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THE RIGHT HON. SIR GEOFFREY VOS

RECOVERY OR RADICAL TRANSFORMATION: THE EFFECT OF COVID-19 ON JUSTICE SYSTEMS

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Introduction

1. I am very grateful to the LSE's European Institute and Department of Law for inviting me to deliver this talk. Even without Covid, it would not have taken me long to walk the 300 metres from the Royal Courts of Justice to the LSE to do so. Even the time taken for that short walk has been cut by the wonders of Zoom. I joke, but the point has some relevance to what I am intending to talk about this afternoon.
2. I have been asked to address the *effect of Covid-19 on justice systems* by reference to the question: *is it recovery or radical transformation?* It will be an open secret to those listening that I am keen that our civil justice system should consider radical technological reforms.
3. There are two main strands to my approach: resolving the disputes of the future, rather than those of the past; and reform of the processes that we use to achieve resolution.
4. I have tried to be in the vanguard of those who think that, when considering how to reform our justice systems – whether here or in other jurisdictions – we should be considering carefully the kinds of cases that judges, mediators and arbitrators will actually be required to determine in a new technological era. That means realising how technology will change the lives of individuals, consumers and businesses – and not waiting for those changes fully to manifest themselves before thinking about the effects they will have on the justice process.

5. Secondly, and equally importantly, I do not think we should confuse utilising quite straightforward modern technology such as video conferencing, e-filing, or electronic documentation, with substantively reforming the methods by which we deliver justice. Video hearings just enable us to undergo the same court process remotely rather than face-to-face. E-filing simply avoids the journey to the courthouse to issue legal proceedings. And electronic documentation happily saves thousands of trees from destruction just in order that vast paper bundles can be referred to in a physical courtroom. But none of these things change the process itself. I am concerned to consider this afternoon how that process might be changed, whilst still ensuring fairness and justice for those using the justice system. As regards online justice, I am sure that we will only be able to offer access to justice for all, fit for the 21st century, if we move our civil – and in fact our family and tribunals – justice systems online (whilst leaving final resolution of at least some cases started online to be undertaken by judges either face-to-face or by remote methods as appropriate).
6. I will return to each of these fundamentals in a moment.

The background

7. The issues I have already mentioned do not, of course, affect only the justice system of England and Wales. They affect every justice system that aspires to learn the lessons of the Covid pandemic and wants to make sensible preparations for the way life will be lived and business will be undertaken in the decades to come.
8. It is already reasonably clear what technological innovations will most affect life and business. First, the ubiquitous use of the internet and of smart devices. Secondly, huge data storage recording every aspect of our lives and our businesses. Thirdly, instantaneous high-quality communication around the globe. Fourthly, electronic transferrable documentation. Fifthly, on-chain smart contracts recording every kind of consumer and business transaction immutably and irrebuttably. Finally, central bank wholesale and retail digital currencies or cryptoassets allowing 24/7 financial and market activity nationally and internationally.
9. What then has really happened as a result of Covid?

10. As I have already indicated, the truthful answer to this question is 'not much'. In England & Wales, the civil courts were relatively quick to adopt remote working for most types of case allowing proceedings to continue to be determined whilst lockdown and social distancing measures were in place. The Business and Property Courts, in particular, hardly missed a beat. They continued hearing interlocutory matters and final trials from a very early stage using Skype for Business and then Teams.
11. In other countries, I think it is fair to say that judges were slower to react. Our judiciary has held numerous bilateral engagements with other countries' judges on Zoom. We have been slightly surprised by the elemental technology that they are often using and by the obstacles placed in the way of doing things without face-to-face contact. For example, in one European country, the commercial judges gathered round a single screen in an 18th century library. In another, court hearings had had to be postponed because of the legal requirement to change the air in any public space every 20 minutes. In the USA, the judges we spoke to were reluctant to consider remote hearings for any case in which evidence was required, and so on and so on.
12. In many countries, I expect that things will return imperceptibly to a pre-Covid normal after Covid restrictions are relaxed.
13. So, what of the position here? Here, I think and hope that judges will be more receptive to learning lessons from what we have had, by force of circumstances, to do. I cannot envisage returning to face-to-face hearings for case management appointments or even short hearings on other issues. Remote hearings are popular with lawyers as they save time and travelling costs. They are effective for lawyers as well, as it is hardly more difficult for a judge to communicate with a lawyer on a video call than it is in person. With litigants in person, that is not universally true, and in many types of case, face-to-face contact between judge and litigant is still likely to be important.
14. Judges here are being gradually prised away from their enthusiasm for paper. I for one no longer use the stuff. Electronic documents are far more convenient and much lighter to take home on the tube.
15. But as I have said already, and I think is far more important, I expect that judges in England & Wales will be more receptive to more radical departures as a result of their Covid experience.

16. In one sense, Covid came at an inconvenient time, because it struck when the HMCTS reform programme was in full swing, but had yet to be completed. So far as judges were concerned, at the time of the first lockdown, the new Online Civil Money Claims (now with over 200,000 cases) was producing unresolved cases in a digital form to only 17 County Courts. At that time, therefore, few judges at the coalface were seeing the effects of the change. Now, I am pleased to say, cases from OCMC will shortly be dealt with in all County Courts across the country, and Damages Claims Online launched on 28 May 2021.
17. In the next two years, online justice in England and Wales will become a reality for most common types of claim, whether they are damages claims, money claims, possession claims, employment tribunal claims or public or private family claims.
18. There are online justice systems in other countries, such as the Civil Resolution Tribunal in British Columbia in Canada, and also in China and in Kazakhstan, but none of the mainstream common law jurisdictions has an established system for court cases being brought online across the board.
19. There is another aspect to this, which I regard as of central importance. That is about Alternative Dispute Resolution, which I said in a recent speech should really be renamed as “Dispute Resolution” since it is not alternative at all. Online systems allow for continuous mediated interventions aimed at every stage at resolving the dispute. Moreover, the online space allows also for pre-action portals with the same objective. These pre-action portals are now very much a reality in England and Wales, with the personal injury portal, the whiplash portal, and the forthcoming SME portal as prime examples. I have recently suggested that the pre-action space might become even more important, and might be accredited by an online rules committee, so that users would have confidence in online pre-action portals as a way of speedy and cost-effective dispute resolution.
20. With that rather lengthy exposition of the background, let me come back to my two suggested innovations: resolving the disputes of the future, rather than those of the past; and reform of the processes that we use to achieve resolution in the context of online justice.

What kinds of case will need resolution?

21. Some insightful thinking is necessary here. There is a wide range of disputes from the 60 million disputes resolved every year on eBay at one end to the disputes worth billions of dollars resolved in the Financial List of the Business and Property Courts in the Rolls Building, at the other extreme. Historically, we have always allowed our thinking to concentrate on the very small number of cases at that high end extreme. That is letting the tail wag the dog. It is necessary in thinking about the future to consider the entire picture.
22. Many if not most disputes of the future will originate on the internet, because of some purchase or transaction concluded online. The consumer of 2021 does their banking online, receives their utilities and telecoms bills online, and buys their groceries and many other products online. SMEs increasingly transact exclusively online. Some of the older ones amongst you may have experienced how hard it is to find an address or telephone number for a government office, energy company or local council.
23. But this is only the start. The real revolution will come when consumers and SMEs alike use entirely electronic transferable documentation and on-chain retail and wholesale digital currencies. Disputes are less likely in that space to be about what was agreed, because that will all be irreversibly recorded in the electronic record.
24. It was for this reason that the UK Jurisdiction Taskforce, which I chair, introduced its streamlined digital dispute resolution rules launched in April 2021. The objective is to allow experts or arbitrators to resolve on chain disputes in days rather than months or years, and to implement decisions directly on-chain using a private key, allowing also for optional anonymity of the parties.
25. Of course, there will still be a role for debt collection cases even in the brave new world that I am expecting. But I would expect those kinds of cases to be resolved far more quickly online with payment plans being agreed or, in extremis, enforcement online. Payment plans are online now in OCMC, and already HMCTS plan to bring enforcement online.
26. Once one understands exactly what kinds of dispute will arise in a tech enabled business and consumer world, it is easier to work out how to reform the dispute resolution mechanisms that will be appropriate. That is where I am going now.

Reform of the dispute resolution process itself

27. I have already explained why remote hearings and the other Covid measures change the method, but not the system. That does not mean that the lessons we have learned are not valuable. They are. But there is more to be done.
28. The online funnel for all civil, family and tribunal disputes is now in the course of creation. In just a few years, almost all cases will be capable of being started and progressed online. That will be an extraordinary achievement, but ultimately more will be needed to ensure that the online space does not simply replicate what was previously done on paper.
29. For example, some of the online systems will start by asking the user to upload a statement of their claim or written evidence. It will be better when we have built decision trees that take the user directly towards the identification of the issue or the issues that divide the parties. In a road traffic case, the real question is often very simple, such as *was the car going too fast?* In a SME dispute, it might be: *Were the widgets of the agreed quality?* At the moment, the drafting of lengthy claim forms, pleadings, experts' reports and witness statements provides a lengthy and costly route to the identification of the one or two issues that are really at the heart of the problem. Many have advocated cutting the White Book in half. I am in favour, as I have said, of a new online rules committee to provide the governance for the online dispute resolution space. It will be necessary to be sufficiently flexible to allow the programs to develop imaginatively, and to use artificial intelligence wisely, whilst retaining the participants' inalienable rights to a fair and just process, in which consumers and business alike have absolute confidence.
30. The difficult part of all this is not actually programming first class online dispute resolution pre-action portals, connected by appropriate APIs to online claims systems, all using a single data set. The difficult part is deciding how the judges operating throughout and at the end of the online process should ultimately resolve the legal and factual issues that will still arise. At the moment, if a case is not resolved by the dispute resolution mechanisms integrated within the online process, the case will simply be referred to an interlocutory or final hearing whether remote or face-to-face.

31. My sense is that there must be a process that does not so often involve getting lawyers, parties, experts and witnesses all in one place at one time, sometimes for days on end. Undoubtedly, remote hearings are a useful tool. But I think we need also to work out what kinds of issues can actually be resolved by judges in an asynchronous online process. There is more work to be done, but once we have created the funnel made up of pre-action portals and online claims, I have the feeling that the answers to these questions will seem far more straightforward.

My answer to the essay question

32. It will, by now, be clear that my answer to the question that I was set is that the effect of Covid-19 on justice systems is both recovery and radical transformation. The latter was on its way before Covid intervened. But the terrible pandemic has, to some extent at least, provided a springboard for the reforms that were already long overdue.
33. You may already have detected that I am actually very excited about the current developments and the ones that already being planned.
34. I understand that technology will not solve all our problems. I understand that there will still be those who are digitally disadvantaged and who will require assistance to utilise the online space. I understand that there will always be some disputes that will only ever be capable of resolution by bringing the parties face-to-face for a judge to decide who is telling the truth. Finally, I completely understand the need for the state to provide an independent judicial dispute resolution process, available quickly and at proportionate cost to all. That is really the access to justice prize that will result from the developments I have described.
35. My sense about this, however, is that the vast bulk of civil disputes, and possibly the vast bulk also of employment, tribunal and private family disputes are amenable to a streamlined online dispute resolution process. The speed of that process - even if there are still face-to-face hearings in the most difficult cases - will allow the parties to spend less time and emotional energy agonising over their disputes, and more time concentrating on their economic or personal lives.