Whither the institution of silk?

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Introduction

During the past two years, a debate has ensued on the fusion of the legal profession. The debate gained momentum with the appointment of the Budlender Task Team, which was charged with the responsibility of reconciling different views on the regulation of the legal profession. In the process, the need for the continued existence of the institution of silk came under sharp focus. In particular, the practice of reserving the conferment of silk to advocates and academics, to the exclusion of attorneys, ignited a heated debate. Now there are members of the Bar who are questioning whether it is worthwhile, at all, to retain the institution of silk.

The position in England

2 The first Queen’s Counsel was appointed at the end of the 16th century to supplement the advice given to the Crown by the Law Officers. With the passage of time, silk status was bestowed on individuals as a mark of excellence.1

3 Traditionally in England, only barristers were eligible for appointment as Queen’s Counsel (QC) but, in 1996, the right was extended to solicitors with rights of appearance in the higher courts.2

4 The institution of silk has been reviewed many times in England. In the 1960s, the Bar reviewed the institution. Again in 1978, the Benson Royal Commission did so. In 1993 the Kalisher Committee also conducted a review. Recently, the Kttridge and Glidewell Committees have also subjected the institution to intense critical review.3

5 Not so long ago, the British government suspended the system and encouraged public debate on its continued existence.4

6 The suspension of the system of the institution of silk by government in England triggered various responses by the Bar. It sought to respond to concerns raised in the consultation paper, such as: (a) the rank of QC was not a reliable guarantee of quality; (b) the rank restricted competition and did not allow market forces freely to determine the allocation of resources; for example, the consultation paper suggested that the choice was reduced because the system discouraged the use of highly competent junior counsel; (c) the division of the barristers profession into only two ranks did not constitute a sufficient career structure and the emphasis on the attainment of QC placed a disproportionate premium on that step; and (d) the current focus on oral advocacy in court put at a disadvantage any barrister who specialised in areas of law where the majority of his or her work was on paper or was directed towards achieving resolution out of court. Solicitors were seen to be similarly disadvantaged.5

7 The Bar in England initiated consultation within its structures and at an extraordinary meeting of the members of the Bar in September 2003, the Bar voted overwhelmingly to support the continued existence and improvement of the QC system.6

8 In the end, the British government decided to retain the QC system with necessary reform. Under the new QC system, the professions will select candidates after an open competition and send a list to the Department of Constitutional Affairs.

9 The Secretary of State will ensure that the recommendations are consistent with the terms of the new scheme and, in exceptional circumstances, he may depart from the list. He then recommends to the Queen that she appoints the listed candidates to the rank of Queen’s Counsel.7

10 Lord Falconer, when unveiling the new scheme, said that merit would remain the most important of the selection criteria. Others are advocacy ability, knowledge of law, integrity, professional standing and personal qualities including leadership and authority.8

The institution of silk: towards a new system in South Africa

11 I must, at the outset, indicate that I am in favour of the continued existence of the institution of silk.

12 The institution of silk is deeply embedded in the South African legal system. The procedure in general is for a candidate to apply to the chair of the Bar Council. In other Bars, committees of silks have been established. After the selection process, a recommendation is forwarded to the Judge President of that division of the High Court in which the candidate practises and if the Judge President agrees with the recommendation, it is then forwarded to the Minister of Justice, on whose approval, letters patent will then be issued by the President.9

13 It is a well-known fact that the most serious criticism of the system has been lack of transparency in the selection process. The other deficiency of the system is that, at the moment, it is not representative of the demographics of the society in terms of race and gender. The system has therefore produced imbalances which need to be addressed as a matter of urgency.

14 At the moment, the selection is done in-house by different Bars. This in my view, is an issue that may need to be revisited in order to demonstrate that the procedure adopted is not only transparent and objective, but inspires confidence. In other words, what is needed is a rigorous, transparent and fair procedure.

15 Consideration should be given to involving outside independent lawyers in the selection process. I do not see any reason why a retired or serving judge cannot be invited to sit on the ‘Committee of Silk’. In any event, judges are already actively involved in the pupillage system.
16 The other problem is that a candidate who has been turned down has no internal remedy. In fact, the Johannesburg and Pretoria Bars regard it as inconsistent with membership of the Bar for any member to make an approach to any person or authority with the objective of initiating interference in the procedure applied by the selection panel. The Johannesburg Bar allows candidates who have not been recommended for conferment of silk to approach the chair of the Bar Council to discuss the reasons for the decision of the Committee of Silks. 10 In Pretoria, there is one pending case of a member who is being charged for misconduct for having taken the matter further beyond the Bar Council.

17 I do not believe that it is fair to candidates who have not been selected to have charges of misconduct preferred against them merely because they have questioned their exclusion from recommendation. It is time that an internal remedy system be established which will grant such candidates a right to approach the General Council of the Bar (GCB) to challenge the decision of a local Bar selection panel. Furthermore, I do not see anything wrong with a candidate approaching either the Judge President or the Minister if there are valid reasons to do so. As long as the power to confer silk rests with the executive, the Bar cannot justifiably retain the power to initiate disciplinary proceedings against any dissatisfied candidate.

Racial and gender balance

18 It cannot be denied that the institution is dominated by white males, and, by and large, is regarded as an elite institution. We have only a handful of black silks. This unsatisfactory state of affairs needs urgent attention if the institution is to survive. The GCB must have a clear target which must be reached in the next five years. Each constituent Bar must initiate a programme aimed at identifying potential black and female candidates. The programme must ensure that identified candidates are exposed to quality work, involving appearances in the SCA, Constitutional Court and other High Courts.

Reasons for retaining the institution of silk

19 In the South African context, it is important to retain the institution of silk. No one can deny the fact that silks are often engaged in highly complex matters by private companies and government. In this way, the institution plays a pivotal role in the administration of justice. The institution of silk remains the most effective tool to create a reservoir of aspirant judges. If the institution is correctly nurtured, and all the negative factors removed, it can play a significant role in the total transformation of the judiciary.

Removal of rank of silk

20 Whilst I am in favour of the retention of the silk system, I am also of the view that, where appropriate, the rank of silk should be removed. For example, where a silk has been struck off the roll, there is no reason why the rank should not be removed. There may be other instances where removal of the rank is entirely justified. 11

Public debate

22 It is now opportune to initiate a public debate on whether the institution of silk should continue to exist. The danger of confining the debate to the legal profession is that a decision may be arrived at without having taken into consideration the views of the consumers of legal services and the public at large. In the long run, the exclusion of the public at large from the debate may not be sustainable.

23 The public debate could either be initiated by the Bar itself or a recommendation in this regard could be made to the Minister of Justice and Constitutional Development to initiate a public process similar to the one conducted in England in the past few years.

24 The process in England indeed led to the transformation of the institution, which is now geared towards meeting modern legal challenges.

Conclusion

25 To sum up, the words of the then chair of the Bar Council of England and Wales, Matthias Kelly QC, are apposite: ‘The QC system has long-standing benefits. The professional goal of taking silks raises standards among junior practitioners, as they aspire to attain QC status. QC provides a core of highly regarded advocates both at home and overseas who are experts in their fields. Their specialised skills make the courts work more effectively. The silk system not only operates in the public interest but also in the interests of justice’. 12

Endnotes

1 Consultation paper Constitutional reform: the future of Queen’s Counsel 2003 November Counsel 3.

2 Ibid. See also Glanville Williams Learning the Law 5th edition (Sweet & Maxwell, 2002) 240.


4 Consultation paper (July 2003), In 1 above, and Matthias Kelly QC ‘In the public interest’ 2003 November Counsel 3.

5 Consultation paper (July 2003) 20.


7 Chairman’s Column ‘QC reform: Good news for UK plc’ 2004 July Counsel 4.

8 Ibid 4.


10 Clauses 10 and 13 of the ‘Criteria and procedures applied by the Johannesburg Bar in respect of the conferment of silk’ and clause 26 of the ‘Criteria and procedures of the Pretoria Bar in respect of the granting of silk’.
