Article

Looking at silk

by the Rt Hon Sir Robert Megarry

The Second Annual Lecture to be presented by the Society for Advanced Legal Studies was given by Sir Robert Megarry on 16 June 1999. The text of his speech is reproduced below.

It is indeed an honour to be invited to deliver the second annual lecture to your learned society, especially when the first was given by so eminent a lawyer as Lord Mackay of Clashfern. It was not easy to choose a subject, but in the end it seemed appropriate to take a look at silk. This, of course, is the time-honoured name for the rank or status of Queen's Counsel that is derived from the silken black gown that they wear in court. The subject seems timely, for today silk is now about four centuries old. Its exact age is uncertain. In 2000 it may be four years more than 400, or it may be four years less. In any case, silk has a past which is both interesting and curious, and a future which has become controversial.

On one view, silk began in 1596 when Elizabeth I appointed Francis Bacon, then aged 35, to be one of her 'Counsel Extraordinary'. The Queen's ordinary counsel were her serjeants-at-law, and the Attorney-General and Solicitor-General. Whether this was the true origin of silk is uncertain. The appointment was made orally, and carried no salary; and Bacon was only one amongst a number of others. His position may have been merely that of being one of a group of counsel who would be regularly instructed to act on behalf of the Crown, rather than having been given any formal rank or status; and there is little evidence of those who were members of the group.

On the other hand, there can be no doubt about 1604; and by the dubious process of taking an average it could be said that next year will be the 400th anniversary of silk. What is clear beyond doubt is that by Letters Patent dated 18 August 1604, James I, who had continued Bacon as one of the Crown's 'Counsel Extraordinary', appointed him to be 'one of Our counsel learned in the law', with 'place and precedence in Our courts'. This creation of a rank or status was emphasised by it carrying a salary of £40 a year which continued to be paid to all silks until it disappeared with the surge of numbers in the 1830s.

Bacon continued as an undoubted silk for nearly 14 years, until his silk merged in his office when appointed Lord Chancellor in January 1618; and a little over three years later, England's first silk fell into disaster. After confessing to 23 charges of accepting bribes in the Court of Chancery, Bacon was sentenced by the House of Lords to imprisonment in the Tower of London, a fine of £40,000 and disqualification from all office. By royal clemency he spent only one day in the Tower and the fine was wholly remitted. Five years later, his death insolvent raised some sad questions. If a bribe is made as a loan and not a gift, can the litigant prove for it as a debt in the insolvency? And after accepting a bribe, which is the worse: to decide the case in the litigant's favour, or against him? And what of accepting bribes from both sides, as Bacon sometimes did? Let us hope that we never need to know.

The establishment of silk as a new rank at the Bar brought questions of its relation to the other two ranks – serjeants-at-law; and barristers, as 'apprentices to the law' had become known. Serjeants were the great men of the law. Judges of the courts of common law could be appointed only from the ranks of serjeants, though in time difficulties were avoided by making any incipient judge a serjeant if he was not already one. Serjeants were appointed under the Great Seal and not by mere Letters Patent, and they had the sole right of audience in the Court of Common Pleas. The name 'serjeant' indicated that they were servants of the Crown, and 'at-law' distinguished them from other serjeants, such as those who held land by one of the tenures in serjeanty. When appointed, a serjeant would cease to be a member of his Inn of Court, and would be solemnly rung out of his Inn as if dead, joining all the other serjeants and the common law judges in Serjeants' Inn. Although Serjeants' Inn in Fleet Street was abandoned in 1737, the Inn in Chancery Lane remained until it was sold in 1877.

The impact of silk on the serjeanty was considerable. With their 'place and precedence in Our courts', the most junior silk took precedence over the most senior serjeant, apart from the select few King's Serjeants and an occasional serjeant who had been given a patent of precedence. In court, too, silks sat in the front row, 'within the bar'; serjeants did not until, in 1864, this privilege was accorded them, giving them some consolation in the dying days of their race. Silks also remained members of their Inn of Court. This brought diversity to the Benches of the Inns, which otherwise included only juniors (of whatever age or seniority) together with an occasional Lord Chancellor or Master of the Rolls who had not become a serjeant.

The emergence of the race of silks was slow. After Bacon, only about six or seven had been appointed before Charles II was restored to the throne in 1660. After that, their numbers increased very gently. One of the most noteworthy was Francis

North, who took silk in 1668, aged only 31. His Inn, Middle Temple, refused to elect him a bencher, probably because he was junior to all the benchers both in age and in call. North thereupon went to the two Chief Justices and the Chief Baron and drew their attention to this 'slight upon His Majesty'. There followed what became known as the 'Deaf Day': the chiefs refused to hear any of the benchers in court until they had elected North. His election was prompt, and thereafter new silks were speedily elected benchers of their Inns. Occasionally election was not prompt enough for them. Alderson B remembered James Scarlett (later Lord Abinger CB) and Charles Wetherall sitting very indignantly at the bar table in Inner Temple in their new silk gowns in 1816, and refusing to rise in respect as the benchers left hall after dinner.

The matter was reopened after the 1830s had brought a marked increase in the number of silks. In 1846 *Re Hayward's Petition* arose for decision by 11 judges sitting as Visitors of the Inns of Court. When Hayward was given silk, the benchers of Inner Temple had not elected him to their bench. He had little practice in the courts and mainly spent his time working as an author and editor. After a full hearing it was held that the matter was one for the benchers alone; and he was never elected. After that, with a continuing increase in the number of silks, it soon became settled that the election of silks to the bench was a discretionary matter, and that although seniority would be given substantial weight, it carried no right to be elected. In these days it is common for a new silk to wait for six or seven years before being put up for election.

TRADITION AND CONTROVERSY

... silk ... of course is the time-honoured name for the rank or status of Queen's Counsel that is derived from the silken black gown that they wear in court. The subject seems timely, for today silk is now about four centuries old. Its exact age is uncertain. In 2000 it may be four years more than 400, or it may be four years less. In any case, silk has a past which is both interesting and curious, and a future which has become controversial.

During the argument in *Hayward's Case* some confusion arose between the Deaf Day and the Dumb Day: North was a protagonist in each. By 1675, when aged 38, he had become Chief Justice of the Common Pleas, later rising to be Lord Guilford LC. Soon after becoming Chief Justice he began to hear attorneys and barristers (including his brother Roger) in court on minor matters, in breach of the serjeants' monopoly in the Common Pleas. This soon occasioned a rare example of members of the Bar going on strike. On one motion day in 1675 the serjeants all refused to move any motions. After an attorney had protested at his serjeant's failure to move, North announced that when the court sat the next day it would hear the attorneys, or their clients, or barristers, or anyone who thought fit to appear, rather than let justice fail. 'This was like thunder to the serjeants', who 'with great humility begged pardon'. Thereupon the court gave them 'a formal chiding with acrimony enough'; and upon North telling a serjeant to move his motion, he did so, 'more like crying than speaking'.

Until about 1830, the co-existence of silks and serjeants was on the whole peaceful. In Serjeants' Inn there were the judges and practising serjeants; in the Inns of Court there were the silks and juniors; and in the courts (apart from the Common Pleas) there was a rivalry that was usually friendly, apart from an undercurrent of resentment for the privileges of silk. Numbers were small. In the 170 years from 1660 to 1830, only 165 silks were appointed; and the number of serjeants was similar. There were rarely more than some 15 to 20 of each in practice at any one time. But in 1830 Henry Brougham was appointed Lord Chancellor. At once the rate of appointment of new silks rose from about one a year to nine or ten, although the rate for new serjeants remained unchanged. During the next 40 years the total number of silks soared from 63 in 1840 to 171 in 1870. The total number of serjeants, however, remained steady at about 26 or 28; and in 1870 it fell to 24.

During this period there were other changes. In 1834 Brougham procured a Royal Mandate which purported to abolish the serjeants' exclusive right of audience in the Common Pleas. By way of consolation, 15 serjeants were given precedence over all silks subsequently appointed. But the mandate was challenged, and in proceedings before the Judicial Committee of the Privy Council in 1839 the Crown felt unable to support it. The following year the Court of Common Pleas held that it was ineffective. Finally, in 1846, statute abolished the serjeants' exclusive right of audience, and opened the Common Pleas to the Bar at large. Less than 40 years remained for the serjeants. Apart from judges, no serjeants were appointed after 1868, and in 1875 the *Judicature Act* 1873 abolished the rule that only serjeants could be appointed judges in the Common Law courts. In 1877, when no more serjeants were being appointed and the revenue from the admission fees paid by new serjeants was at an end, Serjeants' Inn was sold, yielding some £900 for each of the remaining serjeants. Homeless, they were welcomed back by their former Inns of Court, the judges as benchers. After many centuries, the Bar had been restored to two ranks instead of three, with silks replacing serjeants; and the benches of the Inns no longer consisted of barristers alone, with the silks predominant. Finally, in 1921 came the death of Lord Lindley, the last surviving serjeant. (Serjeant Sullivan, widely known as the 'last serjeant', was an Irish serjeant, under a different system).

During the 20th century the annual rate of appointment to silk rose gently during the first half and sharply during the second. Between the wars it increased to about 15; and for about 15 years after the second war it was some 19 or 20, with the 11 of 1956 rock bottom in numbers – though good, I would say, to the last drop. In the 1960s the rate was at first about 25, and then rose to about 35 until the end of the 1970s, 50 in the 1980s and nearly 70 in the 1990s. Throughout, the ratio of silks to juniors in the practising Bar has remained fairly constant at about one in ten. Today, there are some 970 out of 9,400. By 1999, the rate of success in applications for silk had become about one in eight: of 553 applications, 69 succeeded. For women and ethnic minorities, the rate of success was about two in nine. It is only in the last two or three decades, of course, that substantial numbers of those in these two categories have come to the Bar and continued in practice for long enough to justify appointment to silk. Indeed, not until 1921 was it made possible for women to be called to the Bar by virtue of an Act which I

happily remember one examination candidate calling the 'Sex Removal (Disqualification) Act'. Women silks did not appear until the list for 1949 included Helena Normanton, called in 1922, and Rose Heilbron, called 17 years later.

What is the future for silk? Two of the current proposals are, first, that it should be abolished, and, second, that the method of appointment should be radically changed. The proposal for abolition, which has been voiced in Parliament, seems to be based on the proposition that litigation costs too much; QCs charge too much; and therefore litigation will cost less if the rank of QC is abolished. I do not propose to spend much time on this. Litigation in the USA, for example, is not notably cheaper because there are no silks there, nor would solicitors cease to brief the best counsel for the money that they can find, label or no. If the proposal is not merely for no new appointments to be made but is for the total abolition of the rank, presumably 'ex-QC' might become a label to be adopted by existing silks; and those who considered themselves worthy might become 'SC' (or Senior Counsel), either under the wing of the Bar Council or by self-assertion. In Scotland there was no roll of QCs until 1897, and advocates who wished to lead professional lives comparable with that of silks simply announced their intention to 'give up writing', and ran the risks of voluntary silken restrictions. Some jurisdictions have faced the question of abolition. Not long ago, the Province of Ontario, which had been appointing over 100 silks a year, abolished silk, while British Columbia, which had long been very much more restrained, continued in the ancient way. But it is difficult to see anything cogent in the proposal to abolish silk in England. The large earnings at the top which attract public attention depend not on the letters 'QC' but on reputation with solicitors based on performance.

SELECTION: COLLECTIVE JUDGMENT

The process today is comprehensive and thorough. It is essentially dependent on the collective judgment of judges and others with first-hand professional experience of the forensic abilities of the applicants ...The proposal is to replace this process by the decision of 'an appointments panel consisting of eminent lawyers and distinguished non-lawyers.' Many questions are obvious. How will members of the panel be selected? What skills will be displayed by the distinguished non-lawyers? What use, if any, will be made of the views of judges? What are the defects in the present system that this would correct? And more simply, what is the need for such a radical change?

The case for changing the system of appointment is another matter. An article in *The Times* of 6 April 1999 by Mr David Pannick QC, a distinguished practising silk, discussed the appointment of silks by the Lord Chancellor and, after referring to great improvements in the system in recent years, rejected the suggestion that the rank of QC should be abolished. However the conclusion of the article was that:

'... there is a strong case for removing the role of a government department in the making of appointments. The Bar values its independence. It is, then, difficult to justify a system by which promotion to senior status is dependent on the advice of civil servants and the decision of a politician, however wide the consultation. The Bar itself should decide the relevant policies, criteria and procedures, and should create an appointments panel consisting of eminent lawyers and distinguished non-lawyers to determine which applications should be approved. The rank of Queen's Counsel could and should be replaced by a rank of Senior Counsel.'

If the present system can truly be described as being 'dependent on the advice of civil servants and the decision of a politician', many might agree. But is it? Is 'a politician' a fair description of the Lord Chancellor? Is the process one in which the judges play no part? After all, it is the judges who daily appreciate and endure the skills and failings of members of the Bar, and have, more than any others, an accumulated knowledge and experience of the qualities demanded by silk. So before turning to the details of the process of appointment, let me say something about the part that has long been played by the judges.

At the heart of the process is a wide-ranging system of consultation by the Lord Chancellor's Department. Those consulted naturally include all judges of the High Court and Court of Appeal, the law lords and many others. There are variations in this process, but I shall speak of it as I knew it in my time in the Chancery Division; and the process continues today.

It begins with the Lord Chancellor's Department sending a list of all the applicants for silk who practise in the Chancery Division to the Vice-Chancellor, as head of the Division. This list covers not only those with a general Chancery practice, but also those who practise in the other work of the Division, such as company law, bankruptcy, income tax, copyright, trademarks, patents and other intellectual property. A copy of the list is sent to all the Chancery judges, who then meet. At the meeting each applicant is considered separately, every judge (starting with the junior) stating his views on every applicant that he knows from his appearances in court before him and otherwise. Often the comment is brief, perhaps ranging from a mere 'alpha plus' to 'gamma minus', or beyond. (Today the Lord Chancellor's Department uses 'A' to 'D', with 'P' for premature.) Sometimes there is disagreement and some discussion, but usually there is general agreement, with some 'not yets'. After the meeting, the Vice-Chancellor sends the Lord Chancellor's Department a letter summarising the views of the Chancery judges.

Some while later, the Heads of Division (the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor) are sent a list of 'probables' and 'possibles'. They then attend a meeting with the Lord Chancellor, with his Permanent Secretary in attendance. For the most part there is general agreement, though usually a few of the applications evoke discussion. After that, the Lord Chancellor settles the list. This also usually includes two or three academic lawyers or others as honorary QCs. In my nine years as a puisne and nine as Vice-Chancellor, I cannot remember any real surprises in the list as finally settled. Sometimes there would be a raised eyebrow at an inclusion or a sympathetic sigh for an exclusion, with perhaps a murmur of 'next year'; but that was all.

I need not stress the importance of this process. In high degree the list gives effect to the comprehensive and collective views, after discussion, of those who have seen and heard the applicants conducting cases in court. The process of advocacy is often wonderfully revealing, especially to the judges, who are deeply and impartially involved in the case and no mere spectators. Who better than the judges in giving a collective opinion on the abilities of those who have appeared before them?

I turn to the process of applying for silk. This has changed considerably over the years. In my day (1956), with much smaller numbers, it was less elaborate. The first step was to send a letter to all juniors who were your senior in call and in the same field of practice (the same circuit, the Chancery Division, and so on). This stated that you were applying for silk and so gave the recipients due warning that unless they too applied, you might o'erleap them. This practice was abandoned many years ago when numbers at the Bar had grown so much. You then, at the end of the year, sent the Lord Chancellor a letter applying for silk, giving some brief personal details and an indication of the nature and substance of your practice. (Today there is instead the detailed form of application that I shall mention in a moment). The letter had to include the names of two judges who had agreed to be your referees. This still continues, save that today you must not inform the judges that you will be giving their names. Finally, you waited until the newspapers appeared on the next Maundy Thursday, when you would search the list of new silks for the names of yourself and others. Today, the list still appears in the papers on the same day, but a kindly letter arriving on the previous Monday will have told you whether your stuff gown will be transmuted into silk. Anxieties about whether the Thursday papers will be delivered late are no more.

As I have indicated, the process today is much fuller and more detailed. Applicants have to obtain from the Lord Chancellor's Department an eight-page form and peruse the 16 pages of 'Notes for Guidance for Applicants' that come with it. The notes tell you that 15–20 years' standing at the Bar are usually required and that it is unusual for anyone under 38 to be appointed. (The youngest appointment that I can remember in modern times was that of the future Lord Evershed, who was 33 when in 1933 he took silk after a mere ten years at the Bar.) This form asks many full and detailed questions about your life and career at the Bar. When it is completed, it has to be sent in between mid-September and mid-October, allowing six months (instead of the former three) for consideration. During this period the Lord Chancellor's Silk Team carry out exhaustive consultations with all those appearing on a four-page list. In addition to the judges, these include the Law Officers, leaders of the circuits and many bar associations and solicitors' associations. Those consulted are all professional lawyers and not politicians or other laymen. At one time it was said that any barrister who was an MP could have silk for the asking, not least if he supported the party in power. But soon after the last war any validity in this belief withered and died. Today, even mere suspicions of inclusions or exclusions for political reasons are rare. The whole process of appointment is, of course, expensive both in time and in money: the cost was recently stated in Parliament to be £120,000 a year. It is hardly surprising that it has now been announced that the Lord Chancellor is to seek power to require applicants to pay fees that would cover this cost. (In October 1999, a fee of £335 was announced.)

The formalities of taking silk may be summarised briefly. On the first day of Term after the announcement (which is always the second Tuesday after Easter), all the new silks attend the House of Lords in the morning. They arrive in full regalia, including knee-breeches and silk gown and also the full-bottomed wig so beloved of the media. Thereafter they will wear this wig on a few special occasions, but not for the argument of cases in court, save when the House of Lords, exceptionally, sits in the Chamber of the House and not in a committee room. The ceremony is no longer held in private but takes place in the Royal Gallery, and relations, friends and the clerks to the new silks may now attend. The new silks are duly sworn in by each making a solemn declaration, and the Lord Chancellor then addresses them. Thereafter the new silks depart for the Law Courts, to be called within the bar.

That is the morning. In the afternoon, the new silks tour the Law Courts. In the court of the Lord Chief Justice, each is called within the bar, and moves into the front row from outside the bar that divides it from the second row. On being asked, 'Do you move, Mr Smith?', the silk politely bows and silently leaves the front row vacant for his successors; for he has no motions to move. (Legend has it that a Mr Murphy, of pronounced bulk, once breached convention by answering, 'With difficulty, My Lord'.) In former days, this process was followed in all the courts in which judges were sitting at the time; but increasing numbers of both silks and courtrooms led to it becoming obligatory only for the courts of the four Heads of Division, and today only for the court of the Lord Chief Justice, sitting with the other Heads of Division. Yet it has remained optional for each silk to go on and be called within the bar of any of the other courts that are sitting; and many do, going to courts in the Division in which they mainly practise.

I return from the formalities to the substance. The process today is comprehensive and thorough. It is essentially dependent on the collective judgment of judges and others with first-hand professional experience of the forensic abilities of the applicants. This begins with the experience of the various firms of solicitors who, by trial and error, have brought the practice of the applicant within the bounds of silk-worthiness; and at the end the final decision lies with the great Officer of State who is head of the legal profession. The proposal is to replace this process by the decision of 'an appointments panel consisting of eminent lawyers and distinguished non-lawyers.' Many questions are obvious. How will members of the panel be selected? What skills will be displayed by the distinguished non-lawyers? What use, if any, will be made of the views of judges? What are the defects in the present system that this would correct? And, more simply, what is the need for such a radical change? My answer to the last question must have long been plain; and, to borrow from Jessel MR, I would add, 'I may be wrong, but I have no doubts'.

The Rt Hon Sir Robert Megarry