

Judicial titles and dress in the Supreme Court and below

by Graham Zellick

INTRODUCTION

This article describes and comments on the titles accorded to Supreme Court justices and the Court's policy on judicial and barristers' costume, criticises the absence of any public discussion of these matters and considers some issues in relation to judicial titles and dress generally. It also comments on the recent peerage conferred on the Lord Chief Justice of England and Wales.

TITLES FOR SUPREME COURT JUDGES

It is odd that at no time between the government's proposal to replace the House of Lords as a judicial body and the creation of the Supreme Court by the Constitutional Reform Act 2005 was there any consideration or public discussion of the title, if any, to be accorded to the justices of the new Court.

On 1 October 2009 when the Court came into existence, all its members automatically transferred from the House of Lords where they had been Lords of Appeal-in-Ordinary. All were therefore life peers with the title of Lord or Lady. The first member to be appointed direct to the Supreme Court without having been a Law Lord was Lord Clarke of Stone-cum-Ebony, but he had already become a peer when Master of the Rolls. He was followed by Lord Justice Dyson, who was not a peer, in 2010. He thus ceased to be a Lord Justice of Appeal and reverted to being called Sir John Dyson.

There was thus briefly a situation where most judges of the Supreme Court were styled "Lord" – whether because they had been Law Lords or had previously been Scottish Lords of Session who, though not peers, have that title by courtesy – but the minority, newly appointed from the English or Northern Ireland Bench or Bar, would be styled Sir or Dame. These variations were for some reason thought undesirable and the Queen was advised to act.

Before explaining what was done, it is worthwhile to ponder why any action was thought necessary. What is the problem with one judge being Lord Smith and another Sir John Smith? Is someone really going to infer that Lord Smith is superior to Sir John and carries greater authority? Does that happen in the Court of Appeal when a Lord Justice sits with a brother judge who has some other title or in the Judicial Committee of the Privy Council? The Presidents of all three divisions of

the High Court, normally Lords Justices on their appointment, surrender their title of Lord Justice and revert to their name: Sir James Munby, Sir Terence Etherton and Sir Brian Leveson are the three current Heads of Division who presumably feel in no need of a more exalted title to maintain their authority and leadership. The same has often been true in the past of the Master of the Rolls.

Had no change been made, it would have been only a matter of time before all but the Supreme Court judges from Scotland would have been knights and dames without any other title. That is, of course, on the assumption that any person appointed direct to the Supreme Court from the Bar would be knighted or appointed a Dame as is the custom with High Court judges. Mr Jonathan Sumption QC was not, however, knighted on his appointment to the Supreme Court, presumably because the change introduced following Sir John Dyson's appointment has been thought to render it unnecessary.

The obvious and straightforward solution to the perceived problem of different titles among the justices of the Supreme Court would have been to create them life peers, but it must have been thought that this would derogate from or compromise the thrust of the reform which was to secure clear separation between the legislature and the judiciary.

With the titles of Judge, Mr(s) Justice and Lord/Lady Justice already committed, a neat solution was found in the Scottish practice of conferring the courtesy title of "Lord" or "Lady" on all Senators of the College of Justice/Lords of Session, a title retained after retirement. Accordingly, the Queen issued two warrants of precedence under the royal sign manual for Justices of the Supreme Court who have not been granted a life peerage, one for Scotland addressed to Lord Lyon King of Arms and the other for England addressed to the Duke of Norfolk as Earl Marshal and head of the College of Arms in London, which in practice entrusts the matter to Garter King of Arms.

Both warrants are dated 10 December 2010 (over a year after the Court came into being) and countersigned by the then Lord Chancellor, Kenneth Clarke, QC, MP. They are otherwise in identical form save for referring to the Lyon Office and the College of Arms respectively. The nearest thing to a rationale contained in the recitals is that Her Majesty "deem[s] it expedient that . . . Justices of the Supreme Court . . . shall be

designated by the courtesy style and title of ‘Lord’ or ‘Lady’”. The operative provisions of the warrants are contained in two paragraphs:

- Any justices of the Supreme Court who have not been created a Baron for life shall be known and addressed by the courtesy title of “Lord” or “Lady” during their terms of office and “in retirement”. The drafting does not make clear that the intention is to prescribe the style of a peer (“Lord Sumption”) rather than the courtesy style which applies to the younger sons of dukes and marquesses (“Lord Jonathan Sumption”) or the daughters of dukes, marquesses and earls (“Lady Mary Crawley”). Thus, they become Lords or Ladies without also becoming Barons and Baronesses (as is the case with life peers).
- The wife or widow of any justice shall be known and addressed by the courtesy title of “Lady” for so long as she continues to be his wife or remains his widow. No privilege extends to same-sex or unmarried partners, but this of course mirrors the situation regarding titles generally.

The practical consequences are as follows:

1. As these are courtesy titles and not substantive peerages, a number of incidents that flow from the latter do not arise. First, children do not acquire the prefix ‘Honourable’. Secondly, the justice is not entitled to the definite article which denotes a peerage (ie “Lord Sumption” and not “The Lord Sumption”). Thirdly, signature by title alone (eg “Sumption”) would be wrong but a justice with a courtesy title that includes a place name (eg Lord Wilson of Culworth) may include the place name in his signature (eg “Nicholas Wilson of Culworth”).
2. It will be seen from the previous paragraph that the courtesy title for a Supreme Court judge may include a place name on the same basis as for a peer, namely, to distinguish its holder from another peer or Lord with the same name or title, eg Lord Hughes of Ombersley, although the warrant makes no express provision for this. Thus, Supreme Court judges must discuss and agree their proposed titles with Garter or Lord Lyon, as the case may be, and the agreed title is recorded in a formal note signed by the person concerned. This also means that, if the judge is later created a peer, there can be a seamless transition from courtesy title to peerage. We do not yet know whether Supreme Court judges on retirement will routinely be made life peers. The title may include a name different from the justice’s surname, although the warrant makes no explicit provision for this. It would in any case be discouraged unless there were a good reason for it.
3. It has been concluded that the reference to “retirement” in the warrants extends to resignation

whether in order to take up another judicial office or otherwise. Thus, Lord Dyson continues to be so styled in his current office of Master of the Rolls. This conclusion, however, is questionable. The warrants speak of “retirement” which is an unambiguous term and does not overlap with resignation. Moreover, the justification for retaining the title after resignation disappears. It is arguable, therefore, that Lord Dyson should have reverted to Sir John Dyson on assuming office as Master of the Rolls until such time as he is created a peer (which has been the custom in recent years). For example, a circuit judge continues to enjoy the prefix “His [or “Her”] Honour” on retirement, but that does not apply if he or she resigns before retirement, even to assume another judicial post. Likewise, in the academic world, a university professor loses the title on resigning, though on retirement is customarily awarded the title of Emeritus Professor which allows its retention for life. I accept that an instrument of this kind will not be drafted with the care and precision expected of an Act of Parliament, but it would not have been difficult for the draftsman to have used words leaving no doubt that the style would be enjoyed “for life” unless subsequently created a Baron. It might also have been prudent to have included a clause allowing revocation of the title by Her Majesty, but perhaps that was thought to be implicit.

4. The warrants authorise titles only for the justices of the Supreme Court. The practice is not therefore available for other senior judges, usually Lords Justices of Appeal, who may be promoted to a higher judicial office which carries no specific title, such as Lord Chief Justice, Master of the Rolls, Chancellor of the High Court and the Presidents of the Family and Queen’s Bench Divisions.

It is noteworthy that every other judicial title derives directly from the statutory office held by the incumbent, whether judge, justice or lord justice, but in the case of the Supreme Court there is no connection between their office, designated by statute as “Justice of the Supreme Court” (Constitutional Reform Act 2005, s 23(6)), and the title the Queen has been advised to give them.

It is worth pondering how every other common law jurisdiction manages with just the two titles, “judge” and “justice”, even the USA, with over 50 jurisdictions and any number of different judicial levels. Britain, or rather England, exhibits its customary devotion to hierarchy in setting its face against a title shared with more junior colleagues or, perish the thought, no specific title at all. How refreshing it would have been if the Supreme Court judges had concluded that there would be no specific title or if they had adopted the gender-free “Justice”, in line with their statutory office, followed for official purposes by the post-nominal “JSC”.

The proliferation of judges has in fact given rise to a corresponding proliferation of titles. It began, quite reasonably,

with Official Referees (who became Circuit Judges), was then extended to county court registrars and later stipendiary magistrates (who both became District Judges), and reached its apotheosis when nearly all legally qualified tribunal members, both salaried and fee-paid, became judges (Tribunals, Courts and Enforcement Act 2007), contrary to Sir Andrew Leggatt's conclusion in his *Report of the Review of Tribunals* (see *Tribunals for Users: One System, One Service* (2001), para 6.52, p 82).

It might be supposed that, as in other countries, a judge is a judge. If it were right to reject the Leggatt conclusion and distribute the title so liberally, then surely the inevitable consequence is that these judges are entitled to be so styled simpliciter and it is too late to resile from that consequence with a series of qualified titles that imply that either they are not truly judges or at any rate are only lesser judges to be distinguished from their superior colleagues. But it was not to be.

Thus, every grade of judge is now precisely calibrated by the title he is allowed to use before his name just like the personnel in the Armed Forces: District Judge, Tribunal Judge, Upper Tribunal Judge and Employment Judge, all distinguishable from the Circuit Judge who alone is entitled to be styled "Judge" and with the additional appellation "His [or Her] Honour" further to emphasise the distinction; and above them we have Mr/Mrs Justice, Lord/Lady Justice and Lord/Lady.

JUDGES AND PEERAGES

I mentioned above that it must have been thought inappropriate to confer peerages on new justices of the Supreme Court. Moreover, there is in place a statutory prohibition on those judges who are peers from participating in the work of the House of Lords. Section 137(3) of the Constitutional Reform Act 2005 provides:

"A member of the House of Lords is, while he holds any disqualifying judicial office, disqualified for sitting or voting in –

- (a) the House of Lords,
- (b) a committee of that House, or
- (c) a joint committee of both Houses."

A "disqualifying judicial office" means any judicial office specified in Part 1 of Schedule 1 to the House of Commons Disqualification Act 1975 (as amended). One anomaly that arises from this is that a peer excluded from section 137(3) can neither sit in the Lords nor vote in elections, whereas the hereditary peers removed from Parliament under the House of Lords Act 1999 were rightly allowed the vote (s 3(1)(a)).

Lord Judge commented on the exclusion under section 137 in a lecture delivered at University College London shortly after his retirement as Lord Chief Justice of England and Wales:

"The clamour for the separation of powers led the Law

Lords, now transferred into the Supreme Court, and the Lord Chief Justice to be deprived of their long standing right to speak in debates in the House of Lords. The single method of communication now available to the Lord Chief Justice is a letter to Parliament, but he cannot stand up and speak in our sovereign Parliament, even on issues which directly affect the administration of justice. Although the change was based on lip service to the separation of powers, as I have already described, Government ministers continue to enjoy rights of audience in the House of Commons and the House of Lords of which the Lord Chief Justice was and remains deprived ("Constitutional Change: Unfinished Business", 4 December 2013, para 17).

The "letter to Parliament" to which Lord Judge refers is a reference to section 5(1) of the Constitutional Reform Act 2005, which reads:

"The chief justice . . . may lay before Parliament written representations on matters that appear to him to be matters of importance to the judiciary, or otherwise to the administration of justice . . ."

The Lord Chief Justice also appears annually before the Constitution Select Committee. It is perhaps surprising, then, that Lord Judge's successor as Lord Chief Justice, Sir John Thomas, was immediately raised to the peerage. Does Lord Thomas's peerage not detract from the separation of powers argument? What purpose does it serve if he cannot participate in the work of the House of Lords until such time as he demits office? Why should the Lord Chief Justice be treated in this regard differently from others who hold correspondingly high office, such as the Cabinet Secretary, the Governor of the Bank of England, the Chief of the Defence Staff and the Commissioner of the Metropolitan Police, whose peerages must await their retirement?

It may be said that a peerage underlines the significance and importance of the office, but so great is that significance and importance that it surely needs no reinforcement by way of a peerage, especially one that is deprived of all practical significance by the 2005 Act. When the House of Lords was the supreme appellate tribunal, the Lord Chief Justice could participate in its judicial work only if a peer; but that no longer applies and he (and others) may be invited by the President to sit in the Supreme Court (Constitutional Reform Act 2005, s 38(1)(a) and (8)(a)). While Lord Thomas's peerage may in form be distinguishable from the courtesy title fashioned for Supreme Court judges, in substance it is very little different, at least until his retirement when the statutory exclusion will no longer apply.

It is true that there are other peers denied membership of the House of Lords – most hereditary peers (by the House of Lords Act 1999) and those not domiciled in the UK for tax purposes who have withdrawn from the House (Constitutional Reform and Governance Act 2010, s 42) – but it is one thing to pass legislation which excludes certain categories of existing

peers but quite another to confer a peerage which is subject to exclusion at the time it is created.

JUDICIAL DRESS

Questions also arise about the judicial dress adopted by the Supreme Court. The Law Lords had no judicial costume because in theory they were merely sitting and acting as peers of Parliament who wear no robes when carrying out parliamentary duties. Law Lords, as barons or baronesses for life, had parliamentary robes for ceremonial occasions such as the State Opening of Parliament, but on legal ceremonial occasions, such as the Opening of the Legal Year, they wore morning dress.

The Supreme Court justices have decided to wear no robe or official dress when sitting in court. This can be explained either as wishing to preserve the tradition in the House of Lords, which would be odd given that the whole point of establishing the Supreme Court was to break, visibly and emphatically, with that tradition; or as evincing hostility to judicial dress in general.

If judicial costume is worn in every other court from the Crown Court and County Court to the Court of Appeal, it is difficult to identify a single respectable argument for a different practice in the Supreme Court. Indeed, a strong argument can be made that wearing robes in the lower courts requires support from the practice in the nation's highest court.

A simple black silk gown, which was the personal preference of the Courts first President, Lord Phillips of Worth Matravers, perhaps with some modest distinctive feature, even if worn over ordinary clothing, would have paid due deference to legal tradition and practice and lent support to the rest of the court judiciary.

It is understandable that, even in the absence of everyday judicial dress, provision should be made for ceremonial occasions, but surely something dignified, simple and above all distinctive was appropriate. Instead, the Court has adopted the enormously expensive and elaborate black flowered silk damask robe with gold lace and decorations worn on ceremonial occasions by the Lord Chancellor, Lord Speaker, Speaker of the Commons, Chancellor of the Exchequer, Master of the Rolls, Lords Justices of Appeal, the Heads of Division of the High Court and the Lord Mayor of London (one of her five different robes). But unlike all of them except the Chancellor of the Exchequer, it is worn over ordinary dress with no accoutrements of any kind (although the Lord Chancellor, Lord Speaker, Mr Speaker, the Chancellor of the Exchequer and the Lord Mayor have either dispensed with or never worn wigs); and there is no headgear save that for some reason Baroness Hale of Richmond has been permitted (incongruously) to adopt a velvet Tudor bonnet. There is no

precedent for combining this with the robe chosen, and it has no previous association with judicial dress. The bonnet is found in livery companies and in English universities as part of doctoral academic dress but it is not worn by university Chancellors whose robe is identical to that of the Supreme Court judge. There is no historical link to justify this gown for Supreme Court members.

The Court's rules on its judicial dress lack coherence and distinctiveness. It is unfortunate that, as with their titles, there was no public consultation or discussion beforehand as if these were not matters of legitimate public and legal interest but of interest and concern only to the judges themselves.


Also bemusing is the rule governing counsel's dress. Counsel are required to robe (before an unrobed bench) unless all counsel in the case agree otherwise, the explanation for which is elusive. Presumably it would be undesirable to have some counsel robed and others not, but surely it is for the Court to determine whether counsel should robe or not. What is the basis for leaving it to them to determine case by case? It is difficult to deduce from this rule any coherent attitude on the part of the Court to barristers' dress.

Just as the proliferation of judicial titles reveals an obsession with rank and status, so too do the robes for those required to wear them, in the Court of Appeal, High Court, Crown Court and County Court, where the robe displays the judge's grade as if sporting the insignia of rank on a military uniform.

CONCLUSION

The Supreme Court opts for informality in sitting without robes but then elects to be called Lord or Lady and to adopt the most grandiose robe for ceremonial occasions. It is difficult to reconcile these attitudes.

The rules governing both judicial dress and titles are complicated and exhibit a questionable preoccupation with status. The general public and even the media have no appreciation of these niceties.

These recent measures, rather than enhancing the standing, authority and dignity of the judiciary, have in a small way detracted from them and misjudged the mood and temper of the times. 

Professor Graham Zellick CBE, QC, AcSS

Emeritus Professor of Law in the University of London; Honorary Fellow of Gonville and Caius College, Cambridge; Master of the Bench and sometime Reader of the Middle Temple; Honorary Fellow of the Society.