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Origins of HMCTS

Giving judges these responsibilities would not have been possible if the prime minister had not decided to sack his lord chancellor in 2003.¹ Tony Blair set in train reforms that led inexorably to the Constitutional Reform Act 2005. The lord chancellor remained in the cabinet, sitting as a secretary of state. But the holder of that ancient office is no longer head of the judiciary. That role now belongs to the lord chief justice, the senior judge of England and Wales.

Following these constitutional reforms, senior judges became responsible for the administration of their own courts. It is now their job to assess the need for improvement and set in train the sort of changes that had previously been initiated by ministers.²

Of course, the judges would not have got very far without the support of staff and officials. As part of the reforms, a Judicial Office was set up in April 2006.³ “The constitutional settlement out of which the office emerged, as well as the very existence of the organisation itself, has undoubtedly buttressed the integrity and independence of the judicial system that we have today,” wrote Lord Thomas of Cwmgiedd and Sir Ernest Ryder, the two judges who headed the department, in a report to mark its tenth anniversary.⁴

The Judicial Office has a staff of around 200 people, half of them working in human resources and judicial training.⁵ They are “civil servants who bring their expertise to bear to help judges in their efforts to manoeuvre through the thicket of administrative challenges in exactly the same way that their colleagues in Whitehall advise and assist their ministers”.⁶ Many are based near the judges they serve at the law courts in central London.

At the same time as the Judicial Office was being set up, staff working at different courts across England and Wales were being brought together in a single courts service. That was in 2005. A further merger in 2011 with the unified tribunals⁷ – which had mostly been administered by the very government departments over which those tribunals sat in judgment – created a new body called Her Majesty’s Courts and Tribunals Service (HMCTS).

HMCTS is an executive agency of the Ministry of Justice (MoJ). Under the terms of its service framework document, it “operates on the basis of a partnership between the lord chancellor and the lord chief justice”.⁸ The service is responsible for running criminal, civil and family

courts and tribunals in England and Wales and the non-devolved tribunals in Scotland and Northern Ireland. HMCTS has a chief executive⁹ and a board headed by an independent chair.¹⁰ The board includes three judicial members¹¹ as well as executive members, non-executive members and a representative member from the MoJ. In 2016-17, HMCTS employed around 16,000 staff, processed over 4.1 million cases, and spent £1.9bn.¹²

Comparing the plans launched in 2015 to the failed IT reforms of the decade from 1998 to 2008, Lord Thomas said that the current changes “would never have occurred without the judiciary assuming its new role of leadership and without its active engagement with [ministers and their officials], particularly through the joint venture that is HMCTS”.¹³

Even so, there is still scope for giving the judges more control of their own affairs. Lord Justice Gross, a former senior presiding judge, argued in June 2016 that recent reforms to HMCTS were part of an “unfinished journey”.¹⁴ He questioned whether HMCTS should remain part of a ministry that also has responsibility for prisons. “Would the governance arrangements for HMCTS and, hence, the reform programme and our ability to implement it, be simplified and improved,” he asked, “if HMCTS reported to a single shareholder (the judiciary) rather than both the executive and the judiciary?”

Though the appeal judge would not be drawn further, his question hints, perhaps, at unresolved tensions on matters such as IT strategy. The difficulty with his suggestion, as he well understood, is that somebody has to be responsible to parliament for all public spending. In the case of HMCTS, it is the secretary of state for justice and lord chancellor. The more autonomy the government gives the courts and tribunals service, the more difficult it is for the justice secretary to answer for its spending decisions. But Lord Justice Gross thought these problems were not insuperable.

Greater judicial involvement is not without its risks. Chantal-Aimée Doerries QC, who chaired the Bar Council in 2016, accepted that a close working relationship between judges, officials and ministers was needed if the reforms were to succeed. In her view, though, the closeness of that relationship risked undermining the independence of the judiciary.

“This may arise less as a threat to the independence of individual judges but rather as a threat to the judiciary as a group or institution,” she said. “If judges become too closely identified with a programme of modernisation where success is dependent on funding and implementation by the executive, there is a risk that we will evaluate our judges on their ability to be effective managers rather than fearless independent judges.”¹⁵

But this was not modernisation by the executive as much as modernisation by the judges themselves, with the government’s support. That was why Lord Justice Fulford said it was essential to involve the judges at an early stage of reform. “For example,” he explained, “proposed case officers who will take on some of the work currently done by judges¹⁶ will be supervised by and accountable for their work only to a judge. If judges are not involved in designing the new processes, there is a real risk that principles like this will not be reflected in the structures being built and the processes will not underpin the impartial and independent administration of justice.”¹⁷

And, as Sir Ernest Ryder said in 2018, the idea that senior judges “could not or should not properly be engaged in developing and leading the HMCTS reform programme is one that stands no scrutiny; it rests on the misconception that the judiciary should not be involved in leading the reform of the means through which they discharge their functions”.¹⁸

Of course, we want judges to be fearlessly independent. But these days they also need to be good managers. While they should never forget their constitutional duties, the judges' close involvement in the current reforms is essential to their success.

References

1. Lord Irvine of Lairg was the last lord chancellor to sit as a judge by virtue of his office. Adapting a suggestion from Sir Brian Leveson, one might argue that his departure from office was the moment the legal system of England and Wales moved into the 21st century. See <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/pqbd-caroline-weatherill-lecture-2.pdf> paragraph 2.

2. See Lord Thomas of Cwmgiedd, <https://www.judiciary.gov.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf> paragraph 18: "The judiciary – and particularly those with leadership roles – are required themselves to undertake the types of reform effort that had previously been initiated by the Executive."

3. The Judicial Office is funded by the Ministry of Justice and is accountable through the ministry's permanent secretary for financial propriety and regularity. It is answerable to the lord chief justice and senior president of tribunals. It also carries out some functions related to the judiciary on behalf of the lord chancellor. The office delivers a wide range of functions for the senior judiciary and to approximately 28,000 judges and other holders of judicial office including training (through the Judicial College), communications, human resources, welfare, legal and policy advice. Through the Judicial Conduct Investigations Office, it deals with complaints about the conduct of judicial office-holders. The office also provides support to the chief coroner and to the judge advocate general (the senior military judge). See <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/jo-business-plan-16-17-final.pdf>

4. <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/jo-business-plan-16-17-final.pdf>

5. <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/jo-business-plan-16-17-final.pdf> page 25.

6. Sir Brian Leveson, <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/pqbd-caroline-weatherill-lecture-2.pdf> paragraph 25.

7. A few tribunals – including the Employment Tribunal – were not brought into the unified system created by the Tribunals, Courts and Enforcement Act 2007 but still come under the judicial leadership of the senior president.

8. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf

9. Natalie Ceeney CBE was appointed chief executive in January 2015 and unexpectedly resigned at the end May 2016. No explanation was given but she had been questioned by the Commons Public Accounts Committee two months earlier. Transcript:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/efficiency-in-the-criminal-justice-system/oral/30752.pdf> Video:

<http://parliamentlive.tv/event/index/7c4e80be-6f28-4013-8210-5cc44f1fa8ec> Susan Acland-Hood replaced Ceeney on 22 November 2016. Kevin Sadler, the deputy chief executive, had run HMCTS in the meantime.

10. Tim Parker, who took over from Robert Ayling in April 2018.

11. Lady Justice Macur, Sir Ernest Ryder and District Judge Tim Jenkins.

12. <https://www.nao.org.uk/report/early-progress-in-transforming-courts-and-tribunals/>

13. <https://www.judiciary.gov.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf> paragraph 32. He referred to "the Executive".

14. <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/lj-gross-grays-barnards-inn-reading-june-16.pdf> paragraph 44(v).

15. <https://www.thebriefpremium.co.uk/court-modernisation/article/> 21 October 2016

16. Explained later in this paper.

17. <https://www.thebriefpremium.co.uk/court-modernisation-response/article/>

18. <https://www.judiciary.gov.uk/announcements/speech-by-sir-ernest-ryder-senior-president-of-tribunals-assisting-access-to-justice/>
