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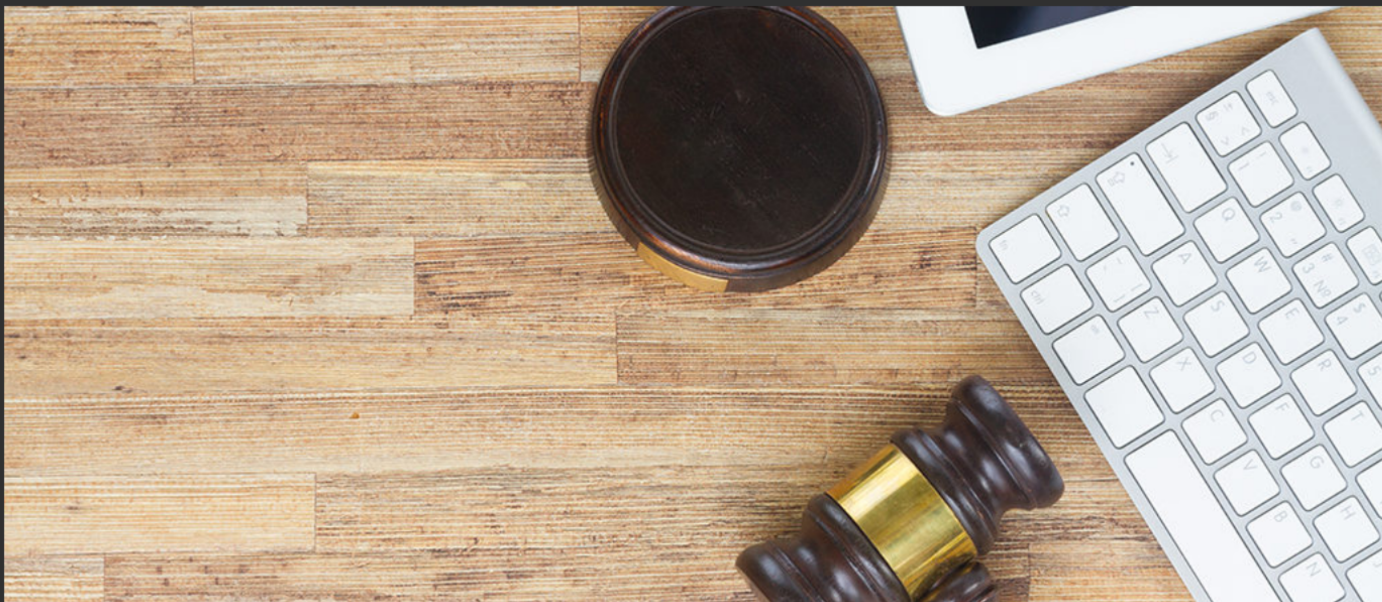

The Future of Courts

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In the middle of March 2020, court buildings around the world began to close in response to the rapid spread of a newly identified coronavirus, SARS-CoV-2 (the "virus"). Within days, alternative ways of delivering court service were put in place in many jurisdictions. The uptake of various technologies, especially video, was accelerated in the justice systems of numerous countries. There remain some skeptics and critics, but in light of the experience during the crisis, there is certainly greater acceptance now than in February 2020—amongst lawyers, judges, officials, and court users—that judicial and court work might be undertaken very differently in years to come. Minds have been opened and changed over the past few months. Many assumptions have been swept aside.

We remain in an era of threat, with risks of barely functioning court systems, greatly reduced access to justice, and, in turn, a potential weakening of the rule of law. We are also in an era of opportunity—the chance to build boldly on the shift of attitude and on demonstrable recent successes with technology, and to put in place improved, sustainable court services that are much more accessible than today's.

In this article, I consider the impact of the virus on our courts. I start by outlining the challenges that our justice systems currently face and suggest we need a new mindset if we are to tackle these successfully. I then introduce the various types

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of remote courts that have been deployed during the crisis and summarize what has been achieved so far and what lessons we have learned, offering the UK Supreme Court as a case study. Thereafter I explore the concept of virtual juries, and unearth the many ways in which the term "justice" is used in debate about remote courts. In the latter part of the article I introduce the concept of "front-ends" and argue that they will be indispensable in justice systems of tomorrow. I conclude by recommending how courts should plan for the future.

Challenges

Our court systems currently face three major challenges. Two of these arise directly from the virus and so are new, while the third is long-standing. The first challenge is to maintain a sufficient level of service while our traditional courts are closed. The extent of this challenge is unclear and varies across the world. An optimistic view is that we are over the worst and normal service is already being restored. A more realistic view is that the virus, in one way or another, will afflict us for many more months and possibly years. The most significant problem here is that we do not yet have alternative methods for handling some kinds of court hearing, such as those relating to serious crimes.

The second challenge flows from the first. This is the backlog of cases that is accumulating while courts are not able to handle their normal load. Those justice systems that are regarded as coping well with the crisis are disposing of around one-third of their normal throughput. Adjournments and delays are building at a disturbing rate.

> "Even in justice systems that we regard as the most advanced, dispute resolution in public courts generally takes too long, costs too much, and the process is unintelligible to all but lawyers."

The third challenge, the long-standing one, flows from an alarming truth—that even in justice systems that we regard as the most advanced, dispute resolution in public courts generally takes too long, costs too much, and the process is unintelligible to all but lawyers. In the most general terms, we call this the "access to justice" problem. We can choose to blame the widespread reduction in public legal funding, we can argue that the current judicial and court machinery is disproportionate in many cases, we can claim that sometimes lawyers are the problem because they can inflame disputes, we can regret how little data is available to help us even to understand the dilemma, we can condemn the system for being antiquated and arcane, and more. But whatever explanation is preferred, the unvarnished reality is that most people on our planet cannot afford to enforce their legal entitlements in public courts. Globally, the statistics are stark. According to the Organisation for Economic Co-operation and Development, only 46 percent of human beings live under the protection of the law.

Lawyers everywhere should be ashamed. There is much that we can be proud of in our law and legal institutions—our industry, commitment, impartiality, probity. But we cannot allow vanity to occlude our view of how alienated from the courts most people are.

This widespread exclusion from the law was one of the premises of my book, *Online Courts and the Future of Justice*, published in November 2019. I called there for a transformation in our courts, largely enabled through technology. Mainly for cultural reasons, I conceded that it might take a decade to bring the changes that I recommended. I wanted the book to generate the sense of urgency that theorists tell us is necessary if substantial change is to be achieved. This was not my first call. For almost 40 years, I have been making the case for transformation. Perhaps the access-to-justice problem has not been regarded as urgent precisely because it is so prevalent and long-standing. It has been handled as a chronic ailment deserving of inquiries and commissions rather than an acute problem requiring immediate care.

Mindset

> “The role of technology here is not to support and enhance our old ways of working but to overhaul and often replace our practices of the past.”

In calling for radical change in my book, I urged a new mindset in thinking about the future of courts. I asked a question that I have been asking since the late 1990s: Is court a service or a place? Do we really need on all occasions to congregate physically to settle our legal differences? In a digital society, in which it is commonplace to receive and provide all manner of services online, is it such a leap to imagine the delivery of online court services? Here is one way, I suggested, that we might be able to deliver an affordable, swift, understandable, and proportionate service.

There is another mindset issue here, one that relates more specifically to technology. When most lawyers and judges think of technology, they think of automation. They have in mind the introduction of systems to streamline and improve some preexisting, often inefficient, working practices. Technology, on this view, is grafted onto long-standing legal and court processes. The first 50 years of legal and court technology were devoted in this way to automating (digitizing) the practice of law and the administration of justice.

But there is a much more significant role for technology, and that is to bring about transformation. By this, I mean the use of technology to effect radical change and to allow us to do things that previously were not possible (or even conceivable). The role of technology here is not to support and enhance our old ways of working but to overhaul and often replace our practices of the past.

In *Online Courts and the Future of Justice*, I argued, in this spirit, that one promising answer to the access-to-justice problem is to use technology to *transform* court service. Simply carrying on with the automation of our courts (the strategy of almost all governments) would simply yield “mess for less.” This would be to optimize a process that is no longer fit for purpose, no matter how well it is polished. On publication, my book was well enough received by the legal technology and legal innovation communities. But it is always harder to convince the wider legal and judicial establishment of the case for change.

In the event, though, the virus intervened and immediately generated the sense of urgency just mentioned. Management theorists speak of innovation under constraints. Others, more prosaically, remind us that necessity is the mother of invention. In simpler terms, for our courts, there was no choice but to change. Within a fortnight, in March 2020, there was a technological upheaval. We moved from a world in which almost all court hearings were physical to one in which there were almost none. Policymakers and judges recognized that if court services were to be maintained, there was no option other than to embrace technology.

Options

> “We are at the foothills of the transformation in court services.”

When court buildings began to close, policymakers and judges rapidly explored various technical options. Quite quickly, however, a confusing range of terms—“remote,” “virtual,” “online,” “digital,” “technology,” and “electronic”—bubbled from the lips of the newly baptized legal technologists. I argued in the growing confusion that it would be helpful to keep the terminology simple and to settle on some standard terms. I suggested that a new taxonomy was needed. For England and Wales, I proposed a generic term and some more specific terms.

Generically, we needed a term that referred to all alternatives to physical hearings. Although they come with slightly negative undertones, I recommended “remote” and “remote hearings.” The other options, I felt, did not obviously embrace telephone hearings and have even more worrying connotations—a digital hearing, for example, might be thought, by lay people, to involve machines making decisions rather than judges.

A more detailed classification was also needed to distinguish the three main types of remote hearing. First, there are audio hearings, when proceedings are conducted by telephone or by audio-only systems. There are two subtypes here: partly audio, when there is a physical hearing into which some participants are connected by audio, and fully audio, when there is no physical hearing and all participants are therefore connected by audio. Second, there are video hearings, when proceedings are conducted using Zoom, Microsoft Teams, or the like. Again, there are two subtypes: partly video, when there is a physical hearing into which some participants are connected by video, and fully video, when there is no physical hearing and all participants are therefore connected by video. Third, there are paper hearings, when decisions are made on the basis of written submissions alone.

Of course, it will be possible, and often desirable, for a mixture of these various types of hearings to be used in the course of individual cases. Case managers, or judges in their capacity as case managers, should be able to identify the most suitable form of hearing at different stages of each case. For instance, a case management meeting might be held in an audio hearing, but when evidence is being heard, a video hearing might be deemed preferable.

The story so far

On the strength of several months of remote courts, many lawyers and judges are now insisting we will never go back, that the transition to technology-based justice has been achieved. This is an overstatement. The leap from physical courts to remote hearings has, of course, been remarkable, but it is very early days and no one can sensibly claim that they are suitable for all cases and issues. We are at the foothills of the transformation in court services. The current array of remote courts is a valiant collection of ad hoc services, but much work and investment will be needed to industrialize these efforts, to build court capabilities that are scalable, stable, and, crucially, designed for use as much by lay people as by lawyers.

More than this, the current systems that have been cobbled together are still examples of automation rather than transformation. Almost all the remote courts that have been set up in response to the virus are variations on the theme of traditional courts. But we should be clear: dropping our current court system into Zoom is not a shift in paradigm.

> “The legal professions in countries that had already embarked on court digitization projects, by and large, seem to have found it easier to adapt than those that had not.”

I find it helpful to regard the developments of the last few months as a huge unscheduled pilot, a great experiment in the use of a variety of technologies in our courts. They were inspired by the need to keep our court services afloat, but they should also cast light on possible futures for our courts. In some cases, it has been a proof of concept. But if this is indeed an experiment, we should be systematically and rigorously collecting data about timings, volumes, technologies, applications, and users (lawyers and clients, both represented and self-represented) and their experiences. Thus far, in the melee of keeping courts operational, the gathering of data about the performance of remote courts has been modest and uneven.

Nonetheless, there are a number of fledgling attempts to monitor developments and evaluate progress. One with which I have been involved is Remote Courts Worldwide. We launched this on March 27, 2020, four days after the prime minister of the United Kingdom declared a nationwide lockdown. Remote Courts Worldwide (www.remotecourts.org) is a website designed to help the global community of justice workers—judges, lawyers, court officials, litigants, court technologists—to share their experiences of remote alternatives to traditional court hearings. The service is a joint effort, hosted by the Society for Computers and Law, funded by Lawtech UK, and supported by Her Majesty's Courts & Tribunals Service.

In announcing the system, we suggested that we must seize the moment and come together globally to accelerate the development of new ways of continuing to deliver just outcomes for court users. We noted that new remote court methods and techniques were being developed at remarkable speed but pointed to the

danger of the wheel being reinvented and of unnecessary duplication of effort across the world. In response, our site offers a systematic way for remote court innovators and people who work in the justice system to exchange user stories, news of operational systems, as well as plans, ideas, policies, protocols, techniques, and safeguards. By using this site, justice workers can learn from one another's successes and disappointments.

What lessons can be said to have been learned so far, even if our study of remote courts is in its early stages? In the broadest of terms, we should immediately acknowledge just how adaptable and resourceful judges and lawyers can be—when events and conditions require a major shift. The conventional wisdom is that the legal profession is deeply conservative and almost incapable of change. The evidence that can be gleaned from Remote Courts Worldwide suggests otherwise, with remote courts up and running in 56 countries by mid-July 2020. In many of these jurisdictions, judges and lawyers have rapidly put in place a rich new set of rules, procedures, protocols, and practice directions to enable court service to continue. And with little training and support, many of these same judges and lawyers have swiftly ascended the learning curve and become competent users of video technology. Some, of course, have been more tentative and have preferred to conduct court work in their comfort zone of audio hearings (by telephone), but the feedback so far suggests this to be an inferior medium. The legal professions in countries that had already embarked on court digitization projects, by and large, seem to have found it easier to adapt than those that had not.

> “Most doubt that a video conference can be majestic, but many argue that majesty is not an objective in and of itself.”

Overall, I think it fair to say that the level of satisfaction with video hearings amongst judicial and legal users is high, and, I believe, much higher than they would have anticipated had they been asked before the crisis about the suitability of remote hearings. In one of the few rigorous and systematic reviews of remote courts, undertaken under the auspices of the Civil Justice Council in England and Wales, a survey of 1,077 people (871 of whom were lawyers) asked about their experiences. These related to 480 civil hearings, mainly held at the start of May 2020. The research and the report that followed found that “[b]roadly speaking, the lawyers who completed this survey were satisfied with their experience of remote hearings: 71.5% of respondents described their experience as positive or very positive.” Given the haste with which these remote courts were convened, I regard this as a notably positive response.

This is not to say that there have been no problems. On the contrary, there have been clear difficulties, for instance, for elderly as well as young parties, for those requiring translation, and for court users with poor internet connection. There have also been concerns about privacy and security on some of the video platforms. Interestingly, early instincts that remote courts might impede open justice have generally not been supported. Indeed, many report that video hearings are more accessible than conventional courts, both to the public and the media.

Many smaller lessons have also been learned. It turns out that video hearings are more tiring than physical hearings and that more breaks are needed when convening by video. It is difficult to handle large numbers of documents if only one screen is available. It is also difficult to handle large numbers of documents if the court system in question is still largely paper-based. If solemnity is to be maintained, then lighting, background, clothing, tone, and posture matter. Poor internet connection can scupper proceedings entirely.

At the same time, there are clear areas of contention, for example, in relation to the credibility of witnesses and whether this can be assessed in video hearings. Some say you need to be in the same room as humans to determine whether they are speaking the truth. Others insist that you can still look people in the eye when interacting remotely. Another topic of spirited debate is whether the “majesty” of a court can be preserved in a remote hearing—most doubt that a video conference can be majestic, but many argue that majesty is not an objective in and of itself and that, so long as there is solemnity and authority, then that should suffice.

There is widespread accord, in contrast, on one issue: much more work needs to be done to determine what kinds of cases or issues are best suited to what types of disposal, whether by physical, audio, video, or paper hearing. Some early views, though, are taking root. It is generally agreed, for example, that family disputes that involve the custody of children or domestic abuse should be heard in person if possible. Similarly, in most countries, cases involving serious crime are felt to require physical hearings. (There have been some dramatic exceptions—after a three-hour hearing at Lagos High Court, in Nigeria, "the virtual judgment of the court," in the words of Justice Dada, was that the accused "be hanged by the neck.") I return to serious crime below.

> "Early instincts that remote courts might impede open justice have generally not been supported."

On the other hand, certain types of disputes are emerging as well suited to remote handling—interim, procedural, and interlocutory hearings; routine family work; small money claims; minor criminal offences; commercial disputes; administrative tribunals; civil appeals; and more. Contrary to early thinking about online dispute resolution, it is mistaken to believe that remote hearings are ideally suited to high-volume, low-margin cases, while traditional physical courts are the places in which to argue and settle the lower volumes of high-value cases. There is no direct mapping between the value of a case and its suitability for remote treatment. A low-value case can raise highly sensitive personal issues that might best be handled in person. A low-value case can also raise very challenging legal questions.

There is a further layer of complexity here. When we ask what types of cases and issues can be settled by remote hearing, are we trying to determine when remote hearings can be said to be better than physical hearings, as good as physical hearings, not as good but "good enough" (and when is "good enough" good enough?), or not as good but, with some investment and imagination, likely to be good enough, as good, or better? The commentary is currently silent on this issue, insofar as I can see. As a matter of urgency, that silence must be broken.

In summary, the feedback and research we have seen so far suggests that some—and probably many—legal disputes can indeed be handled remotely, often at lower cost, more conveniently, more speedily, and less combatively than in our traditional system. But this must be taken as a tentative hypothesis that we should be challenging and testing systematically. To do so, we need to capture more data about live cases that have been concluded remotely and make that data available to our social scientists, who can dispassionately evaluate what has been achieved and what has not. In turn, this evaluation can form the basis of informed decisions about what should be preserved once the virus has been vanquished and what cases should be returned to conventional physical courts.

In this way, our policymaking about change in our court services can be evidence-based. That said, if we are to make major leaps, social scientists may not always have the last word. We must also offer space for our social entrepreneurs to allow their creativity, imagination, and vision to flourish.

The UK Supreme Court

Case studies bring the idea of remote courts to life. My chosen illustration for this paper is the UK Supreme Court (UKSC), the highest court in the United Kingdom. As I write in July 2020, the UKSC held its last hearing in a physical court on March 17 and 18, 2020. As lockdown loomed, appropriate technology was put in place within a week (WebEx for video hearings, with livestreaming so that the public could watch proceedings online), training was given, and rehearsals were held. The first remote hearing took place on March 24, 2020.

By July 31, the Supreme Court will have heard 17 cases by video hearing and handed down 24 judgments. The Judicial Committee of the Privy Council (JCPC) will have heard 17 cases and handed down 12 judgments. (The JCPC, based in the same building as the UKSC, is the final court of appeal for a number of Commonwealth countries, the crown dependencies, and UK overseas territories. The justices of the UK Supreme Court also serve as the judges of the JCPC. Prior to the crisis, some appeals to the JCPC cases were occasionally heard

by video as an alternative to physical hearings, but the vast majority were heard in person in the Supreme Court building.)

> In livestreaming video proceedings, open justice has been maintained.

This wholesale move to video hearings for the UKSC and the JCPC was therefore a fundamental change in practice. Since that first remote hearing on March 24, 2020, almost all cases have been heard remotely. In the early stages of lockdown, a few had to be adjourned at the request of the parties because counsel was ill or video facilities were not available to participants. In that handful of cases, the parties were given the option of having their appeals decided on the basis of written submissions (a "paper hearing," in the terminology introduced earlier). No case has yet been adjourned because the UKSC has been unable to provide a hearing. In the words of Lord Reed, the president of the UKSC, "We were determined to ensure that the Court continued to meet its obligation to ensure access to justice and that we continued to do our work openly and transparently."

In practice, for hearings that last for a day, four separate video meetings have been arranged: one for the justices' prehearing discussion, two for the morning and afternoon sessions of the hearing itself, and one for the justices' posthearing conference. The justices have been flexible in allowing posthearing submissions because counsel addressing the court remotely have not had immediate contact with their legal teams and expert advisers. Counsel have been encouraged to maintain contact with their team electronically or by phone.

The rest of the work of the UKSC has also continued, using videoconferencing and teleconferencing in place of face-to-face meetings between the justices—for instance, processing and deciding applications for permission to appeal, and other applications to the court that can be decided without oral hearings.

Other technological advances were precipitated by the shift to remote hearings. By the end of April 2020, parties were permitted to submit papers and case bundles electronically, via SharePoint, rather than using memory sticks. It had been intended for some time to offer this facility, but this was accelerated to help cope with the restrictions brought about by the virus.

Some technical lessons have been learned along the way—such as muting microphones when not speaking, avoiding automatic software updates during hearings, and connecting laptops directly into routers via ethernet connection when Wi-Fi has been unreliable.

In livestreaming video proceedings, open justice has been maintained. From the point of view of observers, however, watching a video hearing is different from viewing the livestream of a traditional sitting. For example, there is not the chance to see the same spontaneity of interaction between counsel and the justices. In the early days, this was compounded by viewers being unable to see anyone other than the current speaker, with no sense of the whole court. In response, the setup was adapted so that all the justices can now be seen on screen when counsel are addressing the court. This conveys more of a sense of a hearing rather than of a meeting or lecture.

In summary, in the words again of Lord Reed:

> Reaction to the video hearings has been very positive … This new way of working has required us to introduce a number of changes. Arrangements have been introduced for all the documents required by the court to be filed electronically. Justices access the documents on their laptops, and have moved to paperless working … Video meetings have become a way of life … The benefits we have discovered will be retained. But we all look forward to resuming our normal daily contact with one another, and to a return to the form of hearings with which we are most familiar.

The UKSC and JCPC intend to sit remotely until the end of the current term (July 31, 2020), hoping to hold physical hearings in the building again in October 2020, when the new term starts. But they are prepared to revert to remote hearings if necessary.

It is to the great credit of the UKSC that it so quickly moved its entire caseload from physical to video hearings, and did so as effectively as any other Supreme Court that is noted on Remote Courts Worldwide. Indeed, I would say that the UK Supreme Court has responded more emphatically and successfully than any of its equivalents internationally. Thanks to technology, perseverance, and judicial adaptability, access to the highest court in the United Kingdom has been maintained during the crisis.

Virtual juries

> "If we do not take the plunge, how can we ever innovate?"

When people are instinctively troubled by remote courts, however, they are often not thinking of the highest courts in the land but of everyday criminal cases. Many feel it important to have a public physical space in which, to borrow from Lord Denning, society can express its "emphatic denunciation" of crimes. Before the crisis, there was little debate over the suitability of remote methods for full criminal trials. Most early remote courts handled civil cases. But when court buildings closed, attention quickly shifted to alternative ways of hearing criminal cases. In the spirit of the moment, many lawyers and judges recognized that remote hearings could serve well enough for preliminary and procedural matters. After all, video links from prisons to courts for bail hearings and remand hearings have been used for many years. For lesser offenses, without juries, it has also been conceded, although by no means universally, that trials might be conducted by video (for example, in England before magistrates). But by far the most challenging question, in crime and across the justice system generally, is how serious crimes should be handled if the virus effectively precludes conventional trials by jury, given that it is deeply undesirable to incarcerate accused individuals indefinitely. Many options are on the table around the world, such as trial by judge alone, trials with smaller juries, substitution of juries by lay magistrates, and relocation to massive rooms to accommodate socially distanced jurors.

Another option is trial by virtual jury. While my instinct as a lifelong legal technologist is to pursue this idea with gusto, I believe instead that we should view it with caution. I worry that we have no direct evidence of how this would actually work in practice. I am not aware of any examples of the remote conduct of full jury trials in real cases, although there have been some fascinating experiments. We therefore have no past data to guide us.

A jury trial is a form of interpersonal communication that is much more complex than envisaged in the design of the current generation of videoconferencing systems (even advanced "telepresence" systems). There are, to my knowledge, no existing systems that were designed with jury hearings in mind (note that "crowdjustice" and "mass collaboration" jury systems bear almost no relation to mainstream criminal jury systems). I am far from sure that dropping juries into Zoom would be sufficient, scalable, reliable, and manageable, even if early experiments are promising.

If we do not take the plunge, though, how can we ever innovate? The answer here is not to leap immediately into the deepest part of the pool. It is to wade in shallow waters in the first instance. It is widely acknowledged in the technology community that the best way to introduce complex new systems is to start simply and build incrementally, informed by experience. It is also widely held that to begin with the most challenging problems and systems and to develop ground-breaking systems from scratch is inadvisable. The failure rate of pioneering public-sector technology projects is alarmingly high.

A further reason for caution in introducing remote jury trials is practical. I am not an expert on the management of juries, but I am told that the art and method of communicating with juries has many different components—maintaining their attention, gauging and responding to their level of understanding, ensuring that they have clear sight of evidence and documents, persuading them memorably, appealing to them collectively, and so forth. This form of rhetoric is well understood when pursued in a shared physical space, but we have no experience at all of how to replicate it virtually. The danger here is that what might be lost is much more than, say, a good legal point for a judge. Rather, an inability to bring the art and method online might strike at the heart of what a jury trial is all about, which is surely that juries of peers are fully and communally engaged. If

they are not, then in this respect I am not yet persuaded that the interests of the accused would be protected adequately.

> The best way to introduce complex new systems is to start simply and build incrementally.

I am also concerned about public perception of a hurried change to the jury trial, not least at a time of such societal uncertainty. As Lord Devlin famously put it, "Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." My instinct is that it is important at times of insecurity and instability not to remove or change foundational elements of our social and legal structures unless we are highly confident of success.

I do not dismiss the idea that serious criminal trials will be conducted in the future using some kind of video technology. In fact, I expect they will. I simply warn against this being done in a rush, with no global experience to guide us. For those who are interested in the much longer-term administration of justice, the plan of action that I recommend, again, is not to automate current practice; not to layer technology onto how work is conducted today; not to try and lift and replicate the current jury trial in a virtual environment. Instead, the challenge will be to take a step back and ask what fundamental values and principles the jury trial embodies, and what practical outcomes and benefits it secures, and ask whether these values, principles, outcomes, and benefits might be delivered and enhanced, perhaps in new and quite different ways, in a digital society.

Justice

What about justice? It is striking that fans and opponents alike rely on arguments about justice when making their cases for and against nonphysical courts. Advocates speak, for example, about distributive justice, claiming that the social good of dispute resolution can be made more widely available if court hearings are held remotely, while critics question whether remote courts can deliver procedural justice, challenging whether online processes can be fair and sufficiently public.

I explore this ubiquitous reliance of justice in *Online Courts and the Future of Justice* (see, in particular, chapter 7). I suggest there that are no fewer than seven different conceptions of justice to be found in discourse on "justice according to the law." Building on this finding, my aim has been to develop a test that I now call the "justice test," against which we can evaluate any court service, whether online or traditional. The test is made up of seven elements, requiring that court systems should secure and deliver:

- Substantive justice (fair decisions)
- Procedural justice (fair process)
- Open justice (transparency)
- Distributive justice (accessibility)
- Proportionate justice (appropriate balance)
- Enforceable justice (backing by the state)
- Sustainable justice (sufficient resources)

The main objections to remote courts, so far, have been framed as threats to open justice and procedural justice. It has been argued, in short, that remote hearings are insufficiently transparent and indeed are not fair hearings. I think it balanced to conclude, from the research thus far, that most judges and lawyers who have actually participated in remote hearings do not share these concerns. Experience of using the systems in practice has often changed views. Notably, many critics who voice concerns do so from armchairs rather than personal involvement in remote hearings.

> Fans and opponents alike rely on arguments about

My bigger point, though, is that whether remote courts secure and deliver justice is a more complex

justice when making their cases for and against nonphysical courts. ”

question than most commentators allow and we should view with skepticism any blanket rejections of remote courts on the grounds of justice. There is certainly a debate to be had, but that should be a more nuanced conversation than most critics often want to allow. If we choose to industrialize remote courts and keep them in operation after the virus has been thwarted, we are contemplating a more fundamental change to our courts than we have seen in hundreds of years. This shift merits deep discussion rather than dismissive emotional appeals to justice.

The need for "front-ends"

Although the industrialization of remote courts may appear radical to many judges and lawyers, I regard it as but a first step in our migration away from the settlement of legal disputes exclusively in physical spaces.

In the past few months, many people have said to me, because of the upsurge of remote courts, that I must be pleased that my hopes have now become a reality. In fact, my thinking about the future of courts has always extended far beyond video hearings. We are just warming up.

In *Online Courts and the Future of Justice*, I introduced the related but broader concept of online courts, which I characterized in terms of two basic services. The first is online judging, which is an asynchronous process involving human judges receiving arguments and evidence in electronic form and delivering their decisions in kind—with no oral hearings, either in physical courtrooms or by video. This corresponds with the third form of hearing—the paper hearing—in my earlier classification of remote hearings. I continue to believe that this will come to be regarded as the most proportionate and convenient form of hearing for many cases. This move to online judging will be a much greater leap than the move from courtrooms to video hearings.

But for now, leaving comparisons between video and paper hearings for another occasion, I want to focus on the second basic service of online courts, which I call the "extended court." The idea here is that, in a digital society in which most people have internet access, our courts should provide services beyond their primary function of delivering authoritative, binding adjudications, backed by the coercive power of the state. The extended services that I described in *Online Courts and the Future of Justice* include decision trees and diagnostic systems that can help court users, especially those who are self-represented, to understand their entitlements and obligations; guides that help identify the options for resolution that are open to users; tools that can help nonlawyers organize their evidence and formulate their arguments; facilities to encourage and support parties to settle their differences on their own; case officers who can actively offer mediation and other services in the spirit of alternative dispute resolution (ADR), not as a private-sector offering but as an integral part of the public court service.

I am well aware that such extensions to traditional courts represent a radical departure from our common conception of court service. My motivation is this: I simply do not believe that improving and optimizing our current court processes will be sufficient to overcome the intolerable access-to-justice problem, as compounded by the backlog that is building because of the virus.

To take an extreme example, in Brazil there is a backlog of around 80 million cases—even before the virus took hold. It is inconceivable that these will all be settled using judges and lawyers, whether in physical or remote courts, and whether or not there are improvements in, say, their case management and calendaring systems. Even in jurisdictions with smaller backlogs, it is highly improbable that these can be handled simply by turbocharging the existing system or holding more video hearings.

“ My thinking about the future of courts has always extended far beyond video hearings. We are just warming up. ”

Instead, in advocating the extension to courts, I am proposing that we build “front-ends” and slot these, as the wording suggests, in front of our conventional court services. I am importing the term “front-ends” from the world of technology (and, I accept, mangling it a little as I do so). The fundamental idea here is that we insert a new set of services and processes that are made available to people in dispute before they should need to call upon the traditional adjudicatory service of the court, whether physical or remote. The aim here is either to *dissolve* or *divert* simmering legal disagreements.

In seeking to dissolve rather than resolve disputes, we are recognizing that some conflicts can fade away when parties are better informed about their legal positions and the likelihood of success if they come before a court. When a dispute is not dissolved, it can be diverted to some form of online dispute resolution, a form of electronic ADR, rather than jumping directly into the conventional court system. This can take many forms, including negotiation, mediation, conciliation, expert determination, early neutral evaluation—all conducted online (using audio and video technology, as well as written exchanges). Online triage is another way of diverting cases by systematically directing problems to the most proportionate available form of dispute management rather than defaulting to the courts.

The rationale here should be clear—to cope with backlogs and to increase access to justice, we have to find new ways for people to handle their disputes. Rather than encouraging them to jump directly into formal court process, we should be offering, up front, an alternative suite of affordable, usable, and intelligible facilities that would help dispose of many problems without the pain of full-scale litigation and indeed would dispose of many of the problems that, I am told by judges, unnecessarily clog up the court system. At the same time, my hope is that these front-ends would be more accessible to people with legal grievances, if only to help them understand the law, as it applies to them.

These front-ends will be less about formal resolution and more about the avoidance and containment of disputes—putting a fence at the top of the cliff rather than an ambulance at the bottom, and discouraging disputes from escalating, as often they do when formal legal proceedings commence and lawyers begin combat. Front-ends would promote a more preventative type of dispute service.

In the coming years, we will find many online techniques for dissolving and diverting disputes. Extended court services, as introduced in *Online Courts and the Future of Justice*, are one type of front-end. In the book, I argued strongly that these extended court facilities should be part of the public court service and not outsourced to the private sector. In other words, I made the case for these front-ends to be a public service. If new and emerging techniques can widen access to justice, I said, then surely the state should embrace these and in so doing demonstrate that public courts are adaptable, flexible, and continue to be relevant as society becomes increasingly digital. Not only should this help enhance confidence in the public justice system, but it should retain the positioning of courts at the center of legal dispute resolution. If the rule of law is to be maintained, courts must surely play a central and not peripheral, role in the settlement of legal disputes.

> “Front-ends would promote a more preventative type of dispute service.”

I would still prefer that extended courts are embedded within public court systems, but pragmatically I now recognize that most courts, during the crisis and for the foreseeable future, will be fully occupied in trying to tackle the backlog by keeping traditional services available. They will have little time or funding for ambitious extensions to their remit. A little reluctantly but nonetheless optimistically, I am now in support of the introduction of front-ends that are not provided by the state but instead (or additionally) are made available by private-sector entities that can see there is a market opportunity here, or perhaps by charitable or educational bodies that want to help tackle the access-to-justice problem. One such project with which I am involved in the United Kingdom is being led by Lawtech UK. The aim is to develop a resolution platform for small businesses to enable them rapidly and affordably to settle late-payment disputes without resorting to lengthy and costly court processes.

In moving front-ends out of the courts, we will have to address a rich new range of challenges. To what extent, for example, should these front-ends be regulated? Systems that dispense legal advice or host dispute resolution processes are providing important services, and users, especially vulnerable users, should be protected from substandard providers. A further set of questions relates to the ways in which these front-ends might interface with the court system: technically, we can imagine case data passing from front-ends into the formal court system when it has not been possible to dissolve or divert disputes; and, legally, we can envisage determinations from the online dispute resolution processes being enforceable as court orders. But these are not trivial issues, and much further debate and development work is needed.

How should courts plan?

In this ever-changing landscape, how should governments and judiciaries prepare for the future? I recommend that court services around the world should be planning and proceeding in three time frames, with the following objectives:

- *Short-term*: stabilize and improve the ad hoc systems that are currently being used, and so minimize the disruption to court services for the remainder of the crisis
- *Medium-term*: ensure that the experience of remote courts informs and, where appropriate, leads to changes in any reform and digitization programs that were being pursued prior to the crisis
- *Long-term*: radically redesign our court systems and put in place a new configuration of people, processes, technologies, and physical spaces that is user-centered, technology-enabled, sustainable, accessible, and better than what we have today

Let me say more about the programs of work that I envisage for each of these time frames.

The short-term program should be practical and immediate. The latest signals from governments and advice from medical scientists suggest that we will be in crisis for many months yet. At best, we might have a vaccine next year (2021). Effective treatment may come earlier but only through some cocktail of existing medicines. We are also likely in months to come to face a new social dilemma, a new inequality—between those who have had the virus, have retained immunity, and have returned to some kind of normality and those who have not and whose activities will still be severely restricted.

I believe we should plan for the temporary provision of remote court facilities at least until the end of 2021. This means we need to put in place more robust procedures and technologies than have been valiantly cobbled together in the last few months. This process will necessarily be incremental. There is no time to stop and develop new systems. You cannot change the wheel on a moving car. Moreover, to avoid resistance amongst judges and the large backlog of cases to which this would give rise, it is important to win many more judicial hearts and minds. Also, as never before, there must be close collaboration between judiciaries and governments, on whom the pressure at present is very great indeed.

“You cannot change the wheel on a moving car.”

I suggest the following six actions are the short-term priorities that will stabilize and improve today's ad hoc systems and minimize disruption during the crisis:

1. *Research:* There must be ongoing research into what is working well and what is not. This research should extend to judges as well as to court users (represented and self-represented) and be based on valid sampling rather than on anecdote or group reporting.
2. *Best practice:* There should be a rapid articulation of “best practice” in the conduct of remote hearings, backed up by online training of judges.
3. *Communication and celebration:* I advise jurisdictions to celebrate and communicate local successes in remote hearings, to build confidence and to provide evidence of what is achievable.

4. *Allocation:* Guidelines should be developed on what kinds of issues and cases are best handled by what types of remote hearings, and on what kinds of issues and cases should be held over for traditional hearings.
5. *Oversight:* If this does not already exist, there should be a formal body—with judges alongside government officials—that oversees the work that addresses the above priorities.
6. *Leadership:* There must be strong leadership by senior judges. Given the crisis will not be over in weeks, the recommended narrative from the top should be one that stresses the responsibility on judges to strive proactively to maintain access to the courts (this is their contribution to the "war effort") and discourages public criticism from the sidelines.

The medium-term program should focus on making sure that experience gained during the crisis feeds into any ongoing digitization initiatives that were being pursued before the virus spread. The current provision of remote courts, as noted earlier, can be regarded as a huge, unscheduled pilot scheme that is no doubt testing many of the ideas and changes that are embedded in existing digitization programs. It is vital, again, that as much data as possible is systematically captured—about the success or otherwise of the innovations that are in operation. The more data that is captured, the more reliable the insights will be gained. Moreover, there is no reason to confine attention to the experiences of local jurisdictions. Already, the Remote Courts Worldwide website is capturing user stories from around the world.

The challenge of informing and refining existing digitization programs can be regarded as contributing to the process of "industrializing" those aspects of current remote hearings that research confirms should be maintained. Many of the facilities will need to be scaled so they can be deployed on all suitable cases. The faster the process of industrialization, the sooner countries can reap the benefits of digitization and reform and help also to manage the backlog of cases that is building everywhere during the crisis.

"Reformers may set out to bring radical change but often regress into searches for quick wins, low-hanging fruit, and mild process improvement."

The first four priorities laid out above are priorities for the medium term too. Three additional priorities also emerge:

1. *Revision to existing plans:* It will be necessary to produce a revised program for any existing change and digitization programs. The experience of the virus should give rise to an updated version (in project management terms) of deliverables, time scales, critical paths, costs, risks, resources, and more. Although it might be claimed that the changes to any programs will constitute no more than an acceleration of existing plans, the developments of the last few months have been so profound that any such claim would be an oversimplification.
2. *Feedback:* Given the enormity of the changes, judges should ensure that their views and insights—their feedback—are formally and fully captured and injected at an appropriate level into program planning. It may be that a new structure or mechanism needs to be put in place for this purpose. Without this, judges will find themselves, time and again, on the back foot.
3. *Expectations:* In response to a growing apprehension amongst lawyers around the world that their governments are likely to keep the ad hoc systems with little modification in order to cut costs, a revised set of messages—ideally common amongst judges, politicians, and policymakers—should be agreed and widely communicated. Expectations need to be managed.

The long-term program that I recommend invites policymakers and judges to take a step back and rethink and redesign their public court systems, to move well beyond the current systems, which are invariably too costly, time-consuming, combative, and complicated. My approach to the long term is informed by my common experience that most so-called transformation projects end up as efficiency projects. Reformers may set out to bring radical change but often regress into searches for quick wins, low-hanging fruit, and mild process improvement.

Accordingly, to improve the chances of bringing about genuine transformation, the program I propose requires the conduct of two quite different streams of work. One of these will be broadly familiar to current justice workers; the other will not.

The familiar exercise will be to undertake a root-and-branch analysis of all judicial and court work in all jurisdictions and at all levels, break the work down into its component parts (tasks and activities), and, in light largely of the insights gained during the crisis, streamline and optimize each part. In more technical terms, this would involve process analysis, process mapping, process simplification, and then process improvement. There are well-established techniques and methods for handling this kind of process review.

> "In vision-based thinking, we do not inherit past practice."

Essentially, this would be an exhaustive efficiency review, resulting, for example, in the substitution of remote hearings for physical hearings, not as an emergency measure but as a matter of course. This exercise would differ from almost all current digitization programs in not simply grafting technology onto existing processes but in optimizing the processes in the first place. Informally, the idea here is to act on and, again, industrialize the current instinct of many judges, lawyers, and officials ("we could surely use many of these temporary techniques much more widely"). This must be a large, coordinated effort, across an entire system. I suggest that the first step is to run a pilot in one particular area.

The second stream of work is much more ambitious and will be alien to most justice workers. One way to conceive it is in terms of the following question: If we were able to start with a blank sheet of paper—no buildings, judicial roles, officials, procedures, technology—and were invited to design our court system from scratch, what would it look like?

The purpose here is to be vision-based and not legacy-based. The latter involves walking backward into the future, contained and constrained by where we are today. The former creates a blueprint for a reconceptualized and transformed court service, enabled by existing and emerging technologies and driven by the outcomes that court users want and society requires (user-centered design). This contrasts with starting with a system designed by lawyers for lawyers.

In vision-based thinking, there are no sacred cows. If it were considered, for instance, that for low-value civil disputes in a common-law system, it would be best to deploy an investigatory rather than adversarial approach to dispute resolution, then that could be embraced as part of the vision, even if it flies in the face of current practice and deeper tradition. In vision-based thinking, we do not inherit past practice (such as thousands of pages of rules of procedure or a complex disclosure system). Again, the first step would be a pilot, to road-test the idea and raise awareness and enthusiasm.

The long-term program, then, would run two parallel streams: one legacy-based (an efficiency review), the other vision-based (a transformation exercise). The combined output would provide the source material for policymakers (in the judiciary and government) in planning tomorrow's court system.

Finally, although I have identified three separate programs, best practice in strategic planning would keep the three coordinated and aligned, and moving in the same direction.

Where does this take us?

In law, as elsewhere, the virus is challenging our assumptions about what is possible and what is desirable. The widespread, and fairly successful, introduction of remote courts around the world has opened the minds of many judges, lawyers, and policymakers who would have balked, not long ago, at the very idea of nonphysical hearings. The door has opened, if only slightly at this stage, to very different ways of resolving disputes. But the winds of conservatism blow briskly through the legal world, and I am aware that many judges and litigators are quietly hunkering and hankering—hunkering down until the viral storm passes while hankering after a complete return to physical courts.

The reactionaries should, however, recall the scale and implications of the three challenges that I outlined at the start—maintaining court service while the virus is at large, coping with the backlog of cases that is accumulating, and tackling once and for all the access-to-justice problem. I do not believe that clinging to the wreckage of our current system is the answer to these challenges. The status quo may serve the wealthy well enough, but it is lamentably inaccessible to the majority of individuals and organizations.

“ The current system is not an evidence-based option that we have consciously chosen. It is simply where we are. We can choose to be elsewhere. ”

Remember too that the current system is not an evidence-based option that we have consciously chosen. It is simply where we are. We can choose to be elsewhere.

My purpose in this article, as in *Online Courts and the Future of Justice,* is to set out some more attractive options than the status quo, a couple of which have been thrust upon us during the crisis. But I emphasize that it is early days and that no one should suppose that several months of video hearings constitutes a lasting revolution in court service.

I can clearly envisage a more distant world in which asynchronous hearings, artificial intelligence, and virtual reality are central pillars of our court systems (see chapters 25–27 of *Online Courts and the Future of Justice* for more). For now, though, I have a more modest hope: that there will be a shift in most advanced justice systems from the presumption that all disputes before the courts should be held in a physical space to the reverse—by default, all cases, in not many years to come, should be conducted online unless there are compelling reasons to assemble in a courtroom.

My larger and heartfelt hope is that we can harness the experience of remote courts and move on to design and build a standard, adaptable global platform for the online resolution of disputes, as a way of encouraging and enabling countries across the world to increase access to justice and respect the rule of law (see chapter 18 of *Online Courts and the Future of Justice*). That, though, is another story for another time.

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