THE FAMILY COURT IN AN ERA OF AUSTERITY: PROBLEMS AND PRIORITIES

An address by Sir James Munby to the Bloomsbury Publishing Family Law Conference

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It is a commonplace that we live in an era of austerity. But however great the temptation, in or out of Whitehall, to use this as a convenient explanation for the serious problems currently facing the family justice system, the truth is bleaker and more profound. For these problems have their roots in public policy, seemingly shared by Governments of whatever political stripe, long pre-dating the banking collapses and ensuing financial crisis of 2008.

The shocking condition of the court estate today reflects decades of neglect, under-spending and penny-pinching cost-cutting. If LASPO is rightly seen as a fundamentally damaging attack on the legal aid system – particularly in the context of private law cases in the family courts – the slow degradation of a system in which we could once take justifiable pride has been going on for at least twenty years. And we need to remember that it was the Blair government, well before 2008, which decided not to embark upon the major IT reforms for the court system recommended, to much welcome, by a committee of far-seeing judicial and other experts.

It is noteworthy that in terms of public expenditure the Ministry of Justice is not a 'protected department' – so its budget has been repeatedly cut in recent years. And since, in practice, expenditure on those aspects of the criminal justice system for which MoJ has responsibility is the first charge on its depleted resources, the impact has been disproportionately severe in relation to civil and, in particular, family justice.

The truth, though those in power will never admit it, is that there is inadequate recognition both of the vital importance of the rule of law and of the equally vital need to ensure that our justice system is properly funded and resourced. Without the rule of law, and without a properly resourced justice system, there can be no democracy, no fair and stable civil society, and, indeed, no thriving economy. The rule of law, and its essential concomitant, a properly resourced justice system, is not some optional extra; at root, the first two responsibilities of any Government must be defence – protection from our external enemies – and a justice system adequately resourced to maintain and enhance the rule of law.

A striking example is the failure, for whatever reason, of Government to respond with appropriate determination and urgency to the crisis in judicial recruitment. Although there are emerging signs of difficulty in recruiting judges (and magistrates) at all levels of the system, the most obvious manifestation of the crisis is the fact that the High Court Bench is no fewer than 14 judges understrength. That astonishing and deeply worrying state of affairs is unprecedented in all the centuries of our legal system. That we should ever find ourselves in this situation would have been unimaginable when I was appointed in 2000. What has happened? That is a very large question and I do not have the time to attempt to answer it. There is, however, one striking, almost shocking, fact to which I draw your attention. In the 2016 *Judicial Attitude Survey*, published in February 2017, and which achieved a 99% response rate, only 2% – yes, only 2%, 38 of the 1,559 judges responding – felt valued by Government. There is obviously something very, very wrong here.

What has been the response from Government? I fear somewhat muted in the face of what some may think a potentially existential threat. On 5 June 2019, in a Press Release headed *Government acts urgently to protect judicial recruitment* the Lord Chancellor announced interim measures to address the problem. Reassuring words, until one remembers that the relevant report of the Senior Salaries Review Body had been on his desk since October 2018, and notes the admission in the Press Release that "The impact is already being felt in the family courts, where a shortfall of judges is contributing to significant delays in child care proceedings." We must all hope, as I do, that these belated measures will go a significant way to ameliorating the situation. I cannot escape the lurking fear that it is all 'too little, too late.' I shall be delighted if my pessimism turns out to be wildly misplaced.

Focusing more specifically on the family justice system, the current reality can be summarised in three 'big' points:

- The entire system is inadequately funded and resourced; in particular there are not enough judges to handle caseloads which, overall, continue to increase. The simple fact is that the system is coping – though in truth it is not really coping – only because *everyone*, and not just the judges, is over-working. The system is already unsustainable and unless urgent action is taken things will only get worse.
- The withdrawal of legal aid has led to many parts of the family justice system becoming increasingly 'lawyer free zones', which has led to additional pressures on the system. This is not, I stress, the fault or the responsibility of these litigants in person. On the contrary it is in overwhelming part the consequence of a system whose rules are, for the typical lay person, of unintelligible complexity and which, even now, despite many useful initiatives, still provides far too little user-friendly information, guidance and assistance for the litigant in person.
- Few savings in terms of what goes on in the courtroom can be expected either from the ongoing process of family justice reform – as you will know, being taken forward with determination by the President of the Family Division – or by even the most successful digitalisation of the process. Full implementation of the President's ambitious programme will, I am sure, significantly improve family court processes, in particular improving the 'experience' for those using the system and improving the outcomes for children and families. But it will not save, nor is its fundamental purpose to save, money. The many inefficiencies in the system have, by and large, already been stripped out; and the (gu)es(s)timated savings of 10% to accrue from digitalisation will not bring much relief if the caseload continues to rise annually by something approaching the same figure. The real savings from digitalisation – and they will, if all goes well, be massive – are in relation to 'back office' functions.

For the typical family practitioner, whatever their particular professional background, there are, if blogs and tweets are anything to go by, a number of recurring complaints. A proper analysis of all this, something one hopes is being undertaken on a rolling basis by the powers that be, would be of enormous interest if, I fear, making for depressing reading. I take just two examples:

- One, which exemplifies the shocking condition of the court estate, are the ongoing problems with court lifts, which are the subject online of much mirth, ridicule and justified complaint. Some lifts – Reading County and Family Court is a notorious example – have been out of action for many, many months. The Reading lift, indeed, had its own twitter account! I am told that the Reading lift has now been fixed. That is welcome if sadly belated news, though another defective lift, at another court, has recently also acquired its own twitter account. I understand that 23 lifts, out of nearly 1,000 across the estate, are currently out of order. That this is only some 2% of the total is no comfort at all to those adversely affected by the 23 – which is, it might be thought, far too high in absolute terms, quite apart from the astonishingly long time it seems to repair some of these lifts. This would not be tolerated in the private sector: what, after all, would your clients think if you had to tell them that the lift had been out of action for some months awaiting a spare part that can only be sourced abroad and that, no, sorry, you cannot say when it will be back in action. Nor, of course, is this kind of thing tolerated in the Westminster Headquarters of the Ministry of Justice.
- The other exemplifies the dire effects of there being too few judges in the family justice system. There are three linked complaints:
    - First, the length of time it takes to obtain hearings in cases not subject to the 26-week rule.
    - Secondly, the unacceptable prevalence of hearings cancelled at the eleventh hour because there is no judge available.
    - Thirdly, the unacceptable extent to which judges, albeit for the very best of reasons – to keep the system going while avoiding undue delays – are expecting parties and professionals to sit well beyond normal court hours. The President is rightly concerned about the adverse impact of this on the well-being of everyone involved (not least, I might add, advocates and judges) and is taking the necessary steps to put a stop to it. Do not, please, get me wrong. I entirely support the action being taken by the President, but the powers that be need to recognise the inevitable consequence if we do not find more judges – ever increasing delays in more and more family cases.

I appreciate, of course, that HMCTS as currently organised inherited a shambles, and that it has been striving mightily to improve what it inherited. And I appreciate, also, that HMCTS has to make do with the judges made available, or not, by others for whom it has no responsibility and over whom it can exercise only limited influence. But even in relation to 'business as usual', to put it bluntly, sometimes HMCTS *is* responsible for failings which only antagonise those who might otherwise be more sympathetic. Let me give just three examples:

- First, the introduction of Regional Divorce Centres was an interim solution pending the complete roll-out of the online divorce project. It was plainly the right thing to do. But it has been marred by the failure of HMCTS to provide adequate numbers of both administrative and judicial personnel, in particular at the largest

of the RDCs, at Bury St Edmonds. As I said in a recent judgment,[1] "It is, unhappily, notorious that some Regional Divorce Units have become bywords for delay and inefficiency, essentially because HMCTS has been unable or unwilling to furnish them with adequate numbers of staff and judges." Utterly predictably, and entirely justifiably, these failings have led to strong criticisms from the professions. The reputational damage to HMCTS has been severe. One can hardly be surprised if this reputational damage is seen in some quarters as reflecting on the ability of HMCTS to deliver any kind of reform. One hopes that HMCTS will not make the same mistakes at the new national Civil and Family Service Centre at Stoke on Trent as it takes on more of the work of the RDCs.

- A recent tweet from a barrister complained that a Financial Dispute Resolution hearing in which she had briefed by a privately-paying client was taken out of the list the day before because there was no judge available (the court in question was not at the time part of the Financial Remedies Court pilot). When an attempt was made to obtain compensation on behalf of her lay client, HMCTS rejected the claim in relation to counsel's brief fee (reduced by 50% because the case had gone off) on the ground that "It is not clear why Counsel were instructed for an interim hearing in this case." Unsurprisingly this tweet generated responses from many who, in addition to complaining of their own experiences of last-minute adjournments caused by lack of a judge, expressed astonishment that HMCTS seemed to think an FDR was simply any-old interim hearing. Given the central importance of an FDR in every financial remedy case, and, not least, the immense amount saved to the system by the many successful FDRs, the HMCTS justification for its decision was crass. As a very experienced family QC, commented, "Obtuse or do they really not know?" Is it any wonder that private FDRs have become so popular? Their popularity is surely an indictment of perceived defects in what the court is offering and yet another reason why the expanding roll-out of the Financial Remedies Court is so important and why it is necessary to continue the expansion as quickly as possible until there is national coverage.
- The lift in the West Green Building in the Royal Courts of Justice – important for all users of the family courts in the West Green Building and vital for wheelchair access to large parts of the RCJ complex – was recently replaced. So far so good. In the nature of things, my visits to the RCJ since my retirement have been relatively infrequent. It is disappointing, to say the least, that on each of my last two visits to the RCJ – the second as recently as Wednesday last week – this new lift should have broken down during the course of the day. What on earth is going on? Why is HMCTS seemingly unable to install a new lift without it breaking down?

What is to be done? What are the priorities? The answer is clear:

- First, we need more judges if delay is not again to become the scourge of the family justice system.

[1] *In re 4 defective divorces, Baron v Baron and others* [2019] EWFC 26, para 59.

- Secondly, we need to press on with speedy implementation of the Court Modernisation Programme. Whatever one thinks about HMCTS, the simple fact is that there is no alternative to the Modernisation Programme. There is no 'Plan B'. Unless we make a success of the Modernisation Programme, we face what is euphemistically described as a process of 'managed decline' – in truth an ever-accelerating descent to the abyss. We have no choice. The Modernisation Programme is unprecedented in scope, scale and ambition, but all of us must do everything possible to make it a reality as soon as possible, now, tomorrow.

What is a matter of increasing concern, however, as the months and years pass, is how little we know about the current thinking, let alone the current plans, in relation to too many key aspects of the Modernisation Plan. In relation to the projects for the online court and online hearings, thinking, so far as the public is aware, is still at quite an early stage. In relation to the extension of the use in the family courts of legal advisers and other authorised court staff, provided for by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 and the new section 31O of the Matrimonial and Family Proceedings Act 1984, nothing of importance and nothing specific, so far as I am aware, has yet been said in public.

My time today is limited, so I focus on the two most important aspects of the Modernisation Programme:

- Improvement in and rationalisation of the court estate.
- Introduction of proper IT in the family courts.

In relation to each of these vital necessities, there is, as yet, not nearly enough specific information available in the public domain, but all the indications are that, unhappily, too much remains to be done.

In relation to the court estate, the latest public pronouncement is the HMCTS Response, published on May 2019, to the *'Fit for the future: transforming the Court and Tribunal Estate' consultation*. This is full of policy and principle, and of course welcome for that, but it is desperately thin on the specifics. Where are the maps and lists illustrating the future geography of the court estate? What specific proposals are there for the rationalisation of the estate in such places as Leeds, Reading and Swindon, to take just a few places at random? What, if any, specific plans are there for new-build courts? What specific plans are there for the refurbishment and improvement of courts, for example to meet the pressing need for separate entrances, separate waiting areas and improved other special measures in the family courts, identified in the May 2018 Report by Queen Mary University of London and Women's Aid *"What about my right not to be abused?" Domestic abuse, human rights and the family courts?* Indeed, what specific steps have so far been taken, and in which courts, to remedy these serious deficiencies?

So far as concerns IT, the picture is mixed. Leaving on one side the projects for the online court and online hearings, there is a crying need in the family courts for proper IT:

- Fully digitised:
    - applications

    - court files
    - hearing bundles
- IT systems capable of creating, generating and sealing standard form orders on the day of the hearing, so that, except in the most complicated case, the litigant can leave court at the end of the hearing in possession of a sealed copy of the order
- Interactive digital tools for, eg, compiling and analysing the Form E and generating and amending financial spreadsheets.

In relation to the first of these requirements, the online divorce project has been a triumphant success, with a published timeline for reaching finality, end-to-end, by the end of this year. That is good news, which we should all recognise and applaud. Projects for the online handling of family financial remedy claims are likewise proceeding to finality by the end of this year. Progress in relation to the online public law and private law projects continues, though seemingly to a slower timeline.

In relation to the other two requirements the news is less good and less specific. The family justice system, as you will know, is hobbled by an IT system, FamilyMan, which was already obsolescent twenty years ago. The plan is that a new case management system called CDM will eventually be used across all civil, family and tribunals services, superseding FamilyMan and all the other 'legacy' systems. But when CDM will be available, for example, to create, generate and seal standard form orders, we do not know, if, indeed, HMCTS itself knows.[2]

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[2] Correction: It has been pointed out to me that the HMCTS *Reform Update: Summer 2019* includes the following in relation to the online public law project:

> "By the end of this year, we will have … added more features to our digital service in family public law, including case management, evidence management and orders … Reforms to family public law … will also allow orders to be written and produced in real time in court (in many cases), meaning that everyone leaves with immediate clarity on what has been agreed … In parallel to making improvements to our existing service, we will be developing the next stages, including … orders. This part of the work … by March 2020 will lead to us testing an end-to-end service to take those using the service from application through to final order."

This is welcome news, though confined to public law orders, showing the right direction of travel and correctly identifying the ultimate objective. But what of private law orders, financial remedy orders and, indeed, the whole panoply of orders embraced within the comprehensive library of published standard family orders? When is the relevant IT to be extended to them? We are told very little. All we are told, in relation to financial remedy orders, is:

> "In the summer of 2018 we began a consent order pilot for legal professionals and in March this year we added financial remedy outcomes to this pilot. By early summer 2019, we plan to have added contested financial remedy applications to the testing phase."

In relation to private law orders, we are told:

> "We will develop and implement systems and processes to enable private family law litigants to initiate and manage their cases online – again, fitting together seamlessly."

These statements, regrettably of almost Delphic obscurity, hardly assist in making clear what is intended. If, as one hopes, the end of the reform process is to be a single system extending to all family orders, and populated with every standard form order, rather than a number of separate systems each confined to a particular class of

That this delay and uncertainty is already prejudicing the wider cause of family justice reform is illustrated by the *President's Guidance: Forms of Orders in Children Cases*, issued on 17 June 2019 – sadly necessary as matters currently stand although, as the President made clear, only, it is to be hoped, as a temporary measure.

Earlier this year there were two spectacular failures of the IT systems used in the Crown Court. It is important to note that these failures were in the MoJ 'underpinnings' and not in anything HMCTS had done; the HMCTS reform systems worked well throughout. However, and this is a very big 'but', three points if I may:

- It is a matter of total indifference to users whether the fault is at MoJ or HMCTS, just as on the railways, if the train is late, it simply exasperates to hear the train operating company saying it is the fault of Network Rail. Just as, in the one case, the passenger expects and demands that the train runs on time, so in the other the user only wants the court IT to work.
- Of more fundamental concern, if the MoJ IT 'underpinnings' are not adequate to support the HMCTS IT reform superstructure, what confidence can we have in anything being done by HMCTS which is dependent upon the MoJ 'underpinnings'?
- How is confidence to be restored if, as announced by MoJ yesterday, the independent analysis of these failures apparently completed in May is not to be made public?

I must draw to a close. I remain upbeat and positive about the future of the Modernisation Programme, but no good is achieved by ignoring or glossing over the many difficulties we continue to face. There is a long way to go if the pessimists and naysayers are to be persuaded. Frank acknowledgment of – facing up to – ongoing failures is surely the best way forward.

orders, why does not HMCTS say so in plain terms and tell us what the planned timeline is for achieving that objective? JM/2.7.2019