SENIOR PRESIDENT OF TRIBUNALS

SIR ERNEST RYDER

SENIOR PRESIDENT OF TRIBUNALS

WHAT'S HAPPENING IN JUSTICE: A VIEW FROM ENGLAND & WALES

THE FUTURE OF JUSTICE, UCL LAWS

14 MAY 2018

---

(1) Introduction[1]

1. We live in an age of transformations. They are more profound than any that we have lived through in any period of our legal history. That is because of both the rapidity of transformation and the nature of change. The transformation from legal French to the use of English and, more recently, the Welsh language in our courts took several centuries to achieve, and its echoes continue to the present. The 1392 Pleadings in English Act did not accomplish its aim overnight. The transformation from common law forms of action and their confusion of substantive and procedural law took most of the course of the 19th century.

2. Transformation historically took time and considerable effort. It stills takes resources and considerable effort. But it no longer does or can take time; that is a simple fact of the technological age we live in. There is a real risk here, that we should note at the outset. Absence of time to get it right increases our chances of getting it wrong. It reduces the chance that we will plan properly; that we will implement those plans properly; and, that we will think about the consequences of what we may be doing properly. Rapidity creates

[1] I wish to thank John Sorabji for all his help in preparing this paper.

risk. And where the delivery of justice is concerned risk must be minimised as far as it properly can. That is an important part of the task in which the judiciary of England and Wales are involved: safeguarding the rule of law by change while preserving our procedural and substantive protections.

3. My focus today is the effect this age of transformations is having on our courts and tribunals. In this short paper I focus on: planning for change; securing greater access to justice; and, improving the quality of justice. Transformation cannot merely be concerned with moving from an analogue, paper-based, process-focused, justice system to a digital one. In this case the medium is not the message. It is and must only be the means to deliver the message better. And the message? Greater access to better quality justice. A justice system that best safeguards the rule of law in the 21st century.

4. When Lord Tomas and I came to agreements with the then Lord Chancellor, Michael Gove MP, we identified an Aim for our modernisation programme and 6 principles. The Aim was: "to give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at lower cost in order to safeguard the rule of law by improving access to justice".

5. The 6 principles are the touchstone against which the judiciary check or validate each of our projects as they are tested and, if successful, implemented. They are:

    1. Ensure justice is accessible to those who need it ie to improve access to justice
    2. Design systems around the people who use them
    3. Create a system that is financially viable using a more cost effective infrastructure ie better IT, new working practices and decent estate
    4. Eliminate the most common causes of delay
    5. Retain our national and international standing as a world class provider of legal services and in the delivery of justice
    6. Maintain the constitutional independence of the judiciary.

6. Let me describe some of the imperatives that guided us and still inform us because they are too often forgotten in non-academic comment and debate: Access to justice is an indivisible right – there can be no second class even in, and I would so particularly in, an age of austerity. Law administered through an independent judiciary requires effective and

efficient governance (the twin statutory duties placed on the Lord Chief Justice and myself) and that necessitates continuing scrutiny of the efficacy of the institution that we are charged to lead to assure the respect that it needs to function. The consequence is that we cannot but look to modernise and reform our system. It is in that way that the judiciary are responsible for ensuring that our system is fit for purpose. We must do that by placing reliance on evidence based and tested improvements to our governance of the system and the quality of our decision making. How are we approaching those aims and principles?

7. Let me give you an indication of how my (tribunal) judges hope to make a dent in the universe. We have plans to change our use of the estate, to provide innovative and digital ways of working, to change and improve the way we lead judges and manage workload, to provide support for the judiciary and our users through registrars and case officers, to provide assisted digital support for our users especially the most vulnerable – a support service that has never been provided before, and to improve diversity by the way we work, including in our recruitment and flexible deployment practices.

8. We intend to deliver the following projects:

    - An online tribunal which provides a continuous online decision making process
    - Separate online interfaces for users and judges
    - Intuitive online applications in place of forms
    - An online notifications and tracking system for each step of the process
    - E-filing
    - Online triage and dispute resolution,
    - Documentary management and case management
    - Online fee payment
    - Online identification
    - Online video hearings
    - Online support services for judges and hearings that facilitate judge and estate bookings, allocation and listing by judges, leave and expense claims and so on
    - Online services for face to face hearings including presentation equipment for documents and people who join remotely and for judgments and orders promulgation

9. Let me outline how we are approaching the task of achieving those aims.

Judicial Ways of Working - 2022

10. First, planning for change and Judicial Ways of Working 2022. Since 2005, our constitutional settlement has been predicated on the idea that the delivery of justice is a partnership between - '*two separate but equal branches working together to manage the courts*': i.e. the government and the judiciary.[2] This interdependent relationship[3] is one that is manifested in a number of ways.

11. One way is that Her Majesty's Courts and Tribunals Service, the body which provides the support for the judiciary to carry out their constitutional role, is operated as a partnership between the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals.[4] Its board answers to these co-equal partners, the judiciary and the executive, and is not, as it was historically, simply the means by which the Ministry of Justice and its predecessors manage the courts.

12. One consequence of that change in our constitutional settlement is that the duty long-placed on the judiciary to lead the modernisation of our justice system is all the more acute today.[5] An example of this can be seen in the role played here by Lord Dyson MR's keen support for the work of Professor Richard Susskind. As Chairman of the Civil Justice Council, Lord Dyson was a prime mover behind the establishment of its Working Party on Online Dispute Resolution.[6] That report was the starting point for further work carried out by Justice and then by Sir Michael, now Lord Briggs in his Civil Court Structure Review.

---

[2] Professor K. Malleson, *The Effect of the Constitutional Reform Act 2005 on the relationship between the Judiciary, the Executive and Parliament*, in House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*, (6th Report of 2007), Appendix 3 at 63 <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>.

[3] Lord Thomas CJ, *The Judiciary within the State – The relationship between the branches of the State*, (15 June 2017, Michael Ryle Lecture) at [18]ff <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf>

[4] HMCTS Framework Agreement (CM 882, July 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf>.

[5] See further, Sir Ernest Ryder SPT, *Securing Open Justice*, (Luxembourg, 1 February 2018) <https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>.

[6] See Civil Justice Council, Online Dispute Resolution for Low Value Claims (2015), <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version.pdf>

13. The foresight of each of the Heads of Jurisdiction who have commissioned, chaired or implemented reviews has informed a series of documents that were distributed by the Lord Chief Justice and me, as Senior President, to all judges, tribunal panel members and magistrates at the beginning of May: they are known as Judicial Ways of Working – 2022. Among other things, they seek the judiciary's views on the modernisation programme; on how and in what ways we can simplify, clarify and improve our processes through digitisation; to incorporate and expand the provision of ADR and ODR; to increase the use of technology and online and video hearings; to increase access to justice; and provide a more flexible, diverse and skilled judiciary.

14. The documents seek judicial feedback. They are not a statement of a foregone conclusion. The duty to lead placed on the senior judiciary, is a duty to lead effectively and efficiently (and in my case also to provide swift, specialist and innovative justice – I am not sure that any other head of jurisdiction has these additional duties). It is my firm personal belief that we have an obligation to lead the transformation that the justice system needs to prevent its decline. And that can only be done through listening effectively. We cannot lead in an echo chamber. We cannot lead without engagement: both with the public and with our judiciary.

15. Genuine leadership is properly informed. It is open, and open to and receptive of criticism. We make better choices when they are informed choices. I am equally firmly of the view that the present transformation of our justice system must be one that is carried out in the light of informed choices. We cannot shy away from scrutiny. Scrutiny, if I may in the present surroundings borrow from Jeremy Bentham, is the best antiseptic. And to the extent that anyone involved in reform does shy away from scrutiny or is less open than they can properly be, reform is likely to be far less effective than it needs to be.

16. To make better choices, we have sought the views of the judiciary on the issues I have mentioned. We must learn from their skills and experience. And we can then ensure, in the fast-moving technological world we live in today, that the reforms we pursue are the ones best calculated to deliver high quality justice.

Improving judicial leadership and management

17. One essential feature of Judicial Ways of Working is the need to develop ways to improve the leadership and management of the judiciary. If, as it discusses, we are to increase the degree to which judges can be deployed across jurisdictions and can have more flexible ways of working, if we are to continue to take a leading role in the modernisation programme, we must review and continue to improve our governance structures.

18. This means that, as with any large-scale organisation, we must review the way in which we work. Do we have the right systems? Do we use the right processes? Do we have the right skills and training? Is, for instance, the present approach to the running of the courts and tribunals the optimum one? Is the judiciary's internal governance system the best for the demands of today? The great court reformers of the Victorian age did not shy away from the difficult questions. Nor should we. Business as usual, in particular our infrastructure and operations, must be improved before we digitise it.

19. This is all the more important if, as has been said – and as we are putting in place – our courts and tribunals in the future will be digital by 'default and by design'[7]. To operate in this way we all need to be properly trained and we need to have the right governance systems in place. We cannot continue to manage the judiciary on an analogue basis. Looking at effective administration of justice from the perspective of first instance courts and tribunals, we must have regard to what Lord Browne-Wilkinson suggested over thirty years ago, a more collegiate leadership structure at all levels[8], more engaged with civil society where it matters, for example in the essential collaborative arrangements with the legislature and the executive that at a national level are indispensable to the maintenance of the rule of law.

[7] M. Briggs, *Civil Courts Structure Review – Interim Report* (December 2015) at 4.
[8] Lord Browne-Wilkinson ibid at 56.

20. If we are to manage a digital workload and lead digital working practices we need better governance arrangements with HMCTS. That is the unfinished business of the 2005 constitutional settlement. We have to manage our functional and formal separation of powers. In any event, modernisation casts a spotlight on our existing arrangements i.e. the essential operational means by which we bring the digital world into the justice system. As judges involved in the governance of HMCTS we must do our utmost to inform, collaborate and scrutinise what is done in our name and modernisation will require better ways of undertaking that function. Leadership and management in particular of innovation are skills that some judges need if reform and its integration into business as usual are to succeed in a court or tribunal near you.

Increasing Accessibility and Open Justice

21. The reforms we have already embarked upon and which we should consider embarking upon have a common objective: to improve access to justice. This is a long-established constitutional duty placed on government and the judiciary to secure.[9] This means we must respond to the needs of digital society. When eBay can deal with 60 million disputes a year[10], there is a pressing need to ensure that our justice system can operate to ensure that where the individuals involved in those disputes wish to do so, they can access the courts as readily as they can eBay's dispute resolution system. And there is a need to learn from those systems so that our courts and tribunals can operate as effectively. This is not to suggest that we seek to discourage settlement via ODR. It is to say that as a society we remain able to secure effective access to justice for all. Our systems must – as they are doing – change to meet the needs of today's society, today's citizens, and today's disputes. We cannot afford to create or countenance the existence of *digital outlaws*; individuals and businesses whose disputes are outside the law's protection.

[9] *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 307.
[10] E. Katsh & O. Rabinovich-Einy, *Digital Justice*, (OUP, 2017) at 4.

22. Access to justice also demands that our reformed courts and tribunals, our new digitised systems, are accessible and accountable to the public. They must remain open to public scrutiny to maintain the health of the system, to maintain judicial accountability and to ensure that arbitrary decision-making does not arise as it can when justice is said to be done outside the public gaze.

23. Open justice and accessibility for today's disputes is necessary for another reason. If we permit the creation of digital outlaws, we permit the subversion of our substantive law. We do so because we acquiesce in some forms of disputes being beyond the reach of the courts. In doing so we accept that some laws cannot be interpreted, applied or explained by the courts. Such laws become dead letters. Their interpretation and application becomes a matter of private actors, not of public fora. We thus accept a democratic deficit in our society. The modernisation programme is the means through which we ensure that in a digital age we do not permit the conversion of public laws, and the values they instantiate, into private and privately interpreted guidelines. Hence the need to ensure that online or video hearings, like telephone hearings at the present time, must be carried out in public.

Improving the quality of justice

24. I also want to touch on the quality of justice. We are all committed to providing the best quality of justice we can.[11] This does not, as some have wrongly suggested, mean that we seek a blank cheque in terms of the allocation of resources to the justice system. It does mean however that the justice system must be provided with the resources to enable it to fulfil its constitutional duty.

25. Quite some time ago now Guido Calabresi and Philip Bobbitt discussed the problem of the tragic choices society faces when it needs to allocate scarce resources among multiple demands.[12] Each is a valid, a necessary demand. How each society decides to allocate its

[11] See further, Sir Ernest Ryder SPT, *The Role of the Justice System in Decision-Making for Children*, (Warwick, 9 April 2018) <https://www.judiciary.gov.uk/wp-content/uploads/2018/04/spt-ryder-bapscan-april2018.pdf>.
[12] G. Calebresi & P. Bobbitt, *Tragic Choices*, (Norton & Co, 1978).

resources is a statement of its fundamental values; it is a statement of what and who we are as a society. In answering the question of resource allocation to our courts and tribunals, to our justice system, we define ourselves. We define our commitment to being a just society. So we must make good choices.

26. Securing quality justice is not just a matter of resources. It goes wider than that. Modernisation must focus on how we are to improve quality. This has a number of strands. I can only touch on some of them. The most important, from my perspective, is the need to ensure that the steps we take to improve the quality of justice are: systematic, evidence-based and tested, for example, there is data embedded to enable each project to be tested and improved over time. Far too often in the past, as I have said before, we have approached modernisation as an exercise in ad-hocery. It is not been evidence-based, or at best it has been based on partial evidence. We have not tested reform. And we have not therefore learnt from such testing. Our civil justice system, for instance, provides a mechanism to test reform. It can introduce pilot schemes. It often does so, and learns the lessons of those pilots.

27. Our modernisation programme is making extensive use of pilots. Both in the courts and tribunals, we have put in place pilots: e-filing was piloted in what are now the Business and Property Courts; online divorce and probate pilot schemes are being tested in the family justice system; online civil money claims processes are being tested in the civil courts and online video hearings (otherwise known as virtual hearings) and continuous online hearings are being piloted in the tribunals alongside application and automatic notification systems. And we are learning from those pilots. Feedback is as important here as anywhere else.

28. Feedback does not stop at reform though. It is something which must be ongoing. Here we have traditionally faced a problem; one well known to Professor Dame Hazel Genn. It can be simply put: we haven't had the evidence. Historically, the default position has been that we do not have sufficient, robust and accessible evidence concerning the operation of our

justice system. We do not therefore have the necessary material to enable us to assess where the causes of problems within the system lie. We have not been able to analyse our data on a continuing basis to inform reform when it needs to be carried out. Hence we lurch from one major reform process, based on anecdote and impression, every ten years or so without genuinely knowing what target we are aiming at.

29. Let us compare that with Canada and the Civil Resolution Tribunal. As is the case with ODR systems such as that operated by eBay, the CRT is able to obtain effective feedback on how it is operating. It can do so in real time. The online system has been designed to enable users – litigants – to provide feedback at every stage of the process. That feedback is then collated and – importantly – acted upon to refine and improve the system.[13] The same type of feedback process must be employed in the pilots of our court and tribunal reforms[14] to provide the means for the effective gathering and dissemination of data so that we can identify problems and cure them as they arise. Modernisation must enable, and will, enable us to ensure that ongoing testing and refinement – and public scrutiny and hence accountability – is a feature of our justice system in the future. And it must enable us to work collaboratively with experts drawn from many different disciplines to ensure we can take a holistic, well-informed approach.

30. Improvements to quality also means improving the quality of judicial decision-making. This is particularly important as we introduce greater use of ADR and ODR into our justice systems. Judges are trained to determine rights. To evaluate the merits of cases. Different skills and approaches are needed when mediation or facilitated negotiation is being carried out. Rights-based, evaluative, approaches may and generally will not be appropriate to mediation and facilitated negotiation. Judges and court and tribunals officers who are involved in the provision of mediation and facilitated negotiation need to be properly trained so that they do not default to the rights-based approach. They must be adept at

[13] See Tanja Rosteck, *Happy First Birthday, Strata Solution Explorer!*, and *Solution Explorer Quarterly Update: 2017 Q4*, <https://civilresolutionbc.ca/happy-first-birthday-strata-solution-explorer/>; <https://civilresolutionbc.ca/solution-explorer-quarterly-update-2017-q4/>.

[14] See Sir Terence Etherton MR, *Civil Justice after Jackson*, (15 March 2018) at [33]-[35] <https://www.judiciary.gov.uk/wp-content/uploads/2018/03/speech-mor-civil-justice-after-jackson-conkerton-lecture-2018.pdf>.

identifying and applying problem-solving, interest-based approaches. We already pioneer such approaches with our Employment Judges and we will need to put more of their training into place as we modernise our approach. There is never a finishing line to the approaches we can adopt to enhance the quality of judicial decision-making.[15]

Conclusion

31. Justice is not something that is done to people. Nor is it a consumer service, as the Supreme Court in the *Unison* case felt moved recently to comment: a lesson to us all in the role and purpose of courts; a lesson in the fact that courts and tribunals are not a consumer service.[16] It was right. And its lesson needs to be heard, understood and inwardly digested by everyone involved in the transformation of our justice system, just as it does by everyone involved in the delivery of justice generally.

32. Justice is, as the opening line of *Justinian's Institutes* rightly noted a very long time ago now, '*the constant and perpetual wish to render everyone [their] due.*'[17] That wish is the duty cast on the State to ensure the effective delivery of justice. The present transformation – modernisation – of our courts and tribunals, of our judiciary, is the means through which we can and must ensure that as a society we can render everyone their due. As I have said before, as a society committed to the rule of law it is a responsibility we cannot shirk.

33. Thank you.

[15] See Sir Ernest Ryder SPT, *The Role of the Justice System in Decision-Making for Children*, ibid.
[16] In particular see Lord Reed's judgment, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [68]ff.
[17] Thomas (ed), *Justinian's Institutes*, (Cornell University Press) (1987).