The Online Court: will IT work?

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Introduction

> **By the year 2022, most civil disputes in England and Wales will be resolved through an online court.**

That, at least, was the plan. As I said in the first draft of this paper in 2016, it was a breathtakingly ambitious one: an online court on this scale does not yet exist anywhere in the world.

And that has since been confirmed by parliamentary watchdogs.

"Given the extent of changes planned," the National Audit Office (NAO) reported in May 2018,[1] "there is a very significant risk that, despite the best efforts of HM Courts and Tribunals Service and other parties, the full ambition of the change portfolio will prove to be undeliverable in the time available."

In response, the courts and tribunals service said it was confident that the £1bn modernisation programme was "on track to deliver the benefits promised on completion"[2].

But the House of Commons Public Accounts Committee echoed my opening words in July 2018. It said:

> HM Courts & Tribunals Service's £1.2 billion programme to modernise the courts is hugely ambitious and on a scale which has never been attempted anywhere before.[3]

The MPs said there was a significant risk that the courts and tribunals service, known as HMCTS, would fail to deliver the benefits it expected:

> The performance of HMCTS to date shows that it has much to learn if it intends to do everything it plans. Despite extending its timetable from four to six years, HMCTS has already fallen behind, delivering only two-thirds of what it expected to at this stage, and it still has not shared a sufficiently well developed plan of what it is trying to achieve.
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> The pressure to deliver quickly and make savings is limiting HMCTS's ability to consult meaningfully with stakeholders and risks it driving forward changes before it fully understands the impact on users and the justice system more widely. HMCTS needs to ensure that the savings expected from these reforms are genuine rather than the consequence of shunting costs to other parts of the justice system such as the police, prison service or Crown Prosecution Service, all of which have their own pressures to manage.[3]

Introducing the reforms early in 2016, a senior judge said they had already gone much further than most people realised. "We are at the beginning of a process that takes us out of a court system that the Georgians would have recognised," said the judge in charge of information technology (IT), with a glance over his shoulder that went back 300 years. Lord Justice Fulford thought it was "untenable in the twenty-first century to continue working in that way".

He added: "In an era in which many people conduct a large part of their lives using some kind of an electronic device – whether it's a smartphone or an iPad or some kind of tablet or computer – the judiciary has got to enable the ways in which we conduct cases to match the expectations of the public."

But IT systems can be deceptive. "Money Claims Online," noted the senior tribunals judge Sir Ernest Ryder in March 2016, "has been in operation since 2001 and has over 180,000 users annually. But once the 'submit' button is pressed by the user or their representative, a civil servant at the other end has to print the e-form and make up a paper file. From that point on, we are back to square one: almost back to the Dickensian model of justice via the quill pen."

The then lord chief justice of England and Wales, Lord Thomas of Cwmgiedd, said in November 2016 that the courts modernisation programme was "intended to achieve the most radical reform since 1873".[4] As he explained, it has three main elements:

- Digitisation and the use of state-of-the-art IT for all procedures and hearings.
- Simplification of processes and procedures, so that there is a uniform, common procedural regime for civil, family and tribunals justice, and for crime.
- Modernisation of the estate, so that buildings are used jointly by courts and tribunals more efficiently, are fit for purpose and support new ways of working.

Sir Ernest Ryder summed it up even more simply. "The aim that the lord chief justice and I have agreed with the lord chancellor is, quite simply, to strengthen the rule of law."[5]

Reform, the two judges added in April 2017, would provide new and better access to justice to citizens in a way that enabled disputes amongst citizens and between citizens and the State to be resolved effectively, speedily and justly.[6]

"At a time of great change," they continued, "the reforms will strengthen the rule of law, economic prosperity and assist in the maintenance of a successful democratic society. The reforms will also underpin the success of the international legal work of the UK, which makes a substantial direct contribution to the economic success of the UK and supports the financial and commercial markets based in the UK."

Shortly afterwards, though, there was a significant setback. Theresa May's unexpected decision to call a general election in 2017 held up planned legislation that the two judges regarded as essential to the reform process. A bill that had been going through the House of Commons was delayed for well over a year. It returned to parliament as a pale shadow of its former self. I shall explore the consequences later in this paper.

Meanwhile, officials were pressing ahead during 2017 with plans to digitise court processes. Very little information emerged in the second half of that year, suggesting the reforms were running into problems.

Lord Burnett of Maldon, who succeeded Lord Thomas as lord chief justice in October 2017, admitted to the House of Lords constitution committee in April 2018 that there were still "pockets of misunderstanding about the modernisation programme among the judiciary and the professions" as well as more widely. He explained how he saw the changes:[7]

> I prefer to talk about modernisation rather than reform because in many ways the current programme is about dragging our courts and tribunals into the 21st century and moving from paper-based to digital processes.
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> While that is long overdue, modernisation is also about so much more than IT. I said recently... that it has three features:
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> The first is improving the administration of justice. That is simply making it more efficient and sensitive to the needs of those who are caught up in it, many of them not voluntarily. The second is widening access to justice, essentially making it easier for people to bring proceedings. The third is improving the conditions for those who use and work in our courts and in the tribunal system.

To bring them up to date, Lord Burnett sent all judicial office-holders in England and Wales a note explaining how the reforms would affect them and seeking their views. Though these papers were not designed for wider publication, the judges made sure that they were seen by commentators and I shall summarise them later in this paper.

Lord Burnett realised that the judiciary was unsettled and his senior colleagues, the heads of division, tried to reassure the judges for whom they were each responsible. "There should be no reason in principle to fear greater digital working in the civil jurisdiction," said Sir Terence Etherton, head of civil justice. "Civil is some way behind other parts of the court service in the use of digital working. In crime, the digital case system means that paper has all but been eliminated in Crown Court hearings. Although the system has had — and continues to have — its teething problems, most Crown Court judges would say that it is a significant improvement."[8]

A week later, though, the NAO published a report called *Early progress in transforming courts and tribunals*.[9] This was hugely revealing. It put details of the reform programme into the public domain for the first time. It disclosed how much the reforms would cost and how much they were expected to save. And it demonstrated what was going wrong.

The NAO report was endorsed by the Commons Public Accounts Committee in July 2018. Meg Hillier MP, who chairs the committee, said:[10]

> Government has cut corners in its rush to push through these reforms. The timetable was unrealistic, consultation has been inadequate and, even now, HMCTS has not clearly explained what the changes will mean in practice.
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> Our report recommends action to address these failings. But even if this programme, or a version of it, gets back on track I have serious concerns about its unforeseen consequences for taxpayers, service users and justice more widely.
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> There is an old line in the medical profession — "the operation was successful but the patient died".
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> It is difficult to see how these reforms could be called a success if the result is to undermine people's access to justice and to pile further pressure on the police and other critical public services.
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> Government must engage properly with these challenges and explain how it will shepherd this programme through the upheaval taking place across the justice system.

The NAO report and the response of the Public Accounts Committee will be explored in detail later in this paper. Before that, I shall summarise the fruits of my research in north America at the end of 2017. I was commissioned by the Legal Education Foundation to visit an online tribunal in British Columbia and investigate the pitfalls of remote adjudication in the United States.

But the bulk of this paper is about the reforms in England and Wales, reforms that go much further than selling off courts to buy computers (as I once characterised them). Sir Terence Etherton summed up his ambitions in June 2017. "Reshaped by the opportunities provided by the internet, spurred on by the need to upgrade to ensure the system is more efficient, we have the opportunity to build a civil court that will not just be fully accessible: it will be one more capable of securing equal justice for all."[11]

With a fair wind, the long-term effect of these reforms will be to set in train the restructuring of a system of justice that has remained largely unchanged since 1873. By the time we reach the 150th anniversary of that momentous year, we can expect to see the system transformed once again.

But will there be greater access to justice? On that, the jury is still out.[12]

Note to readers: This paper was first published in September 2016 as an Amazon ebook. It is now available without charge thanks to the generous support of the Legal Education Foundation. For that reason, it is no longer published by Amazon.

The paper was regularly updated between 2016 and 2018 but readers needed to download it each time if they wanted the latest version. I shall continue to update this online paper and readers will always see the latest revision here.

Most references are to documents available online. Those that originally appeared in the ebook version are shown as web pages. For newer references, click on the HMTL link to access the source document.

There is always a risk of errors and typos in a project such as this. If you spot any, feel free to email me direct: **joshua@rozenberg.net**

References

1. https://www.nao.org.uk/report/early-progress-in-transforming-courts-and-tribunals/
2. https://www.gov.uk/government/news/hmcts-response-to-national-audit-office-report-on-court-reform-programme
3. Public Accounts Committee report, July 2018, summary.
4. Interview February 2016. At that time, the biggest single change in the civil courts since 1873 had been the introduction of a single procedural code — the CPR — together with active judicial case management.
5. https://www.judiciary.gov.uk/wp-content/uploads/2016/11/lcj-report-2016-final-web.pdf
6. Speech to the Bar Conference, 15 October 2016.
7. https://www.publications.parliament.uk/pa/cm201617/cmpublic/PrisonsCourts/memo/PCB19.pdf
8. http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chief-justice/oral/82108.html
9. *Judicial Ways of Working — 2022 Civil*, April 2018, unpublished.
10. Public Accounts Committee.
11. https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf, paragraph 60.

12. I am immensely grateful to Professor Richard Susskind OBE FRSE for reading an early draft of this paper and for correcting a number of misconceptions. Those that remain are mine alone.
