable function the independent advocate has in maintaining the Rule of Law and the liberty of the citizen.

**JASBIR DHILLON**