

## JUSTICE IN A MODERN WAY

Speech by Rt Hon Sir Ernest Ryder, Senior President

Administrative Law Bar Association

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1. Professor Gavin Drewry once summed up the history of the tribunals in three phases. First, they were the ‘*enemies of the rule of law*’; criticised as an aspect of what Lord Hewart CJ termed the ‘new despotism’ (which, for the avoidance of doubt, was a constitutionally subversive separate system of administrative law in the United Kingdom that according to Dicey posed a threat to the rule of law). Then they were ‘*useful but rather marginal entities, floating around in no man’s land somewhere between the judicial and the administrative systems*’. Damned with faint praise. Finally, they were ‘*becoming fully-fledged, professionally accredited bodies set in the mainstream of a modernised and better integrated system of administrative justice*’.<sup>1</sup> The final transformation was a consequence of the Leggatt Review in 2001, which produced the Tribunals, Courts and Enforcement 2007 and the Upper and First-tier Tribunals.
2. The 2007 Act was not of course the end-point. It marked a staging post in the tribunals’ transformation which is being driven on the one hand by the £1Bn courts and tribunals modernisation programme and on the other by an ambitious internal leadership programme that aims to deliver *one judiciary, one system and quality outcomes*. Where might these changes take us both from the tribunals’ perspective and from that of administrative law?

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<sup>1</sup> See G. Drewry, *The Judicialisation of the ‘Administrative’ Tribunals in the UK: From Hewart to Leggatt*, *Transylvanian Review of Administrative Sciences*, No. 28 E SI/2009 45 at 47.

3. The starting point, as will be well-known to you, is the power provided by the 2007 Act to transfer judicial review proceedings to the Upper Tribunal.<sup>2</sup> It marked the first significant step towards the creation of what had long been recommended: the creation of, as William Robson put it both to the Donoughmore Committee in the 1930s and then the Frank's Committee in the 1950s, of a 'General Administrative Appeals Tribunal'. We are not there yet, at least not in the sense meant by Robson.
  
4. The 2007 Act, however, by vesting in the Upper Tribunal all the powers and duties of the High Court both generally and in respect of judicial review provides the basis for a shift away from the bifurcation of administrative law across courts and tribunals. We are seeing such a shift in some areas already; for example, the current pilot schemes between the First-tier Tribunal Property Chamber and the High Court and County Court and also between the Employment Tribunal in England and Wales and the County Court. These pilots seek to achieve two different objects. First, they are drawing together claims arising from the same dispute, which fall under more than one jurisdiction, so that they can be dealt with by a single judge, in a single hearing, sitting simultaneously in both court and tribunal. We are moving to single jurisdiction solutions in property, housing, Equality Act and dismissal compensation claims. More will follow. Second, the pilots provide an opportunity for judges to work alongside each other sharing best practice from their home jurisdictions while exercising the powers of their visiting jurisdictions. In these pilots the traditional procedural protections and jurisdictional specialisms remain intact but the judges become multi-functional.

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<sup>2</sup> Tribunals, Courts and Enforcement Act 2007, ss.15-19.

5. The ultimate goal is to answer the question whether reform will enable us to move to a single jurisdictional venue both for judicial review and merits based problem solving: a general administrative appeals court. The High Court and Upper Tribunal both have a judicial review jurisdiction. The same judges are hearing judicial review proceedings in both jurisdictions. Here I look to substance rather than form. Let me give you an example. In the Upper Tribunal Immigration and Asylum Chamber (UTIAC) we have High Court judges hearing claims. We have senior circuit judges all of whom have authorisations under section 9(1) of the Senior Courts Act 1981 enabling them to act as High Court judges. And we have First-tier Presidents and Upper Tribunal judges who are the equivalent of their senior circuit judge colleagues and have by statute ‘the same powers, rights, privileges and authority as the High Court and Court of Session’: they are both subject specialists and a discrete college of appellate judges whose decisions are binding.
6. The Upper Tribunal’s jurisdiction is exercised by the same judges who exercise, and could exercise, the High Court’s judicial review jurisdiction when sitting in the High Court. The powers and duties are the same. The judicial office holders are the same. For the tribunals we have, as the Leggatt Review put it, ‘*One System, One Service*’. In all but formal structure, we have for judicial review ‘*One System, spread over two services*’: tribunals and courts. In each we have the highest quality decision-making at first instance. That cannot but be the case; the same judges exercise both jurisdictions. That is particularly emphasised in the tribunals, where specialist skills and knowledge have always been fundamental to the delivery of administrative justice.
7. Gavin Drewry talked about the evolution of the tribunals so that they were an integral part of the administrative justice system. As the wider reform programme moves us more closely to the realisation of a single courts and tribunal judiciary, not least by the use of common

procedures through the digitisation of process, we move – as part of the evolutionary development of the tribunals – towards the establishment of a single administrative law jurisdiction. In the long-term this may see the Upper Tribunal become a superior court in reality and not just in name. In name, it is that already. There are different ways in which this could be achieved. There is the Victorian option: it would entail a formal merger of courts and tribunals. There is the 2007 Act option: consolidation and full transfer of the jurisdiction in the Upper Tribunal. Others will no doubt be able to think of other possibilities. The important point underpinning all of them however is simple: reform here, as with the reform programme generally, is underpinned by a commitment to ensure that we can provide effective access to expert justice. The continuing evolution of the Upper Tribunal and its role in delivering administrative justice is just one strand of that. It is, however, one of central importance.

8. The long-term aim is for the merger of the courts and tribunals judiciary and the creation of one justice system, each with its own specialist ways of working and protections. This was set out in the joint statement that the Lord Chancellor, the Lord Chief Justice and Senior President of Tribunals issued in September 2016 – the plan “to create one system and one judiciary”. The then Lord Chief Justice, Lord Thomas of Cymgieidd, explained its historic context and made suggestions for taking the matter forward in a speech in Cardiff in October 2016<sup>3</sup>. It would involve a move away from the Lord Woolf ‘one-size fits all’ approach to

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<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553261/joint-vision-statement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf).

<https://www.judiciary.gov.uk/wp-content/uploads/2016/12/lcj-single-judiciary-wales-Oct-2016.pdf>.

procedure: something which the CPR has been doing since it was introduced through the increase in specialist procedures, for example in the different lists of the business and property courts. The courts could learn from the tribunals here, and from the original premise of reform: a common set of high level rules such as those applying to all tribunals jurisdictions: simple, intelligible and innovative and then specialist rules and processes within that, in a similar way to the approach taken in the Commercial Court or TCC.

9. If you are not persuaded as a matter of principle, then look to the practicalities. At present there are 65 High Court judges who are assigned to the Upper Tribunal to undertake administrative law work alongside their colleagues in the Upper Tribunal (more than both of the smaller two divisions of the High Court). My Vice-President is a member of the England and Wales Court of Appeal, the President of Scottish Tribunals is a member of the Inner House in Scotland and the President of the Welsh Tribunals is a retired High Court judge and former Presiding Judge for Wales. I have two assigned Northern Ireland High Court judges and seven assigned Outer House judges from the College of Justice in Scotland. There are also 28 senior circuit judges and circuit judges assigned to work in the Upper Tribunal and 54 who are assigned to the First-tier Tribunals. The EAT has both assigned High Court judges and specialist employment judges in both senior circuit judge and circuit judge appointments who are dedicated employment law specialists. During the course of the last two years there have been 12 deputy High Court appointments among my Upper Tribunal judges to allow them to undertake parallel work in the courts jurisdictions, two High Court appointments from among the salaried tribunals judges (Sir Peter Lane and Dame Gwyneth Knowles), this last week a further two High Court appointments from among the deputy Upper Tribunal judiciary and two court of appeal appointments (Dame Vivien Rose and Dame Ingrid Simler) to add our previous successes, Sir Keith Lindblom

and Sir Gary Hickinbottom. In addition there are at any one time 14 senior judges who are presidents of their tribunals or chambers. On every basis, the senior judiciary who originate in and who have led the tribunals judiciary are a testament to the excellence of the specialist administrative law service we provide.

10. Then consider the local nature of the service we provide. Aside from the fact that in the First-tier sittings are in local hearing centres throughout Great Britain, all of our Upper Tribunal chambers and the Employment Appeal Tribunal (EAT) sit geographically. The EAT sits with Court of Session judges and High Court judges from England and Wales in Edinburgh and London. The Upper Tribunal Administrative Appeals Chamber sits in Scotland, in London and occasionally in the regions. UTIAC sits in Scotland, in London and ‘on assize’ with regular lists in each region alongside the Administrative Court. Both Upper Tribunal Lands and Tax and Chancery chambers sit where the cases require. We aim to provide access to justice locally and cross jurisdictionally so that where possible Upper Tribunal judges sit alongside their administrative court colleagues throughout England and Wales. Our eventual aim is to share lists, skills and experience.

11. We now have inter-operability with devolved judges in Wales. Section 63 of the Wales Act 2017 has been used to provide a mechanism to assign devolved and reserved judges to each other’s jurisdictions. We have just agreed to the appointment of specialist property chamber judges and members from Wales into England and we will be able to reciprocate and support the new President of Welsh Tribunals to provide services in Wales. I hope that the conclusion of the discussions that have followed the Smith Commission promise on the devolution of tribunals justice in Scotland will lead to similar arrangements there,

permitting the sharing of good practice, skills and experience to facilitate consistency, quality and the implementation of statutory policy objectives across the United Kingdom.

12. In support of our specialist judiciary in both the tribunals and the administrative court we now have an independent Administrative Justice Council whose remit is across the UK and which brings together tribunal and courts jurisdictions with ombudsman and adjudication bodies and the representative, advisory and rights groups who support their users. It has an academics panel comprising 20 specialist academics who have volunteered to work together to provide the Council with an agenda of priority issues including those that are deserving of support for research proposals and for the collection and analysis of data. The panel will provide papers for discussion and working groups on identified administrative law issues. Our first success, only one week in, is to work with HMCTS to create a data lab with appropriate terms of reference to underpin research and analysis including about modernisation projects and access to justice.

13. We also have a pro bono panel where representatives of leading pro bono providers are involved in detailed discussions to bring to our agenda access to justice issues including for vulnerable litigants, litigants in person and all digitally excluded users. We will work closely with the other justice councils to ensure that we provide better access to justice by facilitation, representation and through specialist schemes such as the assisted digital initiative presently being trialed by HMCTS.

14. The Council will facilitate broader discussions between jurisdictions. We will identify good practice, promulgate advice and guidance, respond to consultations from Government and elsewhere and collaborate to support their use of data in research so that the statutory duties

that underpin tribunals justice can be met, namely to provide an effective and efficient administration of justice that is speedy, specialist and innovative.

15. In that context, what are the projects that you will hear more about and some of which you will have seen being trialled in the tribunals? No two tribunals or court jurisdictions are the same. There is no one size fits all to deliver justice although we will use the same tools. There are common digital components and common processes and we will put them together in a bespoke way to respect the different ways of working in each tribunal. The aim is for a paper free environment, faster and fewer hearings but with an overriding imperative to improve access to justice.

16. There are a number of major projects. I shall confine my descriptions to tribunals pilots but some projects may have similar applications in the courts. The first project is online dispute resolution which is being trialled by Social Security and Child Support (SSCS). We have begun with an online system that notifies everyone by email or text of the stage an appeal has reached, identifies the next step in the process and provides hearing notification information. It can allow people to make choices about how a decision is made and we can signpost assistance and settlement opportunities. Associated with this is a new simple online way to start an appeal. We are designing and trialing questions in plain language that build intuitive application forms using judges, our expert panel members, behavioural psychologists and volunteer users who are asked about the language people prefer to use. From the autumn we will pilot digital evidence sharing with DWP and asynchronous conversations so that we can conduct some live hearings without the need for a disabled user to face a difficult journey to a hearing room which many say they find threatening.

17. The second project is about video or virtual hearings where the hearing room is simulated for some or all of the participants. The Tax Chamber is trialling four different participants communicating with each other from different locations in a short contested hearing with a record taken of the whole process. This is in its very early stages but some face to face hearings could be replaced by this method, if appropriate. That would be a judicial decision. The obvious best use is for case management but the method may also be suitable for other purposes. Training would clearly be needed for judges and practitioners and there are interesting behavioural issues to be thought through but that is the function of a pilot scheme: to make sure that, as an option that is available, it is a proper, fair and safe thing to do. We will need to guarantee open justice as well as access to justice. We may trial live streaming: the court of appeal civil division will be following the Supreme Court's lead on that in the next legal year.
18. The third project is the judicial interface through which all judicial office holders (salaried and fee paid alike) will have access to each of the cases allocated to them. They will be able to see all of their cases and the stage each one has reached. They will be able to access the case documents on the cloud. A judge will eventually be able to use digital case management software to prepare and mark up documents including those uploaded by litigants in person. In the crown court and in the business and property courts these systems have already transformed the way judges work.
19. The fourth project is known as 'scheduling and listing' which brings together the need to have a judicial itinerary and booking system with facilities booking and management. My aim is to provide a single system that allows judges to plan their lives and for leadership judges to control the listing rules by which we work. I emphasise judicial control in this: listing is an aspect of deployment which is a matter for the judiciary.

20. The fifth project underpinning the other digital initiatives is called ‘common components’.

There are approximately 30 and the number increases with each project. Our aim is to develop whatever we can in house and to re-use successfully piloted software across jurisdictions once they have been tested with volunteer judges and users. When they are considered compatible with our Rules and everyone is happy, then they are adopted. As I mentioned earlier, this will allow us to identify consistencies in our digital processes which could make procedures more effective and more efficient and could lead to rule changes in due course.

21. The sixth project is the authorisation of case officers and registrars by judges to undertake delegated functions. Different tribunals use them in different ways but they are all highly valued in the tribunals in which they work. They do routine box work including making standard case directions and help judges to make sure they are complied with. Some registrars are involved in forms of early neutral evaluation (for example in the same way that conciliators work in the county court). Every case officer works to a judge who trains and supervises them and their functions are controlled by Rules and practice direction. Our case officers now have a career progression system linked to the Government’s apprenticeship system so that funding is available to allow individuals to progress to professional qualification through the CiLex College.

22. The seventh project is about appeals and judicial review and is known as the RCJ project.

This brings the Court of Appeal and the High Court including the administrative court together with the Upper Tribunal and the EAT on to one platform so that all appeals and judicial review claims are supported in a similar way.

23. In all of these endeavours better access to justice by proportionate dispute resolution and quality decision making should be our goal. That will mean swifter determination and more and better forms of judicial mediation, early conciliation and early neutral evaluation. It will mean simplified process that is more intelligible to the user.
24. I emphasise that there is no programme of ‘one size fits all’ – each tribunal and court will use digital tools in different ways, respecting their specialist traditions and the needs of their users. What may be appropriate for a determination in a non article 6 private, inquisitorial problem solving environment like benefits appeals is unlikely to be appropriate for an adversarial hearing where both article 6 and 8 are engaged. Fee paid judges and panel members need to be provided for to ensure that they can undertake the key functions they perform as specialist judicial office holders with expert knowledge of their subject matter. IT must be trialled before it is introduced with both the public and the judges and it must be a given that training on digital working is provided. The estate needs to be improved with a new plan for its utilisation and for the standard of facilities it provides. Perhaps most importantly, the leadership of the judiciary will have to respond to the challenge that change presents. Change leadership is not likely to be the skill set of most judges but the strategic thinking, problem solving and project management experience of some of my colleagues will be invaluable and will need to be handed on to others. Communication, engagement and the management of business as usual i.e. the leadership of the administration of justice needs to be and to be seen to be of the same high quality as the judgments that we hand down in individual claims and appeals.
25. We have come a long way from the railway commissioners of 1873. It can no longer be said that tribunals facilitate rule making by civil servants nor that judicial powers have been

transferred away from judges. Even Lord Hewart eventually came to regret having written the New Despotism. We are now seen as open, fair and impartial and our judges and judicial office holders are no longer appointed by the Executive. Our recruitment diversity and assignment or deployment opportunities are the envy of the justice system and we are proud of them. We are also a managed service: we owe that to Leggatt and his user-oriented approach that reflects a rather different customer focus than is possible elsewhere. We pay attention to workload allocation, the performance of the system, appraisal and peer review of judges while emphasising the constitutional independence of the judiciary and the independence of judicial / panel determination in the individual case. We believe that is what the constitutional construct requires us to do and we are clear that it delivers the statutory duties and overriding objectives that provide us with the imperatives that inform our governance. We are designed to produce a proportionate dispute resolution service and that informs our approach to reform.

26. Baroness Hale as a former member of the Council on Tribunals said at the time that body existed: *'tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system'*. I would hope that the administrative law bar association would want to collaborate with the judiciary in reform in the way you always have to maximise the benefit for our users and to minimise the obstacles people face when they need access to justice. With your help we could provide new problem solving jurisdictions that would be the envy of the world. Rising to the challenge in a digital world needs solutions for both those who are expert and those who are excluded. That is a worthwhile endeavour.

Thank you.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553261/joint-vision-statement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf).

<https://www.judiciary.gov.uk/wp-content/uploads/2016/12/lcj-single-judiciary-wales-Oct-2016.pdf>.