Spot the judge

By diluting the judicial title, we risk interfering with the administration of justice, argues John Gould

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Until it was abolished by the Crime and Courts Act 2013, scandalising the judiciary was a criminal offence intended to maintain public confidence in judges and the administration of justice. Public confidence is not to be taken for granted. Research published in 2019 by the Sentencing Council suggested that only around half of people surveyed thought that the criminal justice system was effective or fair. Judges are sometimes subjected to unconstitutional and unwarranted attack, such as the notorious newspaper headline describing three judges as 'enemies of the people' in 2016, but a more subtle undermining of the special perception of judges may be developing, arising from the presentation of individuals as 'judges' who are not.

It has long been accepted that for the administration of justice to operate successfully, the right to use the title 'solicitor' or 'barrister' must only be used by people who are actually solicitors or barristers. It is, for example, an offence under s 181 of the Legal Services Act 2007 for an unqualified person to pretend to be a barrister. Solicitors, licensed conveyancers and registered trade mark agents are similarly protected by the criminal law.

The offence in s 181 is widely drawn:

> '181 (1) It is an offence for a person who is not a barrister—
> (a) wilfully to pretend to be a barrister, or
> (b) with the intention of implying falsely that that person is a barrister to take or use any name, title or description.'

The rationale is not hard to identify. The public and those involved in the administration of justice rely on the proper use of protected titles. People approach lawyers with the expectation that they are what they seem. If any unqualified person could present themselves as regulated, the reputation of 'real' lawyers would soon be tarnished. Before long, the essential trust that makes the system work would be destroyed.

The principle is important enough to be backed by criminal sanctions including imprisonment. A person (other than a barrister) who dressed up as a barrister and paraded outside of the RCJ would probably be committing an offence and potentially exposing themselves to two years in prison.

No statutory protection

It might well be thought that the same logic could, even more powerfully, be attached to the title of 'judge', yet there is no statutory protection for that title. This may be for practical reasons—clearly the word applies to all sorts of people who don't purport to hold a judicial office. Even leaving aside flower shows and talent contests, the word can be used in a context which creates no false impression. A person prowling the Strand dressed as Judge Dredd shouting 'I am the law' at passers-by may be annoying but would not be thought, by most people, to have come from the large gothic revival building nearby.

By contrast, a lawyer who pretended to be a judge in a context which might deceive would be likely to be in breach of professional rules by interfering with the administration of justice or not upholding the rule of law. If it was for financial advantage, it might be fraud.

In various circumstances, most notably arbitration, some of the functions of judges may be discharged by individuals who are not holders of judicial office at all. Arbitrators make decisions which, by the prior agreement of the parties, are binding as a matter of contract but are still open to the scrutiny of the courts for legal error and operate within a statutory framework. Arbitrations do not pretend to be part of the system of public justice.

Undoubtedly the most important factors in upholding public confidence in the judiciary relate to the way judges conduct themselves. A judge must uphold and exemplify judicial independence and be impartial in both substance and process. They must not only act with propriety but also appear to do so. They must be free of any influence outside the rule of law.

To an important extent, the public concept of a judge should be divorced from the perception of the individual carrying out the role. Traditionally, individual identities have been de-emphasised by robes, wigs and court etiquette. This has built a powerful judicial paradigm or, to put it another way, a judge's brand. The paradigm judge is the personification of the judge's oath—they have no extraneous beliefs, they are not associated with any particular section of society and they are selected and potentially could be dismissed by a formal process.

Individuals who identify as judges gain prestige and respect but also have the responsibility of maintaining the brand in the public interest. For the holders of judicial office, there are arrangements for dealing with misconduct in either a judicial or private capacity, and disciplinary processes have been improved and made more transparent in recent years. It matters whether someone is or is not a judge.

'Judges' not in judicial office

The issue of 'judges' who do not hold judicial offices has arisen recently in two contexts.

The first is the expression of views and opinions by retired judges in the media. There is a narrow field in which the views and experience of retired judges are appropriately expressed on the basis of their former offices, and valuable contributions to public debate have been made on that basis.

When, however, their previous status is used to give authority to views largely unrelated to their judicial experience, their views are likely to damage the perception of those who actually hold offices and raise the possibility that beneath the serene surface,

those sitting judges hold partisan views and opinions.

Confidence in a judge does not arise from the projection of their personality or opinions; it arises from a degree of anonymity and the public's acceptance that the identity of the individual judge isn't decisive in determining the outcome of the case. If retired judges wish to express views in the media on Brexit, gender, lockdowns, assisted dying or any other hot political issues, they should only do so if the job that they used to do is not used to give authority or legitimacy to what they say. If that is impractical, their silence would be a greater public service than their contribution to any debate.

The second area of concern is illustrated by the recent announcement of a 'Sikh court', said to be the first in the world. An announcement from the Religion Media Centre recorded that in the Old Hall of Lincoln's Inn:

> 'Beneath portraits of England's 17th-century judiciary, 46 Sikh "magistrates and judges" took an oath to "uphold the principles of justice, equality, and integrity as prescribed by the teachings of the Sri Guru Granth Sahib Ji and the Sikh faith".'

The accompanying photograph shows those assembled, resplendent in blue and black robes. The court is reported to have been set up by Sikh lawyers who felt that the UK courts lacked the religious and cultural expertise and resources to deal with disputes between Sikhs due to the pressure they are under. Yet this is not a religious court and Sikhism does not have its own legal code.

Ironically, but presumably unnoticed, the main painting in the photograph is William Hogarth's portrayal of Saint Paul being judged by the Roman governor Felix in Ceasarea, after being saved by Roman soldiers, as a Roman citizen, from a hostile Jewish crowd for ignoring their laws. Community justice had its problems even in the first century.

The Sikh court is something new, if only in presentational terms. In substance it is a provider of mediation and arbitration in the same way as, say, the International Chamber of Commerce, or Resolution in family cases, but it presents as a traditional formal court. It calls itself a court, it has 'judges' and 'magistrates' and clothes itself in the panoply of the English courts. It has no law, religious or otherwise, other than English law. It presents itself as being able to reduce the backlog in the conventional courts.

This presentational approach represents a step change. The 2018 report 'The independent review into the application of sharia law in England and Wales', commissioned by the government, criticised the incorrect use of language around sharia councils, in particular by referring to them as 'courts' and their members as 'judges'. Its view was that this misrepresentation of sharia councils as courts would lead to public misconceptions over the primacy of sharia over domestic law and concerns of a parallel legal system. It noted that the misrepresentations came from the media rather than the councils themselves.

The London Beth Din is in a similar position and also appears to describe its adjudication functions with care:

> 'The London Beth Din serves the Anglo-Jewish Orthodox community as a forum for the adjudication of disputes. It allows adherents of Jewish law to have their disputes resolved in a manner consistent with the rules of Jewish law (*halacha*). It acts as an arbitration body, comprising rabbinic judges and has a well-earned reputation for conducting arbitration proceedings with professionalism, competence, integrity, confidentiality and fairness.
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> 'The parties to any such dispute are required to sign a formal, legally-binding Arbitration Agreement prior to a hearing taking place. The effect of this is that the decision (Award) given by the London Beth Din can be enforced by the civil courts.'

The judicial brand

The common issue concerning retired judges and pseudo judges is the risk of appropriation and modification of what I've described as the judicial brand. This may be intentional or unintentional, but so far as retired judges are concerned, they should not permit their former positions to be deployed unless that experience is directly relevant to the subject upon which they are commenting. They should certainly not allow a journalistic narrative woven around the significance of their views because of their former office.

As far as arbitration/mediation services are concerned, they should not present themselves as if they were official courts because to do so may cause confusion, raise doubts about the universality of the real judiciary and is trading on a brand which belongs to the public as a whole. Ersatz judges do not improve confidence in judges as a whole.

While it may be impractical to protect the nomenclature, it might tentatively be suggested that some lawyers, including retired judges, should perhaps think more carefully about the responsibilities of their profession or arising from their former office. **NLJ**

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