

## **Keynote speech**

### **Annual Bar and Young Bar Conference 2018, London**

#### **Lord Sumption, Justice of The Supreme Court of the United Kingdom**

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I stumbled into this profession in 1975 after doing something else. I had taught history at a university. After four years of that, I decided that I was a good historian but a lousy teacher and resolved to try something else. In a fortnight's time, I shall retire from the Supreme Court on reaching the statutory retirement age. So this seems a good time to ask some questions. What was I looking for when I abandoned my billet at Oxford and became a barrister? And did I find it? More important perhaps, will people coming to the Bar find it today, whatever it was?

I wish that I could say that I became a lawyer out of a burning desire to right the injustices of the world and help my fellow citizens. There are lawyers who can honestly say that, and I take my hat off to them. My own motives were more mixed, more mundane and perhaps more typical. Top of the list, I am ashamed to admit, was money. I wasn't looking to make a fortune. But I married young and wanted to be able to afford a house and make a decent living for myself and my family. Secondly, I wanted to be self-employed. I am constitutionally unfit to be an employee. I resent hierarchy. I am bad at taking instructions. And I talk too much. The Bar is a good profession for people like that. Thirdly, I wanted varied and intellectually stimulating work, free of the drudgery which is a large part of most occupations.

The externals of a barrister's life have changed a lot since then. The Bar was more picturesque in 1975 and less efficient. It still admitted non-graduates. A fair number of its members were on their second career, as I was. But they had done more exotic things. They were ex-policemen, ex-merchant seamen, ex-army or navy officers, ex-actors. Chambers were small. Mine was only 16 strong when I joined, compared with nearly 100 now. Barristers wore striped trousers and waistcoats, and bowler hats had only just gone out. Papers were delivered tied up in red tape (or white if they came from the Treasury Solicitor). There was no email or fax. Telex existed, but the senior members of my chambers would not allow it in the building, because they didn't want to be continually bombarded by solicitors with messages. For those of us who really wanted to be continually bombarded by solicitors with messages, this was deeply frustrating. There was always

the telephone of course. Our telephone system depended on a large wooden switchboard manufactured in Coventry which stood in the corner of the clerks' room with about 40 sockets with wired plugs coming out of them. An aged clerk sat by it all day, pulling plugs out of some sockets and inserting them into others.

Solicitors and clients were seated on upright chairs in draughty unheated corridors waiting for the great man (and it always was a man) to summon them to his presence. Barristers were officers and gentlemen. Senior clerks were NCOs, who combined unctuous deference and crude bullying in roughly equal measure. He took 10% of all fees and paid the wages of the junior clerks personally. He called you "Sir" and you called him "Jim", but no one doubted who was in charge. Fees were paid by cheque, and kept in the clerk's right-hand drawer until they had almost expired, whereupon they were booked and distributed. Getting pupillage in one of these dark dens of the law depended on knowing someone, and tenancies were awarded at the discretion of the Head of Chambers, generally on the basis of goodchapmanship.

All of this has changed beyond recognition. Modern barristers' chambers are much more professionally run. Recruitment is more meritocratic and diverse. Women comprise about half of new recruits to the profession, although a smaller proportion of tenants and QCs. Premises are still not luxurious but at least they are comfortable. It is a much more competitive business, in which barristers switch chambers to improve their fortunes and chambers outbid each other for the freshly-minted products of the universities.

These are, however, only the externals. The essentials have not fundamentally changed. Barristers still work as individuals, taking responsibility for their own work. Advocacy is briefer, but otherwise not very different. Judges are more resistant to being battered with case-law, and the cases themselves are no longer cited from the actual volumes, covered in leather dust which comes off on your hands and suit. The suits themselves are of two pieces not three, and usually bought off the shelf.

Yet if I had to identify the most significant changes they would not be about the working environment, or the way that the profession is managed. They would be about the Bar's relations

with the world outside. Two relationships in particular have radically changed: the relationship with solicitors and the relationship with the state.

Until the 1970s, solicitors were quite extraordinarily deferential to barristers. The great figures of the solicitors profession were still what Trollope, a hundred years earlier, had called “men of business”. They were experienced negotiators, client-getters, draftsmen and dispensers of worldly advice. But few of them were sharp legal analysts or learned in case-law. Litigation was no business for a gentleman, and respectable clients were not expected to engage in it. One of the most prestigious commercial firms in the City of London had a litigation department consisting of a single managing clerk. His job was to arrange to get the chairman of the client’s chauffeur off speeding charges, and to rid the senior partner of his wife at minimum cost to his bottom line. The ablest analytical lawyers became barristers, and they were the indispensable port of call for any serious legal problem.

When I entered pupillage in 1975, there was still quite a lot of that world left. Conferences were always held in barrister’s chambers, never in the solicitor’s office. The barrister pontificated. The partner assumed a reverend expression and nudged his trainee to take a detailed note, but otherwise took no very noticeable part in the proceedings. A barrister who shamelessly failed to read the papers rarely got found out. When post-it stickers came in in the 1980s, a distinguished member of my chambers used to instruct his juniors to plant them at strategic point through the bundles in order to suggest careful perusal. That would have been quite unnecessary a decade earlier.

One of the major changes that has come over the work of the Bar is that most solicitors are excellent lawyers who differ intellectually from barristers only in having a less practised instinct for the way that judges think. They will give legal advice to the client themselves in the majority of cases where it would once have been routine to go to counsel. Today, counsel are only instructed when the question is particularly difficult; or litigation is likely; or the client has already received unwelcome advice and become obstreperous. By the time I left the Bar, the relationship between the two branches of the legal profession called for a high degree of mutual respect, and had done for many years. This is particularly true in the specialised areas of civil practice, where solicitors are not only formidable lawyers but frequently have a great deal of practical experience

of the business background. Today, if you write an opinion full of nonsense, or overlook some critical case, or try to bluff your way through a conference, you will probably not be instructed again. Barristers unquestionably have to work harder for their fees than their forbears did, and the standard of their work has benefitted immeasurably as a result. It is much more difficult than it once was for bad lawyers to survive simply by looking senatorial and sounding plausible.

However, undoubtedly the greatest change has been in the Bar's relations with the state. The Attorney-General has spoken of this fundamental change. The Bar has of course always had close links with public life. Throughout the nineteenth and for most of the twentieth century, there was a shared culture between the Bar and the higher reaches of government and the civil service. A very large number of practising barristers were members of the House of Commons. This was possible because the pace of professional life for most barristers was relatively relaxed and the sittings of the House of Commons began at 4 p.m. when the courts rose. Until recently, a surprisingly large number of judges had previously served in the House of Commons. There are still a lot of lawyers in the House of Commons, but many of them are solicitors, and very few are in full time practice. I share the Attorney's regret at the growing gulf between the worlds of law and politics. He himself has been able to bridge it. But I doubt whether it is realistic to expect a significant reversal. It is just one symptom of a more general change in English professional life. We live in a world dedicated to specialisation, in which the public does not believe that one can do more than one thing well. The pressures of work and a tougher work/life balance cause people to withdraw into silos, with fewer links to other worlds. Lawyers now tend to marry each other, an interesting symptom of social change. Social and professional life overlap much more than they used to, sometimes totally. I think that the Bar has resisted this trend better than most professions. But it is still noticeable.

There is also at the Bar a powerful ideology of opposition to the state, notably in the fields of crime, public law and human rights. In some ways this is healthy. But it has unquestionably made ministers and civil servants much warier of the barristers and judges. Even so, they are still in demand for public inquiries and public appointments calling for a high degree of confidence in their objectivity and integrity.

However, I hardly need to tell this gathering that the biggest single factor by far in the growing distance between government and the Bar, is the perennial row about legal aid fees. It is, I think, helpful to look at this historically. The financial dependence of a large part of the Bar on publicly funded work really dates from the 1970s. Although the legal aid scheme had begun in 1949, the criteria were initially very restrictive. For example, it did not cover magistrates' courts. The Bar's dependence on legal aid fees was not great. All this changed in the 1970s. There was an explosion of litigation across the whole field of legal practice from shipping and banking at one extreme to petty crime at the other. This was a big cultural shift after the legal doldrums of the 1950s. In practice areas supported by public funding, there was a rapid expansion of work, occasioned mainly by a rise in crime and by the accelerating rate of family breakdown. This was accompanied by changes in the criteria for legal aid which made most of the population eligible and covered most areas of civil as well as criminal litigation. According to Sir Henry Brook's survey, legal aid, which had represented less than 10% of the earnings of the Bar in 1970, rose to 30% a decade later. All of this meant more work for the Bar, which still enjoyed a monopoly of rights of audience. The message percolated through to the universities. The Bar doubled in size in little more than a decade. The 1970s and early 1980s were in retrospect a golden age. But it was also the backdrop to the high expectations and profound disappointments of the following years.

The turning point came in the 2<sup>nd</sup> half of the 1980s, with the chancellorships of Lord Hailsham and Lord Mackay. The Mackay reforms were a shock to the Bar. It had always believed that its high standards of conduct and competence justified its monopoly of forensic advocacy. The advent of a world in which competition was regarded as inherently virtuous severely disrupted the assumptions of much of middle class England, and nowhere more so than at the Bar. My own view at the time was that if the Bar couldn't see off competition from solicitors, it didn't deserve a monopoly. The whole issue provoked a good deal of ill-feeling in my chambers, where the head was due to be the next Chairman of the Bar. But, as it has turned out, the end of the Bar's monopoly of rights of audience has proved to be a damp squib. People who devote their whole professional lives to court advocacy are always likely to do it better than those who have to combine it with all the other aspects of litigation and client relations. By and large, solicitors have made very few inroads into the Bar's business except for the more routine work where the case for using both a barrister and a solicitor never was very strong.

But what was perhaps a bigger shock was the change of direction on legal aid, which occurred at about the same time. Legal aid cuts have fundamentally changed the nature of practice in every area where the clients are too poor to do without it. That includes most crime and family work, two fields in which litigation is hardly ever optional. LASPO and the recent cuts in legal aid fees represent the latest chapter in a story which has been heading that way for more than 30 years. So, like all of you here, I welcome the Attorney's statement this morning that we may be at a turning point.

There are some heads of government expenditure which are discretionary. Governments decide how much money is available and cut their suit according to their cloth. There are others which are fundamental to the whole purpose of government, and have to be paid for whatever the costs. Historically, the administration of justice was the *raison d'être* of the state. The maintenance of a functioning system of justice is not discretionary. It is fundamental to the existence of the state and to our existence as a civil society. If I may take up the theme of the Chairman's address, that means a functioning system of criminal legal aid; enough judges of the right calibre to do the work without undue delay or haste; an effective police force; and a humane prison service to receive the unusually large number of people whom we sentence to be locked up. A court system which leaves criminal defendants to face the state's prosecutors with no, or no adequate, representation, is not a functioning court system. A court system which leaves defendants to foot the bill for their defence when the state has failed to prove its case against them, is not a functioning court system. A prison system comprising overcrowded and understaffed seminaries of crime is not a functioning prison system. These things may not even be cheaper, if the result is that more court time is wasted by litigants in person; and prisons that simply turn more and more embittered and vicious recidivists. These are areas where any government has to pay whatever it costs.

But other parts of the justice budget really are discretionary, even if the Bar is apt to forget the fact. That includes much (not all) of civil legal aid. Supporting the cost of civil litigation may be desirable in cases where people are too poor to fund it themselves. But it is not fundamental in the way that criminal legal aid is fundamental. However desirable, it has to compete with all the other calls on public funds: health, education, defence, social security and so on. Governments of every political hue can fairly be accused of having failed to recognise that some of the most basic and indispensable functions of the state just cost more. This is a truth which cannot be

obscured just by paying less. But not all of the costs associated with the justice system come into that category.

I know that this is not going to be a popular message in this place, but the Bar's response to these challenges has not always been wise. In the first place it has overstated its case, by failing to recognise that we cannot return to the open-handed approach to legal aid that prevailed in the 1970s. There is a trade-off between the cost of the civil justice system and other kinds of government expenditure which are at least as important in the public's eyes. Secondly, the Bar has tended to run the kind of campaigns which could only have worked if its cause enjoyed strong and instinctive public support. It does not. Most of the public believes that there is no smoke without fire, that people charged with criminal offences are almost certainly guilty, and that barristers are rich toffs who help their clients to avoid their just deserts. This is a travesty. But it is a deeply embedded prejudice which we have to reckon with. There have never been any votes in having a fair and properly functioning court system, fundamental as it is. Barristers will never have the kind of public support that nurses or teachers enjoy. This means that they cannot use the same campaigning methods. Public demonstrations with banner in hand and wig on head look ridiculous and are completely counter-productive. The Bar's only real weapons are to refuse to take instructions for inadequate fees; and to work on ministers who, however resistant, are at least likely to have a better understanding of the problem than most of the wider public, as this morning's announcement shows.

I doubt whether many people would today advise a young lawyer to go to the criminal or the family bar. But one of the extraordinary and heartening things is the number of able young people who still want to be criminal lawyers or family lawyers. They know about the problems. They don't have private money. But they still do it. Not, I suspect, in sufficient numbers to secure the long term future of these practice areas. But, even so, in sufficient numbers to show that there is more to the Bar than just making a good living. Some of them no doubt hope that they will be able to buck the trend that affects the rest of the profession. But most of them are drawn by the other things that the Bar offers: a sense of autonomy, personal responsibility for one's own work, absence of hierarchy, constant intellectual challenge and sheer variety, but also, I think, a sense of idealism and service to a cause.

So, what will the future hold? I think that the future will probably see a smaller Bar. I suspect that the Bar will meet the challenge presented by the high standards of the solicitors' branch, rising expectation of clients and declining levels of public funding by specialising even more than they do at present. I have no doubt that the Bar will continue to flourish as a specialised and expensive referral profession. Business disputes will account for a larger proportion of its work, and especially international business disputes, where the English bench and Bar enjoy a reputation for expertise and objectivity which is a major asset. Even in the courts of the European Union, I suspect that English barristers will continue to appear, even if they have to masquerade as Irishmen. But as far as the public interest is concerned, all of this will, I am afraid, be a mixed blessing. Poorer clients will find it harder to obtain expert advice and representation. The more poorly remunerated areas of practice will shrink, and some will wither away.

There is another change, which is already occurring, and which personally I shall regret. Until recently, appointment to the bench was regarded as the natural culmination of a successful legal career. It almost always involved a significant drop in income and, initially at least, a less interesting range of work. You spend your early years as a judge trying a lot of cases which you would not have touched with a bargepole as a top-ranking barrister. People nevertheless accepted appointment to the bench. They did it for a variety of reasons: time for a change of view; children growing up; the prospect of promotion to the Court of Appeal or the Supreme Court, where the work was more uniformly interesting; status - especially at High Court level. But although cynics will reject this, by far the most significant reason was the strong public service ethic of the Bar. It is the same public service ethic that contributes to the decisions of many people entering the profession to go into practice areas which pay badly, but meet a manifest public need.

The Bar's public service ethic hasn't disappeared. But it is no longer enough to persuade people to go to the bench when they would be better off staying in practice. The decline in applications for judicial appointment has been particularly marked among the Bar's high-flyers, from whose number the leading members of the judiciary have traditionally been drawn. Recent difficulties in making suitable appointments to the High Court are well known. This is a complex phenomenon, and any single all-embracing explanation is likely to be wrong. But a major factor is the perception that the work of judges is no longer valued as much as it was, by the government or by the public at large. Not just financially by the government, but more generally



by the public at large. There is a vicious circle at work here. As the perceived quality of new recruits to the bench gradually declines, respect for the office will decline further, not just in government and among the public, but among practitioners themselves. They will be even less interested in joining their ranks of the judiciary. The public service ethic of the Bar has been an exceptionally valuable resource for this country. It isn't a matter of rules, standards and codes of conduct. It is a matter of educated instinct, shared culture and peer pressure. It takes decades, arguably centuries, to build a culture of public service, but only a few years to destroy it.

The long-term implications for the Bar are uncertain, but may be significant. One consequence will be a change in the age profile of the Bar. The Bar has traditionally been a relatively young profession. It used to be repeatedly top-sliced as its most senior members left for the bench at the age of about 50. Apart from a few heroic old mastodons, the top barristers in practice have generally been in their late forties or early fifties. As more of the most talented barristers remain in practice until their sixties and even in their eighties, the progress of younger practitioners may be less rapid than it was. As the top practitioners stop going to the bench, the close relations which currently exist between Bar and bench, are likely in the long term to become more distant and formal. This is what has happened in the United States, where the ablest practitioners stopped going to the bench many years ago. And in France, where advocates and judges have never belonged to the same profession. This will make court hearings less enjoyable, and probably less efficient. Naturally, I hope that none of these things come to pass, but the auguries are not good.

So, I return to the question with which I opened this address. I certainly found what I wanted at the Bar, and I believe that those coming to the profession now will find it. The Bar is not without its problems, and I am certainly not saying that everything in the garden is wonderful. But let us not forget why the Bar is still where the magic is. It is a demanding, endlessly varied and stimulating profession. It is serious and theatrical at the same time. It is populated by rigorously independent-minded and intelligent people, with high ethical standards. Its members are surrounded by congenial and civilised colleagues, offering a great deal of mutual support, especially to younger members of the profession. All of us want to feel that we are doing something worth doing. And we are, whether or not others realise it. For as long as forensic advocacy survives as a pillar of our system, these will be assets worth celebrating, and worth enjoying.