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The Prisons and Courts Bill

> **In February 2017, the government published its Prisons and Court Bill.[1] This was intended to lay the foundations for an online court, leaving the details to be designed later.**

"This bill," said the then lord chancellor and justice secretary Elizabeth Truss, "introduces a new online court which will enable people to resolve civil claims of up to £25,000 simply and easily online."[2]

It might have introduced an online civil court but it certainly would not have created it. Nor was there any mention in the bill of a claims limit, though the figure of £25,000 did appear in the government's delegated powers memorandum.

The bill was also intended to end direct cross-examination of domestic violence victims in by their alleged perpetrators in the family courts — something that family judges had been calling for. And there was a much more sinister proposal that at least one former judge had been campaigning against: fixed terms for the most senior judicial appointments, allowing judges such as the lord chief justice to be demoted if they were not seen as up to scratch.

Welcoming the bill in April 2017, Lord Thomas of Cwmgiedd and Sir Ernest Ryder said[3] that, without it, some of the planned reforms would not be possible. "For example, legislation is necessary for some of the reforms to the criminal justice system that increase flexibility and remove unnecessary hearings, such as extending the use of audio- and video-link technologies and enabling a defendant (if they so elect) to engage with the court online using the common platform.

"Legislation is also necessary to effect reform to the civil, family and tribunals jurisdictions," the judges said. "It is essential to have a new online procedure rule committee if the system which is being designed is to operate to its full potential, and to provide for HMCTS staff to be authorised to carry out certain functions of a court or tribunal under the supervision of the judiciary."

The rule committee referred to by the judges would make rules applying both to courts and tribunals. To begin with, its members would include a senior judge, a more junior judge, a legal practitioner, someone with experience of the lay advice sector and someone with "IT experience and knowledge relating to end-users' experience of internet portals".

These online procedure rules would require specified proceedings to be "initiated by electronic means".[4] Once started online, these proceedings could be "conducted, progressed or disposed of" electronically. Parties and their representatives may be required "to participate in hearings, including the hearing at which the proceedings are disposed of, by electronic means". If a party failed to take a required step electronically, the court could proceed regardless.

The proceedings to be specified by the lord chancellor for these purposes included civil, family and tribunal cases (but not criminal cases, which I shall discuss in the next section). The lord chancellor could disallow rules made by the committee and could require rules to be made. He could also amend primary or secondary legislation — a power that the government said could be used to regularise and modernise terminology in existing statutes.

The rule committee was required to make sure that its rules were both simple and simply expressed. Its practice and procedure had to be accessible and fair so that disputes could be resolved quickly. The rules needed to support innovative methods of resolving disputes.

This is as far as the proposed legislation went in creating an online civil court. It had been thought the bill might create an entirely new jurisdiction. That was what Lord Justice Briggs had recommended in his final report: "I continue to regard making the online court a new and wholly separate court as a very important element in bringing about the necessary culture change," he said, "and I so recommend."[5] But that proved too ambitious — though it was not entirely clear why.

Sir Oliver Heald, who was justice minister at the time, told me in March 2017 that rather than confine the new jurisdiction to money claims — as Lord Justice Briggs had recommended — ministers thought it desirable to have online procedures that were flexible enough to cover family proceedings and tribunal work as well.

Online procedure rules "may provide for proceedings of a specified kind to be taken in a court or tribunal which is not the court or tribunal in which they would be taken if governed by the applicable standard rules", the bill said. Proceedings that would currently be heard in separate courts or tribunals could be taken together. This was designed to rationalise unnecessary divisions in the current structures.

Take the example of an individual who has been diagnosed as having a mental health disorder and "sectioned" under the Mental Health Act — detained as a patient in a psychiatric hospital. A tribunal, formally known as the First-tier Tribunal (Mental Health), will decide whether the patient is fit to be discharged. But the effect of a ruling from the Supreme Court in 2014 is that any "deprivation of liberty" must be authorised by the Court of Protection, which acts in the best interests of the patient.

It's obviously in the patient's interest for the tribunal and the court to work together. To some extent, that can be achieved by "cross-ticketing" — allowing a single judge to sit in two different jurisdictions. But it will be much more convenient to have a single court dealing with all aspects of a patient's care.

Except that supporters of the existing tribunal system don't want to see the concept swallowed up into something called a "court". They preferred to call it the "online justice platform". But that won't work in the real word: if it looks like a court and works like a court then "court" is what it will have to be called.

Speaking in October 2016, Sir Ernest Ryder said his tribunal judges were piloting an innovative way of dealing with disputes in the property tribunal. It involved "the concurrent hearing of tribunal and court proceedings relating to property before one specialist panel so that the litigant can avoid going to separate places to get a complete solution to their property problems". And, he added, these concurrent hearings might evolve into a single hearing before a single specialist judicial forum. "There need be no distinction in the future between a specialist tribunal judge and a specialist courts judge," he said.[6]

By early April 2017, Sir Ernest Ryder and Lord Thomas were promising that reform would change the way the judiciary worked. "The development of common processes will bring together the courts and tribunals into one system and one judiciary. Courts and tribunals judges are now sitting in each other's jurisdictions, sharing skills and experience and providing the opportunity for the litigant to resolve related problems before one specialist judge or panel. The magistrates' courts will work more closely with the Crown court while maintaining their close links to local communities."[7]

And then, suddenly, everything went wrong. On 18 April 2017, Theresa May unexpectedly announced that that there would be a general election on 8 June. When parliament was dissolved, the Prisons and Courts Bill fell with it; none of it became law.

If the Conservative government had been returned to power with an increased majority, as the prime minister had expected, the bill would presumably have been reintroduced in much the same form as before and parliament would have picked up where it had left off. But, as I shall explain later in this paper, that was not to be.

References

1. http://services.parliament.uk/bills/2016-17/prisonsandcourts.html
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