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JUSTICE ONLINE: GETTING BETTER?

JOSHUA ROZENBERG QC (HON)

The courts of England and Wales are facing their biggest changes since the 19th century. A six-year reform programme was launched in 2016 and will cost £1bn. But legislation that senior judges regard as essential to the success of these reforms is now running more than a year behind schedule. And public scrutiny of the reforms has been thwarted by a culture of secrecy from which the Ministry of Justice is only now beginning to emerge.

This paper is being distributed at the second in a planned series of three annual Gresham lectures. The first was delivered on 22 February 2017 and is available on the Gresham College website. New readers may wish to start there. The final lecture in this series is planned for 19 February 2019.

I have also written a much longer paper called *The Online Court: will IT work?* This is updated regularly and is currently available to download as an eBook from Amazon. The Legal Education Foundation have supported my research in north America and are also planning to publish my report on the reforms. Both those papers will have copious references and web links. As this note is intended for printed distribution after my lecture, I will not trouble the reader with footnotes.

Prisons and Courts Bill

One day after my first Gresham lecture, the government published its Prisons and Courts Bill. Liz Truss was Lord Chancellor and Secretary of State for Justice. She said later that the bill "introduces a new online court which will enable people to resolve civil claims of up to £25,000 simply and easily online".

The bill might have introduced an online civil court but it certainly would not have created it. Nor was there any mention in the bill of a claims limit, though the figure of £25,000 did appear in the government's delegated powers memorandum.

But the bill was hugely important. Welcoming it in in April 2017, the then Lord Chief Justice and the current senior tribunals judge said that, without it, some of the planned reforms would not be possible. "For example, legislation is necessary for some of the reforms to the criminal justice system that increase flexibility and remove unnecessary hearings, such as extending the use of audio- and video-link technologies and enabling a defendant (if they so elect) to engage with the court online using the common platform.

"Legislation is also necessary to effect reform to the civil, family and tribunals jurisdictions," the judges added. "It is essential to have a new Online Procedure Rule Committee if the system which is being designed is to operate to its full potential, and to provide for HMCTS staff to be authorised to carry out certain functions of a court or tribunal under the supervision of the judiciary."

HMCTS is Her Majesty's Courts and Tribunals Service, an executive agency of the Ministry of Justice that runs the courts of England and Wales as well as the non-devolved tribunals in Scotland and Northern Ireland.

Under the bill, a committee would have created rules of court and tribunal rules that required proceedings to be initiated by electronic means. Those rules had to be simple and simply expressed, the bill said. They had to support innovative methods of solving disputes.

The Prisons and Courts Bill began its progress through parliament. It seemed set to become law by the end of 2017. And then on 18 April 2017, Theresa May unexpectedly announced that that there would be a general election on 8 June. When parliament was dissolved, the Prisons and Courts Bill fell with it; none of it became law.

If the Conservatives had been returned to power with an increased majority, as the prime minister had expected, the bill would presumably have been reintroduced in much the same form as before and parliament would have picked up where it had left off. But that was not to be. Even so, the government promised in the Queen's Speech of 21 June 2017 that that legislation would be introduced to modernise the courts system. Background notes issued by the government referred specifically to a Courts Bill. Eight months on, there is still no sign of it.

HMCTS could not say when legislation might be introduced. But I'm told there are plans to bring back the court clauses of the Prisons and Courts Bill in two stages. First there will be a bill dealing with the criminal courts. We can expect that to be published around Easter. And later this year we can expect to see a separate bill setting up a rule committee for the civil courts. It's expected that the new bill will be identical to the abandoned legislation but that's not been confirmed by the government. Even if everything goes according to plan, the reforms will have been delayed by more than a year.

Other Reforms

In the meantime, though, HMCTS is pressing ahead with other reforms. Many of these involve replacing paper documents with electronic files. The reforms are expected to produce huge savings in time, effort and money. Most of these changes can be achieved without legislation.

Until recently, every case dealt with by a court — criminal, civil or family — involved a folder of paper records. That folder had to be in court every time there was a hearing so that it could be consulted and updated by the judge. So paper files needed to be stored in the back office of the court where a case was to be heard. The case could not proceed unless the judge and the file were in the same location. To work on a case during the evening or at a weekend, the judge needed either to stay late at court or take home the file.

With an electronic file, none of that is necessary. Material can be uploaded and accessed by anyone with permission to do so. Court staff are no longer needed to file paper documents and retrieve folders when needed.

There is a bewildering array of online projects that can be categorised as forming part of the online court. Which of them to include is a matter for debate because "online court" is not the project's official name: nobody has decided what to call it or even if it should have a collective name at all. The entire reform project used to be referred to as HMCTS reform and now seems to be known as the HMCTS change programme.

But this branding is not used on the pages accessed by the public. Instead, each page is prominently marked GOV.UK and hosted on the government's website. This is surely wrong as a matter of principle. If you are challenging the government in court —over benefits payments, for example — you should not have to do so on a platform that is hosted by one of the parties. When I put this point to HMCTS, I was told that no users had objected.

But the importance of judicial independence was accepted by the government when tribunals were moved from government departments and brought into HMCTS. It was accepted when the UK Supreme Court was taken off the government website. The same should happen to the online court.

Of its constituent parts, some of the most ambitious are invisible to the public. These include case management projects, such as the common platform for criminal cases tried in the Crown Court. The aim is for police, prosecutors, lawyers and the court to share a single electronic file for each case. The first cases using this end-to-end process were listed for hearing at the Crown Court in Liverpool in January 2018.

Some are less dramatic but equally below the radar: high-volume summary criminal cases such as fare evasion are now dealt with by a single magistrate at Lavender Hill court in London using a highly automated system known as the single justice procedure. The prosecutor and defendant are not present and so the magistrate and a

legal adviser sit in an office rather than a courtroom. They can deal with cases in which the defendant has pleaded guilty or not responded to a summons.

The first tax appeals to be heard through video hearings are scheduled for this spring. Video technology is already used in criminal courts to allow some victims and witnesses to give evidence. This pilot is taking this concept a step further, with all parties, including the judge, participating in the hearing via video technology.

The video hearings will take place over the internet, with each participant using a webcam from a location of their choice. For the pilot, the judge will be in a courtroom.

HMCTS say they are working closely with the judiciary to ensure that the "majesty" of a physical courtroom will be upheld. The decision to use a video hearing would always be taken by the judge in the case. Private online conversations will be possible before the hearing and the procedure will be the same as in a traditional hearing.

All this was announced last Thursday and I immediately asked HMCTS about arrangements for watching the hearing online. They told me that, as the judge would be sitting in a traditional courtroom for the pilot, the hearing could be observed in the same way as at present. But there was no information about the arrangements that would be made when the judge, too, becomes an online presence.

Other online services are already in use, such as one that allows people charged with traffic offences to make a plea online.

And several new services are now being developed, of which the most far-reaching is online divorce. These services are being tested on real applicants although what's emerged so far about the questions being asked suggests that much wider consultation is needed.

Online Services

Most people applying for a divorce are still required to fill in and send off a paper form — although the form can now be completed online and posted to a divorce registry. But selected applicants are now invited to deal with the whole process using a home computer or a mobile phone.

If you are applying for an online divorce, you will be directed to a website that asks you a series of questions and collects a fee of £550 from you. The initial questions are designed to establish whether you qualify for a divorce in England and Wales. Each question (apart from the first) depends on the answer you have given to the one before. So, for example, you will be asked whether you are divorcing your husband or your wife. If you answer "my wife" you will then be asked to give a "reason" for divorcing her, such as adultery, behaviour, desertion or separation.

Similarly, it is now possible to apply for probate online. Probate means proving the will of someone who has died. Unless the estate is quite small, the executors need to obtain probate before they can sell the deceased's property and distribute the assets. For the moment, the Probate Service is accepting online applications only in simple cases. Other applicants can fill in a form online, print it off and arrange for it to be sworn or affirmed by executors according to long-standing requirements.

HMCTS say in a briefing note that "people are applying for probate online (with grants of probate often on the day)". If that means on the day that applicants upload death certificates and original wills then one must wonder how must time is spent checking the validity of these documents.

Another project being tested is called civil money claims. This is currently limited to small claims worth less than £10,000. One page currently being tested says "You might have to go to a hearing in front of a judge if the person says they don't owe you. It can take up to seven months to get a hearing date."

Quite apart from the demotic language, there seems to be something of an implied threat here. Why should anyone have to wait seven months for a hearing? And why is the system putting you under this kind of pressure?

Maybe it's not. The HMCTS briefing note that says "from claiming to getting a hearing date now takes around two weeks". It's all a bit confusing.

Challenges Ahead

One of the problems HMCTS faces in developing its online services is that it has been doing so behind closed doors. I asked for an update from the Ministry of Justice in June 2017, shortly after the government had emerged from the general election and, before that, the pre-election period. It was the very end of January 2018 before HMCTS agreed to see me. HMCTS does have user engagement groups and it also puts on road shows for practitioners. But, until very recently, it has been very unwilling to engage with academics, journalists or the wider public. Consultation and communication are still very limited.

Academics are particularly concerned about the lack of research. Dr Judith Townend, lecturer in Media and Information Law at the University of Sussex and one of the few specialists in this area, believes that HMCTS has not adequately consulted on important issues such as media and public access to digital proceedings.

Professor Dame Hazell Genn DBE QC (hon) is a founder and co-director of the Judicial Institute at University College London. As the UK's leading authority on socio-legal studies, she is widely respected for her research on the responsiveness of the courts to the needs of their users.

Delivering the Birkenhead Lecture at Gray's Inn on 16 October 2017, Hazel Genn said of the court reforms then under way:

> 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 only regular public source of updates is the "Inside HMCTS Blog". The lack of a clear flow of communication has been a cause of some complaint among the profession, the judiciary and academics.

In support of this complaint, Hazel Genn cited a blog published a month earlier by none other than the chief executive of HMCTS. Susan Acland-Hood admitted: "we have not talked widely enough yet about our reform plans; but more importantly, I don't think we've listened enough, or given enough ways for people who care about the system and how it works to help shape its improvement".

Since then, things have improved slightly. There has been a change of ministers at the Ministry of Justice and HMCTS officials are more willing to discuss their plans with academics and journalists. But they still seem reluctant to take advice on the use of clear English. And they seem not to know, for example, why users of their online pilots fall by the wayside.

British Columbia

I found a much more open approach in British Columbia on a visit at the end of last year. The Canadian province has established a Civil Resolution Tribunal (CRT) to deal with small claims and disputes between neighbours. The tribunal asks users to rate its pages and online advice services with up to five stars. Officials tell me they find users' comments invaluable in designing improvements.

The CRT's aim, as set out in the statute that led to its launch in July 2016, is "to encourage the resolution of disputes by agreement between the parties". Dispute resolution services have to be provided in a way that is "accessible, speedy, economical, informal and flexible". It is only if agreement cannot be reached that the tribunal must "resolve the dispute by deciding the claims brought to the tribunal". And it is only if the tribunal's findings are not respected that enforcement proceedings will be necessary.

Shannon Salter, the lawyer who chairs the CRT, told me about the thinking behind it.

> In Canada — and these figures are the same in the US, in England and Australia — we know that, for every 100 people who go down to a courthouse and file a civil claim, only two of those will

> go to trial. But we have oriented our entire civil justice system in the common-law world around this idea of a day in court — that we know doesn't come 98 per cent of the time. And we know that about half of those 98 per cent of people don't settle their claim: they just give up because they run out of time and money and energy.
>
> We have tried to flip that model. We assume that you're not going to have your day in court: the equivalent, for us, is a day in front of a tribunal member. We assume that, with the right support and help, you can reach a consensual agreement. And we have built the tribunal around that notion. We know, statistically, that people are happier with agreements they reach themselves — and also, surprisingly, that they are more likely to adhere to them than even a court order. It makes sense to empower people to be active participants in their dispute resolution, as much as you can, and leave adjudication as a last resort.

Anyone can visit the CRT website and take advantage of the advice it offers. It's attractively laid out, friendly and non-threatening. The home page shows a series of users from different social groups with the slogan "what can the CRT do for you?"

Darin Thompson, a lawyer working for the British Columbia government, has been involved with the CRT since its initial stages. He told me about the message it was trying to convey.

We wish you didn't have a dispute but, now that you do, what can we do to help you resolve it? You want to file your documents when you get home from work and after you put your kids to bed? Fine. You want to access our services on a cell phone from a park bench? Fine, you can do that.

You have to start with the solution explorer which, as the name suggests, explores whether there may be a solution to your problem. This is a so-called expert system; it uses a "decision-tree" of questions and answers but does not involve artificial intelligence. After an introductory video the system provides you with self-help tools, giving basic legal advice and drafting letters that you can post or email to the person on the other side of your dispute.

Significantly, you are not asked for your name and address at this stage or told to pay a fee. That happens only if you cannot resolve the dispute yourself and decide to start the formal tribunal process.

Once a claim reaches the tribunal, everything changes. The CRT no longer has a benign interest in helping people to help themselves. It becomes instead an impartial court with a duty to ensure procedural fairness. Its process is adversarial although its proceedings are normally written. In due course a reasoned decision is sent to the parties and published.

If fairness requires an oral hearing — perhaps because the credibility of a witness is at issue — then a one can be arranged by telephone or through video-conferencing techniques. Parties may address the tribunal from their smart phones or tablets.

"We don't rule out the idea of having an in-person hearing one day", Shannon Salter told me in December 2017, "But it hasn't happened yet. In fact, an oral hearing hasn't happened yet. One thing that has surprised us is that no party has so far requested one."

This seemed to contradict the received wisdom that people wanted their day in court — and that the court had to be a physical courtroom. "As it turns out," Shannon Salter told me, people are generally quite happy not to take a day off work or arrange child care to travel to a hearing." Some people found easier to express themselves in writing, she added.

This may not be the way forward for the courts of England and Wales. Steering people away from a hearing before a judge in a traditional courtroom is something that requires careful thought. But it's a debate that's going by default here in England and Wales.

Open Justice

One ideal that must never be lost is open justice. That's not just my view as a journalist. It's the view of Sir Ernest Ryder, the Senior President of Tribunals and, as such, the judge most closely involved in reform. "Our digital courts must be open courts," he said in February 2018. The senior tribunals judge insisted that judges must be involved in reform and suggested non-executive directors to support judicial governance, more training for judges in management skills, more transparency, and more accountability.

He continued:

> We are now in a new, digital world… In order to understand, to design and to test reform we must, it seems to me, engage far more than we have in the past with academia, with management experts, digital experts, with the professions, regulators, ombuds and wider society. Reform must be based on proper research; robust and tested. It must consider the latest design techniques. It must be open to scrutiny, and communicated clearly and readily to the judiciary, government, parliament, the professions and the wider public. It must require us to consider whether our processes are sufficient to modern conditions… Which of our processes must change, which may fall by the historical wayside? No question can be out-of-bounds. If we are to secure open justice, all questions must be capable of being asked and examined. But examined properly. The judiciary must therefore support, promote, and commission research. Just as the unexamined life is one not worth living; the unexamined and unresearched reform may not be worth taking.

But the reality is more mundane. A few days later, a senior judge was furious to find that video links were not working between his court and a prison. He switched courtrooms in a vain attempt to get the system working, suggesting that the fault lay with the court rather than with the prison. The judge, Sir Brian Leveson, was due to hear a judicial review challenge a day later involving the prisoner John Worboys. Sir Brian was so concerned the links might fail again that he ordered Worboys to be brought to court in person, distressing though he knew this would be for claimants in court who had been assaulted by the former taxi-driver. It was an embarrassingly high-profile example of how HMCTS had failed to get basic technology right.

So, is justice online getting any better? Come back next year to hear my conclusions. For now, the jury is still out.