

## **LEADERS OF THE REFERRAL BARS RESOLVE TO FIGHT FOR INDEPENDENCE AND BARE THEIR TEETH**

*Christopher Gardner Q.C. reports on the Inaugural World Conference of Barristers and Advocates held in Edinburgh last June.*

Sceptics may have doubted whether a meeting of the great and the good from the Bars of Australia, England and Wales, Hong Kong, Ireland, Northern Ireland, New Zealand, South Africa, Zimbabwe and the hosts, the Faculty of Advocates in Scotland, could hope to achieve anything in terms of solidarity and common approach. They would have been wrong.

Colin Campbell Q.C., Dean of Faculty, stressed the need to analyse the value of, the threats to and the initiatives that needed to be taken by an independent bar if it was to proclaim its value and public interest. The highest standards of professional conduct and ethics, although vital, were not enough. Independence should never be taken for granted and direct challenges from the OFT and other such bodies at least had the effect of waking the bar from its slumbers.

Mrs Mary Robinson, United Nations Commissioner for Human Rights and a former barrister, when bringing a different and defining emphasis to the Conference, pointed out that practice of the law was a privilege which brought with it responsibilities to promote and protect access to justice, as a human right, and the rule of law. She urged the 180 delegates to look beyond the commercial concerns of their own practices and the problems of the bar within their own jurisdictions, and to do more to support the judges and advocates wherever their independence was under attack from governments and other institutions.

Anthony Gubbay S.C., former Chief Justice of Zimbabwe, described how legislative abuse and unlawful action by the government had robbed Zimbabwe of an independent judiciary and bar and with it the rule of law. Recent statutes had resulted in the barring of public meetings; the arrest of those who criticise the government, and the gagging of the outspoken privately owned press. The Presidential pardon had been used to free those convicted of serious political crimes, including torture and the burning down of homes to influence election results. When the Supreme Court insisted that land redistribution had to be carried out in accordance with the constitution and not by unlawful occupation, 200 veterans occupied their court building. Neither the Ministry of Justice nor the Attorney General condemned this. The Law Society, however, courageously held a countryside procession and presented the President with a petition calling on him to take action against those who had threatened the judges. When he was arrested and detained, and a judge refused to release him under a writ of habeas corpus, not a single lawyer stood up when the court adjourned.

Adrian de Bourbon S.C., Chairman of the Zimbabwe Bar, also spoke of visits made to the judges to pressurise them to resign. The Chief Justice was forced to take early retirement and five other judges resigned, one as a result of a direct threat to his family. This provoked an IBA mission, led by Lord Goldsmith, to whom the President undertook not to pack the judiciary with his supporters. He has since made four such appointments and there is no longer an independent judiciary. The 22 remaining members of the bar are also under threat and as a result some do not take human rights cases involving the government. When the present Chief Justice was asked to recuse himself in the case of the farmers, he described

the application as evidencing unbridled arrogance, which for the first and last time would go unpunished. Decisions are delayed to enable new laws to be passed which did not exist at the time of the hearing, and in respect of which no representations are allowed subsequently. Despite all of these difficulties, the bar in Zimbabwe had never felt isolated, thanks to the support of the other bars of the Commonwealth. He asked that this international condemnation should continue and so boost the morale of those seeking to restore the rule of law from within Zimbabwe. He received a standing ovation.

Alan Leong S.C., chairman of the Hong Kong bar, spoke of the difficulties resulting from lawyers on different sides in a human rights matter coming from different jurisdictions, and wishing to apply the common law of Hong Kong and the civil law of the Special Administrative Region of the Peoples Republic respectively. When the Central Committee overruled a decision of the court the Hong Kong bar, about 800 strong, took part in a silent march of protest. He saw the need for lawyers to educate the public as to the importance of the rule of law, by visits to schools, universities, seminars, articles in popular Chinese newspapers and television interviews, and in their professional lives to offer unbiased, rational and principled advice consistent with the rule of law and the administration of justice.

Dianna Kempe Q.C., President of the IBA, said that its Human Rights Institute had received 111 complaints from 47 different countries of lawyers under threat, which the IBA does its best to verify through local bar associations and embassies. They include death threats, detention, imprisonment, secret trials, disappearances, burglaries and revocation of licences to practice. Letters of intention and complaint are sent to the government in question. These meet with little success but they do make the lawyers under threat feel that they are being supported and this gives them the strength to keep going. She urged other member associations to do the same.

### **The Edinburgh Declaration**

The Conference, having been sensitised to the need to do more to support judges and advocates under attack in this way, resolved:

1. That the independence of courts is essential to the functioning of democracies, and that the independence of the legal profession in turn is essential to the independence of the courts.
2. That the referral Bars, the organised bodies of the profession of barristers and advocates, have a vital role to play in defending the independence of the courts and in ensuring access by the public to them.
3. That the participating Bars commit themselves to supporting, in all ways open to them, legal practitioners in all countries where their capacity to practice and organise themselves freely and independently is under threat.
4. That this conference expresses its complete support for:
  - the Bar Council and Law Society of Zimbabwe in their assertion of independence and in their commitment to the restoration of the rule of law in Zimbabwe
  - to the Hong Kong Bar in its principled espousal of the rule of law
5. That the participating Bars shall take practical steps to coordinate and advance the work of the Bars around the world for the protection of human rights and for the enhancement of pro bono services for the poor and the vulnerable.
6. That the participating Bars shall also continue to work to defend the independence of the profession of barrister and advocate.

To ignore the other topics discussed during the two and a half days of the Conference would be misleading and unfair. Speakers included Lord Cullen, Lord President of the Court of Session; Lord Reed, Senator of the College of Justice; Roy Martin Q.C., Vice-Dean of the Faculty of Scotland; David Curtain Q.C., President of the Australian Bar Association; Steven Rares Q.C. of the New South Wales Bar; Lord Goldsmith, Attorney-General of England and Wales; and David Bean Q.C., Chairman of the Bar Council of England and Wales.

Important papers were given and break out sessions held upon how the independence of the Bars could be challenged and maintained by reference to the following topics:

Direct access: DPA is difficult to avoid in Australia. Complaints against barristers have increased as pressure from clients has encouraged the cutting of corners. In England the bar direct scheme has been condemned as anti-competitive by the Kentridge committee.

Advertising: negative advertising was considered to be unacceptable. Advertising of success rates would threaten the cab rank rule.

Cab rank Rule: the public needs educating as to the merits of the rule and its essential accompaniment, an independent bar. Retainers acted as a negation of the rule, keeping the ablest advocates from the reach of potential opponents. Barristers should not fear championing unpopular causes as they, like judges, will not be stigmatised by the arguments they have advanced prior to their appointment.

Specialism: this is increasingly demanded of the bar by its clients, but the dangers of over specialising were recognised. An advocate's experience and knowledge may not be broad enough for a particular case. Client led pressure on an advocate to act only for one side, such as from insurers, planning and prosecuting authorities, prevented the advocate from walking on both sides of the street, which is vital to his ability to be able to see both sides of the argument, and judge the tactics and approach of the other side. Questions were asked as to how the specialism of an advocate was to be verified and by whom. Should the bars have a role in certification, such as for legal aid work?

Quality standards and competency: David Bean Q.C. reminded us that the bar in England and Wales acted as a resource to solicitors on a ratio of ten to one, and was vital as 80% of firms comprised 4 solicitors or less. Market forces alone were not good enough to ensure high standards. Busy practitioners found it difficult to keep up to date, not only as to the law, but also procedure, ethics and the requirements of advocacy training. In two years time all barristers will be subject to compulsory continuing education, although for the established practitioner this could be met by giving lectures and publishing articles. There was a need to attract good candidates and provide them with at least the minimum wage whilst they are training. Clients need some way of knowing if a barrister is of the correct quality, but any accreditation system must not prevent practitioners from moving from one speciality to another, nor should it stifle personality and flair.

Advocacy training: in Scotland an advocate who completes 8 weeks training is allowed to practice, whereas in New Zealand a full time three-month course, paid for by the candidate, has to be attended and exams passed. This raised questions as to whether any assessment should be made and how, when and by whom it should be carried out. Malcolm Wallis S.C. said that to hold oneself out as being able to train advocates but then not to assess them in the light of that training could itself lead to litigation. Timothy Dutton Q.C. felt that a referral bar had to be able to demonstrate a system of training and assessment. If it was possible to assess an opera singer it should be possible to assess oral and written advocacy, with witness handling being assessed during pupillage. This should not be done by pupil supervisors but by independent scrutineers.

Regulation of conduct: the public is no longer deferential to the advocate's profession, nor will it have any truck with secrecy. Referral bars must be open and accountable, and sensitive to the political environment in which it operates.

The relationship between the independent bar and the state: Lord Goldsmith declared a belief in the Bar of England and Wales, which had stood the test of time. It enabled clients to pick the best advocates/advisers in each field. It acted as a safety valve for government departments, enabling them to obtain a second and independent opinion. Independent lawyers were a key element in safeguarding our freedoms and it was vital that all persons had access to the legal services of an independent lawyer. He cautioned that such lawyers were not exclusively barristers and advocates.

Competition policy reform: in England in March 2001 the OFT published a report challenging the bar to justify their existence and that any restrictions on competition are in the public interest. The principal response is that it is in a clients best interests to be able to choose, via the cab rank rule, an advocate with the requisite skill and experience to take responsibility for the presentation of his case in court, which presentation is subject to scrutiny by an independent judge. This choice is wider because the advocate does not require the capital or staff of a partnership in order to trade, and has the added advantage that he does not have to handle the client's money. The advocate does not have the fear of another firm seducing his client away from him, and by being removed from these matters can better concentrate on the job in hand. So far such arguments have faced an attitude, which appears unbending. In Australia, where the assault on the independent bar is further down the line, chambers, clerking and robing have been abolished, so that sole practitioners practice from their homes or even the boot of their cars. They are no longer able to seek the views of others in chambers on ethical, practice and procedure matters. The next step will be to remove the disciplinary role from the bar.

This Conference was an initiative of the Barristers and Advocates Forum of the International Bar Association, and its co chairs, the Dean of Faculty and Glenn Martin S.C., and its organisers in Australia and elsewhere, are to be congratulated on a stimulating and purposive debate.

A second World Conference is to be held in South Africa at Easter 2004, when common problems will again be considered and the success of trying to implement the "Edinburgh Declaration" will be assessed.

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