

BOOK REVIEWS

ENGLISH LAWYERS: BETWEEN MARKET AND STATE,

RICHARD L ABEL, OUP, OXFORD & NEW YORK, 2003

Are professional bodies simply a glorified form of trade union committed to restricting markets, or are they preservers of values and ethics? Are the claims professions make as to expertise and knowledge sustainable, and if so how are consumers of legal services to evaluate relative levels of competence before engaging a lawyer to act on their behalf? Are many of these claims as to expertise spurious or exaggerated, thus simply acting as a smokescreen behind which professions such as law can claim a monopoly over certain tasks and at the same time charge consumers' extortionate rates for such services? If this is the case and lawyers are not necessarily better at performing some tasks which have been traditionally regarded as requiring legal expertise why shouldn't these areas be opened up to competitors such as paralegals and professionals in cognate areas of practice? Many of these questions were only for the first time seriously addressed in the 1980s on the tide of market driven reforms ushered in by reforming *laissez faire* administrations.

The wave of extreme liberalism ushered into mainstream political debate by Thatcherism in the United Kingdom, and emulated by a number of other conservative governments in various parts of the globe (including Australia) during the 1980s and 1990s, therefore had significant implications for a number of professions, including the legal profession. The legal profession in the United Kingdom prior to this period had been largely exempt from provisions prohibiting restrictive practices. Indeed, prior to Thatcherism, threats to the legal professions privileged position had generally been perceived to lie with reforming Labour administrations. The profession invariably saw Conservative governments as supporters of the status quo. This had remained the prevailing view in the early years of Thatcherism. During these years whilst many other areas of business were being drastically reformed the legal profession was largely left alone. Lord Hailsham, the Lord Chancellor during this period was a conservative in the 'old sense' of the word. He remained stoically resistant to any significant changes being made to the legal profession. Like most of his predecessors Lord Hailsham strongly believed in the retention of restrictive practices on the grounds that these practices ensured independence and integrity in the profession.¹

¹ Richard L Abel, *English Lawyers: Between Market and State* (2003) 26.

This period of immunity from the *laissez faire* reforms sweeping the rest of English society ended with the appointment of a new Lord Chancellor, Lord Mackay, in 1987. In 1988 a Green Paper was released which proposed sweeping changes to the organization and practices of the legal profession – amongst the reforms proposed by the Green Paper were expanded audience rights for solicitor advocates, the establishment of Legal Services Ombudsman to oversee discipline for the profession, the opening up the profession to multidisciplinary and multinational partnerships, the possibility of a contingent fee system being introduced and an opening up of a number of areas in which solicitors had traditionally enjoyed a monopoly to non-lawyers – conveyancing, the preparation of wills, and probate being areas particularly singled out for change.

Professor Abel's study examines the way in which these new *laissez faire* policies embodied in Lord Mackay's Green Paper and subsequent legislation enacted by both the Conservative governments of Mrs Thatcher and John Major and by the Labour government of Tony Blair, impacted on the legal profession, which had previously enjoyed a range of privileges and protections from the state, and the manner in which the profession itself responded to these dramatic changes. Professor Abel concludes his study with a number of theses as to the possible future for the legal profession in the United Kingdom, and more generally for the future of the profession elsewhere.

Abel's account of these developments includes an examination of the political environment in the United Kingdom within which these major changes to the legal profession occurred. The politics of Maggie Thatcher, John Major, Old Labour and Tony Blair during the period covered by this study (1988-1998) are succinctly encapsulated in a concise account which provides a condensed analysis of the motivations, electoral strategies, and policies in English political life during this period and how and why, if somewhat belatedly, such changes in political thinking were to have significant implications for the English legal profession.

Professor Abel's account is presented principally in the form of a narrative in which the words of the principal actors themselves (the Law Society, Lord Mackay, the Bar Council, etc) are used to construct the 'story'. This form of exposition works well, imparting an 'authenticity' to the account that may have not been the case with a third person narrative. Indeed the voice of the author intrudes very rarely in the early chapters, leaving the story to be effectively told in the 'first person' by the actors themselves. Professor Abel has previously utilized this method of accumulating evidence and narrative in the 'first person' to good effect in his account of various legal campaigns against apartheid in South Africa in *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994*.²

Professor Abel's account is empirically grounded, with a level of detail and rigorousness that is absent in many lesser studies of Thatcherite politics in action.

² Richard L Abel, *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994* (1994).

Despite its empirical density the narrative is engrossing, indeed often exciting, at times even humorous; providing insights into motivations, personalities and strategy which would not be possible in a third person account. It is also an account that places significant demands on the reader. As one reviewer of Abel's earlier text on the legal struggles surrounding apartheid put it, when commenting on that text, it is a form of narrative that occasionally lapses into detail that is downright excessive.³ However, as that earlier reviewer also noted there is a serious purpose to this superabundance of detail. This 'excess' of evidence underlines the veracity of the theses being advanced by the author. Abel's technique is to ensure the reader forms their own view of events, rather than constantly being inveigled by a third person narrator as to how they should interpret events.

As readers we are provided with contemporary accounts reported in the press, professional journals and other media of the response of the Bar Council and the Law Society to the reform agenda proposed in Lord Mackay's Green Paper and to later legislation. As we might expect these responses were largely hostile to the proposed reforms, though the Law Society was somewhat more muted in its initial response than was the Bar Council. Critics from within the senior ranks of the profession were wheeled out to defend tradition. Judges, QC's and law lords all raised their voices in defence of the status quo. The former Lord Chancellor, Lord Hailsham, sprang to the defence of the profession he had once overseen, going so far as to suggest that 'there was no question of restrictive practices. There are already enough market forces built into the system to do whatever market forces are capable of doing'.⁴ A number of other 'traditionalists' such as William Rees-Mogg also sprang to the defence of the profession suggesting that if the Green Papers were adopted they would 'import a legal system like the one that exists in New York'.⁵ As Abel ruefully notes 'if the English profession was the embodiment of perfection, the American-which the proposals threatened to import-was evil incarnate'.⁶

This reaction to the Green Papers by the Law Society and the Bar Council appears to confirm Abel's thesis that in the last instant the legal profession, like other professions, is driven not by altruism or tradition, but rather by a concern to maintain market control in those areas where they feature of the 'legal professions' claim expertise, to limit the numbers of new entrants into the profession and to ensure the legitimacy of the status claims of the profession.

One of the striking aspects of the legal professions reaction to the Green Paper, was, however, the apparent strategic ineptitude of the Law Society and the Bar Council in responding to these proposals for sweeping changes. The protestations of these bodies appear, when collected together, as both patently self-serving and empirically ungrounded. The potency of rhetoric invoking the importance of retaining tradition

³ J Klaaren, Review of Richard L Abel, 'Politics by Other Means' (1995) 6(6) *Law and Politics Book Review* 95-97.

⁴ Abel, above n 1, 29.

⁵ Ibid 39.

⁶ Ibid 53.

and its alchemic relationship to the integrity and independence of the profession was lost on Thatcherite England. At our remove, when reading these responses, one is struck by the shallowness of most of the justifications advanced in defence of the legal professions privileges, and perhaps surprised at how those privileges could have been sustained for so long on such spurious logic. The public proclamations and newspaper reports of the 'professions' response as documented by Abel indeed demonstrates how out of touch the profession apparently was with the *zeitgeist* of the times.

Abel's account also exposes the fissures between segments of the legal profession. The government, as Abel notes, quite cleverly exploited the fault lines between the upper and lower branches of the profession on issues such as audience rights for solicitor advocates or the issue of the composition of the pool of candidates from which judicial appointments would be made. When solicitors lost their conveyancing monopoly they in turn asserted an expanded role for themselves in the courts as solicitor advocates, this led, of course, to conflict with barristers who saw their monopoly privileges as advocates in superior courts being challenged. Quite cleverly the governments policies ensured that there was never a single voice of the 'profession', but rather several voices each contending with each other making claims that were unsustainable in a society now more concerned with the price of legal services than with tradition.

Abel also examines other fissures within each branch of the profession in some detail, particularly those related to the unrepresentative nature of both branches of the profession, particularly at their upper tiers. Despite a huge change in their gender composition and their ethnic composition both the Law Society, and particularly the Bar Council, did not reflect this changing nature of the profession. Again, these fault lines effectively disabled both branches of the profession, as embodied in their professional associations, as being able to present themselves as representative.

At a more general level one of the significant questions raised by Abel's analysis is in respect to the possible lack of identity between the professional organizations purporting to represent solicitors and barristers and their constituencies. This is particularly striking in the case of the 'lower branch' of the profession where practitioners are required to be members of the representative body (the Law Society) as a condition attached to their practicing certificate. Unlike unions where closed shops have been prohibited professional associations have been permitted such arrangements, at least until the current spate of reforms have called such arrangements into question.

In many places, including the UK and Australia the Law Society has enjoyed such a favoured status. Abel deals with strident internal politics of the Law Society during the period following the release of the Green Paper by Lord Mackay in some detail. The 'revolution' in the politics of the Law Society under the somewhat extravagant figure of Mears and his *confreeres* is narrated in some detail. Whilst this material certainly illustrates the strong tendency amongst the then leadership of the Law Society to pursue agendas seeking to restore the professions favoured position, and to resist at any

cost proposals that might erode the market advantages which practitioners have traditionally enjoyed. However, revealingly, Abel notes the steady decline in voter turnout for the election of officers of the Law Society during these years.⁷ From 35% of the eligible members of the 'lower branch' of the profession voting in the elections for President and other officers of the Society the voter turnout rapidly declined to just an 18% participation rate for eligible voters in the election (and only slightly above 50% of those voter who voted for the victors in the leadership contest – ie, only around 9% of solicitors ('the profession'?) in fact voted for those in charge of the Law Society and its agenda for resisting the changes being effected by government to the very nature of legal practice. At times in his account Abel the 'profession' is embodied in its professional associations and at others that the 'profession' is not truly represented by those organizations. By relying on newspaper and media sources, which as we have noted earlier enriches Abel's account in many ways, Abel also effectively leaves us wondering what may be, for instance, the views of the 91% of the Law Societies membership who did not vote for the incumbent leadership. Abel, to his credit, recognises the problem of suggesting an identity between the 'profession' and its 'professional associations', but never quite properly resolves that tension.

For anyone interested in the recent history of the legal profession this book is an essential reference point. It is rich in ideas and information, both in the areas focused on above and in many others, such as the sweeping reforms to legal aid instigated by the Conservative government in the UK 1980s and concluded with the even more drastic reforms implemented by the Blair administration in the late 1990s. Professor Abel's conclusions, drawing on the material collected in the text are of relevance not only to the English legal profession, but also to Australia and other common law regimes. The implications of many of the possible future scenarios are so significant that we would be foolish to ignore them. The future carries significant implications for legal education, the ability of the profession to maintain a foothold in many traditional areas of practice, and the possible blurring of boundaries between different professional disciplines as (multidisciplinary practices) MDP's become more significant forces. Rather than summarize all of Abel's conclusions I should, however, leave it up to the reader to judge those conclusions on the basis intended by Professor Abel himself, by reading and evaluating the vast amount of empirical material brought together in this important text in support of those conclusions.

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Abel, above n 1, 407-470.