

SILK CUT

ARE QUEEN'S COUNSEL NECESSARY?

by Peter Reeves



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1.Introduction and history

State patronage

The great expense of legal proceedings whether civil or criminal, is a constant target of criticism. Lawyers' charges are a major element of the price paid when using the courts. Of these, extremely high and disproportionate fees paid to Queen's Counsel often amaze the public, dismay litigants and attract judicial comment.

Queen's Counsel belong to a small and privileged group of barristers who benefit from state patronage. Apart from an increase in earning power they form a pool from which members of the higher judiciary are selected.

Any assessment of the value of Queen's Counsel to the legal system must begin with an examination of the method of appointment. Conducted in secrecy there is no means of knowing whether this process leads to promotion of the most competent practitioners.

Even more disturbing is the evident restriction upon the number appointed each year. With the consequent lack of true competition a high level of fees is maintained. Prevailing rates are grossly in excess of those paid to barrister and solicitor advocates who are not Queen's Counsel.

Confidence in our legal system is being damaged by the constant revelation of the high cost of proceedings. The part played by Queen's Counsel in raising charges to inordinate levels has been exposed over many years. Even if excessive fees can be reigned in it must still be asked whether the office itself is really necessary.

History

Among historians it is generally accepted that Queen's Counsel first appeared as a recognised office at the end of the sixteenth century. They assisted the law officers of the Crown in conducting prosecutions and were described as 'the Queen's Learned Counsel.'

For some time after the Revolution of 1688 the office existed only as a dignity without meaning or function. Then it apparently evolved slowly to become a more prominent feature of the Bar. It was not until the second half of the 19th

Century that the initials Q.C or K.C. appeared in law reports and it took another 30 years for the practice to become universal.

With diminishing official duties their last functional connection with the Crown was removed in 1920. Until that date King's Counsel, as they were then called, required a licence to represent a defendant in an action brought by the Crown. With an increasing number of appointments their position as an elite class of counsel was firmly established.

Confusing title

Among lawyers, Queen's Counsel are usually called 'silk'. This odd description, first used in about 1810, is derived from the shiny appearance of the gown they wear. Although the title Queen's Counsel is merely a historical survival it serves to enhance both the income and prestige of the holder. Inevitably but incorrectly the impression is given that it is similar in nature to a Royal Warrant.

The Lord Chancellor uses the term 'silk' in documents accompanying application forms for appointment to the office. Although not to be found in the Code of Conduct of the Bar of England and Wales, the description silk appears throughout the 'Report of the Working Party Established by the Bar Council on the Appointment of Queen's Counsel' published in June 1994 (the Kalisher Report). Following this established custom Queen's Counsel will in this survey be referred to as 'silk'.

Appointment

Selected candidates for the office are recommended to the Queen by the Lord Chancellor and appointed by letters patent. This arrangement was instituted about a century ago. With a small practising Bar of about 1000 at the time about a dozen members or so applied for silk annually. Most of the candidates would have been known to the Lord Chancellor individually. Now, with between 450 and 500 candidates annually, the process of selection has, through sheer numbers, lost this personal element.

It has become the practice to create a few honorary silk - there were six in the 1997 list. They are selected solely by the Lord Chancellor and not by application.

Maundy Thursday is usually associated with the symbolic giving of alms by the Queen. Every year on this day a very different act is performed by the Lord Chancellor. He then announces the names of those who have been chosen to join the privileged ranks of silk. So far as barristers are concerned the recipients of this coveted accolade enjoy an immediate elevation of status and remarkable increase in earning power.

It was only in 1995, that solicitors were invited to apply for appointment as practising silk. This was a radical innovation. It may, in time, weaken the present rigid division of the profession into solicitors and barristers. At present a client can instruct a solicitor silk direct. When employing a barrister, with a few

exceptions, instructions must be given through a solicitor. This is just one of the anomalies which will arise when a significant number of solicitors become silk.

Investiture

Those selected to become silk soon become aware of the special attention they can expect for the rest of their careers. They are summoned to what can be described as an investiture at the House of Lords. Ceremonial dress is worn which makes no concession to modernity and provides a photo opportunity for the media. The outfit consists of buckled patent leather shoes, silk stockings, breeches, a gown, lace around the wrist, white gloves and a shoulder length bell bottomed wig.

The Lord Chancellor gives an address to the assembled gathering and presents each counsel with a grand patent of precedence as one of Her Majesty's Counsel. In keeping with tradition this announces in archaic style "To all to whom these presents shall come Greeting Know Ye that We of Our especial grace have constituted ordained and appointed our trusty and well beloved....." then follows the name of the fortunate individual as being "one of our Counsel learned in the Law."

Rank

In contact with the public the letters 'Q.C.' are used and displayed to distinguish the holder as possessing a superior rank in the legal profession. They are to be found outside barristers' chambers, in practice brochures and advertisements. No doubt to give authority to views being expressed, media interviewers will often introduce an individual as a Q.C. as if this were a form of legal knighthood.

Emphasising a lower rank, the customary title 'junior' is used officially to describe all practising barristers who are not silk. For the public the term is misleading and cannot be taken as an indication of ability or seniority. It embraces all counsel from the novice to senior experienced practitioners. The latter maybe equally competent as silk.

Traditional descriptions in the law are often archaic and bear no relation to their modern function. A solicitor, for instance, was at one time employed to tout for business and bribe court officials. The Master of the Rolls was keeper of records and assistant to the Lord Chancellor. Despite acquiring judicial authority in the 13th century, the ancient title persists.

Elitism

The survival of silk as an elite group stems from the rigid division of the legal profession into solicitors and barristers. Separation arose from a determination on the part of barristers to preserve their social position and sectional interests.

The creation of what are now two legal professions was completed with the foundation of the Law Society in 1845 as the professional body of solicitors and

other legal functionaries. Barristers remained separate and with their monopoly of advocacy in the higher courts retained, until recently, the sole privilege of appointment as silk.

With solicitors consolidating their position the Bar, governed by the four inns of Court, organised collectively by forming the Bar Committee in 1883, later to be replaced by the General Council of the Bar in 1895 (the Bar Council). Constituted as an elected body, the Bar Council derived its authority from general meetings.

Under the courts and the Legal services Act 1990 solicitors were granted rights of audience before all courts. On achieving parity with the Bar they became eligible to serve as silk.

1. Method of appointment

Role of the Lord Chancellor

The Lord Chancellor's constitutional position is unique and his domain extensive. Appointed by the Sovereign, on the recommendation of the Prime Minister, he participates in the activities of the legislature, executive and judiciary. He is a senior member of the Cabinet, Speaker of the House of Lords and chairman of the Appellate and Appeal Committees of the House of Lords and the Privy Council and head of the judiciary. Although only a minimal part of his duties the Lord Chancellor occasionally hears appeals to the House of Lords.

The combination of these roles is claimed to ensure the protection of judicial independence and the effective administration of justice. As head of a Department the Lord Chancellor's remit extends to aspects of civil law reform, the appointment of judges, members of tribunals and magistrates. Other responsibilities include the management of Crown and County Courts and overseeing of locally administered magistrates courts.

Nestling among this multitude of duties is the task of assessing the merit of candidates suitable for appointment as silk. The process is called the 'silk round' and a group of civil servants (the silk team) is responsible for gathering and collating views and information about applicants from the legal profession and judiciary.

The silk team for 1998 appointments consists of seven individuals. Two of whom are permanent full-time members of the Judicial Appointments Group and devote 60% of their time to the process. An administrative officer and an agency typist are employed full-time and exclusively on the silk round administration from September to Maundy Thursday.

Eligibility

The conditions which a candidate for silk must meet are not clear-cut. Applications are 'not normally' accepted from barrister or solicitor advocates with less than ten years' qualified professional service. Those who have served for less than this period and intend to apply are asked to justify their decision to make an early application. A warning has been given that successful candidates usually have between fifteen and twenty years service.

Advocates employed by the Crown Prosecution Service (CPS), local authorities and industry are not eligible as candidates for silk. Because of restrictions placed upon their rights of audience they would, in any event, be unable to satisfy the advocacy criteria. Although the present director of the CPS is a silk she was appointed before joining the service. Honorary awards are made by invitation only to a few non-practising lawyers and academics.

Basis of selection

Lord Chancellor Irvine has confirmed the great importance which he attaches to his responsibilities for the appointment of silk in the context of the provision of legal services and of judicial appointments. He states that he has no present intention 'to introduce any change to those responsibilities, or substantially to change the nature of the appointment process'.

The detailed account of the appointment process which follows is based upon an article by Lord Mackay (The Myths and Facts About Silk, Counsel. October 1993) and the current 'Guide for Applicants' and 'Guide for Consultees'.

The silk round

For an applicant the procedure begins with the submission of a written application form. This asks for details of education, experience, offices held, annual fees received and the names of two judges or other senior members of the profession to whom the applicant is known.

According to the current Guide for Applicants the exercise is now to be conducted mainly by written consultation. Where necessary meetings will be held to clarify written views or where a consultee has relied upon the opinions of others.

As in the past personal interviews will continue to be held with the Presiding Judges, Circuit leaders and the chair and vice-chair of the Bar Council. These are conducted by senior members of the Judicial Appointments Group who also conduct the sift of applicants for the preparation of a brief to be submitted to the Lord Chancellor.

Consultations

The Guide for Applicants sets out in some detail steps taken to decide who shall be endowed with the coveted award of silk. A list of all candidates is sent by post to some 350 consultees asking for written opinions upon the suitability of individual applicants. Of those consulted approximately 146 are members of the higher judiciary and 100 Circuit Judges. The remainder are connected directly with the law and include judges of the European and International Courts of Justice, specialist silks, the Law Society and various Bar and solicitors specialist associations.

Written views expressed by consultees may be based upon first hand knowledge or reports from disclosed sources. In some instances individuals consulted are asked to make 'further discreet enquiries' of the candidates amongst the judiciary or senior members of the profession.

Views of judges

Because of the undoubted importance of the role of judges in the consultation procedure the revelation of Piers Ashworth, a silk, writing in *The Times* (5th October 1993) is pertinent. He stated 'very experienced and competent barristers with civil practices frequently go for months or years without the opportunity of arguing cases before the very judges whose views on their suitability for silk are so important.'

The responses to enquiries and meetings are assembled, without editing, in a single volume which is submitted to the Lord Chancellor with a brief, in late February. It is from this mass of information and any further discussions thought appropriate, that a list of successful candidates for submission to the Queen is completed early in the following April.

Qualities assessed

Silk is stated to be primarily a recognition of prowess in advocacy. The Lord Chancellor has regard principally 'to the qualities displayed by candidates in their practice before the courts'. Account is also taken of an advocate's expertise in the conduct of litigation and advisory work. A few honorary appointments are made each year to academics and lawyers who do not necessarily fulfil these criteria.

Consultees are given an outline of the attributes which successful candidates are expected to possess to "a degree which marks them out as leaders of the profession."

These are stated to be:

- (a) sound intellectual ability and a thorough, comprehensive and up-to-date knowledge of law and procedures in the field in which they practice;
- (b) outstanding ability as an advocate, to a standard to be expected of Silk in the applicant's field of practice;
- (c) total professional integrity;
- (d) the highest professional standing, having gained the respect of the Bench and the profession in observing the advocate's duty to the Court and to the administration of justice, while presenting their client's case and being formidable, fair and honourable as an opponent;
- (e) maturity of judgement and balance;

(f) a high quality practice based on demanding cases which will allow the full measure of these qualities to be demonstrated.

(g) the ability to maintain appropriate professional relationships with lay and professional clients.

These qualities are presumed to be assessed from secret comments and without a written examination or viva voce. With so many intangible elements this formidable list can only be regarded as a model of perfection. It is questionable whether a reliable assessment of every candidate can be made solely from unstructured comments, no matter how wide ranging they may be. According to the current Guide for Consultees the Lord Chancellor intends to keep under review the criteria expected to be met by successful candidates. Taking into account the length of time the process has existed this indicates a lack of confidence in the system. Any further attempt to elaborate upon the qualities required may produce vague and superficial responses.

Grading of candidates

Consultees are invited to grade candidates in order of suitability into one of five categories A-D and P.

Fortunate individuals graded A are those considered suitable for silk now and 'sufficiently outstanding' for appointment this year.

The B grading is defined as 'possibly ready for silk now but not in the front rank of applicants for this year.' This can be an arbitrary judgement. Without knowing beforehand who is considered to be in the front rank it becomes no more than a guess. If relied upon, a candidate may be excluded who is in fact suitable for immediate appointment.

Category C 'Not obviously fitted for silk at present' must present a problem to a consultee. By removing the word 'obviously', comment to support this grading could be more precise.

To be rated D—'Not fitted for silk'—is clear enough. If repeated by a significant number of consultees the chances of the applicant ever becoming acceptable seem remote.

P. 'This application is premature.' Although age limits are not stipulated, candidates must have been qualified for at least 10 years. Statistics show that relatively few are successful over the age of 50 or under 38. It follows that in the past, age has been a bar to appointment regardless of merit.

Comments of consultees

The appointment system is viewed as being 'highly competitive'. If the competition is based on reliable evidence of a candidate's knowledge and

competence, there can be no complaint. Whether this is so may be judged from specimen comments and briefing, set out in the Appendix, which are stated to have been constructed from comments made in recent years. These are extracted from what is described as a mock-up of briefing material supplied to the Lord Chancellor when selecting silk. The following examples give an idea of their nature:

'Is he silk material?, Not ready in my view ' (Judge)

'He is very able. I am surprised to see he is 48, he looks younger.' (Q.C.)

'I don't know him personally but those I have consulted say he is OK although not very special.' (Q.C Chairman of legal association.)

'Average.' Judge of High Court)

Unfavourable general comment may be prompted by reasons unrelated to the competence and suitability of an applicant. A consultee may, for instance dislike the accent, appearance or personality of an individual. These prejudices could motivate consultees to make vague and unenthusiastic remarks about an applicant which cannot be challenged.

Quota

It is emphasised that new appointments are not limited to any form of quota. This presumably, means that no overall number of silk appointments is set annually.

Although this is an accurate statement the real position is more subtle. In the Guide for Consultees the Lord Chancellor says that; "In a highly competitive situation like this, it is very helpful to be given a ranking of the leading candidates. Please therefore give an order of preference in classifications A and B where they appear in the same field of practice."

As already explained the difference between these two ratings does not appear to be based upon merit. Consequently a suitable candidate may be rejected merely because he or she is not 'preferred'. As a consequence a restriction of appointments in a particular field can be accomplished without imposing an overall quota.

The Kalisher report is forthright upon this issue in stating that restrictions upon numbers deprives the public of 'the opportunity to choose from the full pool of barristers who are properly marked out as silk'; further, their cost may be forced up, which is not in the public interest.

Confidentiality

The Lord Chancellor treats all applications as confidential to himself, his immediate advisers, judicial appointment staff and those he consults on

candidates. Consultees are 'invited to return or destroy the lists submitted and to keep them secure during use.'

Secrecy is an essential feature of the process. Lord MacKay suggested that senior members of the profession and the judiciary would be reluctant to give 'sincere and honest' views upon candidates without the assurance that they were confidential. Some observers put the opposite view by questioning the value of statements which those who made them do not wish to be divulged to the individual concerned.

Statistics

An indicator of the competition for silk is shown by the number of applications. The 1997 round attracted five hundred candidates of which forty-one were from women, twelve from 'a minority ethnic background' and six from solicitors. Sixty eight were successful with a further eight honorary appointments. Over the previous five years applications averaged four hundred and eighty-two annually with an average success rate of seventy one. Five hundred and fifty-one applications have been made for 1998 appointments.

At present there are approximately 9400 practising barristers. Of these approximately 10% are silks. This percentage has remained constant for many years. Although the consistency of this figure may be fortuitous, the fact remains that a number of appointments in differing areas and types of practice have been restricted.

If this restrictive policy is not to continue A and B categories will need to be replaced by a single grading 'Fitted for silk now' without any preference being expressed and regardless of the area of practice.

Although the Kalisher report condemns any restriction upon the numbers appointed this view is contradicted in the same report. It carries on to say that candidates should be placed in order of preference 'because the number of silks should remain low in order to demonstrate the excellence of the rank'. To achieve this it is suggested that the 'pass mark' should be high enough to ensure that only the 'worthy' succeed. However, without an orthodox examination such an arrangement would make the present situation even more capricious.

It is not unusual for candidates to apply a number of times before being selected. Available statistics show that in one year of the awards of silk '22% of candidates had applied four times and one fifteen times. Apparently the formidable qualities which an applicant is expected to possess may be absent early on in the process and developed later. Alternatively, exclusion may have been due to a restriction in numbers.

Earnings

By asking for disclosure of earnings for the last three years the Lord Chancellor may be presented with a dilemma. Where an applicant reveals an unusually high

level of fees it could be asked whether this was an individual likely to overcharge if appointed silk.

When in office Lord Mackay said that 'high earnings can be a tie breaker between evenly balanced candidates'. Presumably this practice will no longer be followed. Lord Irvine now indicates that 'it is the evidence of a candidate's ability and the strength of his or her support...' which influences him.

The part which earnings play in determining a candidate's suitability is vague. No limits are set but this information is considered to be helpful as an indicator of the quality of a practice. On the other hand the level of fees is said not to be critical if it is shown that the individual has an active practice.

Age

Another area of uncertainty is the age at which appointments are made as distinct from the question of competence. Awards below 38 whilst not unknown are exceptional. For the over 50's relatively few succeed. This observation is a clear message to those in the higher age range: their chances of appointment are slim.

In referring to younger applicants, Lord Mackay commented that in a few cases those consulted 'add a remark about their [the applicant's] judgement in making a premature application.' This is a powerful deterrent to anyone under 38 becoming a candidate as they run the risk of blighting a future application.

Appeal

There is concern in the profession that applicants for silk who are considered unsuitable have no means of knowing the precise reason for their rejection. The Lord Chancellor acts upon confidential reports and cannot be questioned upon or held accountable for his decisions.

No procedure exists for unsuccessful candidates to challenge what may be considered to be unfair, unjust or misleading comment. Instead they are invited to discuss their position with a member of the Lord Chancellor's staff. Only a generalised account of the support received and nature of views expressed is given. The names of those consulted or their comments remain secret at all times.

Secrecy is relaxed slightly when a consultee makes a specific allegation of misconduct by an applicant. Details of the allegation may be sent to the applicant who is given an opportunity to comment upon them.

2. Queen's counsel today

Prestige

Appointment as silk is regarded as a pinnacle of achievement in the legal profession. The Kalisher report describes this senior rank as a recognition of attainment of which the recipient is justly proud. Self-satisfaction may motivate some aspiring candidates but there is also a more tangible incentive: the office has become the route to extremely high earnings.

Silk are assumed to possess above average ability as advocates or to have highly specialised knowledge of an area of law. They are employed in a wide range of cases, some involving what are considered to be complex legal questions and others having substantial financial implications. Frequently, though, they act where relatively unimportant issues are involved. The overriding factor is whether clients can afford their expensive services. Where legal aid or local authorities are concerned this is no problem once the decision has been taken to employ silk.

Rights

Although the rank of silk bestows undoubted financial benefit upon the holder it does not confer specific rights of any consequence. There are no honorary special duties attaching to the office which benefit the public. Apart from being entitled to sit in the front row of advocates, their right of audience in all courts is shared equally with other barristers and solicitor advocates.

Rank

As previously explained barristers who are not silk are called 'juniors' regardless of their seniority or competence. By custom and to complicate the situation, the term "senior junior" is sometimes applied to those of greater experience or seniority. In cases thought to need the efforts of two juniors the term is used to describe the leader.

Yet the description 'senior junior' is not backed officially and does not appear in the Code of Conduct of the Bar. No test or examination exists to distinguish the senior barrister from the tyro. No action has been taken by the profession to rationalise the position. For a client to learn that a senior and experienced

barrister is a 'junior' hardly establishes confidence, particularly when the opposing side is represented by a silk.

Precedence among barristers reflects these groups. In the Supreme Court the Attorney General followed by the Solicitor General (so far always a barrister) take precedence over all. Silks follow ranking in order of seniority of appointment among themselves and finally junior counsel who rank according to the date of their call to the Bar.

Purpose

For a client or solicitor the silk system is thought to make the choice of suitable counsel easier. It assists in the identification of those barristers who are presumed to be highly skilled advocates. Similarly, selection of the higher judiciary is facilitated as senior judges are with very few exceptions drawn from this elite group. Whether this ensures that the most suitable individuals are chosen is another question.

For barristers who practice from specialist chambers the addition of silk to their roll is an undoubted advantage. In the 1997 appointments two sets gained three silk each and a senior chambers clerk of one set indicated that the appointments would strengthen the European Union practice.

For juniors, promotion to silk is acknowledged to be an escape from the drudgery routine paper work. Written pleadings, affidavits, pre-trial procedures and general advice are by custom recognised as the work of juniors. They are not, as a general rule, undertaken by silk. This accounts for the frequent use of two counsel. The leader, a silk, can then devote more time to advocacy in other cases which, incidentally, attracts higher fees.

Solicitor silk

The advent of solicitor silk has cut across established rules. Barristers practise as individuals and, with a few exceptions, must receive their instructions through solicitors. Solicitors, including those who are silk, may practise in partnership. They are free to deal with clients direct whether acting as advocates or in matters which do not involve the courts.

There are 70,000 solicitors and in the past no formal ranking existed in their profession. Although self regulating, a distinction has, in effect been imposed by the state.

Unlike barristers, solicitor silk are not, except in criminal legal aid cases, entitled to charge higher fees merely because of their designation. Their charges, where the courts are not involved, can be scrutinised by the Law Society. A client may ask the Society to review a bill and issue a certificate of the amount considered to be fair and reasonable to pay. The Bar does not operate a similar scheme for non-contentious work.

Court dress

When solicitors were permitted to appear in the higher courts attempts to abolish the traditional wig of the barrister failed. Confusion reigned when some solicitor advocates wore a wig and others appeared bare-headed. The topic was dismissed by the Bar as trivial and not worthy of serious discussion. Eventually, by edict of the Lord Chancellor and Lord Chief Justice, solicitor advocates were forbidden to wear a wig in any court.

That was not the end of the story. With solicitor silk created for the first time last year the rule was modified. At the appointment ceremony it would no doubt have spoiled the display if some of the main participants did not follow tradition. For the sake of uniformity solicitor silk were permitted to wear the customary bellbottomed wig. Also, when in court they must, on the Lord Chancellor's instructions, wear a wig. Other solicitor advocates continue to appear without one.

No reason has been advanced for this difference. Little regard is had to public comprehension of the status of lawyer advocates. Some believe, incorrectly, that the traditional headgear denotes a higher rank. If court dress is considered to be of importance to the administration of justice, at least it should be uniform.

A quaint custom illustrates the support given to the silk system within the profession. It is usual for a junior to carry wig and gown in a blue bag. Some will have a red bag. This is given by silk in recognition of the contribution which the junior has made to a particularly important or difficult case.

Engaging silk

In most instances the solicitor has a duty to recommend suitable counsel. If it is considered that an expert in a particular branch of the law or a highly skilled advocate is appropriate, silk may be suggested. Cost then becomes a primary consideration. Unfortunately there are instances where a client does not realise the financial burden which may arise once a silk has been engaged.

Litigants who lose can be staggered at the extraordinary high cost particularly if silk are employed. For those who win, costs recovered from the other side may not meet the amount charged by their own lawyers. With silk involved the difference can be significant, so making the victory a hollow one.

Basically there is no difference in the actual working practices and methods of silk and junior counsel. They may oppose each other and this can result in one side having the services of silk and a junior and the other just a junior. There is no rule which reserves complex or important cases for silk.

At one time a silk was not allowed to act without a junior. The current Code of Conduct has relaxed this restriction but with little effect. Silk may still refuse to act alone in settling documents usually prepared by or in conjunction with a junior. Furthermore, a brief or instructions to act alone may be refused if the

interests of the client are thought to require the assistance of a junior. In effect, the strict rule has given way to a discretionary one which gives silk an option to act with or without a junior.

3. Employing silk

When used

On looking through the law reports it is striking to see how frequently silk are employed. Although numbering only 10% of all practising barristers they have a considerable share of substantial and remunerative work.

The choice of silk is not necessarily dictated by special expertise or competence. There will always be the wealthy individual or corporation who gives a solicitor carte blanche to employ 'fashionable' silk. Cost will be immaterial and usually measured in thousands of pounds. No sympathy need be wasted over the eventual bill to be met by such a client.

It is for the individual of modest means lured or forced into litigation that concern should be shown. In being led to believe their chances of success are improved by employing silk the stakes are raised. Failure can bring disproportionate financial loss in meeting the costs of the winner - in part due to excessive fees charged by silk.

Often a litigant will be dismayed to find an opponent represented by silk. Concern may be shared by the solicitor running the case. A myth persists that the prestige of silk automatically brings with it superior forensic skill. Consequently, silk and a junior may be employed, unnecessarily, to match the opposition. Unwarranted optimism follows to be paid for by inordinately high charges if the case is lost.

Choosing counsel

A client, when consulting a firm of solicitors, may be advised to take counsel's opinion. This can happen if the firm does not have the required expertise inhouse. Even if the problem is within the solicitor's field of practice an opinion may be sought. This may be done to protect the solicitor who by acting upon counsel's opinion may avoid responsibility for giving faulty advice.

In choosing counsel a silk is often preferred if cost permits. The opinion given will be thought to be more persuasive, particularly when used in negotiations with a third party. Whether the high cost is justified is often not appreciated by the client. An equally competent junior can usually be found whose fee would be reasonable and realistic in relation to the financial implications of a problem.

Silk v. junior

Silk are frequently opposed by junior counsel. In a case involving extradition (*R. v. Governor of Brixton Prison and another ex Parte Levin* (1996) AER 350) a silk and junior represented Levin and a junior alone was instructed by the Crown Prosecution Service. This illustrates that the gravity of a case does not necessarily call for the use of silk on both sides.

Ideally the outcome of any case should depend entirely upon its merit. Litigants are entitled to assume that a hearing will be fair and unaffected by the designation of the advocates involved. Their competence, whether silk or junior is rarely questioned, whatever the result.

Why then, it must be asked, should silk be entitled to claim a fee so much higher than that of a senior junior, win or lose? Yet this is considered to be the norm regardless of the fact that they have each performed similar tasks.

Concern has been expressed by senior judges who have written to the Lord Chancellor about 'far fetched' legally aided cases which are coming before the courts. Several high profile actions have failed running up bills of several million pounds all paid by the tax payer. No explanation has been given to show how these cases came to be supported by legal aid and why in some instances it was thought necessary to engage silk at high cost.

Judicial criticism

In the past criticism of the use made of silk and expense involved has rarely been expressed by judges. This silence was broken in the case of *Birmingham City Council v. H (a minor)* (1994) 1 AER 12. being an appeal to the House of Lords concerning the Children's Act 1989. Under the Act the local authority sought an order terminating contact between a mother and her child who were both minors. It was decided that as the child's welfare was paramount the court did not have to balance the welfare of one party against that of the other. Five Queen's counsel each with a junior were engaged.

Lord Keith of Kinkel commented:

'It is desirable that something be said about the level of separate representation of parties, all at public expense, which was a feature of this appeal. The appellant proceeding through his guardian ad litem was represented by solicitors and by senior (silk) and junior counsel funded by the legal aid board and rightly so. Birmingham City Council, which supported the appeal was similarly represented at the expense of Birmingham community charge or council tax payers.

Separate solicitors and also senior and junior counsel appeared for each of the mother, the father and the guardian ad litem to the mother. These three had lodged a joint written case. The mother and father were funded by the Legal Aid

Board and the mother's guardian ad litem by Birmingham City Council. There was no significant difference between the arguments for those who supported the appeal or between the arguments of the who resisted it.

In the circumstances there must be a serious question whether the degree of separate representation was necessary or in any event whether the employment of so many senior counsel was justified."

In *Re. a company* (No. 004081 of 1989) (1995) 2 AER 155 the court was asked to decide whether the costs incurred by trustees and payable by the plaintiff were reasonable. The trustees were joined as defendants in proceedings concerning trust property. They instructed silk and junior counsel at fees of £20,000 and £7,000 respectively for a hearing expected to last about 20 days, but which could have lasted for between eight to ten weeks. No criticism was made of this charge.

Eventually the action was settled ten minutes after the commencement of the trial. A further hearing was arranged for a formal consent order to be made by the court. The silk claimed a further £1500 for attending the second hearing.

It was held that; "on the facts, the matter could have been settled, so far as the trustees were concerned, by way of a letter agreeing to the proposed terms and, as a result, the fee claimed of £1,500 was beyond any doubt unreasonable, particularly in view of the £20,000 which had been due a fortnight earlier on the brief for attendance at court of some ten minutes, and the whole of that item would be disallowed."

Less complex cases

In many reported cases the issues involved do not appear to justify the use of silk with a junior. The examples which follow show the total number of counsel, silk and juniors, engaged in each case.

A question of ownership of a motor car valued at less than £8000 received the attention of two silks and two juniors. A total of three silks and four juniors were engaged to argue whether the limitation period in a defamation action should be extended. In the Court of Appeal a total of two silks and two juniors appeared when a defendant pleaded as a defence that he did not know his action was unlawful. The plea was rejected quickly on the well known grounds that ignorance of the law is no excuse.

It is not unreasonable to suggest that in each instance a single experienced junior or solicitor advocate on each side could have undertaken the work at far less cost.

5. The cost of silk Differentials

Rules governing the calculation and payment of costs in a legal action are complex and time consuming. They often prove to be more involved than the issues being litigated. However, throughout the system one factor remains constant. silk are allowed to demand fees of a very high order, far in excess of those paid to junior counsel and solicitor advocates.

As already described, the number of silk appointed annually is restricted. Consequently free and open competition does not operate. Their fees reflect more the prestige value of their title rather than competence. Literally overnight silk are placed in a position to charge far more than junior counsel who may be equally skilled. This differential is supported by the sums allowed in legally aided cases and by the court in privately funded cases.

Fees paid for legal aid work are generous by normal standards. Evidently, though, they are not sufficient to attract the services of some silk. This no doubt was why Lord MacKay, when in office, appealed to all silk to make it known that they were as willing to act for legally aided clients as for any other.

As the Kalisher Report confirms, "the appointment brings with it the prospect of increased financial rewards." In commenting upon the importance attached to this inducement, self-interest is frankly admitted. "Because the rewards of a successful application can be so high, we are aware that the news of failure can be deeply distressing."

Subsidy

For the lucrative accolade of silk the successful applicant pays little - a mere £150 which includes £50 for the letters patent from the Queen. Nothing is charged for making an application despite the cost to the tax payer of the consultation procedure.

Lord Chancellor Mackay stated that every application involves the expense of significant public resources of time and money. In reply to a Parliamentary question of last year the annual cost of running the silk team in 1996 was estimated at £82,000 for salaries alone. Overheads for office accommodation, equipment, supplies and support services are not included.

The total expenditure in effect amounts to a subsidy paid by the tax payer to privileged members of the Bar. It benefits selected senior members of the profession at the peak of their careers when their earnings are already high. Upon appointment an incredible increase in earning power follows.

Legal aid

The higher level of fees for silk is reflected in legally aided criminal and care proceedings in the Crown Court. They are paid considerably more than juniors and solicitor advocates. Since 1st January 1997 a basic fee applies to jury trials lasting ten days or less, guilty pleas and certain other shorter cases. The amount is graduated according to the type and length of case. This has made little alteration to the differential in favour of silk which has always existed.

Take as an example a case of homicide or a related grave offence, which goes for trial lasting four days. Silk will be paid a basic fee of £1616.50 and a daily refresher of £413.50 and daily length of trial uplift of £835.50 per day, for three days, making a total of £5363.50. Solicitor advocates and juniors engaged in a similar case and performing the similar work will receive £2683.50 calculated in the same manner but with reduced amounts.

According to the Lord Chancellor's Department the overall level of income for advocacy will be unchanged by this new system. It follows that silk will continue to enjoy considerably higher fees than other advocates merely because of their designation.

Advocates fees which fall outside the limits of the fixed fee scheme are settled by the court. This accounts for the extremely high amounts paid in complex fraud trials. Again silk are shown to receive disproportionately high fees compared with other advocates.

An answer to a Parliamentary question covering the accounting year 1995/96 shows that there are silk who find legal aid work lucrative. Some received total annual payments of £450,000 for legal aid cases alone. Although the figures include fees for work in progress and earlier work, they give an idea of the demands made upon legal aid funds.

With the soaring bill for legal aid, regulations governing the employment of silk were issued in 1994. They covered criminal and care proceedings. Application must be made to the court for the assignment of silk or more than one counsel. Despite this it appears to be a rare event for a silk to appear alone.

Private funding

In the field of privately funded work the immense advantage of being a silk is manifest. Negotiation of fees is in the hands of barristers' clerks. According to an authoritative source, a significant number of clerks are paid on a commission basis and of these the majority are paid by commission on Chambers turnover. Where commission is paid this is not disclosed to the lay client or solicitor.

In the Bar Strategy for the Future Report 1990 it was concluded that commission payments were 'too costly and encourage immediate revenue maximisation at the expense of longer-term planning.' A Guide to Chambers Administration at that time favoured a move away from commission payments.

Because of the unstructured and diverse nature of chambers organisation, a fresh look at the general position was thought necessary. In 1995 the Bar Council was given a cash grant by Central London Training and Enterprise Council of an undisclosed amount to assist with the development of practice management standards for the Bar.

Consultants were employed to draft a standard management scheme to replace the differing methods of organising business in use by groups of barristers. The resulting Chambers Management Manual was adopted as a recommended framework for all practising sets of barristers.

If all Chambers complied with the new management regime a more acceptable way of paying clerks than by commission would become universal. At present there is no compulsion adopt the new regime. As a consequence payment by commission is still practised.

There is little official data showing precise payments made to silk. An indication of the high fees charged can be found in recent press reports. Top commercial silks are sharply criticised by larger firms of solicitors who cite silk rates as high as £750 an hour.

A retainer for silk of £40,000 is not uncommon with a daily 'refresher' of £2000 a day for as long as the case lasts. If a junior is employed an additional fee of half that amount would be charged. For a case lasting ten days the total bill for counsel with VAT could be over £100,000.

In a House of Lords appeal Lord Templeman said " The amount of fees you and your leader (silk) were claiming for a four-day case would have hired three very competent headmasters for a year. Does public interest not say there must be some proportionality between £107,000 for four days on cases, however important, and everything else? Is there nobody except the House of Lords who can raise its eyebrows at that?

Judicial criticism of fees

Disquiet over the charges of silk is not confined to the press. It is echoed by the judiciary at the highest level. The late Lord Chief Justice Taylor when in office j I said at a Bar conference "The level of fees both of solicitors and the Bar in the weightier cases, especially of corporate clients, is often out of all proportion to a reasonable rate for the job. This applies with even more force to silk who are paid at a much higher rate than juniors."

Recently Lord Chancellor Irvine castigated those silk whose fees have reached what he considers to be excessive levels. He said in the House of Lords "It is a fact that there are a significant number of Q.C.'s who earn a million pounds per annum and many who would describe half a million pounds in one year as representing a very bad year for them."

Home Secretary Jack Straw has added trenchant criticism of the escalating bill for legal aid. He singled out senior criminal barristers, including silk, as responsible for massive costs incurred in fraud trials. Unless fees were reduced by the Bar he indicated that the government would impose restrictions.

Frequent and persistent criticism is made of over manning which, in turn, inflates total fees. At one time the Bar code of conduct stipulated that silk must always employ a junior as a condition of accepting a brief. Because of objections to this practice it was modified by the Bar code of conduct. Nevertheless silk may still refuse to act alone if it is 'thought' that to do so would put the lay client's interests in jeopardy. Similarly a silk may refuse to draft documents of a kind which, by custom, are generally settled by or in conjunction with a junior.

Financial advantages

Silk have since 1969 been entitled to a special tax concession which all barristers enjoy in relation to Value Added Tax upon their fees. Unlike other professionals they are not called upon to pay this tax until fees are actually received. With the high earnings of silk this can be a tremendous advantage to their cash flow. It is anticipated that this practice will be withdrawn in the 1998 Finance Bill.

As with their junior colleagues silk may not sue for their fees. Generally this is academic as, in the absence of agreement, delay in payment of bills can have dire consequences for the instructing solicitor. Under an agreement with the Law Society a solicitor is personally responsible for the payment of counsel's fees regardless of the wishes of the lay client. Failure to do so can result in a heavy fine or even suspension.

Compared with the problems normally encountered in recovering unpaid accounts through the court this sanction places the Bar, including silk, in a favourable position. It is equivalent to a guarantee backed by severe enforceable consequences for the instructing solicitor without the need to sue.

Another immense advantage to counsel and solicitor advocates is immunity from claims based upon incompetent advocacy. Where, for instance, an advocate fails to call a crucial witness or argue a point correctly the client has no personal legal remedy. Even silk, who are singled out as being eminent advocates and well paid on this account, enjoy this blanket immunity.

A Complaints Commissioner, set up by the Bar Council, does have power to investigate complaints of 'professional misconduct or inadequate professional services' on the part of silk and juniors. The scope of matters within the Commissioner's remit is apparently intended to exclude negligent representation

in court. In any event the procedure is of little practical use to the public for any compensation awarded is limited to £2000 and legal aid is not available to pursue a complaint.

6. European Union

European Union

The legal systems of most of our partners in the European Union (EU) are based upon the civil law. A draft directive of the Ministers of the fifteen EU states is awaiting approval of the European Parliament. If adopted qualified lawyers of member states will enjoy freedom of movement in all European jurisdictions. They will be permitted to practise permanently under their home title anywhere throughout the EU for an unlimited period.

Arrangements for qualifying in a host Member state are to be eased. In the long term this can be seen as a move towards the harmonisation of EU institutions.

Citizens of EU member states may apply for appointment as silk. To do so they must be advocates with full rights of audience in the High Court or the Crown Court. Regular appearance before the courts of England and Wales is required which, for this purpose, includes the European Court of Justice, the International Court of Justice and the European Court of Human Rights. Applications are not accepted from those who have not practised in these courts during the past year.

Republic of Ireland

This is the only EU country which operates a system resembling that of silk in the UK. Barristers who have been practising at the Bar for ten years or more must formally apply to the Government for a Patent of Precedence for admission to the Inner Bar. Upon admission they are designated 'Senior Counsel'.

The Government through the Attorney General initiates enquiries with the Chief Justice and other members of the judiciary to decide whether an applicant is suitable. A successful candidate is admitted to the Inner Bar by Warrant signed by the Taoiseach (Prime Minister) and addressed to the Chief Justice.

Belgium

No equivalent title of silk exists. There is a category of lawyer 'avocats a la Cour de Cassation' (lawyers with the Supreme Court) of which there are sixteen. They are appointed by the King and have the additional exclusive right of representing parties before the Supreme Court.

France

France has no equivalent to Silk but has advocates who are entitled to appear in certain of the superior courts and who practise in specialist areas of the law. However, there is no system in operation whereby advocates are granted by recommendation a special title that denotes their reputation and distinction.

Germany

Germany has three supreme courts. One deals with civil and criminal law, one with public law and the other with rights of the individual and with state law. The supreme court for civil and criminal law operates a system of granting rights of audience to a limited number of advocates. This arrangement is based upon a process of recommendation within the legal profession and the judiciary. It does not confer upon an advocate a title or position comparable with that of silk.

Italy

The profession of avvocato has a great number of similarities with the profession of barrister in England and Wales and also overlaps with many of the functions of a solicitor. There is no distinction or rank accorded to eminent practitioners.

In the remaining EU countries all advocates are entitled to exercise rights of audience in the courts. They are not distinguished by a special title denoting a higher rank.

Northern Ireland

The procedure for appointing the equivalent of silk in Northern Ireland differs from that in England and Wales. The Lord Chancellor is not involved. It is the responsibility of the Lord Chief Justice to recommend suitable candidates after consultation with judges and the profession. Appointment is by Warrant of The Secretary of State for Northern Ireland issued on behalf of the Queen.

Scotland

The Lord Chancellor's powers do not extend to Scotland. Silk are appointed by the Queen on the recommendation of the Secretary of State for Scotland who, in turn, is advised by the Lord President (equivalent to the Lord Chief Justice) in consultation with the Dean of the Faculty of Advocates. Because of the small size of the Bar candidates are known to the Dean. This makes the process of consultation less superficial than in England and Wales.

7.Reform proposals

Alternatives .

Discontent with the appointment system emerges occasionally within the profession. Usually it is made by silk who believe the present order to be flawed. Those who aspire to become silk are naturally reluctant to express their views publicly. More forthright criticism is constantly voiced in the media.

Few proposals for reform have been made. None suggest any change in the function of silk or, indeed, consider the need for this distinction.

Lord Williams of Mostyn has suggested the creation of an independent committee comprised of lay members as well as lawyers to select silk. He favours advertising for candidates in the media and a more open system which complies with equal opportunity guidelines.

The Queen acts Constitutionally on the advice of her minister, consequently under such a scheme the title Queen's Counsel would have to be discarded. Instead 'Senior Counsel' or a similar description would need to be substituted.

Another suggestion is for the Prime Minister, instead of the Lord Chancellor, to recommend appointments to the Queen. In practice this would have little effect. Advice would be required from an appropriate minister. Only the Lord Chancellor would be in a position to put forward the names of candidates thought suitable.

It would be possible to devise an appointment scheme within the profession by introducing a higher qualification of 'senior counsel.' With structured examinations open to all advocates an attempt could be made to grant the qualification entirely on the grounds of merit. It is unlikely that the Bar would cooperate with such a scheme. To do so would prevent any restriction being placed upon the numbers appointed. With more advocates regarded as the equivalent of silk it would be difficult to sustain fees at the present inordinate levels.

Complications

As solicitors are now eligible for appointment as silk the position has become more complicated. A change in the present system of selection would involve the

Law Society and Bar Council. A duplication of effort could ensue with the possibility of conflicting aims.

With the Bar Council and Law Society separately involved in a system of appointing senior counsel the present method of selecting the higher judiciary would need to be modified. The Lord Chancellor would lose control over the appointment of senior counsel who replace silk. This would bring into question the present method of appointing the higher judiciary.

8. Conclusion

Justification

Few reasons of any substance are advanced to justify the existence of silk. Comment generally centres upon administrative convenience with praise for the excellence of those who hold the office. Little is said about its value as a contribution to the effective dispensation of justice. Criticism of the system has been met with the bland assertion that silk are an important element in the provision of legal services and the appointment of high court judges.

The Kalisher report admits that 'elevation to a senior rank has long been the badge (sic) of the eminent and successful barrister.' For aspiring candidates the prospect of acquiring a distinctive title no doubt appeals to personal vanity. The prime attraction, though, is more likely to be the rapid and vast increase in fee income it brings.

Supporters of the system say that silk provide an identifiable pool of advocates of recognised ability. For those who employ them the title is thought to be a reliable guide to competence and suitability for important and complex cases. In reality many equally skilled juniors or solicitor advocates may be overlooked because they do not have the cachet of silk.

As already shown, the criteria for appointment are assessed upon confidential comments, sometimes of a superficial and even frivolous nature. At no stage is there a formal interview. There is no way of finding out whether all suitable and competent applicants are eventually appointed silk.

Judiciary

Some ambiguity exists in the use made of the silk system in appointing the higher judiciary. As explained, a pool of silk is said by the Lord Chancellor to be of assistance in selecting candidates thought to be suitable. At present out of one hundred and forty six members of the higher judiciary only eight are not silk. Clearly those who aspire to this level of judicial office have only a slim chance of succeeding if not appointed as silk beforehand.

Yet the Guide for Applicants indicates that it is not relevant in considering the appointment of silk that a candidate holds or has applied for a part time judicial office. The qualities required for silk and those for judicial office are, it is

explained, different in nature. If this is the case why, it must be asked, is such reliance placed upon the silk system in choosing judges of the High Court and above.

A recent President of the Law Society, Tony Girling, commented in April 1997 that the appointment of solicitor silk might 'create the implication that progress to the High Court bench may only be through becoming silk.' He also said; "I have serious doubts whether the silk system is of continuing relevance in a modern justice system." (The Law Society's Gazette 3 April 1997).

With the increasing number of solicitor advocates in the High Court (There are now 495) a great deal of talent will be overlooked under the present system. To reach the 10% proportion of silks that exists at the Bar there will need to be about 50 solicitor silks. At the present rate of appointment, there were two last year, it will take many years to achieve this figure.

The Lord Chancellor's Department staff already identify suitable applicants for the Circuit bench. Appointments made are from the ranks of silks, juniors and solicitor advocates. It has been suggested that a similar competitive system should also be introduced for the higher judiciary.

As admitted 'becoming a silk is a way of escaping the drudgery of paper work'. At one time it was a rule that a junior should always be employed to deal with pleadings and advise in writing as an action progresses. This restrictive practice was relaxed giving individual silk discretion to act alone. Judging by the law reports this does not happen very often. Consequently over manning can result under the pretext that the issues in a case are so important that two lawyers are needed to present an argument. The result is an inflation of costs and a protracted hearing.

Silk are said to be appointed essentially for their prowess in advocacy. This may account for the comment of Judge Ole Due when President of the European Court of Justice. He said that the written submissions of British lawyers to the Court were often unduly long and repetitive - extending to one hundred pages at times. This made the task of producing a summarised report for a hearing very difficult, particularly as reports had to be translated into French.

The ability to produce succinct written opinions and submissions apparently ranks low in the qualities required of candidates for silk. Yet clarity and brevity in the written word are qualities to be expected of those who are claimed to be of above average competence as advocates and lawyers.

In practice the opinion of silk is often endowed with a prestige which does not necessarily correspond with its value. There is often little to distinguish the silk's opinion from that of a competent junior. In a case where the issues are evenly balanced the side which does not employ silk may be deterred from taking action. Conversely, a prospective litigant may be encouraged to pursue a weak case by mistakenly believing that the advice of silk is the best available.

The independence of the Bar is constantly emphasised. Its members practice individually and the profession is self regulating. It is not suggested that the Lord Chancellor's power to select silk compromises this freedom. Nevertheless the position invites criticism as silk do derive a substantial and enhanced income from the state in the form of legal aid. Those who seek to be entrusted with complex and important cases must first secure what is in effect a seal of State approval.

Clearly the office of silk does not meet modern demands. An archaic and misleading title is bestowed upon a relatively few practitioners. The cost of litigation is artificially increased because of the prestige attaching to silk and limited number appointed. For these advantages to be in the gift of a single unelected member of the government is hardly compatible with the spirit of democracy.

Abolition

With the many disadvantages described the existence of silk becomes more untenable as time passes. The only alternative, if further complications and anomalies are to be avoided, is to abolish the office. Overnight the complexion of the profession would be transformed. Freed from the shackles of outdated practices it would be seen to adapt to modern conditions.

An immediate saving of the cost of the system of appointment would benefit the taxpayer. In the case of legal aid work, payments to all advocates could be put on a basis which truly reflects merit and work undertaken. The special and over generous tariff now enjoyed by leading counsel could be revoked. Although some may see their fees plummet this would help to contain the escalating cost of legal aid.

Without silk or any similar formal rank, a free market in advocacy generally would prevail. Reputations would be gained or lost by performance. This is the present position with solicitor advocates and junior barristers where fees charged reflect their competence. No longer would the mystique and financial advantages created by a title which has no relevance to modern times persist.

Without any named distinction all barristers and solicitors would compete equally. Those who wished to restrict their activity to more complex cases and not undertake paper work or pleadings, would be free to announce this fact. If this were not acceptable to a potential professional client then an advocate willing to undertake these tasks would be sought.

A philosophical observation, Occam's razor, as defined by Bertrand Russell states 'Entities are not to be multiplied without necessity.' This maxim can usefully be borrowed and applied to the mundane affairs of the legal profession. Silk is an unnecessary distinction which does nothing to improve legal services or benefit administration of the law.