the view from below

On any given day, it should be possible to find a lay participant in a courtroom looking upwards towards the judge. Whether or not this is the intended consequence, the positioning of key players in the ritual intimidates in an environment that already provides a foreign experience. Spurred on by the media, public perception of lawyers – the view from below – is affected by interactions with lawyers through the adversary system, disciplinary proceedings and regulatory functions. It is vital to understand to improve the service that the public receives from lawyers.

Firstly, what do lawyers want the public to perceive? As Pue notes, the legal profession regards its independence as arising from the need to safeguard the rights of citizens. This entails a few problems. Firstly, it is undemocratic to demand that the discipline of members rests entirely with the group itself, considering its public service function; any claims that the profession can adequately handle this function by itself are nullified by, at least in the 1800s, the low rate of debarments. Secondly, the independence presupposes influence and power over society – is this necessary? What differentiates lawyers from plumbers? After all, lawyers often perform what can be characterised as professional form filling, at least for the junior members. The difference could lie in the fact that lawyers frequent prominent sectors of the community. If anything, it is unlikely that this power is inherent, for the law, as a reflection of morality, is necessarily a reflection of *someone's* morality, which may not necessarily according with your own. Thirdly, as part of resource theory (Ross), the profession insists that only is trained members are able to participate in legal services. The possibly all-too convenient excuse of the difficulty of the subject matter lends itself to monopolistic practices that are usually controlled as examples of the worst of laissez faire excesses. Fortunately, as demonstrated by the changes to conveyancing in the 1990s, attacking the sacred cow has not caused the sky to collapse. Market forces, where introduced, lead a positive impact on customer service, as solicitors now seek to improve the value they provide to their clients.

Could the status quo of a mixture of self-regulation and government legislation be improved by the introduction of the co-regulatory model proposed by Braithwaite? Firstly, not that if the existing current frameworks were dismantled, for sure there would be inertia once again in returning to the same level of regulation. The benefits of co-regulation, namely a lessening of

government supervision, do not translate to the legal profession, as law firms are more numerous and homogeneous compared with coalmines. Partners are more likely to be at the coalface compared to CEOs of other organisations. Even if co-regulation were to be applied, the maintenance of laypersons on the relevant committees should remain a priority to ensure a consumer-centred culture; the larger firms could engage in best practices to raise standards via market-oriented solutions in this case. Even some firm liberals as Chris Patten, as he noted in *East and West*, recognise that government should intervene in essential frameworks that uphold the economy.

The nature of the adversary system, an often popularly portrayed process, influences the perception of the legal profession. Firstly, the idea of an adversary system invokes images of public contest, in which the parties aim to be as aggressive as possible, contrasting with the conception of the law as peaceful. Secondly, the system assumes that a neutral judge will decide between two "ideal legal persons" (Naffine), both equally intelligent and conversant in the law. Without an absolute right to counsel at public expense (*Dietrich*), there is no guarantee that a participant will have his or her case presented in the best possible light. I can imagine the furore expressed towards lawyers if someone were forced to settle, or to plea bargain, in order to end the case or to qualify for limited legal aid funding. Even with representation, the lawyer-client relationship may be soured if clients are treated as mere pawns in a game between lawyers; lawyers are obliged to advance their clients' interests (e.g. BR17), but the unequal power between a lawyer and an indigent client may result in lawyer control over the client. The conjunction of these problems is that the outcome of a case is predicated on a client's position in society, education and wealth; no just legal system should consider these distinctions. However, is there a viable alternative to the adversary system? Luban's optimism at the current system is well founded. Given the woeful resources currently allocated to legal aid, one can imagine the plethora of problems that would undermine an inquisitorial system; it just shifts the burden and the problem elsewhere.

Lay participants might worry that overzealous lawyers corrupt the ideals of justice by being "hired guns" that will do anything for their clients. Hence, the lawyers' paramount duty to the court – a public institution – is reassuring. The clear delineation of what an advocate can and cannot do (e.g. frankness in court in BR21) creates confidence in the morality of the system – confidence for the public and confidence for the legal practitioners who know where to stand. The Rules and the

legislation also act as public relations tools to justify the profession's monopoly. BR17A is also useful to negate the fear that barristers engage in advocacy regardless of the client's actual needs. Some rules, such as BR19, may be taken negatively by clients, considering that the barrister has been hired for some price, although as noted by Le Brun, clients consider process over outcome more important. It is interesting to note that government lawyers and prosecutors are held to have higher responsibilities as compared to other lawyers, for example, through the DPP's Prosecutorial Guidelines 18 and 26, and *Apostilides*, while not reducing their adversarial zeal. This is only fair, as it recognises that the crown has superior resources and investigative abilities over the individual, and the Crown is never an unrepresented litigant. It sets a good example by which other lawyers can observe the spirit of the law in action in addition to the letter of the law. All of this provides a useful foundation for relations with the public, because many non-lawyers encounter the legal system through criminal trials, and it is then that they are most vulnerable.

Although it is ironic that changes to disciplinary procedures would help foster public perception of the legal profession – because there should be no need to seek such recourse – inevitably, things will go wrong. The trend has been towards making it easier and less expensive to make a complaint against a lawyer, especially for consumer-style complaints – for example, through the establishment of the Legal Services Commission, and procedures that allow for the possibility of mediation and summary dismissal. In fact, the involvement of the government in discipline helps to negate arguments that the profession, being as elite as it is, should not be allowed to pass judgment on itself; it appears more open and accountable in this way, thus preserving legitimacy. Furthermore, there are now lay people on committees of the professional societies, possibly in recognition that there are basic values respected by people in the community, judge or otherwise; the legal profession does not exist in a vacuum. One interesting note about discipline is that the outcome of the complaints procedure is nominally designed to protect the public (e.g. in *Himmelhoch*), even though they may be punitive in nature. I can see that this could be a public relations exercise, by framing the action against the errant lawyer in the positive language of assistance, instead of admitting that a member of the legal profession has erred in this instance.

Another common way in which members of the public interact with lawyers is the client interview, the solicitor's office being a primary means of access to legal knowledge. It is surprising

that given the service-oriented nature of legal work, and the need to deal directly with clients that we read of practising lawyers who communicate poorly or cannot empathise with their clients. I am not suggesting that the lawyer identify wholly with the client's cause, as there needs to be adequate detachment. Of course, it is fallacious to suggest that only one mode of communication in the lawyer-client relationship is correct, as to accept a common paradigm risks "routines of denial" (Duncanson). It would be natural to expect lawyers and clients to have different experiences due to differences in socioeconomic background. However, it has been suggested, for example, that women should be the first point of contact for women clients involved in divorce or domestic violence cases, due to the ability to understand what sensitivities may exist. Overall, ensuring gender equality in the legal profession will reduce overtones of parochialism in the legal profession, even if there is no one female voice to which the cause can be attached (Rhode). Perhaps minorities, racial or otherwise, will be more satisfied with the legal process if there was a greater representation, or at least understanding, of them among lawyers.

In Sarat & Felstiner's study, the lawyer jeopardises the clean image of the legal profession in order to control the client. However, why do lawyers feel the need to control clients? Perhaps the lawyer too feels threatened by the presence of the client as opposed to the client being threatened by the presence of the lawyer due to their differences. Perhaps the traditional model of the interview comes from the heritage of being the protectors of the public, not as assistants to the public in the protection of itself. Finally, it may simply be economic necessity; the resource limitations, especially in legal aid, and the desire to rise up the ranks of law firms, make it tempting to control clients to ensure mechanical efficiency in the processing of their cases.

It is easier to appreciate the disillusionment of the public towards the legal profession once you consider the common difficulties that are experienced. Although the legal profession is surely the public's profession more than ever before, I feel that barriers such as poor communication and divergent attitudes must still be rectified in order to ensure that clients' needs are met.

the lawyer in the corporate world

In *The Corporation*, the corporation was characterised as a psychopath, a person without a soul and the ability to feel guilty. In this age of increasing commercialism, it is valid to question the role of the lawyer in this context: the firms and companies that he or she will work in, and the opportunities that exist in those roles.

Spangler noted in particular two distinct firms: the patriarchal and the collegiate firm. This distinction echoes the distinction between the traditional and participatory models of client interviewing. Do these differences share the same root in a model of professional interaction? It is quite conceivable that a patriarch of a law firm who seeks to enforce, for instance, the wearing of specific attire by his staff, would also seek to micromanage the client; by comparison, the haphazard, informal approach of collegiate law firms humanises the experiences along with the participatory interviewing model. The collegiate model is more appealing than the straightjacket of the patriarchal firm because it appears to allow for professional growth in an organic fashion, where you are able to contribute to your working environment, such as through committees. The collegiate model in the end more closely reflects a global mindset of cooperation instead of homogeneity. The collegiate law firm might also be more receptive of complaints, which is important for both the public and junior employees.

Alongside the development of different styles of leadership has seen the rise of the mega law firm. These firms are the desire of many students, attracted by the look of wealth and the spectacular city views to boot. However, how has the mega law firm reached this status? Presumably, it is through much hard work. This is not to say that working at smaller firms is easier, but “grinders” are forced to perform a large amount of work for what may be an illusory benefit. The incentive to work hard, apart from current remuneration, is the possibility of rising through the ranks to the lofty position of partner. The difficulty now is the limited number of those positions; the threat of an endless array of mechanical work cannot be stimulating. The comparison with the intellectual challenge of university must invoke outbursts of pain (assuming that they were fortunate enough to participate in Goldsmith’s transformative model of law school learning, as opposed to mindless replication). Especially with enforced specialisation (generalists are discouraged), a dehumanising Ford production line comes to mind. Mental health is therefore one of immediate

concern, highlighted by recent conferences that address this issue; it parallels the experience of the medical profession, where young doctors are said to be subjected to excessive amounts of overtime, leading to depression. The moral of the story is that younger employees perhaps need to be more aware of their environment, and be more assertive in demanding a balanced lifestyle, especially women with children, despite the pressures on profits this will undeniably create. Fortunately, shareholder apathy in the context of law firms is likely to be lessened by the fact that profits are shared amongst partners who actually work at the firm.

A driving force behind the pressure to specialise is the phenomenon of the in-house lawyer, as corporations may choose to refer only specialised requests to external firms for reasons of cost. There are several types of in-house counsel as identified by Nelson & Nielson, and the roles of cops and entrepreneurs are most instructive because of the conflict and complement respectively of their roles as lawyers and the commercial culture. The fact that the in-house counsel is required to stress the value to the organisation that they provide by ensuring that the company meets its legal obligations is a sad reflection on the limitations of the corporation as a responsible citizen – it will only feel compelled to follow regulations where the cost of non-compliance exceeds the cost of compliance. In this role, in-house counsels face dilemmas largely unknown to other lawyers, namely the conflict caused by synergising accurate and objective legal advice and the employer's objectives. There is guidance in the professional rules; as explicitly stated in SR4, the duty to the court remains paramount. This is problematical in that in-house counsel may fulfil other managerial functions, in which case it is impossible to compartmentalise the two functions completely. The in-house lawyer hence needs to be aware of the lines that they must draw in the sand, because no one else will draw these lines for them. Because there exist legal implications such as legal professional privilege for activities performed as a lawyer, but not otherwise, it is doubly important for in-house lawyers to be diligent to record keeping and a recognition of which hat they are currently wearing.

Entrepreneurial lawyers, on the other hand, are far more intimate with core business functions, and are primarily motivated by financial returns. This raises the question of the extent to which the law will tolerate lawyers profiting from the law over and above their remuneration for services. Does the law exist to be used in such a way? For example, lawyers who abuse court processes by intentionally litigating to cause delay are not tolerated (*Flower & Hart*). Perhaps the

difference here is that entrepreneurial lawyers do not offend some common social order; activities such as acquisitions are acceptable. Entrepreneurial lawyers are seen as team players, and they are hence more accepted by the rest of the company for what they do. However, this closer integration, while fitting in with today's managerial philosophies, makes it harder to keep the roles separate. Even if the complications against in-house counsel were eliminated, there are strong arguments against in-house lawyers appearing on behalf of their employers in court, even if it is still permissible. For example, a judge is able to disqualify a lawyer from appearing in court if the lawyer likely to be appearing as a witness, which in the case of an employee lawyer, is not out of the question.

In a sense, in-house lawyers also act as cause lawyers. Cause lawyers engage the use of litigation to achieve changes in society – the legislature, executive or judiciary. It is a particularly different approach to lawyering compared with the lawyer in the corporate outfit. It seeks to redress any perceived imbalance in power, particularly for minority groups, and lawyers, having the requisite knowledge, have some kind of moral obligation to change society. However, some changes may be questionable under cause lawyering. The example cited by Abel of redressing electoral inconsistencies is actually quite unacceptable, because it subverts the electoral process and lawyers form only a small fraction of society; lawyers should first obtain a mandate. Cause lawyering for businesses – that is, pushing the grey boundaries in new test cases for the benefit of the organisation – is even more questionable, as there is only claim to assist the organisation. Although it may be legitimate, the lawyers involved must consider the other stakeholders in the equation; the corporation, while not having a soul of its own, does not exist in a vacuum and destroying the social fabric is counterproductive. On an individual level, however, cause lawyering appears to be a valuable use of your skills to further society. It is a choice that lawyers have to decide – it requires a lot of ordinary work to fund cause lawyering, and the response may be less than positive.

Ultimately, the choice of workplace is a personal one, and it is difficult to say what I prefer without having experienced it myself. Regardless, I can see that it is important to have something to hold onto, something that inspires you to continue in your job as a lawyer. All the roles identified contribute in some way to society, or to an organisation, but radical cause lawyering provides many opportunities to expand.