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Notaries in England and Wales: modernising a profession frozen in time

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The notary in this country is a very strange and unknown animal. And most of my partners and other solicitors in the firm don't know what a notary is and do not understand the need for notaries. And most of the people who come to me for work don't understand why they need a notary ... I think it's an anachronism in this country. But I love anachronisms.
(Solicitor notary, Bristol, 1995)

Introduction

In civil law jurisdictions, notaries represent one of the classical legal professions, alongside judges, prosecutors and practising lawyers. Although there is no internationally accepted definition and their functions vary from country to country, they all are, broadly speaking, public officers whose involvement is a statutory requirement in the context of a range of important legal transactions, such as company, intellectual property, inheritance and real estate matters. Few legal transactions recorded in public registries can be effected without a notary's intervention (Urquhart, 1990). On the other hand, in most civil law countries, notaries (the so-called 'Latin' notaries) are also lawyers engaged in private practice in the context of non-contentious civil law matters. Notaries tend to be high earners and male.

In contrast, notaries in common law countries represent a marginal profession in every respect (Basedow, 1991). In England, few people, even lawyers and parliamentarians, have any idea what a notary is or does. The profession, which originated in ancient Rome, has had an unbroken tradition in the English legal system from the late Middle Ages. However, over the last 150 years it has only just survived in the backwaters of legal history—neglected, indeed, forgotten by the government and ignored by the bulk of the legal fraternity. It was only in the 1990s, in the context of sweeping changes affecting all legal professions, that the notarial

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profession was faced with the challenge to modernise itself. It is still an open question as to whether this modernisation process will result in strengthening or in crushing the profession.

This paper traces the inner tensions and outer pressures that have affected the profession in England and Wales, and assesses its prospects for the future. As the body of literature available on the subject is extremely slim as well as being mainly concerned with the past (Brooks *et al.*, 1991; Cheney, 1972; Dunford, 1999; Ready, 1992), most of the evidence regarding present and future developments has been drawn from three sources: first, a survey conducted in 1994 with questionnaires sent to 52 notaries in England;¹ secondly, various documents kindly provided by members of the profession, most particularly the Secretary of the Notaries' Society; and thirdly, a dozen semi-structured interviews with notaries conducted early in 1995 and, for the most part, in the spring of 2000, the latter including interviews with three key actors in recent developments. In order to get a more balanced picture, a final interview with a spokesman of the Law Society was added for good measure.

Frozen in Time

Up until the early nineteenth century, various groups of legal professionals were concerned with the administration of justice and the law in England and Wales. Most of these then underwent a process of rationalisation and modernisation, a milestone being reached in 1825 with the setting up of the Incorporated Law Society as the professional body for solicitors. The 1875 Judicature Act provided for a merger of the associated professions of proctors, solicitors and attorneys under the name of 'solicitors' (Brooks *et al.*, 1991).

There then remained only two groups of legal practitioners in England and Wales with a status independent from the Law Society: barristers and notaries. Efforts on the part of the Law Society to absorb these, too, failed (Brooks *et al.*, 1991). Both groups were able to argue successfully that their members' privileges were in the public interest and ought to be preserved. However, there was a crucial difference between their respective positions. While barristers had always been the solicitors' traditional ideal of an honourable profession (Burrage, 1996), wielded considerable political clout and could point to a nation-wide public in need of their services, notaries' public profile was low, their function within the common law system marginal and their indispensability as a separate profession anything but obvious to the government or anyone else.

Why should that be so, given the key function of notarial certification and authentication in civil law systems? The reasons are simple but fundamental ones. They are rooted in profound differences between civil and common law systems with respect to the status accorded to documents certified by a notary and hence the status accorded to the notarial profession itself. First, while in civil law jurisdictions notarial acts or instruments (whether they relate to a public or to a private matter) count as public documents and are automatically granted authenticity and probative force of the statements recorded, this is not the case in common law

jurisdictions, where the category of ‘public act’ does not include notarial acts, these latter mainly concerning purely private matters and not being available for public inspection. Secondly, whereas in civil law systems notarial acts carry executory force, i.e. they are judicially enforceable as judgements, common law systems rely entirely on oral evidence in court (principle of orality) and would see notarial (written) evidence as counteracting the rule against hearsay. Thirdly, in keeping with the difference in the status of notarial acts, in civil law systems the profession itself is seen as indispensable and its members are treated as officers of the state, while having no recognisable function within a common law context.

For many centuries, civil law had its place in England alongside the common law. There were courts which did, indeed, apply Roman law, most particularly courts of the admiralty and ecclesiastical courts, where English notaries had an important function to perform. However, notaries lost this *raison d’être* in the context of English domestic law when, in the nineteenth century, the entire business of courts of the admiralty and the bulk of the business of ecclesiastical courts was transferred to common law courts (Ready, 1992). From then on, notaries in England and Wales were left with a highly marginal function, as truly notarial certification was only needed for the purpose of satisfying the requirements of foreign legal systems where the notariat had its central place.

Why, then, should notaries have survived at all as a separate profession? The answer is not without its irony. For what saved the notarial profession in the nineteenth century from being swallowed up by the Incorporated Law Society and what has continued to save it ever since from the acquisitive grasp of that organisation has not been a strong united notarial front but a deep internal division, i.e. a division between a tiny minority of notaries working in London (some 25–30 of them), the so-called ‘scrivener notaries’ or ‘scriveners’, and the large and still growing majority (today some 1300) of public notaries working everywhere else in the country. It was the former, not the latter, who have always commanded a sufficiently strong parliamentary lobby to keep at bay any hostile take-over intentions on the part of the Law Society (Brooks *et al.*, 1991).

This was most notably the case in 1884, the year of the Law Society’s latest outright attack. Following a debate in the House of Lords, a former Lord Chancellor, Lord Cairns, put forward two arguments in favour of continuing notarial independence (Brooks *et al.*, 1991). He argued that, first, the merger proposed by the Incorporated Law Society was intended to benefit mainly the Society itself; and that, secondly, merchants and bankers of the City of London who relied on the experience and special service of London notaries would not take kindly to these notaries being submerged under an influx of solicitors from all over the country. Taking Lord Cairns’s advice, the Lords rejected the Bill by 92 votes to 30, and the notariat in England and Wales had its independence confirmed once again.

The differences between London scrivener notaries and notaries outside London, often referred to as ‘provincial notaries’, are profound and longstanding. Provincial notaries are almost always primarily solicitors and, as such, subject to the authority of the Incorporated Law Society in most of what they do. In their notarial work, which is kept strictly separate from their main occupation as solicitors, they

are subject to the jurisdiction of the Archbishop of Canterbury, whose disciplinary powers are delegated to the so-called 'Court of the Faculties', headed by the Master of the Faculties. The volume of their notarial duties and fees is marginal (one interviewee estimated the average annual notarial income in 1999–2000 to be around £4000). These derive mainly from shipping protests, protests of bills of exchange and general witnessing of signatures and documents for use abroad. Often no particular legal expertise is required. Mastery of a foreign language and familiarity with a foreign legal culture are rare amongst provincial notaries and are seldom felt to be a prerequisite of any real significance.

By comparison, notaries operating in London, so-called 'scrivener notaries', are a very different breed. They are full-time notaries in the sense that they are not members of the Law Society, although a lot of the work they do could also be done by solicitors and they may even be qualified solicitors. Although protected from competition from provincial notaries, scriveners have long been accustomed to operate in a climate of (moderate) competition amongst each other. Generally speaking, they are and always have been commercially astute. Their main clients have traditionally been London merchants and bankers as well as the latter's clients or partners abroad, especially in the shipping industry. The core of their business is associated with financial dealings, i.e. managing and investing clients' funds, arranging loans and preparing the necessary documents. The uniqueness of their expertise in the context of international commerce, which gives them an edge over potential competitors from other professions, such as solicitors and bankers, is crucially related to two (interlinked) strengths: their longstanding and well protected networks on the one hand; and their ability to operate in foreign languages, commercial systems and legal cultures on the other. To quote from an interview with a key player:

Q: So the challenge to you is not so much to solve a legal issue and find the best solution? It's rather more knowing things about foreign countries and systems?

A: Yes, I think that's right. There are legal issues which we are able to solve from time to time, but it's more the strands and bringing them together. Companies are our main source of income after all. And large companies, bless them, have a lot of overseas transactions: they appoint managers and they dismiss managers, they file trade marks and they change trade marks; a company is taken over by another one, and they reregister their trade marks. And we have to do all the little procedural background work in those sort of transactions. Not the glamorous writing of the contract work, but the nuts-and-bolts registration. And accuracy is very important. (Scrivener notary, 1995)

Scrivener notaries' relationship with the Law Society is one of mutual tolerance and, indeed, respect. Solicitors value scriveners' international expertise and do not resent the separate and privileged status of what, after all, is a very small number of people able to do things they themselves could not do. Scrivener notaries, in turn, are only too aware that one-third of their clients are solicitors, and that another third come

to them on the recommendation of solicitors. Both sides therefore accept each other in a spirit of enlightened self-interest.

Organisationally, scriveners are members of a London guild, the Worshipful Company of Scrivener Notaries. Founded in 1373, it also includes members from many other professions. The number of scriveners has remained stable over the centuries at around 25–30, with certain family names reappearing amongst them with a fair degree of frequency. Admission and training practices are tightly controlled by the Company, and much is made of the very special nature of their work, which, however, they have taken care not to have spelt out in any publicly accessible document. There has always been a general assumption, certainly on their own part, but also on the part of the Notaries' Society, the Law Society and Latin notariats abroad, that their professional status is superior to that of provincial notaries.

For a number of centuries, indeed until November 1999, members of the Scriveners' Company were shielded from competition from other notaries by a geographically defined statutory monopoly of notarial work in the City of London. While, by 1760, they had lost their monopoly of drawing deeds of conveyance in the City (Ready, 1992), and by 1804 the right to convey real property was restricted to members of the legal profession (including solicitor notaries), scrivener notaries had their London notarial monopoly confirmed in Public Notaries Acts of 1801, 1833 and 1843 as well as in the Courts and Legal Services Act of 1990—all this in stark contrast to the cavalier treatment meted out by Parliament to notaries in the provinces.

Winds of Change Starting to Blow

Modernisation from within

In spite of pronounced differences in the work and status of scrivener notaries and provincial notaries, they have traditionally shared one key feature, a common culture of benevolent patriarchy, the key to which was the obligatory apprenticeship system—“one of the best closed shops in the world . . . a jealously guarded privilege, passed on from partner to partner”, as a solicitor notary phrased it during an interview (1995). In particular, notaries outside London, who had little or no actual contact with colleagues, felt part of an exclusive gentlemen's club, shrouded in secrecy and mystique. However insignificant their financial rewards, however ignored or misunderstood their role within society, they enjoyed a diffuse sense of being part of an elite, entrusted with the power to apply the notarial seal to documents that would have official status in distant countries. “I suppose it is the mysticism, isn't it? You can put ‘notary public’ on your notepaper. Nobody knows what a notary public is, but it must be terribly important”, the same solicitor notary explained to the author.

This sense of status and exclusivity was brought to an abrupt end in the 1990s. While the solicitors' profession, at that stage, was rapidly completing a process of transformation from, in Burrage's (1996) words, a “gentleman's profession” of white middle-class males to a “public profession”, a process that had started in the 1960s,

notaries were, for the first time in over a century and a half of cosy immobility, confronted with the challenge of reconsidering the profession's role and position in the context of a globalised legal market.

It began with the passing of the Courts and Legal Services Act in 1990. This item of legislation still left the elite hard core of the profession, the scriveners in London, untouched, but brought change for the notariat in the rest of the country. First, a previously existing category of notaries public working outside London who were not also solicitors (so-called 'district notaries') was abolished. This reduced the level of fragmentation of the profession as well as providing a stepping-stone for a process of modernisation and upgrading of notarial training. The statutory requirement of a period of apprenticeship prior to appointment as a notary public was also abolished, to be replaced by an alternative system of formal training qualifications which the Master of the Faculties was asked to devise. New qualification regulations were introduced in 1991 (the Public Notaries (Qualification) Rules). From then on, access to the profession has been open to anyone able to demonstrate appropriate expertise in examinations of the Faculty office, thus largely replacing a prerequisite of social capital by one of academic capital. What has remained in place is a requirement for the aspiring notary to find an experienced colleague willing to act as 'mentor' for the early years of her or his professional practice.

One impact of this training reform has been a loss of sense of exclusivity on the part of members of the profession. Not surprisingly, since 1991 the percentage of women qualifying as notaries has steadily risen, albeit slowly. A survey conducted in 1994 amongst all 52 women notaries outside London (there were then about 1050 male notaries) showed that roughly half of them had gained access to the profession within the 3 years of existence of this new, more open and transparent qualification route. The other side of the coin is likely to be that the need to sit an examination as well as the loss of mystique and magic previously associated with the profession will reduce the general level of motivation amongst solicitors (both male and female) to acquire the additional qualification.

The scriveners in London remained untouched by these developments. Their own revised Scriveners (Qualification) Rules of 1991 continued to require not merely the passing of a broadly based and much more demanding examination (including mastery of at least one foreign language and familiarity with its legal culture) but also membership of the Scriveners' Company and a 5-year apprenticeship, thus protecting their exclusivity and sense of identity. Nor was there any obvious cause for worry regarding the future. Their monopoly had been confirmed, their small but reasonably lucrative market remained secure and their potential major competitors, i.e. solicitors and provincial notaries, seemed to be happy to accept them as a quaint anachronism within a rapidly liberalising wider legal market.

European and global pressures

The impact of European harmonisation and economic globalisation on European notaries generally has been much less pronounced than that on other branches of the legal profession. There is a simple reason for this. In most civil law jurisdictions

notaries are appointed by governments on the basis of need and are described as public officers whose duty it is to make public instruments. This partial delegation of the authority of the state as an element inherent in the exercise of the profession of notary was seen by the European Parliament in 1994 as a justification for the ruling that article 55 of the Treaty of Rome on the freedom of establishment and freedom to provide services did not apply to notaries. Notaries' role as public officers is also used in most European countries to uphold a nationality requirement for members of the profession. For this reason, Latin notaries have been operating in markets largely sheltered from national and, most certainly, from international competition. Their willingness even to consider greater flexibility has varied. German notaries in particular have traditionally adopted a strongly defensive stance (Basedow, 1991), although there are now signs of their previously united front on this issue beginning to crumble (Heinz, 2000).

By comparison, English notaries working within a common law context have had good reason to feel vulnerable to competitive pressures. They lack any state-delegated authority, their numbers are not subject to a *numerus clausus*, they cannot shelter behind a nationality requirement, and there exist very few areas of legal work that specifically require their particular notarial expertise and could not be, indeed often are, also covered by members of other professions. As if this was not enough cause for worry, the marginal status of English notaries within the common law system is beginning to represent a serious threat even in the context of international business. It is this threat that has brought about a flurry of activity amongst them.

Article 50 of the Brussels Convention of 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters states that in cross-national dealings notarial documents retain the status they have in their country of origin. For English notaries this means that a notarial document drawn up and registered in a civil law country is accorded probative force in the UK; however, conversely, a notarial document drawn up in the UK cannot claim the status of a public document in a civil law country, because it does not carry that status in its country of origin. Thus, Spanish courts have been inclined to reject acts certified by English notaries on the grounds that they would not be granted authenticity status in their country of issue. This poses serious problems to English notaries, as it makes their work redundant in an area meant to define their distinctiveness. For this reason, they have for some years and increasingly vociferously campaigned in favour of a general enhancement of the status of notarial acts in England and Wales.

Growing awareness of their own tenuous position has been particularly evident amongst provincial notaries in England and Wales. In the face of increasing mobility (both physical and commercial) of members of competing professions, they (or rather their political leaders) have been forced to give serious thought to the future shape of the profession. Two perceived weaknesses have dominated this debate: on the one hand, the fractured nature of the profession, resulting in a lack of solidarity amongst what, in any case, is a very small membership; and, on the other hand, a persistent lack of credibility of both notarial training and professional standards in the eyes of their colleagues in the Latin notariat.

The need for professional solidarity and allies has rightly been identified as a

major prerequisite for any move forward: the work of the country's 1300 or so provincial notaries is by definition marked by a high degree of geographical isolation from each other. In any case, the vast majority amongst them tend to identify primarily with their role as solicitors, and there is no one statutory body to regulate their work as notaries. While the Faculty Office has formal responsibility for the profession, the Notaries' Society (the voluntary membership body for provincial notaries), due to the initiative of a small number of individuals, has taken the lead in addressing the need to create a sense of identity and solidarity amongst its members. The following *pro domo* plea addressed to members says it all:

Solicitors operate within a written constitution; Notaries do not. The Law Society has a clearly defined role; the Notaries' Society does not. The Master of the Rolls has limited but effective power; the Master of the Faculties has unlimited but largely ineffective power . . . the Faculty Office and the Notaries' Society must establish a pragmatic constitutional relationship which will reinforce the power of the Faculty Office while making sure that such power is exercised only by the Master with the approval and support of the Notaries' Society. The Society does not want the responsibilities of the Faculty Office but at the same time the Faculty Office cannot effectively control the Notarial Profession without the support of the Society. (Langdon, 1992b)

The Notaries' Society itself has taken pains to subject its work and image to a serious face-lift. Its magazine, the *Notary*, produced regularly since 1991, aims to increase members' sense of professional and corporate identity as well as their awareness of domestic and wider developments affecting the profession. Tangible symbols of corporate notarial identity have appeared—a specially designed coat of arms and heraldic badge, a tie and suitable headed stationery (including coloured ribbons)—and members have been encouraged to make full use of them. The need for enhanced professional standards has been addressed in a variety of ways, most prominently by attempts to persuade members to draw up, keep and issue to clients a protocol, “stating carefully what the client says and indicating the limit of your own responsibility” (Langdon, 1992a). Liability issues have been raised, and notaries are being warned to cover their backs in the context of a somewhat complex national as well as international indemnity situation.

Attempts on the part of the Notaries' Society to present to Europe and the world at large a united British front have received some support from all notarial groupings in the UK, even the London scriveners who have otherwise continued to keep themselves pretty much to themselves. In 1992, the UK Notarial Forum was set up as a body of discussion and co-operation, bringing together representatives of the Society of Public Notaries of London (notaries practising in central London within the jurisdiction of the Scriveners' Company), the Notaries' Society (representing notaries from the rest of England and Wales), the Law Society of Scotland (representing notaries in Scotland, who have no separate organisation) and the College of Notaries of Northern Ireland.

At the international level, both the provincial and the London notaries made

approaches to be considered for membership of key international professional bodies, in particular the Union International des Notariats Latins (UINL) and the Fédération des Associations de Notaires Européens. While scriveners were finally granted full membership status in the UINL in 1998, provincial notaries were admitted as observers only. Spanish opposition to the scriveners' admission had been defeated with the argument that "recently countries such as Croatia had been admitted and the Scriveners were certainly up to their standards" (*The Notary*, 1998–99).

By and large, moves to present a united front have, it must be said, been limited to a small group of dedicated individuals running the Notaries' Society. Scriveners on their part have been inclined to ignore notaries outside London as an irrelevance and to be perfectly happy being seen by their Latin notary colleagues as the only group of English notaries anyone needs to know about or talk to. In the words of one of them:

The scrivener notary is a member of a legal profession. There are only 25 of them. But we are as highly qualified as any other lawyer in Britain. We are somewhere about two-thirds towards the Latin notaries. We are a different profession. And we are an organised profession. In miniature, but ... We are very well liked [in Europe] because we are a little pocket of notaries, real notaries, in a hostile country ... amongst Anglo-Saxon notaries that no one likes. (interview with a Scrivener notary, 1995)

The large majority of provincial notaries, for whom their notarial work represents no more than a form of light relief from working as a solicitor, frankly do not care very much about what happens to the profession, especially now that it has lost its old glamour. Nor can they get resentful at the thought of any privileges available to their London colleagues. As one solicitor notary pointed out in 1995:

I don't even know who the scriveners are. I have never come across one. They certainly don't cause me any problem at all. But then, you see, in this country, we are cultured that we don't like officialdom. And notaries are part of that officialdom. So I don't think one would like to become a full-time notary.

However, key representatives of the Notaries' Society currently steering the profession through the political storms (however little notice the rest of the world may be taking) have been at pains to strike a fine balance between, on the one hand, trying to hold their own, while on the other hand giving their powerful London colleagues clear signals that they have no interest in alienating them, but would, on the contrary, very much like to recruit them as allies in the struggle for professional recognition at home and abroad.

One memorable instance, when even the scriveners made a concerted effort to project a profile of English solidarity to their Latin counterparts, was the submission of a formal joint statement in 1994 intended to enlighten Her Majesty's Government on matters it obviously knew little or nothing about, i.e. the training and role of notaries in England and Wales as well as the proper position for the Government to

adopt in European debates on the notarial profession. The document resembles a tutorial on the ambiguous status of English notarial acts and the disadvantages this causes the profession in their international dealings. The paper culminates in a plea to the Government to bring English law into line with much of the civilised world, in particular with the laws of evidence in other jurisdictions of the European Union. There are, the Government is assured, substantial advantages to be gained: a reduction of fraud; a reduction in the possibility of disputes relating to contractual documents; the development of electronic commerce; and greater competitiveness within the European Union. Unfortunately, there is no evidence as yet that the Government has taken any of this to heart.

The final blow

As the 1990s progressed, the notarial training reform of 1991 turned out to have been no more than a stepping-stone towards more radical and comprehensive change. It began with the Master of the Faculties considering further steps to upgrade and modernise training for new recruits. Five objectives were to be met:

- to enhance English notaries' academic credibility *vis-à-vis* their European colleagues;
- to level out the training differential between scrivener notaries and all other English notaries;
- to wrest control of notarial exams from the scriveners;
- to replace the (old-fashioned) examination mode by a more modern and appropriate continuous assessment format;
- to upgrade the requirements for solicitors wishing to acquire a notarial qualification.

By the autumn of 1997, this second training reform was taking shape in outline. Plans envisaged that:

- access to the profession of notary in England and Wales would require a university degree (albeit not necessarily in law), which would endow the notarial qualification with postgraduate diploma status;
- the apprenticeship system held dear by, and then still compulsory for, scrivener notaries would be abolished;
- the examination would become a great deal more demanding to approximate Continental standards, for instance by the inclusion of compulsory papers on international law and civil law.

Members of the Notaries' Society were reassured that these drastic steps would serve two purposes: they would, on the one hand, guarantee generally high academic standards; but, on the other hand, and politically more importantly, they would eliminate any formal obstacles to English notaries being included under agreements on the mutual recognition of notarial qualifications in Europe, should such agreements ever come about. They would also "encourage our friends in the UINL to see that there is no difference, in the areas of work common to all notaries, between

the qualification and skills of general notaries and the scriveners” (*The Notary*, 1997–98, p. 3).

The scriveners, so the Notaries’ Society generously conceded, would of course be free to require additional qualifications to cover those extra fields of work, which they regarded as their special expertise. The benefits of this concession to provincial notaries were evident. It would either confirm solicitor notaries’ frequently voiced suspicion that there probably was no such expertise, since, after all, familiarity with foreign languages and legal systems was not necessarily limited to their colleagues in London, or it would bring out into the open the precise nature of such expertise and make more permeable the barrier between the two branches of the profession, as individual provincial notaries might then be given the opportunity of qualifying additionally as scriveners. By 1998, this appeared to have become a wholly realistic scenario. If scriveners were prepared to ‘grandfather’ provincial notaries, i.e. to train ‘on the job’ keen applicants from outside London, the Notaries’ Society was prepared to accept without protest the scriveners’ continuing geographical monopoly:

One thing remains unchanged—and that is the statutory restriction on non-Scrivener-Notaries from practising in the defined London area. The policy of the Notaries’ Society is that it does not seek the removal of this exclusive jurisdiction . . . despite pressures from Notaries with offices in the vicinity of London who would like to move into currently excluded areas (*The Notary*, 1998, p. 1).

In the event, this carefully designed strategy failed because there was a last-minute redrawing of battle lines. The scriveners ultimately refused to accept the ‘grandfathering’ method. The Notaries’ Society, given its overriding policy of maintaining a state of peaceful co-existence with the scriveners in the interest of some semblance of professional unity, decided nevertheless not to go back on its undertaking not to fight the maintenance of the scriveners’ monopoly. However, this did not apply to the small group of notaries “with offices in the vicinity of London” who were dying to move into the forbidden geographical areas and had long been identified by the bigger players as potential trouble-shooters. This handful of people, by relentless lobbying of Members of Parliament, managed to gain all-party support for their campaign to abolish the scriveners’ monopoly. As a result, a major piece of legislation on reforms of the legal system then just about to be passed by Parliament, the Access to Justice Bill of 1999, had inserted a brief article 53, which baldly stated:

A public notary may practise as a notary in, or within three miles of, the City of London whether or not he is a member of the Incorporated Company of Scriveners of London (even if he is admitted to practise only outside that area).

Having already lost control over the training of entrants to the profession, the scrivener notaries, to everybody’s amazement, now also lost their century-old exclusive jurisdiction over the City of London. The only ones unreservedly pleased with this development were its immediate beneficiaries, i.e. the newly formed ginger

group on the edge of London. When interviewed in 1999, the Secretary of the Notaries' Society, far from admitting to any sense of *schadenfreude*, offered the following comments:

[The abolition of the scriveners' monopoly] is a thorn in our respective side at the moment, which we are gently and patiently trying to extract. I think we realize that the issues that unite us are more important than those that separate us: recognition of notarial acts, particularly in Europe, that's the big issue at the moment.

Whither English notaries?

Just in time for the start of the new millennium, external and internal pressures have thus brought about the demolition of statutory barriers between the two previously radically separate groups of notaries in England and Wales. At the same time, much weightier shifts in the demarcation of territories traditionally occupied by the main players amongst legal practitioners, i.e. solicitors and barristers, have occurred, as the protective walls surrounding the Bar (and therefore also the Bench) have been eroded by pressures from the Law Society. Solicitors generally are facing the future with confidence: globalisation has greatly favoured their profession due to its propitious skills profile, which appears to be just what the global market, including electronic commerce, needs.

What are the prospects for notaries? Interviews conducted with four key players between November 1999 and February 2000 teased out the following perspectives.

First, the Secretary of the Notaries' Society is keen for his organisation to continue a relationship of peaceful co-existence and potential solidarity with scriveners, whatever the present internal tensions. He is convinced that a new alignment of the notariat in England and Wales, reinforced by some closer correlation between common law and civil law notaries in Europe and beyond, is essential for the survival of the profession. Electronic commerce, in his view, provides a welcome incentive to try to bring this about. He feels encouraged by two things: by the increasing number of solicitor notaries who, like himself, opt to relinquish their solicitor's practising certificate and set up outside London as pure notaries; and by a recent public reference on the part of the Law Society President to a possible split within the solicitors' profession into members who do contentious work and join the Bar, and those who do not and might feel inclined to merge with the notariat, licensed surveyors and other professions to form a new profession in the non-contentious legal field. However, should such drawing together not be achieved, the profession's demise can be anticipated within the next 20 years.

Secondly, a spokesman for the London scriveners expressed his confidence that basically nothing had changed for him and his colleagues. Their exceptional expertise, vastly superior to that of provincial notaries, will ensure their clients' loyalty, including the loyalty of the many solicitors seeking scriveners' advice. Should outsiders seriously move into the London market, scriveners would be forced to concentrate even more strongly on their major commercial clients and leave only

the modest end of the market to the intruders. He is worried by two trends, though: first, the need to upstage the general notarial postgraduate diploma by a master's qualification for scriveners, which he expects to cause recruitment problems; and secondly, the trend amongst solicitor notaries to hand back their practising certificate and work as full-time notaries, initiated by the differential in indemnity insurance payments for solicitors and scriveners on the one hand and for non-scribener notaries on the other. To stop this migration, he argues for an increase in the statutory notarial indemnity insurance from the current £100,000 to £1 million, which is the current requirement for solicitors and scriveners. He would not favour an absorption of general notaries by the Law Society, as this would be disastrous for all notaries in England and Wales, including scriveners, at a time when their joint priority should be to ensure a change in the status of notarial acts in the English common law system.

Thirdly, a prime mover in the ginger group of public notaries in and around London at last able to practise in what was for centuries the scriveners' *chasse gardée* agrees with both larger groups concerning the prime need to upgrade the status of notarial acts in England. The English notary, in his view, is unique, in that "the English notary is the only notary in Europe and probably in the world who is actually trained to provide a service for other systems of law: we are the Common Market principle" (interview, 1999). His main arguments in fighting the scriveners' monopoly have been that the latter's claim to superior expertise is hollow and that there are numerous notaries in the country at large just as capable, competent and professionally well connected.

Finally, the International Director of the Law Society sees notaries in England and Wales as professionals in search of a role. However, in his view, even Latin notaries feel increasingly under threat, as their market is disappearing ("there are no borders in cyberspace"). Notaries and notarial acts generally, he is convinced, are "a throttle on commerce" and an irrelevance in today's world of electronic commerce (interview, 2000) (for an opposing view, see Olgiati, 1994). In England and Wales, he sees the additional problem that the upgrading of notarial training to postgraduate level is beginning to cause serious recruitment problems for the profession. The only grouping in the English context for which he continues to see a genuine market niche are the scriveners, as they are small in numbers and perform a valued service which it would be difficult for any other group to provide. However, the global future, he argues, belongs to the English solicitor. It is only the English solicitor who, through longstanding experience in non-contentious work, advising clients, in particular business clients, has acquired the precise skills mix that matches the requirements of a globalised market.

Conclusions

There is general consensus amongst those interviewed that, following a long period of stability, the notarial profession in both the civil law and the common law countries is today facing great challenges, best symbolised by the growth in electronic commerce. While Latin notaries can, for the foreseeable future, rely on their

traditional functions and powers continuing to enjoy statutory protection at least within their respective national contexts (which, in turn, are not without weight in the process of Europeanisation (Olgiati, 1994)), English notaries, until a few years ago a profession frozen in time, are now undergoing a belated process of liberalisation and professionalisation in a context of total exposure to market pressures from various directions and at various levels.

With apprenticeship training abolished, access to the profession has become subject to academic rather than social criteria, costing the profession its greatest capital, i.e. control over access and the aura of mystery and exclusivity. At the same time, the steep increase in standards of entry will appear to many potential aspirants as disproportionate, given the low financial rewards in store for them. There therefore exists a serious threat to recruitment both in London and in the rest of England and in Wales, a threat acknowledged by all key players.

The scriveners' loss of their London monopoly has opened up the prospect of competition with other notarial groups, in particular those who led the anti-monopoly campaign in the first place. However, their head-start in terms of international and commercial expertise and networks, the support they continue to enjoy from the Law Society and their relatively high international reputation are likely to allow them to keep at bay serious internal and external competition at least in the mid-term.

The situation is bleaker for provincial notaries. Their survival beyond the next two decades is on the line. It will depend mainly on two issues: first, whether the status of notarial acts within the English common law system is granted an upgrading in order to secure equal status with notarial acts from civil law countries; and secondly, whether notarial certification is somehow built into electronic commerce dealings. Tied up with the latter is the highly controversial question of whether the law applicable in electronic commerce transactions is to be the law of the recipient or the law of the provider, with solicitors arguing for the latter and notaries having an obvious interest in supporting the case for the law of the recipient. The relatively laid-back approach, not to say indifference, of the main body of solicitor notaries across the country regarding the future fate of the notarial profession, and the fact that their professional commitment as well as livelihood are firmly tied to their being members of the Law Society, do not bode well for the future of the English notariat outside London. The hope of a realignment occurring within the solicitors' profession, which might open up opportunities for a repositioning of English notaries, may turn out to remain the dream of a few.

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Note

[1] Questionnaires sent to 52 notaries, equalling approximately 5% of the profession; response rate = 60%. Scrivener notaries declined to complete any questionnaires but offered to answer questions in interviews.

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