The Bar of England and Wales

The editor talks to the immediate past Chairman of the Bar of England and Wales, Mr Peter Goldsmith QC

Consultus:

THANK you very much for the opportunity to conduct an interview with you, especially because you are on a private visit to South Africa. The organised Bar in South Africa and the Bar of England and Wales have many practices and traditions in common. They face wide-raging problems and threats that are common. But they are also established professional organisations striving, in your own words, to "... create a progressive and dynamically structured profession fit for the 21st century".

Before talking about professional matters, please tell our readers something about yourself.

PG:

I have been at the Bar in England since 1972, essentially as a commercial practitioner and found that the opportunity to represent the Bar, to be in the middle of some of the greatest changes we have experienced in the last hundred years, was not only a privilege and a challenge but also brought its own excitement. As for my own background I came from grammar school education – educated in Liverpool – the same school as John Lennon who was far more significant than any of the rest of us were at that time. Then onto Cambridge where I read law, graduating in 1971. I then did a masters degree at London University at the same time as reading for my Bar finals in 1972 where I met again my wife who was doing her masters in law at the same time. I went then into the chambers as a pupil of Mark Potter, as he then was. He is now Sir Mark Potter, a High Court judge, and has been presiding judge of our Commercial Court. I started, as we did in those days, in my chambers with a fairly general practice such as some crime, and a lot of small civil work, but fairly soon started to specialize in commercial work and public law. I was common law junior counsel to the Crown before I took silk in 1987. In recent years my practice has focused particularly on failed city transactions, most of the big banks that have failed, for example BCCI and Barings. Takeovers which have not taken place have given rise to great deal of litigation in the United Kingdom and I have been involved in a lot of that. I suppose my major specialization has been in auditors' negligence cases. I argued for the accountants in *Caparo v Dickman* in the House of Lords, for example. There has been a great deal of that sort of work, I am afraid to say, around.

Peter Goldsmith QC

Consultus:

This is your first visit to South Africa. How did you experience it?

PG:

This is a remarkable country. Joy, my wife, and I have enormously enjoyed the few days we have been able to snatch here. We have enjoyed the tranquillity and beauty of the Cape, the majesty of the Game Reserve and its inhabitants, and the remarkable concept of Sun City, where we spent twenty four hours. Johannesburg promises to be an interesting experience as well.

Qualifying as a barrister

Consultus:

Let us start at the beginning. What are the qualifications required of a prospective barrister in the UK? How does a person go about being admitted as a barrister? What is a "pupillage clearing house"?

PG:

The intending barrister starts with a first degree. For most people this is a three year law degree which is run by the universities and will be the same academic qualification as intending solicitors will have. The following year will be a vocational year. That will be a year at Bar school, dedicated to learning those skills which an advocate particularly needs to have. Our present course is 60% skills based and has received considerable acclaim from independent academics. It concentrates on advocacy, negotiating, fact management and research skills – things which someone who spends his or her life in court needs to have. At the moment that is run only in our own school, the Inns ➤

of Court School of Law based in London. But one of the changes that we have made is to permit other institutions to teach that course too. That will allow a broader base for education and enable people who cannot study in London the opportunity to study outside and through competition will also stimulate the courts to even greater levels. So that is the fourth year. The final year is the pupillage year – twelve months during the first six months of which the pupil is not allowed to earn, not to work for anybody.

Up till now, pupillage have been obtained – and they are hard to obtain particularly in the best chambers – through a haphazard process of application. Each chamber is operating its own system of application and selection and at different times of the year.

I was very anxious during my year as chairman of the Bar to put an end to what is really the law of the jungle and to produce a clearing house so that all applicants would produce the same application form at the same time. It would help them and it would help chambers. It would also mean, and I regard this as very important, that the Bar would only choose its pupils on the basis of merit. They would not be affected by irrelevant considerations like race or sex. Doing that is not only right but it also means that the Bar will recruit the best and the brightest. That scheme – the pupillage application clearing house or PACH as we call it – is now in operation. We are about to see the first round. It is not compulsory but as a result of our efforts I am glad to say that 82% of chambers have voluntarily agreed to go into the scheme. I hope and am sure it will be a great success.

Advocacy training

Let me recap then the ways that the Bar trains in an organized manner. Firstly, we have the responsibility for making sure that the academic training meets our requirements. We, therefore, in effect, certify university degrees. Secondly, we provide the vocational training year, a full year directed to advocacy skills. Thirdly, we supervise during pupillage.

We, that is to say, the Bar Council, have required that during pupillage every pupil receives two additional forms of training. The first is a course we ourselves run, called advice to counsel, which is a two-day intensive course designed to teach people things they need to know when they go into practice – from further reminders about conduct to how to deal with tax of different sorts, pension contributions and insurance obligations. But even more important than that, we require them to undertake a further advocacy course which is provided in London by the Four Inns of Court and is administered by an excellent body called the IATC which has been developing our advocacy training and pupillage over the last few years. They are the people who I asked to visit South Africa in the last few months in order to show how we try to train people during advocacy. It is even more important these days, in my view, that we should do that, because with increasing competition from others, the English Bar no longer has the monopoly. We have to prove that we have the qualities to get the work, and that means quality, standards of conduct and of competence at all stages.

Co-operation with the SA Bar

"I was delighted that together with Malcolm Wallis SC we were able to provide an opportunity for concrete co-operation between the South African Bar and the English Bar. That is important not just because we have a long common tradition, but because commonwealth and common law countries and their lawyers need to have close association. I hope we will see greater co-operation between commonwealth and common law lawyers. Since we no longer have the Privy Council as a co-ordinating force in the law it lies with our judges and practitioners to learn to support each other. I am delighted that this advocacy venture in South Africa is one opportunity to demonstrate that closeness and mutual support."

Co-operation with solicitors

Consultus:
To what extent does the Bar co-operate with solicitors in regard to vocational training?

PG:
The Bar and solicitors have learned a great deal from each other in the vocational training that we do. For example, the present solicitor's course called the legal practice course was largely based on the principles underlying the Bar course. Not the detail, because they are training people to do a different thing. They are training solicitors to run a general practice so they have to teach real property law, probate and small business transactions. They do not devote the same amount of time to advocacy, or things of that sort, but the principle that there should be practical training and not just black letter law they have drawn from us. We have discussed quite extensively whether we should be aiming for a greater degree of common training. We have common academic training, as I have explained, because everyone does the same first degree. But up to now, the view we have taken is that because both courses are teaching different skills, there is little scope for overlap and a great deal of difficulty in trying to produce a course which would meet both objectives. It would either have to be a lot longer – which would give rise to great financial problems for the young – or it would fail to meet either objective. ➤

Rights of appearance

Consultus:
We understand that solicitors have for some time been entitled to appear in the highest courts. Which courts? What additional qualifications or experience are required? What has the effect been on the Bar? Have many barristers joined the solicitor's branch? Does the Bar still receive a sufficient number of applications for pupillage?

PG:
The changes to our system mean that solicitors can now acquire the right to appear in the high courts. It is limited to solicitors who have obtained the further qualification. Essentially that means, first, that they have to have been qualified for three years; second, that they must show an existing experience in advocacy in the lower courts; third, that they then have to pass a test in procedure, relating to the high court in criminal or civil matters, and then they undergo a further period of training which can be done effectively over two long weekends.

The numbers that have done this so far were actually quite small. At the last count there were less than 400 solicitors who had acquired these rights and fewer still who were actually exercising them. So the effect on the Bar so far has not been great. The numbers coming to the Bar have been still far greater. People wanting to come to the Bar have been greater than we have been able to absorb – for example in 1994 there were 2 500 applicants for the Bar school which normally we expect to take no more than a thousand. But, and this is one of the messages I was particularly trying to give during my year as chairman, those things we cannot be complacent about. There is a very real place for the Bar – I have no doubt about that at all – but like any other business, and I am afraid the Bar has to be a business too to some extent, you only succeed by being competitive – that means providing a service of high quality, efficiently and at a rate which is competitive. So a lot of my year was directed towards modernising the Bar so that it could meet those challenges.

Appointment as judges

Consultus:
Are judges of the high courts appointed solely from the ranks of the Bar? What procedure is followed? Do judges receive any training?

PG:
We have two types of higher court judge. The high court judges are those who sit in the high court – who we call "red" judges – and then they go on to the court of appeal and even higher. And we have circuit court judges who sit in our crown courts and in our country courts. They are professional judges but at a lower level of jurisdiction – although the jurisdiction is now very high. Both barristers and solicitors are qualified for appointment but the qualification is in a sense different. In order to be appointed a high court judge you have to have a number of years experience as a higher court advocate. Now, all barristers are in that position but very few solicitors, and none at the moment are in that position because the new system has not been going for five years. There is an alternative method for solicitors to get to the High Court and that involves them starting off as a Recorder, which is a part-time judge, then becoming a circuit judge and then being appointed to the High Court. We have one example of that at the moment and I am sure we will have others. The justification for that is that if you do not come to this with experience as a full-time advocate in the past, it is better to gain experience in a lower court as a circuit judge before moving directly to the High Court. As to the circuit bench of whom there are about 450, they are drawn from barristers and solicitors. There are quite a number of solicitors on the bench who have all been recorders (part-time judges appearing for a period of time before appointment to the circuit bench). They all receive training. The training for circuit judges is an induction course which will last for four days, repeated as a residential course every three years, and every year there is a single day's refresher, largely directed to sentencing matters. There is much to debate as to whether the training should be extended.

Getting on with solicitors

Consultus:
How does the Bar get on with the solicitor's branch?

PG:
Generally the working relationship in the Bar Council and the Law Society representing solicitors has been extremely good. The officers, that is to say the Chairman of the Bar and the President of the Law Society, have been on good personal terms. When I was Vice-Chairman of the Bar we instituted a system that the Vice-Chairman of the Bar and the Vice-President would have a regular meeting. We have regular quarterly meetings in any event and an annual weekend retreat with the officers of the Law Society and the officers of the Bar Council. The relationship between the secretariats are also close. The Chief Executive of the Bar and the General Secretary of the Law Society will be in close contact. Sometimes there are issues which mean the relationship becomes strained. It would be undeniable that when we were having the major battle about rights of audience the relationships did get strained, but through the good sense of those who were involved at that time those were not allowed to interfere with co-operation in other areas because I am sure it is true that the areas which the Bar and the Law Society have in common are far more significant, far more numerous, than those where we may have a different sectional interest. It is very important, for example, that practising lawyers should have a close co-operative view on matters which concern the administration of justice in general and sometimes there may be no one else to speak out in those areas. ➤

The Woolf Report

Consultus:
What are the main implications of the Woolf Report for the Bar?

PG:
The Woolf Report is, I think, the 62nd report we have had this century on civil justice review. Almost all of them were full of good ideas, but many of them failed as a result of the resources not being there.

The centrepiece of the Woolf Report is judicial case management. Actually we have tried this before. We have summonses for directions and pre-trial reviews. That will only work in my view if the government provides to the judiciary the resources and the training to do it. It has got to provide the resources because you cannot have a judge coming into court expressing a view how a case should be tried if he has not had a proper opportunity to read the papers before. And that does not mean just glancing through them – it means studying them completely. And I am not confident our government is going to provide the additional judicial manpower which that implies.

Secondly, you need to train judges to do this because they are not naturally people who see it as their job to manage the way that a case operates – some do it extremely well and do it naturally and others, I am afraid, do not.

It will put an even greater responsibility on the Bar to be involved in cases in an early stage, to identify what the real issues are and to make sure that the judge understands what those real issues are so that we do not find it is being said that the party is prevented from dealing with the particular point because the judge has not seen what its real significance is.

Organization of chambers

Consultus:
How do barristers organise themselves to render efficient and competitive service?

PG:
The chambers system as it has developed is something of a hybrid between total independence and a co-operative association. Most barristers, although not all, practise in chambers – maybe as many as 50 in number, or perhaps as few as 5 or 10. There is obviously no sharing of fees within chambers and members of chambers consider themselves free, and their clients do, to appear against each other, which partners could never do. That is quite important because you will find that specialists will gather in the same chambers. You may find there are only three or four chambers which deal extensively with a particular area. If they were partners and were unable to act against each other it would considerably reduce the scope for clients to find a barrister of experience in that area. But there is an increasing amount of "corporate identity". Chambers will have a logo, they will want to have their own image, they will choose very carefully who comes into those chambers and they will perhaps even direct themselves to try to capture a particular part of the market.

We have to watch this to make sure that it does not result in any loss of independence which a barrister needs to have. So far, I am sure, it has not done so. On the contrary, I think it has given rise to advantages, for example, a group who have gathered together can afford to invest in not just library systems but technology in a way that they could do not do alone. They are able to employ somebody to manage the business in a way in which it would not be possible for a individual barrister to do. They are also able to adopt modern business practices in relation to organisation of work.

Direct access by clients

Consultus:
Can barristers be directly accessed by clients?

PG:
We have direct professional access which is access by other professionals such as accountants, surveyors, architects and engineers who have a problem generally that they are bringing on behalf of a client. So they are acting as intermediaries as well. But we have had and are continuing to have a major debate about whether greater access should be permitted, particularly to the lay client. I have to say that I have been personally opposed to that on the basis that the Bar's real function is in acting as a referral profession on the instructions of an intermediary. And I think when barristers and solicitors work together it produces a very good team. I am also concerned about the regulatory aspects of it.

The Bar Council has a major responsibility to regulate barristers' conduct. Judging from the solicitors' experience the biggest problems on regulation come from practitioners who are handling clients' money or acting in cases outside their experience and competence and I would hate to see that sort of burden of responsibility falling on the Bar Council.

"Conditional fees"

Consultus:
Have conditional fee arrangements been introduced in the UK – and accepted by the Bar?

PG:
Yes, they have been introduced and – a qualified "yes" – been accepted by the Bar.

The system permits conditional fees in personal injury cases, insolvency cases and human rights cases. Personal injury is the most important. It allows the lawyer to agree with the client an uplift of up to a 100% on his normal fee – if there is success. The Bar has been very unenthusiastic about these proposals, principally because we have been worried about the impact on the objectivity of advice which is given by someone who stands to gain from a particular course of events.

For example, if someone sees a ➤

case perhaps going badly, and therefore a risk of receiving nothing at all if the case fails, he may be more inclined to cut his losses and persuade the client to accept a settlement when the true interests of the client demand fighting on. But the Bar is in a particularly difficult situation because a barrister does not have partners and employees with whom to share the burden. If the case fails and the barrister gets no fees that may be a very significant financial hardship for the barrister. So it is much more difficult for a barrister to accept that he will do, for example, a four week trial on the basis of a conditional fee. But it is early days yet and we will have to see how it works out.

Immunity

Consultus:
Tell us something about barristers' immunity in England and Wales.

PG:
Barristers are still immune from civil action in cases connected with the appearance in court. Actually our Court of Appeal has recently extended this in a case concerning a solicitor because solicitors have the same immunity for litigation matters as the Bar does; they have extended it in a case called *Smith and Linskell* to cover some quite extensive pre-trial advice in a criminal case.

The silk system

Consultus:
How does the silk system operate in the UK?

PG:
We just had the latest round of silks announced this week. You apply to the Lord Chancellor who makes the final decision, but he does that after consultation with all the senior judiciary, the Chairman of the Bar and the heads of the specialist Bar associations and of our local Bars. He also now consults the Law Society as well. You will probably find that there will be about 500 to 600 applications from whom about 60 or 70 are likely to be appointed in any year.

Legal aid

Consultus:
Broadly speaking – how is legal aid applied? On what basis are barristers paid – hourly or on a fixed fee basis?

PG:
We have at the moment two different forms of payment for legal aid. The smaller cases – and I am talking about how the Bar are paid, not solicitors – are called standard fee cases and for those there is a fixed fee although it is time related. For example, for a case which does not last more than a day there will be a fixed fee which will be the same whether the case is finished in two hours or in five hours. In the more serious cases – those which are over three days in length – there will be a taxation of the cost at the end of the case and the taxation will take account of the time that has been spent in preparation and have regard to the gravity of the case. Here I am talking about criminal cases.

Civil cases are all done on the basis of a taxation after the event with certain scale fees which apply to different elements of the job. But we are just moving to a new system called graduated fees where four different factors will determine what the fee in criminal cases is going to be and only one of those is going to be concerned with the length of the hearing. That is going to result in swifter payment for the Bar, but it will also result in more certainty for the government as to what the cost of the cases are going to be.

Composition of the Bar

Consultus:
Has the composition of the English Bar changed much lately?

PG:
It has changed a great deal. If you look at our senior judges you will find they are mostly white, male and public school educated but that is because they were called to the Bar 30 or more years ago. At the moment the number of women coming to the Bar is about the same as men – just about 50% of those who are called to the Bar each year are women.

Those who come from, what we would term ethnic minorities, because that is the position in the United Kingdom, account for about 9% of the Bar at the moment which is greater than the percentage that those groups represent in the population as a whole.

So these things have changed a great deal. There is a much better spread in terms of race and sex than there used to be. The worry is that that may change back and the reason for that is the increasing financial difficulty that young students have in coming to the Bar because government funding has dropped off. That is something we are enquiring into at the moment to see if we can find any solution for it.

Future of the Bar

Consultus:
How do you see the future of the Bar in the UK?

PG:
I am very confident in the future of the English Bar provided it modernizes itself and reacts to the challenge. I think it will do extremely well because the degree of experience and the advantages that independent practice give mean that they will be best able to provide advice and advocacy services to clients up and down the country.

It has always been a hard career to come to; it has always been competitive and some people have always failed but I am very sure that young people who are committed to the Bar will find it a rewarding career and a satisfying career.

For the right person I cannot imagine any better career and I think that will be true in the next century as it has been in this as well.