Online Courts and the Future of Justice

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The following is an abridged version of the lecture. The full text, including footnotes, is available in Gray's Inn Library and on the website.

Our world is changing rapidly through technological development. I am interested in how technology is already altering how we 'do justice' and how our system might be significantly remodelled in the future. I was an early adopter of new technology and am long familiar with the power of technology to sort and analyse. I am also certain of the value of rigorous data to support and evaluate justice system policy. During a career researching the operation of civil courts and tribunals I have frequently despaired about the state of court hardware and data, and I do not need convincing about the scope for improved justice system technology.

But we are standing now on the brink of significant change. In September 2016 the Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals published a joint vision statement signalling a 'once in a lifetime' £1billion transformation of the justice system. The proposals will affect how the justice system operates, the public experience of it and how legal professionals and judiciary will function within new structures and processes. Some of this – because of the pressure to get the money out of the door while it's still available – is happening quite fast by the standards of justice system reform.

To put the transformation programme in a broader context, it can be seen as part of a global trend, which is particularly prevalent in common law jurisdictions. Although some procedural issues remain surprisingly impervious to change, the process of development and reform has been pretty constant. And the landscape of dispute resolution has also altered, with the advent of a plethora of private dispute

resolution mechanisms now available including mediation, conciliation, adjudication, ombudsmen, ENE (Early Neutral Evaluation), and, of course, ODR (Online Dispute Resolution).

I want to focus on the public justice system and to remind us of its societal significance. I have written in the past about the importance of a strong justice system that supports social stability, facilitates economic activity, checks the power of government and helps us to live harmonious, relatively peaceful lives. In this respect, we are fortunate to benefit from a deep rule of law culture in which the objective of substantive justice is pursued via a complex labyrinth of procedural rules designed to elicit truth and lead to accurate decisions on legal merits.

In my research, I have been involved in quantifying the extent to which ordinary citizens struggle with a lack of understanding of their legal rights, an absence of knowledge of redress systems, and an inability to access free sources of advice – difficulties that are not evenly distributed among the population, but disproportionately concentrated among disadvantaged or vulnerable groups. So a central interest for me is the possibility of a future in which the potential of technology is harnessed to deliver a more accessible state-backed dispute resolution system, but which nevertheless remains grounded in our core rule of law values and procedures, and inspires public confidence and trust.

What is happening now in information and communication technology

Having the internet to create and communicate information, we now have massive complex data sets (Big Data) that provide insights into processes and behaviour. In the current stage of development, artificial intelligence, or 'increasingly capable computers' (machines), draw on and analyse Big Data to predict, make decisions, and educate themselves so that they autonomously increase their own capability. It used to be thought that the potential of computers was limited by the human ingenuity and intellect of their programmers. But this seems to be wrong. Not only can increasingly capable machines 'think' but they can outperform human experts using 'brute-force processing'.

These machines are capable of not only 'augmenting' the processing and decision-making of functionaries and professionals, but also of supplanting those decision-makers. Although people may express shock at the idea of software making decisions about rights issues, it is already

happening. Many first line administrative decisions affecting rights are made by machines or via computer processing.

An example of the power of AI is JP Morgan's programme called 'Contract Intelligence', which scans a contract in seconds to interpret commercial loan agreements, thereby replacing thousands of hours of work by lawyers. More recently, while we have all become fairly used to voice recognition software, increasingly capable systems are making use of robotic sensing which enables software/machines to detect and respond to the emotions of users. Known as 'affective computing', this software can scan facial actions and, in experiments, has outperformed most people in differentiating between faked and genuine pain.

What all of this technology can do for the justice system

There is probably no limit, but at the moment the following are already happening in our own jurisdiction and elsewhere:

- Technology can help to reach out – communication/information
- It can speed up processes – e-filing, online procedures, document handling
- It can simplify processes for litigants in person (LIPs) – by embedding procedural rules within online forms and processes: you don't need to know the rule if the system prompts you to do things and explains why
- It can facilitate the sharing of complex information instantaneously
- It can allow people to congregate without the need for physical presence
- It can facilitate online resolution
- Ultimately it could support or replace human decision-making through automated processes
- Finally, databases of the subject matter, duration and outcome of disputes could help dispute prevention and early resolution.

With this potential, the current vision in this jurisdiction is a justice system 'digital by default and by design'. The 2016 Joint Vision Statement promised a transformation through technology to enable online access for parties in a single system for civil, family and tribunal cases. Robust document and case management systems would replace paper filing and some cases would be handled entirely online. There would also be

online pleading and virtual hearings – either online or using telephone or video technology.

While the technological turn in the UK can be seen as part of a global trend, there is a mighty coincidence of factors relevant to the current transformation programme. The past decade has seen a decline in justice system funding and the slashing of legal aid for civil and welfare cases. This has led to a flood of LIPs in the courts, struggling with the complexities of an adversarial system.

From the other side of the bench, the judiciary are straining to meet the needs of LIPs, with decreasing levels of administrative support. In his 2013 Birkenhead Lecture Lord Thomas (then LCJ) outlined the challenges facing courts and tribunals and stressed the urgent need to make better use of technology to do 'more with less'. A year later, he spoke of the impact of continuous austerity on the justice system, which, unlike other areas of state expenditure, is 'unprotected from retrenchment'. Earlier reports had laid the ground for the development of online courts and tribunals seeing them as the answer to expensive, slow, unintelligible, processes that were 'out of step with the internet society', as well as solving the resource problem of crumbling courts by substituting remote dispensation of justice.

The Susskind/CJC report recommended an internet-based court service, integrating online advice and dispute resolution, followed by online judicial determination as a last resort. The Briggs Civil Court Review set out a blueprint for an Online Court similar to that adopted in the British Columbia Civil Resolution Tribunal:

- An automated (AI) 'triage' stage, including advice to help claimants articulate their cases; exchange between the claimant and defendant; and preparation of claim form and particulars of claim. This stage could be bypassed by represented and repeat player claimants.
- Second, a dispute resolution stage, which could involve telephone, online or face to face mediation or ENE.
- Finally, for those cases not settled at stage 1 or 2, a determination stage, which could comprise a conventional hearing, a telephone or video hearing, or legal determination without a hearing.

Initially announced as a 'court' designed end-to-end for use without lawyers, lawyers will not, however, be excluded from the process. A new

set of simplified procedural rules will deliver increased accessibility, and case management will be delegated to 'case officers' rather than judges. The idea is that after testing on low value claims, the Online Court will be mandatory for money claims up to £25,000 (the vast majority of claims in the County Court) and that, longer term, it could expand to cover higher value and other case types.

Where we have got to

There is clearly a great deal of activity, but it is not easy to say on any one day exactly what is happening and how far any particular part of the programme has progressed. The lack of a clear flow of communication has been a cause of some complaint among the profession, the judiciary and academics. Nevertheless, it is apparent that changes have already taken place in the criminal courts and that new processes are being introduced or are about to take place in civil, family and tribunal proceedings.

There can't be many who disagree with the proposition that the hardware and connectivity in courts needs improving; and moving from mountains of hard copy to having everything online is the sort of development that we have all experienced at work, in consumer transactions and public services. The Parking Appeals Service has been paperless for well over a decade. But the vision and planning for courts and tribunals is going further. Developmental work and testing has already started on: digitisation of existing processes; development of new procedural rules; development of a common platform for initiating claims; the Online Court; online facilitation and ODR; development of iterative court and tribunal processes; online/virtual hearings; court closures and disposal of the estate.

As I understand it, the change is happening in bite-sized pieces, using the concept of 'agile development' – the opposite of the unfortunate big bang approaches seen in the past with government IT initiatives. The modus operandi is of teams working incrementally and iteratively on different blocks, focusing on quick production of software to test. The hope is that ultimately all of the blocks can be assembled to deliver a new, coherent justice process.

The questions we should be discussing and researching now

My first and longest question concerns the extent to which technology

and ODR have the potential to create a public justice system that is more accessible, better able to meet the needs of users and delivers procedurally fair and substantively just outcomes.

Second, and allied to the first issue, I want briefly to consider the implications of moving to asynchronous, iterative processes. While the proposed changes in many ways make perfect practical sense, I wonder whether are we looking at a tectonic rather than incremental shift in common law adversarial procedures and what that might mean for professional practice, for judicial decision-making and for substantive outcomes.

Third, I want to worry a bit about the move away from physical gathering in one space. I am well aware of the practical disadvantages of everyone having to congregate in the same physical space at the same time. But what are the implications of evidence only online and in writing, or presented orally but remotely? I worry about the loss of physical presence for a range of reasons and the long term consequences of court merely as a service rather than as a public, physical site of justice. Into this goes the question of identifying the foundational values and principles of the existing public justice system that are necessary to maintain and indeed enhance public trust and confidence in the system.

Fourth – and remarkably little has been said or written about this – is the question of how the judiciary will adapt their practices and ethical codes to the new online processes and virtual hearings as they transmogrify themselves into cyber judges. And, equally importantly, how attractive will the role be to potential future judges?

Finally, in part to answer some of these questions, I want to propose a research agenda that helps us to understand the impact of changes as they happen and to maximise the positive potential of technological change, while minimising negative impacts.

The issue of access to justice

Access to public courts and tribunals is central to the rule of law. Backed by the power of the state, courts and tribunals enable citizens and businesses to defend or protect their rights and legal interests, and ultimately provide the means to hold the government to account.

Effective access to justice involves the ability to access public processes for resolving disputes and rights claims, that lead to enforceable remedies reflecting the merits of cases according to law (the concept

of substantive justice), by means of procedures that are conspicuously fair and perceived to be so (participation, procedural justice and trust). Access to justice, thus, means something more than being able to complete an online form and feel comfortable with the process. It requires the ability to engage, to participate, to be dealt with by fair procedures and to receive a substantively just outcome.

That is the individual benefit of access to justice. But the societal benefit goes further than that. Public determination of cases in a common law system states what the law is, communicates and reinforces important norms of social and economic behaviour, and provides a framework for the settlement of future similar disputes. The legitimacy of the system – the reason why people generally do what judges tell them without the need for enforcement – is based on public respect for, and trust and confidence in the system.

The access to justice problem which online processes are said to address is that the courts are too slow, expensive, and complicated for people to use without help, and that for most people help is either unaffordable or unavailable. (Court fees represent another access barrier.) This means that many are simply excluded from access to courts and tribunals and others flounder alone in the process.

Legal procedures have been devised by lawyers and endlessly redrawn, refined, reworked, and rewritten with the ultimate purpose of delivering fairness and substantive justice. When we are looking at a fundamental rethink of the justice system, of making it cheaper for those with lawyers and more accessible and comprehensible for those who have to navigate the processes alone, the key challenge is always to find a balance between rules that will deliver uncomplicated, fair processes and the best chance of a substantively just outcome. The public justice system is founded on different principles from mediation, ODR, EBay, Resolver and other private processes. Parties are not both volunteers. One side may be forced into the process against its will. The public courts are the necessary fallback when voluntary negotiation over disputes is not possible or has failed.

Might online courts be the answer to the access to justice problem? We know that vulnerable groups experience everyday legal problems more often and do less about them. People's objectives and approach vary depending on the issue at stake and the ability to obtain advice and assistance. It also depends on whether they are a potential claimant or defendant and who the opponent is.

Compared with the number of everyday legal problems and disputes that occur, very few people seem to end up in court or tribunals. With the exception of personal injury proceedings, individuals' experience of court proceedings is as a defendant rather than as claimant. The experiences of users of family courts, civil courts, criminal courts and tribunals are very different, because, although there are generic functions of courts and tribunals, the experience of the user and what they need and want varies dramatically.

Thinking about a system tailored to the needs of users, we want something different for the alleged offender than for the bewildered benefit applicant, the consumer wanting his goods replaced, the parents wanting access to a child, the small trader suing for his payment, the indebted householder being sued by his utility company, the represented personal injury claimant, the non-English speaking asylum seeker or the sophisticated taxpayer contesting a VAT penalty.

In terms of objectives and resolution preference, research tells us that what people want is not to have the problem. They do not crave involvement with legal processes, but want the problem to be resolved in their favour. Many people have only a weak or absent understanding of their legal rights; there are significant barriers to obtaining free legal advice; and many cannot afford or will not risk legal costs.

A relatively swift, cheap, fair, online service, accessed from the comfort of home or even on a hand-held device which incorporates the possibility of ODR should be attractive for certain cases. Literate, educated individuals and small businesses, who cannot afford lawyers, will be likely to benefit. Those who previously might have paid for legal advice may feel that that is no longer necessary. That is the ambition of the Online Court and it has a great deal of potential to provide an improved service to many, and the possibility of redress to some who currently feel excluded.

It has been estimated that across the UK, when engaging with government services, only 30% of the population are 'digital self-servers', meaning 70% will require assistance to use digital services. Recent studies show that the young and elderly, as well as those with low educational attainment, are less likely than others to use the internet to resolve legal problems and that, perhaps surprisingly, young people 'struggle to interact with the internet as a legal information resource' and are uncritical about the material that they use. The online forms I have seen both in development here and on the Canadian Online Resolution

Tribunal would be entirely out of reach of the kinds of people that my students deal with in our free legal advice clinic.

The 2016 impact assessment conducted for the 'Assisted Digital' Court Reform programme recognises that there is no such thing as an 'average user' of the justice system, and so a blanket approach to digital support would not be appropriate. The plan is to design and build 'tailored solutions' around the needs of users. Options are to supplement online processes with telephone support, a paper option, or possibly more intensive face-to-face assistance. Testing and development has to be a continuous and iterative process involving a wide range of potential claimants and defendants and those who advise. And the objective of testing and evaluation should go beyond usability and address questions of perceptions of procedural fairness, comprehension of the significance of procedural steps, and substantive outcome.

The implications of procedural change in the digital by default justice system

Changes in court procedure and other policies affect not only the question of access to the courts, but also the outcome of cases, by affecting the balance of power in litigation.

In both courts and tribunals, the description of the move to online processes at first sight suggests a significant shift from traditional adversarial procedure. In the Online Court, we are moving to integrated triage/advice and integrated ODR. In tribunals, there is an explicit shift to an online, iterative process. It is sometimes difficult to be clear whether descriptions of proposed changes apply across the board or only to certain parts of the justice system. In explaining the approach of the modernisation programme, the Senior President of Tribunals has urged people to change their view of litigation in general 'from an adversarial dispute, to a problem to be solved'. With respect, this concept is only appropriate for some disputes in some forums. He has said that similar principles will apply across all jurisdictions (civil, family and tribunals), although they may be applied in different ways depending on the type of dispute. So on the one hand there are some 'one-size-fits-all' principles, but on the other they will be applied differentially.

Under the new system envisaged for tribunals, all participants in cases will be able to iterate and comment online on the case papers so that issues can be clarified and explored. This doesn't need people to

congregate at the same time or, indeed, at all. Describing what sounds very much like a civilian inquisitorial process, the Senior President has said that there will be no single trial or hearing, but the determination process will stretch over a number of linked stages.

Procedural due process within the court system is aimed at ensuring that the law is administered fairly and uniformly thus inspiring confidence in the justice system. In adversarial proceedings, the parties define the scope of claims and defences, and broadly take responsibility for the conduct of the case. As a result of recent rule changes and changes in judicial approaches, judges tend to ask more questions than was once the case, and in tribunal proceedings, where unrepresented parties are very common, judges have developed what has been called an 'enabling function' – intervening to ensure they have elicited the information they need to decide. Since the post LASPO upsurge in litigants in person, particularly in the family court, there has been increasing judicial authority for judges to take a more inquisitorial approach.

The inquisitorial approach puts a greater burden of responsibility on the judge and changes the role of advisers and advocates. It alters the way evidence is presented and how it would be challenged. The impression is of a dynamic, text-only process that requires a considerable shift in judicial behaviour and ethics. While we have already seen an adaptation of judicial behaviour to the demands of dealing with LIPS, under the new online procedures, the boundaries of what is appropriate for a judge in an adversarial system will not merely shift, but disappear.

Having watched many tribunal proceedings, the idea of an iterative process makes a lot of sense. Why wait for everyone to meet in the hearing room to discover that a critical piece of information – like medical evidence – has not been supplied, leaving the tribunal judge with the dilemma of deciding the case without the all of the necessary information, or adjourning – creating inconvenience and wasting time and money?

So iteration may indeed lead to more efficient and possibly more accurate decision-making. But it shifts the balance of responsibility, impacts the independence of the judge and increases the scope for bias. Moving to a sequential, iterative process of determination at the same time as transferring to online communication introduces quite a few simultaneous changes to traditional process. In assessing whether these changes will have a beneficial, neutral or negative impact on public perceptions of process and substantive outcome, it will be necessary to

think hard about the comparison case. Versus the present system, will everyone gain from the new process or will there be some losers? And versus the present system, might there be less efficiency in some areas than currently?

And how will the legal profession and advice agencies adjust to the new iterative online processes? A greater level of representation and advocacy through online iterative processes and at virtual hearings could be possible, but that will require adapting to the new environment, investing in hardware and retraining.

And what will be the principles determining which cases will be allocated to online processes and virtual hearings? Will there be cases where we want to ensure a public legal determination rather than an online decision or ODR? Where, how and by whom will the principles be articulated?

On the subject of ODR/ADR

In both tribunal and court proceedings, there is a will to integrate an ODR stage into new processes. This means that at some point after the beginning of the case, and presumably once sufficient information has been 'uploaded' by both sides, there will be an attempt to achieve an online facilitated settlement between the parties. Will this be mediation or conciliation and by whom?

There is a tricky question here, because of the critical contrast between the public justice system and private dispute resolution. Aside from the practical problem of how one ensures confidentiality of the ODR process if it fails, the spirit of ODR is that it does not focus on legal merits, but rather on problem-solving and achieving a settlement that the parties can live with. We don't know much about the practices or processes or outcomes that take place. It is opaque. The potential use of algorithms in the initial advice stages prior to ODR and, potentially, within the ODR process simply exacerbates this issue.

So we need to consider whether, once ODR is fully integrated into public court processes, the ethical principles of ODR will modify to chime with justice system values, or will we view the justice system as having changed in terms of its commitment to substantive justice. If the latter, it raises some questions about the role of an independent judiciary. As Judith Resnik has compellingly remarked: 'If the task of adjudication is replaced with that of shepherding parties toward

private conciliation, the independence of judges becomes a goal without a purpose or a constraint. The result is the decline of adjudication's potential to serve and to support democracies.'

Moving on to virtual court rooms and online hearings

An important aspect of the modernisation programme is a reduction in adjudication following a hearing that involves simultaneous congregation of parties and their representatives (if any) with a judge in a public physical space called a court or tribunal. Remote working and fully virtual hearings are currently being developed and piloted through expansion of video and telephone links to provide access either into a physical court room or into the new design of a virtual court room.

A pilot in tax tribunal cases involves the applicant, solicitor, presenting officer and judge all joining remotely from different locations. The prototype apparently includes a virtual waiting area, a countdown timer on the screen, and an online administrator available to liaise with those waiting for the hearing. People are able to self-check on the screen and there is advice about where best to sit in the room. Hearing the description of these efforts made me wonder whether the experience will be less or more stressful than physical presence in a court or tribunal for a claimant or defendant facing a decision that could significantly affect their rights or entitlement.

The advantages of the move to online and virtual hearings are said to include ease of access for parties and representatives by removing the need to travel to a court, and the opportunity for efficiencies by closing courts. Judges may be 'virtually hearing' the case sitting in their courtroom or chambers, but there is also the possibility that in due course they would not need to travel to work, but could deal with the hearing from their home. If these are some of the possible advantages, what are some of the apprehensions about the process from access to justice, professional practice, and legitimacy perspectives? Or to look at it another way, what are the important practical and symbolic features of courtrooms and hearing processes that might be lost?

Starting with the practical. Common law adversarial hearings traditionally have been said to provide the opportunity for evidence to be presented in person and to be tested before a neutral and largely impassive judge. Parties can be represented or they can advocate their case themselves. They have their day in court and they can see and hear

justice being done in a physical space that communicates the seriousness of the process and its public nature. The judge has the opportunity to hear evidence and legal argument, to see the disputing parties face-to-face and to make assessments of the opposing cases as presented and the credibility of the evidence.

Whether being able literally to see and hear parties and witnesses assists the judge in assessing credibility is highly contested. Some judges think it essential. Others think that not only is it NOT essential, but that it is misleading, since the best liars are precisely those that are most convincing. Experimental research supports the assertion that judges do little better than chance in detecting lies, and that factors such as appearance, eye contact and physical ticks can be misleading in assessing credibility.

The question that we should be interested in is whether virtual hearings are an improvement on determination on the papers (quite possibly), but less effective or fair than face-to-face physical presence. In the tribunals field there is longstanding evidence that cases determined solely on the papers are less likely to succeed than at oral hearings. A recent study suggested this was largely explained by additional information elicited at the hearing. It did, however, also suggest that the credibility of the claimant was rated more highly when she had been seen and heard.

There is growing interest in the impact of interpersonal communication through different media in a range of contexts. Research suggests that virtual communication can create a different relationship to that built on face-to-face communication. For example, in video conferences the viewer may take shortcuts when evaluating information presented by the speaker, making judgments based on how likeable they perceive the speaker to be rather than the quality of the arguments presented by the speaker.

In criminal trials, research is currently being conducted into the impact of digital presentation of evidence on jury decision-making. For example, do juries perceive a witness who gives evidence in the witness box in court as more believable than a witness giving evidence remotely over a live link or through pre-recorded means; and does this affect jury verdicts? The key question is whether technology assists judicial procedures in terms of process and outcome and whether any influence is neutral, beneficial or biasing.

Perhaps equally important, there are questions about how a virtual

hearing affects the way that parties participate in the process – the way that they present their evidence or tell their story and their perception of the legitimacy of the proceedings. One of the very few studies in this field looked at the use of interactive video technology in US deportation cases. Detained litigants seen over a video link were more likely to be deported than detained in-person litigants, but this was largely because those allocated to video hearings had failed to engage with the system. Explanations for the outcome were that video hearings were thought to be unfair and illegitimate, there were technical challenges in litigating claims over a screen, and video litigants had lower quality interactions with other courtroom actors. Litigants separated from the traditional courtroom setting simply disengaged from the entire process. If this were to be borne out by other research it would tell us something about the flip side of people being put off by court.

Aside from the practical questions of the quality of interaction and its impact on evidence and outcome, a second central issue in relation to online courts is that of openness and transparency. Jeremy Bentham believed that legal disputes should be determined via public hearings, because publicity offers the values of truth, education and discipline – keeping the decision-making process and the judiciary themselves under scrutiny.

The critical factor shaping popular legitimacy of the justice system is an evaluation of the fairness with which the courts exercise their authority. Being seen as fair involves transparency in procedures, conspicuous impartiality and consistency, explanation of rules and decisions, and the promotion of procedures that give parties a voice in the proceedings.

How this will affect judicial behaviour; and the issue of judicial training and recruitment

Reducing paper, easing communication and doing more work on the telephone can be seen as reasonable constructive developments that should make the lives of judges easier. But the plans for the Online Court are more ambitious than that. According to Lord Briggs, it marks a 'radical departure from the traditional courts by being less adversarial, more investigative', and by 'making the judge his or her own lawyer'. Given that the vision for the work of the Online Court is to extend to a wide caseload, there will be a need for a programme of training to

prepare the judiciary for the new cyber environment.

A survey of judicial attitudes conducted in 2014 and 2016 revealed high levels of commitment to the judicial role and professional standards, but low levels of satisfaction with workload, working conditions, and administrative support. Among the factors of most concern were the rise in litigants in person, the introduction of digital working in court and reduction in face-to-face hearings. It will be important for morale, retention and recruitment to prepare judges for the different aspects of their new online roles and then to monitor how their new responsibilities and working practices impact the ethos, collegiality and perception of their role.

What should the research agenda be?

Most of my top research questions feed into the modernisation programme's broad ambition of improved access to justice. By that I do not merely mean can people access the online system, but can they participate effectively and feel they have done so, and achieve substantively just outcomes. That sounds like a large topic, but could be reduced to some relatively straightforward empirical questions:

Who will the future users be? Will the types of people with the types of problems who are currently NOT engaging with the justice system be encouraged to use the system so that they are no longer excluded? Equally importantly, might it be possible that the sorts of people and problems that are currently within the system are deterred by online processes and either shift to private processes where they exist, or give up on the possibility of redress, thus reducing rather than increasing access to justice? And, conversely, could the new system be a happy hunting ground for tech-savvy recreational litigants?

Will LIPs find the system less daunting to use and will they perceive the system to be fair and to do justice? Getting users to say whether a process is manageable is one thing. Whether they like it is another. Whether they would choose to deal with problems that way, given a choice, is yet another. And whether the process delivers substantively just outcomes by means of a fair process is yet another still. Will online systems reduce the challenges judges currently face dealing with LIPs? Will online LIPs require less judicial time?

Will power imbalances between litigants be unaffected, reduced or magnified by online processes? Will outcomes be unaffected, or more

or less substantively just than existing processes? What will be the measure of success for ODR – just settlement or just settlement? Will we be measuring it? Will the outcomes of virtual hearings be unaffected, or more or less substantively just than face to face or paper hearings, and will participants perceive them to be fair?

In order to begin to answer these and other questions that could demonstrate the success of the change programme in relation to one of its key justifications, we need data. We have been hampered for as long as I have been researching by a relative data vacuum relating to the details and dynamics of proceedings in civil courts and tribunals. (The situation in crime has always been better.) But developing a common system for civil, family and tribunals with modern hardware and new software presents an unparalleled data collection opportunity.

It is important to get the software architecture correct at the outset to provide maximum flexibility for the future. In this respect, there are conflicting pressures. The overriding objective in the agile development process is 'minimum viable product' – collect the absolute minimum to do the job you need to do. This is entirely understandable from an operational perspective, but not from the perspective of the need to evaluate the impact of the new system and to be in a position to judge whether it is achieving its access to justice objectives. The opportunities offered by a comprehensive, responsive and flexible database for evidence-based improvement to the justice system are breathtaking, and it is important that we seize this opportunity now while the new system is in development.

And finally, we need to be thinking about how legal advice services, lawyers and judges need to adapt to the online world. Will they be able to use the potential of online processes and virtual hearings to assist the access to justice ambition of the programme? And in terms of open justice, how will the media and other interested parties follow cases if everything is online and in private?

In conclusion

My concluding comments are simply a plea for the future of the programme. We have an opportunity to modernise and reshape our public dispute resolution process to provide greater access for those who feel excluded from the public justice system and greater ease of use for those who are currently struggling without representation.

But we need clarity and co-ordination over objectives (for example high court fees work against access), to distinguish clearly between different categories of case and people and to articulate the principles that will apply in the future in determining what procedures are appropriate for which types of people with which types of legal disputes. Communication is always essential in any change programme, and there is a need for this to be better accomplished. The profession, advice agencies and universities need to prepare for operating to maximum effect in a substantially online environment. The increasingly online environment will transform the role and experience of our judiciary and their performance and training will need to adapt to meet that challenge.

Finally, while we are debating the ways in which the court system is said to be failing now, it is important to remind ourselves what, despite resource constraints, it currently does well and to ensure that its core values and characteristics are imported, as far as possible, to the system of the future. This includes, among other things, transparency, integrity, impartiality, fair process, and substantive justice, presided over by an incorrupt and skilled judiciary performing to the highest standards.

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