

## THE MODERNISATION OF JUSTICE

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1. Just over a week ago at approximately 12 noon on the opening day of the 1<sup>st</sup> International Forum of Digital Courts in London, there was a notable event. The President of the Caribbean Court of Justice, The Hon Mr Justice Saunders, and the Rt Hon Sir Dennis Byron, spoke to approximately 200 delegates, judges and justice administrators, from over 25 countries. They did so by embedding a video into a presentation that illustrated their content graphically, supported by an App that the conference delegates and organisers could load for free.
2. They prepared and delivered the presentation overnight while London slept. What was notable was not just how normal and commonplace it has become for lawyers including Chief Justices to speak across continents (for they remained at home in the Caribbean while we were looking across the City of London from the 8<sup>th</sup> floor of the conference centre at the figure of 'Lady Justice' who sits blindfolded with her scales and sword atop the Old Bailey). It was also the way in which lawyers, decision makers, risk assessors, information technologists, data analysts, cyber security consultants, presentation co-ordinators and others: a range of new legal roles, were reflected in the presentation that we enjoyed. It should be said that the efficiency and effectiveness of the exercise, including its proportionate cost, demonstrated an important way forward in an age of austerity where we strive to provide effective access to justice. The examples given in the presentation included a case of constitutional significance, determined online and with expedition. It was a good moment to reflect upon.
3. I am honoured to have been invited by you to open this very important conference. My theme is the modernisation of justice, its quality, outcomes, impacts and process. The subjects you will be discussing are at the cutting edge of justice. We all have a critical interest in the development and success of our endeavours: indeed the public, whose trust and confidence is our foundation, have a vital stake in the legitimacy of what we are considering.
4. The modernisation of justice is not simply a technical endeavour to digitise process and minimise mountains of paper: we can do that and have done so around the world. It is nothing less than a new emphasis on strategic leadership by the judiciary. We are called upon to deliver an administration of justice that is patently fair, that protects the judiciary's independence and provides equality of access that is open to scrutiny by a diverse public with whom we must engage and communicate if we are to meet their needs and retain their understanding, trust and respect. That will be all the more so as we experience what has been described as the digital or fourth industrial revolution. The digital revolution will be selective in its attribution of benefit with the consequence that it will be antagonistic to some of our professionals and users.
5. Lawyers like other professions must acknowledge that change is disruptive but it is also inherent both in our common law tradition and in our ways of working. Judges must help lead change if they are to prevent the decline of the institutions that are responsible for safeguarding their Rule of Law.

6. I want to approach the modernisation of justice from three perspectives: what the user wants and needs, what new and innovative tools the independent, liberal profession of the law can bring to the table and what part the judiciary should play given the principles and protections we must all respect if we are to safeguard the Rule of Law. Although it is important to begin with the user's perspective if we are not inadvertently to minimise the importance of effective access to justice, I would like to describe the issues so as to set the scene.
7. If we are to maintain the legitimacy of our justice systems we must foster the trust and confidence that the public reposes in us, that is their respect. Respect is earned, not innate in our buildings, legal costumes and rituals. That they tangibly represent decades or even centuries of history must not be forgotten: freedoms have been hard won and can be easily lost, but their significance seems sometimes to be lost on Governments and Legislatures when they express less understanding than they ought about the importance of the principles that underpin the Rule of Law and on individuals who can be forgiven for having more immediate needs with which they are concerned.
8. It goes without saying that to earn respect judges must demonstrate their independence, integrity, impartiality, diligence, competence and the equality of access they provide (the principles enshrined in the 2002 UN declaration known as the Bangalore Principles of Judicial Conduct). I would also suggest that judges must administer justice so as to provide improved process and outcomes that reflect the needs of our users.
9. This latter obligation is a complex mix of civic obligations to communicate and engage, that is to provide a human understanding of the problems that we are asked to solve and the vulnerabilities of those who come to us, voluntarily or otherwise, for justice. There is also an implicit obligation derived from one or both of the principles of effectiveness or proportionality, that is to have regard to the performance of the justice system and the quality of its substantive, procedural and social outcomes.
10. I would also suggest that we have an obligation to provide process that is fair to a wide variety of communities from different backgrounds, with different languages, cultural traditions and social conventions as well as commonly held values. For example, in my Tribunals, there is a well embedded concept in our jurisprudence of making reasonable adjustments to process for those who cannot otherwise present their best case while maintaining fairness to both parties. I hope you will agree that the role of the judiciary in this regard has its reflection in a free and fearless legal profession.
11. In the United Kingdom, where my judges exercise their jurisdictions and, in particular in England and Wales, we have a £1Bn modernisation programme for our courts and Tribunals. That programme began nearly three years ago and has approximately four years to run. It is important to acknowledge the imperative that underscores that programme. It is that access to justice is an indivisible right – there can be no second class. The context is austerity: an approach to reform which if not identified and resolved runs the risk of the price rationing of justice which is the antithesis of equal access to justice. At the time the programme was conceived we had to find a way of addressing the gradual decline of an institution through under investment.

12. We described our purpose as follows: *“to give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at lower cost and safeguards the rule of law by improving access to justice”*. Our objectives are:
  - a. To ensure justice is accessible to those who need it
  - b. To design systems around the people who use them
  - c. To create a system that is financially viable using a more cost effective infrastructure (better and effective use of IT, buildings and new working practices)
  - d. To eliminate the most common causes of delay
  - e. To retain the UK’s international standing as a world class provider of legal services and the judiciary as world leaders in the delivery of justice, and
  - f. To maintain the constitutional independence of the judiciary.
13. Lord Thomas CJ , and I came to the inescapable conclusion that the justice system had to be modernised and, importantly, that it was a judicial responsibility to lead that process. Our approach was strategic. We put the user whose access to justice we wanted to improve in the spotlight. We put the leadership of modernisation on to the judicial agenda.
14. Let me go first to the user. The user needs language that is comprehensible, process that facilitates their access to justice, that allows them to present their best case, and procedures that are swift and cost effective without losing the important protections that we have developed over many years, whether those protections are for adversarial or investigative procedures. The solemnity of the law has its place: for example, there are impressive arguments that the replacement of public architecture that embodies the concepts of legitimacy, trust and respect and our historic common law traditions with cardboard box hearing rooms devoid of significance degrades the importance of the legal principles that those buildings embodied. But the legal rituals housed within them must not become so alien, threatening or antagonistic that we damage the confidence of the public.
15. More than half of the global population is online but according to the OECD only 43% has the protection of the law. That is a thought provoking statistic in a time of austerity, increasing legal complexity and social isolation that is a bi-product of increased personal autonomy. I will suggest that the benefits of modernisation of process and digitisation can be harnessed not only for the majority but also for the minority who most need the protection of the law because of their exclusion and vulnerability.
16. In his speech to the International Forum the Lord Chancellor and Secretary of State for Justice in the United Kingdom warned against complexity as a secret garden that inhibits those who need to vindicate their rights. I have said more than once that our rules and processes have to be intelligible and usable if they are not to be the exclusive playground of the rich. In England and Wales we have embarked on a programme that will simplify language and process, streamline and expedite procedures, removing unnecessary complexity, duplication, error and waste and put the user in the driving seat.
17. That programme involves users who have volunteered to work with project teams and judges to test hypotheses about what works for them and the language that we use.

They have or have had real cases. Engagement with users from the beginning of each project sometimes leads to conclusions rather different from those which lawyers expect. We have already come to the very firm conclusion that there is no one size that fits all of our jurisdictions although we can re-use the software components that we have developed, for example the core case data file, digital case management system, user interfaces and more complex concepts such as continuous online resolution, virtual video enabled hearings and software to help judges make decisions about scheduling and listing.

18. The needs of a benefits appellant or medical negligence victim who has complex disabilities and medical conditions may be very different from the criminal defendant in a jury trial. Likewise, the different needs of a mental health patient who is detained in hospital as compared with those involved in a commercial land regeneration scheme or a tax avoidance allegation are clear, but for their needs to be reflected in new process they must be listened to. Some processes are heavily dependent on credibility whereas others are primarily reliant on documentation. Some processes involve the assistance of lawyers, others do not. We have already learnt that it is highly likely that modernisation from the perspective of our users will necessitate some new end-to-end process and it is vital that users and judges are involved in the design of that process from the beginning.
19. By way of an example: in administrative law it is vital to involve all agencies from the investigation through its assessment by the primary decision maker and thence to the court or Tribunal for determination. That process may also extend to those responsible for implementation of the remedy. From the user's perspective, the process needs to be holistic: their day in court is but a step along a more complex path that they may tread more than once. Furthermore, the real benefits of cost effectiveness and the feedback of lessons learned will be lost without such a collaboration. To take a different example: In criminal law this involves a process in which the police officer collects evidence digitally, the prosecution assess the digital evidence and make a decision about charge online and the documents and statements that are electronically created or discovered are disclosed to the defence and thence to the court for the judge and the jury to consider in court using digital presentation. If a conviction results, the materials necessary for sentence and for the prison or probation services can be made available online.
20. Users and their representatives have been clear that new process must lead to better quality decision making: both for the primary decision maker and the court or Tribunal that reviews or remakes the same. We agree. Their perspective on the three stages of problem solving is important. They want new process to be designed to help with *dispute avoidance* (that is to learn about what works both for the decision maker and the user – otherwise known as getting it right first time); *dispute containment* (that is effective settlement opportunities built-in to the process with an imperative to work quickly with all involved); and *dispute resolution* where judges and case supervisors work concurrently to front load case management, identify issues and prepare evidence so that, wherever possible, the dispute does not become disproportionate either in terms of its complexity or cost and the user, including a litigant in person, can be appropriately assisted to present the relevant evidence that exists.
21. Now to the second element of the equation and the subject of this conference. We know very well what specialist skills our lawyers, both advocates and litigators, have brought to the party. But how is change affecting the professions? It is a fear widely

remarked upon that lawyers, like many other professions, will atrophy with the progress of the digital age. Forgive me if I sound a note of caution: for the duration of my legal career - at the Bar and on the Bench – one or more of a series of storm clouds was expected to signal our decline if not a fatality. I have not seen it yet and I do not expect to see it. What I have experienced is a remarkable diversification in the talent that is demonstrated in our colleagues. Not just in terms of the variety and depth of specialist practice but the ability to change like a chameleon with the confidence of a lion.

22. The judiciary has benefited from the diversity of practice and backgrounds that has been the consequence. My younger judiciary is now representative of the UK population. I have a majority of women judges, the majority are solicitors and the proportion of my judges who come from BAME backgrounds now reflects the communities we serve. That can only lead to greater trust and confidence. It would not have happened if we had not widened our talent pool and if the legal professions had not become more attractive in their diversification. There is still much to do, do not get me wrong, but I do not see the end of the profession anytime soon.
23. What I do see is innovative change and that is what the judiciary should be preparing for. The roles that lawyers are performing and will perform in the future are changing with remarkable speed. It is already obvious that the specialist advice that lawyers need to embrace involves a new understanding of the ways in which global business and individuals conduct their lives. At one end of the spectrum there is blockchain, smart contracts, LawTech, FinTech, predictive analytics and performance data analytics that are transforming the skills that are necessary to undertake risk assessments, give advice and resolve business and property disputes. They have also informed the way legal business is developing in its response to the challenge. It should not be thought, however, that it is only the commercial user whose demands have changed. The rapid increase in the employment of general counsel in business is testament to the need for the same skills to be exercised where they touch on the consumer. And let us not forget that the consumer makes his or her own choices: the disabled benefits appellant who wants to have an online hearing on a smartphone in an environment where the personal data is protected is exercising a choice that is important.
24. So what are the skills that are emerging? I would suggest that they reflect the same skills that I identify in closing as being necessary for the judiciary in a modernised justice system. The modern law firm or chambers is strategic in its leadership and has plans informed by data about the demography, performance and predicted emergence or decline of markets and clients, that is problems to be solved rather than just disputes to be resolved. It thinks in terms of supply and demand. It has timelines, milestones, options and strategic decisions that it constantly reviews. It may be more disaggregated than in the past in that the functions and services it needs to provide may be in collaboration with other lawyers, professionals and specialists. It will offer an understanding of end-to-end process which it will happily help design, change, regulate or govern while at the same time providing boutique and limited services such as predictive analysis, eDiscovery, risk management, preparation or representation.
25. The modern lawyer may be an expert in the skill of primary decision making or problem solving, project management, risk assessment, rules, procedures and process, the use of experts, the use of predictive analytics, audit and governance, communication and engagement, data protection, cyber security, performance and data analytics, PR, marketing, presentation... or may be the person with the gift of thinking and speaking on

his or her feet. I do not intend by any omission I have made to suggest that there are not other specialist functions: there are many, both for lawyers and their colleagues.

26. They will be performing these roles in an online as well as an analogue environment. It is almost certainly the case that both will change dramatically and the skill will be in predicting the channel that becomes the most usable for a particular client. The job titles and the scope of the jobs may be very different but, and I say this as a genuine hope for the future based upon the youngsters I see, the generation of lawyers to come will be more informed by the ethics of our profession, good governance and more acute quality assurance, not less. The public want it and my guess is that lawyers will provide it.
27. Let me then turn to the judiciary. I have nearly 6000 independent judges and specialist panel members sitting across the United Kingdom. We sit in 14 chambers determining cases in over 140 jurisdictions that are as different as an inquisitorial inquiry into mental health detention and an adversarial hearing in tax, land rights or employment. My judges are selected by the independent Judicial Appointments Commission and have the same status, protections and pay as courts judges. I have a constitutional duty to provide effective access to justice that is open to public scrutiny. I also have statutory duties to provide swift, specialist, innovative justice that is informal and flexible. These are important obligations and I take them seriously. I can only abide by them by embedding data into process so that the system outcomes can be transparently analysed alongside the individual decisions of my judges. In this way I avoid the risk of the price rationing of justice by undertaking performance analysis so that I can successfully conclude financial discussions with Government every year.
28. If I and my leadership judges are to be involved in change leadership they and I will need to be able to compare outcome measures of different process, rules and procedures. Those measures will need to track a wide variety of access to justice outcomes, both demographic and social as well as the success rates of appeals processes against primary administrative decision-makers in Government, public sector agencies and, for example, those who exercise employment, property and information rights. Those access to justice measures will be important to the determination of whether the administration of justice we provide is effective and efficient.
29. The data labs that will be the consequence will need the expertise of data analytics, predictive technology and behavioural insight teams. That will engender a whole new environment of transparent research within which leadership judges will be introduced to empirically validated good practice. That will have consequences not just for 'what works' but for rules committees, those who embody good practice in Practice Directions and individual judges selecting the most appropriate process for the case. The feedback loops that the data analysis will provide, both to the judiciary and to the original decision maker, will help transform the quality of decision making. Her Majesty's Courts and Tribunals Service have now embarked on the provision of this ground breaking endeavour with my judges, ably supported by a new Administrative Justice Council with expert panels of academics, the advice sector and pro-bono lawyers. I have great hopes for the success of the project in which we are involved.
30. I have repeatedly enjoined my Tribunal judges, who are subject specialist judges sitting with expert members, to think about the state of expert knowledge in the subject matter they are dealing with. I am very pleased to say that the quality of their training

with dedicated training judges and Judicial College advisors is second to none. But I am now asking them to go further and have regard to empirical material about what works, which process to use and how best to make a decision. Problem solving is as amenable to research as the specialist subject that gives rise to the question that has divided the parties.

31. In the specialist area of judicial leadership, for which I am the Course Director at the Judicial College, we have embarked on a major programme to provide development material and teaching for new, experienced and senior judges in leadership roles. Our aim is to enable all judicial leaders to contribute to change leadership and to collaborate with administrators in change management to improve the governance and performance of the system we lead. We have identified principles which will inform their work and expert tutors to assist them.
32. We have also undertaken a comprehensive exercise over the last year to obtain feedback from all judicial office holders about modernisation and what works for them and the users in their jurisdictions. The 'Judicial Ways of Working' project was supported by a dedicated judicial office team and external consultants who are experts in project management, communication and engagement. Next week we will publish a summary for each jurisdiction that sets out the problems we were asked to solve and the ways of working we have decided as judges will best protect our fundamental principles while allowing us to modernise the system. The exercise was precisely the kind of collaborative multi-disciplinary endeavour that I have described as being the way forward for the legal profession.
33. The modernisation programme causes us to consider the quality of what we do and the relative scarcity of existing research. We are already concerned with the changes that digital working makes to language. The replacement of application forms with intuitive questions that populate a case file is becoming a commonplace. It has reduced the divorce and probate error rates in England and Wales by 40%. That is a remarkable achievement but will the user demonstrate the same capability to make or defend a civil or employment claim online. Early trials suggest that they will. How will a vulnerable user answer online questions as a substitute for or in addition to their application and their filed written materials? Will there be the same understanding of the questions and answers that one might otherwise achieve from a face to face or telephone exchange? Can this be developed into asynchronous conversations between the judge and the user so that by using a smartphone or a tablet, the user and the judge need not come to a court building in simpler cases such as benefits appeals? That may be important in cases where a severely disabled appellant might otherwise be dissuaded from vindicating their rights but it is almost certainly going to require new skills for the judge, the lawyer and those who design and manage the technology for us. We are about to embark on these important enquiries as we trial a form of continuous online resolution early next year.
34. Similar questions arise in the use of virtual video technology where it is possible for no-one to be in the same place while everyone is joined to a video conference that provides a simultaneous hearing. What are the protections that we need to put in place to understand whether the quality of the exchange is the same as face to face? As a way of undertaking case management, simpler hearings where the outcome is primarily document focussed or out of country asylum and immigration appeals where access to justice would otherwise be compromised, the potential benefits are clear. But how do we maintain the essential solemnity of the process and will we know what external

influences are being brought to bear outside the camera's view? In any event, we must ensure that processes that are already open to public scrutiny remain so and how will that be done?

35. These and other similar questions about access to justice, open justice, procedural fairness and the very nature of our fact finding and problem solving process will be asked by multi disciplinary project teams and researchers as we embark on the next stage of our modernisation programme. We have decided to put the judiciary at the front and centre of the process. We have an obligation to lead and to safeguard the fundamental principles that underpin the Rule of Law. That does not mean that we pretend to be expert software designers, behaviourists, data analytics specialists or academic researchers. Whatever the skills of the individual judge we must not fall into the trap of becoming the armchair amateur who is the jack of all trades and the expert in none. Our specialist function has hitherto been judgecraft but must now also be the strategic leadership of the administration of justice.
  
36. I will conclude, if I may, where I began. None of that which I have described would be coherent or an appropriate function of the judiciary were it not for the obligations to society which we have as an independent judiciary. The duty to safeguard the Rule of Law governs what we do. The principles that underpin that duty: constitutional, statutory and ethical, involve protections which the public look to in order that their day to day lives might be regulated by fairness, predictability, consistency, intelligibility and with equality of access to redress. Modernisation is but a way of making what we do work for and with people. Digitisation is a tool in our armoury but the essential component for the future is you: the lawyer.

Thank you.