Do we need barristers?

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England and Wales have a split legal profession, with a traditional distinction between solicitors and barristers. This contrasts with many other countries, including many in the common law world, which have only one type of lawyer.

England and Wales is of course not the only place to have a split profession. Some jurisdictions have split professions based on the English model, such as Northern Ireland and the Republic of Ireland. And in other countries split professions evolved separately. For example, in South Africa, whose law is a mix of English and Roman-Dutch influences, there is a split profession, but the branches are called attorneys and advocates. And some civil law systems have a split between advocates and notaries. However, many jurisdictions whose law is derived from English law have abandoned the split profession. For instance, in the islands of the Eastern Caribbean, where I practise, and many countries in the Commonwealth, there is no longer any division between solicitors and barristers. All lawyers are admitted as attorneys and perform the functions of both solicitors and barristers.

So what's the difference between a solicitor and a barrister? Traditionally, in England, solicitors had a monopoly on the "conduct of litigation". That meant taking steps like issuing proceedings in court on behalf of their client, filing documents with the court and paying court fees. Barristers were not allowed to conduct litigation, nor were they allowed to handle client money. Conversely, barristers had a monopoly on the right of audience in the higher courts – that is, the right to argue cases in court. Although solicitors were allowed to argue before the magistrates' court and the County Court, only barristers were allowed to argue before the Crown Court, the Court of Appeal, the High Court or the House of Lords.

Another tradition was that clients did not instruct barristers directly. Clients instructed solicitors, who in turn instructed barristers to argue on their behalf. The relationship of client with barrister was also different from the relationship of client with solicitor. Originally, a barrister could not be sued for professional negligence in representing their client, whereas a solicitor could.[1] And a barrister could not sue the client for unpaid fees, whereas a solicitor could.[2]

In the last few decades many of these things have changed. Solicitors can now qualify as solicitor-advocates, which gives them a right of audience in the higher courts. Many barristers are now qualified to accept instructions directly from clients through the Bar Public Access Scheme, and a small number are now qualified to conduct litigation. And barristers can now be sued for negligence[3] and can sue solicitors for their fees.[4]

However, it remains the case that the working life of a typical barrister and a typical solicitor are quite different. Most barristers are self-employed and work in chambers (a posh word for a collection of rooms in an office),

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[1] See *Rondel v Worsley* [1969] 1 AC 191

[2] A rule that had existed since 1629: see Roscoe Pound (1944) "Legal Profession in England from the End of the Middle Ages to the Nineteenth Century," 19 *Notre Dame Law Review* 315 at 319 https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=3938&context=ndlr

[3] See *Arthur JS Hall & Co v Simons* [2002] 1 AC 615

[4] See "Are you ready? The new contractual terms come in on the 31 January 2013," *Counsel Magazine,* 31 December 2012 https://www.counselmagazine.co.uk/articles/are-you-ready-the-new-contractual-terms-come-the-31-january-2013

which are not firms, but are associations of individual self-employed barristers. By contrast, most solicitors work in firms, either as employees or as partners with other solicitors. Most barristers still get the bulk of their work through instructions from solicitors, not clients directly. And most barristers still carry out a lot more courtroom advocacy than most solicitors do. But this is a generalisation, and there are exceptions. Even solicitors who aren't solicitor-advocates can carry out advocacy in the lower courts and the tribunals, and some solicitors spend a lot of their working lives carrying out advocacy.

In addition to conducting litigation, many solicitors spend a lot of time on non-litigious work. This includes tasks such as drawing up and advising on contracts, and carrying out conveyancing. But again, this is a generalisation, and there are also some barristers who spend a lot of time on non-litigious work. And to make it even more complicated, there are also employed barristers, some of whom work in-house for companies and government departments, while others work in law firms alongside solicitors.

You can see from everything I have just said that it isn't easy to summarise the difference between solicitors and barristers for a lay audience. Sometimes people use the shorthand of saying that solicitors are "generalists" and barristers are "specialists". But this is not really accurate: some solicitors have highly specialist practices and some barristers have generalist ones. And any statement we might make about the differences between the two professions is inevitably subject to exceptions. In short, the difference between solicitors and barristers is often confusing for the general public.

In this lecture, we will look at the history of the split profession, why it exists, its advantages and disadvantages, and whether we still need it in the modern world.

This lecture will focus on the professions of barrister and solicitor, but it's important to acknowledge that they are not the only legal professions. Chartered legal executives are also part of the legal profession. And there are other regulated professions that perform legal work, such as licensed conveyancers, law costs draftsmen, and regulated immigration advisors. However, the focus of this lecture is on the barrister-solicitor split and whether we still need it.

The history of the split profession

In order to understand why we have a split legal profession today, we need to dive into the history of the English legal system. This will necessarily be only a brief overview, as this is a subject on which many people have written entire books. Today we are familiar with the two traditional branches of the profession, solicitors and barristers, but at one time there were five: attorneys, solicitors, barristers, proctors and advocates.

From its inception in the thirteenth century, the legal profession in the common law courts of England was divided into two branches. The first branch was the pleaders, the forerunner of modern barristers. The leaders of this profession were called the serjeants, which came from the Latin *servientes regis ad legem,* or "servants of the King at law". Junior members of the profession were originally called "apprentices at law". They began to congregate in "Inns", which developed into the Inns of Court, the professional societies for barristers which still exist today. Their role was to speak for their client in court and argue their client's case.[5] By the 17th century, the term "barrister" came into general use in place of the older "apprentice at law".[6]

The second branch was the attorneys. "Attorney" originally means "agent", which is why we still use the term today in a different context to refer to non-lawyers, when a person is given a "power of attorney" to handle another person's affairs. Attorneys acted as agents for their client in the conduct of litigation, in contrast to barristers, who only spoke for the client in court.

Up until the middle of the 16th century, practising attorneys were allowed to join the Inns of Court, and the division between apprentices at law and attorneys was not rigid. However, the division became increasingly rigid in the 16th century, when the Inns of Court began to exclude practising attorneys and relegate them to a different set of Inns, the Inns of Chancery.[7] The Inns of Chancery have since faded into history, but you can see their legacy in some place names in the City of London, such as Barnard's Inn and Furnival's Inn.

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[5] Anton-Hermann Chroust (1960) "The Ranks of the Legal Profession in England," 11 *Case Western Reserve Law Review* 561 at 561-563 https://core.ac.uk/download/pdf/214098082.pdf
[6] Pound, op. cit. at 318
[7] Chroust, op. cit, at 577-578

By the end of the 18th century the policy of excluding practising attorneys from call to the Bar was well established.[8] So by that stage there was a clear division between the two professions. They were also regulated differently. Attorneys were officers of the court, and were regulated strictly by the court, often being harshly punished for minor breaches of the rules.[9] By contrast, barristers were principally regulated by their own professional bodies, the Inns of Court, as well as by restrictive rules of professional etiquette.[10]

Another legal profession which grew up alongside the attorneys and barristers was the solicitors. By way of background, from the late Middle Ages until the 19th century, there was a separation between the courts of common law and the courts of equity. The Court of King's Bench and the Court of Common Pleas administered common law, which tended to be rigid and rule-bound. The Court of Chancery, presided over by the Lord Chancellor, administered equity, which tended to be more flexible and less rigid. Solicitors did the same kind of work in the Court of Chancery that attorneys did in the courts of common law.[11] We can see the legacy of this divide in the structure of the High Court today, which still has a King's Bench Division and a Chancery Division.

To make it even more confusing, there were also two more legal professions: proctors and advocates. These lawyers practised in the ecclesiastical and admiralty courts. The ecclesiastical courts had jurisdiction over probate and divorce as well as church matters, while the admiralty courts had jurisdiction over shipping matters. Those courts administered civil law which was derived from Roman law, rather than English common law. Whereas common law was taught at the Inns of Court, Roman law was taught at the Universities of Oxford and Cambridge. The advocates had their own professional society, called Doctors' Commons, which was immortalised in Charles Dickens' novel David Copperfield.[12]

During the 19th century, there was a process of consolidation of the courts and legal professions. In 1857, Parliament created the Court of Probate and Court for Divorce and Matrimonial Causes, in which barristers could practise, which meant that the advocates of Doctors' Commons lost their monopoly over probate and divorce.[13] Most proctors thereafter joined the ranks of the solicitors,[14] and Doctors' Commons died out in the late 19th century.[15] Another big change came with the Judicature Act 1873, which merged the superior courts of common law and equity into a single High Court, as we know it today, which administers both common law and equity. That Act also merged the professions of attorney and solicitor into one, and provided that both should be known as solicitors.[16] That remains the case today.

Barristers

We've already touched on the history of barristers as a profession, but let's look at that in more detail.

As I said earlier, originally the leaders of the profession were the serjeants. The serjeants had their own Inn, Serjeant's Inn, and ranked higher than ordinary barristers. Judges were drawn from the ranks of serjeants. Over time, however, the serjeants declined, and after the 1873 Act no more were appointed.[17] The title survives only in the title of Common Serjeant of London, a senior judge at the Old Bailey.

Meanwhile, the offices of Attorney-General and Solicitor-General developed as the King's representatives in the courts.[18] Confusingly, in modern times these offices have almost always been held by barristers, not solicitors.[19] With the development of the modern system of cabinet government, the Attorney-General and

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[8] Ibid. at 577
[9] Ibid. at 575-576
[10] Ibid. at 576 and 598-599
[11] Ibid. at 582-586
[12] See generally Frederick Bernays Wiener (1979) "A cosey, dosey, old-fashioned, time-forgotten, sleepy-headed little family party," 39 *Louisiana Law Review* https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=4434&context=lalrev
[13] Ibid. at 1045
[14] Chroust, op. cit. at 586
[15] Wiener, op. cit. at 1045
[16] Chroust, op. cit. at 586
[17] Ibid. at 594-595
[18] Ibid. at 567-570
[19] Although Harriet Harman KC, a solicitor, was appointed Solicitor-General in 2001: see "Solicitor-General Harman goes on to become a silk," *Law Society Gazette,* 26 June 2001 https://www.lawgazette.co.uk/news/solicitor-general-harman-goes-on-to-become-a-silk/34155.article

Solicitor-General became government ministers, and they still are today.

From the reign of Elizabeth I onwards, there was a body of barristers retained by the Crown called King's Counsel. In 1603 James I appointed Francis Bacon as "one of our Counsel learned in the law". This was the origin of the modern rank of King's Counsel, or KC. Originally King's Counsel were appointed to advise the King and his law officers. However, over time, it became a title of honour that was conferred on professionally eminent or politically influential barristers. Historically, King's Counsel could not appear against the Crown except by special licence, but this rule was abolished in 1920.[20]

As most people know, we still have the title of King's Counsel today. Until relatively recently, it was the Lord Chancellor, a Cabinet minister, who appointed King's Counsel after confidential consultation with senior judges and senior barristers. The process was completely lacking in transparency, like the former judicial appointments process that I discussed in my last lecture. However, in 2005 an independent appointments panel was introduced, and the process today is much more transparent and less political.[21]

The training of barristers has changed significantly over the centuries. Historically, the Inns of Court were responsible for the training of barristers. Until the 18th century, the Universities of Oxford and Cambridge did not teach English common law; they only taught civil law, that is Roman law. Barristers received their legal training at the Inns, where they observed proceedings in court and took notes, practised in moots (mock hearings or trials on legal issues), and, by the 15th and 16th centuries, attended readings and lectures.[22] However, by the 17th century this system of legal education had decayed, and all students had to do to be called to the Bar was to eat the required number of dinners at their Inn of Court.[23]

The 19th century saw significant improvements. A Parliamentary Select Committee in 1846 harshly criticised the system of legal education. The four Inns created the Council of Legal Education in the 1850s, and in 1872 it became compulsory for an examination to be passed before Call to the Bar.[24] English law degrees were established at the Universities of Oxford, Cambridge and Durham in the 1850s, and later in the 19th century the new civic universities also began to offer law degrees.[25] In 1959 it became compulsory to complete a period of 12 months' pupillage in chambers after Call to the Bar, and from 1965 pupils were prohibited from taking cases during their first six months of practice.[26]

There were further changes in the late 20th century. The Bar first required barristers to have a university degree in 1975.[27] In 1967 the Inns of Court established the Inns of Court School of Law, with a permanent teaching staff. In 1989 the Bar Finals, the required examinations for Call to the Bar, were replaced with the Bar Vocational Course (BVC).[28] The Inns of Court School of Law had a monopoly on the BVC until 1997, when it was opened up to universities. The BVC has since been renamed the Bar Professional Training Course (BPTC).

One thing that's important to understand is that there has historically been a strong class divide between barristers on the one hand, and attorneys and solicitors on the other. Due to the expense of education at the Inns of Court, barristers were generally drawn from wealthier families and were of higher social status, while attorneys and solicitors were of lower social status.[29] The barristers themselves looked down on attorneys and solicitors. In 1614 the Benchers of the Inns of Court described attorneys and solicitors as "ministerial

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[20] Ibid. at 570-571
[21] See generally Michael Blackwell (2015) "Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015," *Modern Law Review*, 78(6), 971-1003 https://eprints.lse.ac.uk/62942/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Blackwell,%20Michael_Taking%20silk_Blackwell_Taking%20silk_2015.pdf
[22] Andrew Boon and Julian Webb (2008), "Legal education and training in England and Wales: Back to the future?" *Journal of Legal Education* 58, 79-121 at 82-83 https://letr.org.uk/references/storage/U7RC3RR2/Boon%20%26%20Webb%2C%20back%20to%20the%20future.pdf
[23] See Pound, op. cit. at 322-323
[24] Boon and Webb, op. cit. at 83-84
[25] Ibid. at 85
[26] Guy Fetherstonhaugh KC, "Pupillage: a potted history," *Counsel Magazine,* 26 May 2015 https://www.counselmagazine.co.uk/articles/pupillage-potted-history
[27] Richard Label and Philip S C Lewis, "Lawyers in Society: An Overview" (University of California Press, 1996) at 45 https://publishing.cdlib.org/ucpressebooks/view?docId=ft8g5008f6&chunk.id=d0e2688&toc.id=&brand=ucpress
[28] Deverel Capps, "Back to the drawing board?" *Counsel Magazine,* 29 February 2012 https://www.counselmagazine.co.uk/articles/back-the-drawing-board
[29] See Pound, op. cit. at 317; Chroust, op. cit. at 575

persons of an inferior nature". In 1666 they were described, even more harshly, as "immaterial persons as an inferior nature". [30]

This snobbery remained the case two centuries later. In the debate in Parliament on the County Courts Act 1846, which allowed attorneys a right of audience in the county courts, the Attorney-General said the following in opposing the Bill:

> *"…the business of the advocate in all our courts, superior or inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour. He did not believe that any one was visionary enough to imagine that it would be an advantage to dispense with the advocacy of a class of men who had enjoyed the highest education, and who were known to be influenced by the highest feelings …. if any monopoly at all were allowed to exist, it would surely be better to place it in the hands of a highly-educated class of men, rather than in those of an inferior class."*[31]

That tells you a great deal about the prevailing attitude of barristers towards attorneys and solicitors in the 19th century.

Of course, this is not to deny that some attorneys achieved wealth, fame and distinction, or that some barristers made little money. The operettas of Gilbert and Sullivan are an interesting insight into the legal profession of the 19th century, since Gilbert himself was a barrister who had been unsuccessful in the profession. In "Trial by Jury" the judge sings about his time as an impoverished young barrister who did not get sufficient work until he promised to marry the daughter of a rich attorney. He sings "I grew tired of third-class journeys and dinners of bread and water…" Conversely, in HMS Pinafore, Sir Joseph Porter sings about his own rise from office-boy to an attorney's firm, to junior clerk, to articled clerk, to partner, and ultimately to Member of Parliament and First Lord of the Admiralty.

But the structure of the profession of the Bar, where barristers had to pay their own way until they could attract sufficient work to make money, typically meant that the Bar was closed to people who were not from moneyed backgrounds. To an extent, this problem survived into modern times. When I came to the Bar, it was still the case that many pupil barristers were unpaid during their training as was I. In *Edmonds v Lawson* [2000] QB 501 an unpaid pupil barrister sued, claiming that she was a worker who was entitled to the minimum wage. She won at first instance but lost in the Court of Appeal. Nowadays chambers are required to pay their pupils, but this rule was only introduced in 2003. And it remains the case that many barristers who do primarily legal aid work suffer financial hardship in their early years of practice, and need financial help from their family. This continues to make the Bar less accessible to people from poorer backgrounds.

And although the class divide between barristers and solicitors is much less strong today, some vestiges of it remain. In my experience, the title of barrister still attracts a certain amount of social distinction and deference. And the Bar is still very much part of the establishment. It maintains much of its traditional pomp and ceremony, from wearing wigs and gowns to eating dinners at the Inns.

Another important factor in the prestige of barristers is that, traditionally, appointments to the senior judiciary – the High Court, the Court of Appeal and the Supreme Court – have been reserved for barristers. This is no longer the case, and it is now possible for solicitors to be appointed to the senior judiciary. But overwhelmingly, most senior judges still come from the Bar.

Finally, let's look at who regulates barristers. The four Inns of Court, as the professional societies for barristers, survive to the present day. Everyone who wants to be called to the Bar still has to join an Inn of Court first. In 1895 the General Council of the Bar, or Bar Council, was created as an overarching professional body for the Bar. The Inns and the Bar Council regulated barristers until 2006, when the Bar Standards Board was created as a separate regulatory body. Technically speaking, the Bar Standards Board

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[30] Chroust, op. cit., at 573

[31] Hansard Official Report, HC Deb 15 July 1851, Vol. 118, cc. 779-780; see Legal Services Institute, "The Regulation of Legal Services: Reserved Legal Activities – History and Rationale," August 2010 at 8-9 https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf

is a committee of the Bar Council, but it operates autonomously in regulating barristers.

The split profession and the fused profession

So we've now traced the history of the English split profession. We now know why we have the division between barristers and solicitors, and what each of them do on a day-to-day basis. That brings me on to the central question of the lecture. Do we need barristers? Or more precisely, do we need a split profession?

I practise both in England and Wales, which has a split profession, and in the islands of the Eastern Caribbean, which, like many parts of the Commonwealth, have a fused profession. So I am in a good position to compare and contrast the two. That said, comparing the practice of law in two jurisdictions is necessarily an imperfect exercise. The jurisdictions of the Eastern Caribbean are much smaller than England and Wales, with a much smaller Bar, and no two jurisdictions are exactly alike in the nature of their legal problems.

Let's start with some possible advantages of a split profession, and then look at the counter-arguments.

A common argument in defence of the split profession is that barristers are professional advocates. We spend our whole careers doing written and oral advocacy before the courts. Since our day-to-day workload is so different from that of solicitors, we develop a different skillset. And so, we can often add significant value to a case. In my career, for example, I have cross-examined many witnesses, often in difficult circumstances, and so I am much more comfortable with cross-examination than a lawyer who rarely does it. This is an argument often made by barristers in defence of the split profession. In 2018, for example, Andrew Walker QC, then chairman of the Bar Council, said *"The bar's focus is on advocacy and on the expertise of running trials, whereas, although there is a litigation element for solicitors, their work is primarily focused on the transactional work, which generates so much of our earnings."*[32]

Another advantage is that, when a solicitor instructs a barrister, the barrister can sometimes offer an objective and detached view of the case. The solicitor may have been working on the client's case for months or years, may have got to know the client well, and may be very invested (and rightly so) in obtaining success for the client. By contrast, the barrister, with a shorter involvement in the case and more detachment from the client, may be able to offer a more detached and impartial view. All of us lawyers know that when you are knee-deep in a case, it can sometimes be difficult to see the forest for the trees. As Sir Owen Dixon, a former Chief Justice of the High Court of Australia, said in 1952, *"The work of solicitors in the administration of justice has the greatest possible importance, but their allegiance is perhaps more to their clients who have a more permanent or at all events a longer relation with them than the transitory relations between client and counsel when the full enthusiasm and force of the advocate are attached to the individual for a short space of time."*[33]

This objectivity and independence can also be valuable in contexts where the client isn't an individual. For example, when the Crown Prosecution Service, or CPS, prosecutes cases in the Crown Court, it typically instructs barristers who are not themselves employed by the CPS. Many of these barristers have experience of defence work, as well as prosecution work. As such, they have a measure of independence from the CPS, and may be able to take a more objective approach than an institutional insider.

A third advantage is that in a particular case, the barrister may have expertise that the solicitor lacks. For instance, if you're a criminal defence solicitor and you have to deal with an immigration issue which is outside your expertise, you might instruct a specialist immigration barrister.

But there are, of course, possible answers to each of these points. In a fused profession, there's no reason why we couldn't have some lawyers who are primarily advocates and others who are primarily litigators. Indeed, we already have solicitor-advocates in England, many of whom have years of experience of courtroom advocacy under their belt and are highly skilled at it, while being solicitors. Nor is there any reason why lawyers couldn't bring on other lawyers to assist them with a case, just as solicitors presently instruct barristers. In fact, in my experience in the Eastern Caribbean, this happens all the time. An attorney with a big case might bring on a senior attorney at another firm to serve as leading counsel, just as a big case in England would have leading and junior counsel. So, none of the points I've raised is self-evidently a reason

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[32] Max Walters, "Bar chair: Separation remains for a reason," *Law Society Gazette,* 15 January 2018 https://www.lawgazette.co.uk/law/bar-chair-separation-remains-for-a-reason/5064341.article

[33] New South Wales Bar Association, "The role of barristers: Remarks by Sir Owen Dixon," 21 April 1952 https://web.archive.org/web/20140329141439/http://www.nswbar.asn.au/docs/about/what_is/dixon.php

to maintain a split profession.

Let's move on to the disadvantages of a split profession. Some of these are not necessarily disadvantages of a split profession in the abstract, but are disadvantages of the split profession as it currently functions in England and Wales.

One major disadvantage is the fact that most barristers are self-employed, and work in barristers' chambers, which are associations of self-employed barristers rather than firms. Barristers are not salaried, and are reliant on fees. This creates a range of problems. Firstly, as I highlighted earlier, junior barristers who do primarily legal aid work often suffer financial hardship in their early years of practice. This is because legal aid fees tend to take a long time to come through, and in some areas, such as crime, the fees are insultingly low. While barristers can earn better fees from winning civil claims or judicial review claims and securing *inter partes* (between the parties) costs, these too often take years to come through, especially if their costs are disputed. So many junior barristers struggle financially for two or three years after completing pupillage, and many need help from family. This is a huge deterrent to working-class people coming to the Bar. It also tends to push aspiring barristers into better-paid areas of legal work, such as commercial work.

Another problem associated with the self-employment system is fee inequality. This is a controversial subject and I will only touch on it briefly here, but there can often be significant inequalities in work and fees between different members of the same chambers, and between different chambers. Sometimes these inequalities replicate broader inequalities in society as to race, gender, class and disability. And a third problem is that as barristers aren't employees, we have no right to holiday pay, sick pay, an employer's pension scheme, paid parental leave, or any of the other benefits associated with being an employee. Many chambers do have insurance policies and pension schemes for barristers, but these are voluntary, and not all barristers can afford them. In short, the self-employed Bar can often be a "sink or swim" system where it is difficult for marginalised people to make a living.

This is admittedly mitigated by the strong solidarity and collegiality that often exists between barristers. Many sources of help exist, including one's own chambers, the Inns of Court and the Bar Council. There are some great things about the Bar, such as the Bar Mutual Indemnity Fund (BMIF), which provides professional indemnity insurance to all barristers, and is far better than trying to find insurance on the private market. So I'm certainly not suggesting that the Bar has an "everyone for themselves" culture. It does not. Nor am I trying to discourage anyone from coming to the Bar: in fact I've spent a great deal of my working life trying to encourage people of colour and working-class people to come to the Bar. However, it remains the case that the structure of the self-employed Bar naturally creates inequality and hardship. That isn't the fault of individual barristers or their chambers, but of the system we inherited.

The problems with the self-employment system aren't limited to fees. Administering a barristers' chambers presents a unique set of challenges for chambers management and staff, because barristers aren't partners in a firm, but self-employed individuals who simply share the same place of work. Members of chambers can and sometimes do appear against one another in the same case.

Aside from the self-employment system, another major problem with the split profession is the apparently arbitrary lines between what a solicitor can do and what a barrister can do. Barristers, unless we have been specially authorised to do so, cannot conduct litigation. That means we commit a criminal offence if, for example, we issue proceedings in court on behalf of a client. The boundaries of the conduct of litigation are blurred, however, and barristers are allowed to file certain things with the court, such as bundles of authorities and skeleton arguments.

The rules can be especially complex and difficult when conducting Public Access work, where a barrister is instructed directly by a client. In such a case the client has to conduct the litigation themselves, which means they have to file documents with the court themselves. There are also limits to what Public Access barristers are permitted to do in gathering evidence. This often creates difficulties for Public Access barristers, and it is very easy unintentionally to breach the rules. It is also difficult for clients to understand the differences between what a barrister can do and what a solicitor can do. And these problems wouldn't necessarily be alleviated by more barristers becoming authorised to conduct litigation. Since most barristers are self-employed and don't work in firms, many barristers don't have the administrative support systems in place that would be necessary to conduct litigation efficiently.

The restrictions on the other side of the coin are just as arbitrary. Barristers and solicitor-advocates have a monopoly on rights of audience in the Crown Court, High Court, Court of Appeal and Supreme Court, but not in the magistrates' court or the County Court. We've already looked at the historical origins of this distinction,

but it doesn't make a great deal of sense in the modern world. After all, the same skills are required to conduct effective advocacy in an inferior court and in a superior court. If solicitors can be trusted to carry out advocacy in some courts, why not all of them? It's no answer to say that the magistrates' court and the County Court tend to deal with less serious cases. The County Court now routinely deals with a lot of high-value civil cases, as well as high-stakes litigation such as possession claims, where a person is at risk of being evicted from their home. The magistrates' court includes the Youth Court, where children can be tried for relatively serious offences. And solicitors can also carry out advocacy in tribunals, and some tribunal hearings are of immense importance to the individual. For instance, a tribunal hearing in an asylum case is literally a matter of life and death.

That said, as I've already said, advocacy is a specialist skill, and it is true that barristers and solicitor-advocates tend to have much greater experience of advocacy than does the average solicitor. But that doesn't justify drawing an arbitrary line between superior and inferior courts, which exists only for historical reasons.

As an interesting aside, despite the Eastern Caribbean having a fused profession, the historical divide between solicitors and barristers is still of some importance there. In England, the rule that barristers were immune from actions in negligence has been abolished by case law.[34] But in many jurisdictions of the Commonwealth Caribbean, it still exists.[35] This gives rise to significant ambiguity about which types of legal work are immune from negligence claims and which are not, since it is only the work of an advocate that attracts the immunity, not everything done by a lawyer.[36] I should make clear that this is not an argument against a fused profession. Rather, it's an argument against maintaining this archaic immunity, which has been consigned to history in England, and should be equally consigned to history in the Commonwealth Caribbean.

Conclusion

My overall view, which will no doubt be controversial among my colleagues at the Bar, is that there is in principle no sensible reason for a split profession. The separation between solicitors and barristers exists mainly for historical reasons. The lines that are drawn between the two professions don't make a great deal of sense in the modern world. And the structure of the Bar, where most barristers are self-employed, creates a lot of avoidable difficulties. It is true that barristers often bring significant benefits to our cases, due to our specialist skill in advocacy and our independence. Similarly, it is true that solicitors often have skills and experience that most barristers do not. But this does not necessarily require a rigid separation between the two professions, nor does it justify the current arbitrary limits on what each can do.

That said, I'm not necessarily calling for an immediate change. It would be very difficult and disruptive to fuse the English legal professions overnight. And we also need to recognise that the structure of the legal profession does not exist in a political vacuum. We are having this conversation against the backdrop of the systematic underfunding of legal aid over the past two decades. Many of the financial pressures on the self-employed Bar, and indeed the financial pressures on solicitors' firms, are caused by the current parlous state of legal aid. The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which radically reduced the scope of legal aid, was a huge blow to the legal profession and to the integrity of the legal system, from which it has never recovered. Whether we have a split profession or a fused one, it is essential that it be funded properly.

The legal distinctions between what solicitors and barristers may do have already been significantly weakened in recent decades. That process should continue. But this should happen alongside an immediate increase in legal aid rates, the repeal of the 2012 Act and a restoration of the full scope of legal aid, and a commitment to fund the administration of justice properly.

[34] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615
[35] See *Janin Caribbean Construction Ltd v Wilkinson* [2016] UKPC 26
[36] See *Saif Ali v Sydney Mitchell & Co (A Firm)* [1980] AC 198