Conference Opening Remarks

Lord Justice Briggs[*]

Abstract

Lord Justice Briggs has been intimately involved in the development of technology for improving access to justice in the UK. He was the author of a report that energized the move toward online dispute resolution in the courts. These remarks are a retrospective look at his work, now that he is a member of the UK Supreme Court, and no longer involved day-to-day in ODR development.

Keywords: Online Dispute Resolution, online court, access to justice, technology and the law.

It's almost 2 years since I've published, online, my civil court structure review final report. It was a report which I disciplined myself to do in an entirely electronic way, neither receiving nor generating a single piece of paper from start to finish. And as far as I know, a paper copy, at least a public paper copy, of the report doesn't even exist!

I made three, I hope relevant, general recommendations, or headline pieces of advice. Firstly, that a new online solutions court could, solution being short for resolution, greatly improve access to justice for small- to middle-size claims. Where under our current system, legal cost and lawyers' culture make the cost and effort involved in the current process utterly disproportionate to the value at risk. More generally, I advised that in my view digitization could end the tyranny of paper, with big benefits across the justice system in terms of cost, efficiency, transportability, working practices, and not least, the environment. And thirdly, I suggested that procedure in an online solutions court, and indeed in other forms of online court, could be more integrated with what we then called alternative dispute resolution, or ADR, under what I hoisted as the banner 'Taking the A out of ADR.'

Since then, I've spent a year doing implementation of the recommendations in that report, as Deputy Head of Civil Justice, which involved intense day-to-day engagement with the Courts Service Reform Program and then since last October, I've been put out to grass in the Supreme Court. I'm now just judging. So, I'm a sort of watchful has-been, I have no official capacity in the reform process anymore, and what I say now are not in any sense representative of government or the judiciary, they are just my own personal views.

In late 2016, both the government and the judiciary broadly backed my recommendations. And a good slice of the one billion pound public investment in

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the reform program is being devoted to digitization right across the court service, including digitization of, or development of, the online solutions court. The Reform Program has now made large, early strides. There is an ongoing test of a new common platform, based on the Liverpool lower courts, where it brings together under one system of online database documents managed by the prosecution service, the courts, and the defence, and the police, all under one umbrella.

There is great work going on in civil and family tribunals, that is, everything else apart from crime, towards digitization and towards the development of forms for online court.

There is now in beta stage the development and testing of cases related to divorce online, where the error rate in form filling has gone down from 40% when using paper forms to 1% using the online process. You can imagine the improvements that this process generates and the reduction in the levels of frustration of parties who come from a poor background in having their forms sent back because there's some mistake in them. There is online probate at the private beta stage, and there is online civil money claims now at the public beta stage. There is now compulsory e-filing, that is, online filing, and issue of proceedings of the business and property courts, that is mandatory for professional users. This mandatory use is going regional all around the main trial centres in the country later this year.

The Social Security and Child Support Tribunal is getting its process online, and it has a 'Watch my appeal' or 'Track my appeal' process out there, so that users know exactly what's happening in their case in an easily accessible way. The Tax Tribunal is now entertaining online appeals and video hearings, and a process for digitizing and streamlining an arcane and highly inefficient process involving enforcement of judgements is now at the discovery stage, having started earlier this year. And finally, a project to streamline the legal processes for initiating and defending claims of possession of property is about to be launched.

But all these projects are still in their early, minimum, viable project stage. That is, they've been pushed out at a time when, although really skeletal, they're at a sufficient stage of advance to bring real improvements without being anything remotely like the final project product… or part of what's called 'an agile process of development', in sharp contrast with the old system of selling or rather buying from an outside provider a complete system, opening the box and then finding it doesn't work.

Just to give an example, the civil money claims project has launched a system for online commencement of a claim, online defence of a claim, that will take you as far as a default judgement but still goes back into the county court on paper thereafter. This process, with a reversion to paper, is not, and it's not being pretended to be, the online solutions court. It is merely some of the very first building bricks that will eventually be part of the online solutions court. It's being currently rolled out as part of the county court system under the civil procedures where a huge amount of work is being done to develop pilot rules to enable these building bricks to be tested in what might otherwise be thought to be a rather hostile procedural environment.

Meanwhile, in the Supreme Court, a very small and quite separate information technology team (ITT) has been working a quiet miracle, of which I am not the designer, but I am certainly the beneficiary. In the Supreme Court and in the related committee of the Privy Council that hears final appeals from all around the Commonwealth world – the Caribbean, Mauritius, etc. – I heard one from Pitcairn Island the other day and another one from the Cook Islands. We now have all our hearings live-streamed around the world on the Internet, and the Court of Appeals is shortly to follow suit. Parties, especially in the Traditional Committee of the Privy Council, many of whom are poor, don't have huge resources and don't want to spend all of their money putting their lawyers on airplanes to London, are now welcome to appear by video, so we have video hearings. All our documents are now available electronically, although we've maintained a parallel paper path for reasons which I will explain in due course. But it produces a total revolution in working practice.

I am I think, at the moment, the only Supreme Court judge who sits there with twin screens rather than just one, but the wiring is all there under the desk for anyone who wants to join in. I'm still a guinea pig, but my working practices, when compared with a paper-based Court of Appeal, are utterly transformed. I don't have to do all my work in the office. I can work at home, I can work on the train, I can work on my boat and I don't have to carry around piles of files if I want to do homework. I do everything on this laptop which is always connected to the Judicial Intranet within the Supreme Court and to a Skype telephone system; I can, therefore, handle the largest case, or five very large cases, all within the confines of this one laptop or such further screens as I want to plug into wherever I happen to be – and I usually do. This is, I can only say, a total revolution for me, and I assume that it is also for the participating parties who have the same facility.

No doubt, all sorts of out-of-court online dispute resolution (ODR) are being developed in and outside the United Kingdom. Some are being rolled out, for example, the Civil Resolution Tribunal in British Columbia, which is just outside court in the sense that it is an adjudication rather than a court process. Some have been rolled out and then sadly wound up. But at the same time, a quiet revolution is going on in the meaning we ascribe to the acronym ODR.

When I was writing my report in and before 2016, to those to whom it meant anything at all, it really meant new electronic forms of ADR, for example, asynchronous confidential chat line processes and blind bidding as was run by CyberSettle. Like digitization generally, it was all about the facilitation of communication. Now, as this conference agenda shows, ODR has got itself a much wider meaning. The invisible A, because it was Online Alternative Dispute Resolution, has largely gone, as indeed Graham said. The concept of ODR now embraces court processes just as much as out-of-court processes. And, for example, there are now many more links between court dispute resolution and out-of-court dispute resolution, even within an online court process. So, all the early pages that you will encounter if you go onto the civil money claims process will give you links, and guidance, and advice about how to settle your dispute out of court before taking the trouble of litigating. Secondly, the debate is moving on, beyond just commu-

nication. It is moving to artificial intelligence (AI), that is, using IT to decide disputes.

There are, I think, three main drivers for ODR at the moment. The first, not in order of history, is that disputes from the ever-increasing number of online transactions are naturally best resolved online. eBay is an absolutely classic example of this, in which AI plays a central role in the resolution of the very large number of small disputes that are resolved within eBay, a larger number incidentally that are resolved in the civil courts in any given year. Block chain and smart contracts are about to be a huge force which will increase the proportion of our business disputes that have to be resolved online because the contracts, or arrangements or relationships from which those disputes developed originated online. But secondly, modern IT, including digitization and putting everything online, has all sorts of benefits for all kinds of disputes. For example, it's long been used in road traffic accidents, employer's liability, public liability portal, where disputes arise on the road or on the factory floor. The Traffic Penalty Tribunal, about which you're going to hear later, is a very early example of a highly effective ODR, where the dispute arises through people who commit minor infractions of parking obligations, or paying tolls when travelling through tunnels, rather than a dispute originating online. And, of course, the Online Solutions Court, where, when it's been developed and rolled out – it's still in the design stage, what I call in my report Online Stage 1 – Electronic Triage – can enable court users to articulate their grievances in a way that the court can understand and, therefore, get small claims before the court with minimal, but with much more focused, help from lawyers, rather than the lawyer having to hold the client's hand at every stage.

But also bear in mind that the courts are not just for dispute resolution. In fact, most civil claims in this country, in terms of number, are made for the enforcement of undisputed debt. In other words, in that field, there isn't any dispute, but the court is resorted to for enforcement. There are a huge number of debt cases, and the process of initiating those cases through the bulk claims secure data transfer system has been around for years, but that merely gets you so far as a default judgement and nowhere into enforcement, which is currently still entirely paper based. But the Enforcement Project aims to change all this.

So, what are the limits, or constraints upon the advance of ODR? Firstly, they're not I think really technological, except in the very short realm. For example, we still have very incomplete coverage of broadband in the United Kingdom, and this is a very serious constraint. The advances in AI, for example in medical diagnoses, outcome prediction, are constantly accelerating. There's probably nothing that a robot won't eventually be able to do, and no one – bankers, brokers, lawyers, mediators, and even judges – is immune from being *disintermediated*, which is a new buzzword which I learnt the other day at a seminar for judges put on by the Financial Markets Law Committee. It means taking the intermediary out of the link and replacing it with an electronic system operated by AI.

Nonetheless, carrying on with constraints, not technological, but human skills and human preferences, will still be a main inhibitor in the short to medium term. For example, given my own experience in the Supreme Court, fellow judges and senior advocates in the Supreme Court still largely use paper, even when the

electronic alternative is available to them. I am using twin screens, ten of them use single screens, but this means they have to use paper as well because you can't do a case on a single screen or not use a screen at all. When I look at the advocates in front of me, leading counsel almost invariably speak from paper bundles, while their juniors are behind laptops. It's a matter of time, it seems to me.

There are short-term constraints of a funding nature. Online systems, unlike I think paper systems, need teams that are constantly monitoring and improving the product, as you will no doubt hear in relation to the Traffic Penalty Tribunal which has always had a maintenance team alongside the online product, constantly receiving comments from the public and from users, inserting fixes, and publishing them, and inserting them to the main scheme in just the same way as people at Microsoft do with our operating systems. There are other funding constraints. Early take-up may not be sufficient to fund the investment by the payment of fees. This isn't currently a problem with the Court Service Reform Program, which is well funded for the purpose, but we have to ask, whether the funding will be protected to complete the reforms, most of which are in their infancy, bearing in mind the competition from health, now defence, education and dealing with Brexit.

There are other constraints. Even IT gurus make mistakes from time to time, and those responsible for procurement of IT certainly make periodic mistakes. We had something approaching a 10-year delay in getting online issue and filling up and running in the business and property courts, with wrong terms, millions of pounds of product developed and having to be thrown away, rows between the procurers and the IT designers, etc. These things undoubtedly still act as constraints.

There are problems associated with delays in obtaining the necessary primary legislation. For example, we were at committee stage well over a year ago before the last election, where the bill what would have introduced an Online Rule Committee to develop a wholly new approach to procedure across Civil, Family and Tribunals as the base of the introduction of online courts was ready. It was promised in the Queen's speech. The bill has still, for totally understandable reasons of parliamentary management, not been introduced. So, currently, all work on the online civil claims, for example, the Online Solutions Court having to go on under the jacket of Civil Procedure Rules Pilot. Anybody who's read my report will know that is about the worst possible environment in which to have to do it.

There are constraints imposed by reference to the fundamentals of the justice system. Communications in the context of the justice system must be accessible to all, including the many who are digitally challenged. Usually, those who are least able to afford professional help and most in need of it are indeed the most digitally challenged. Using smartphone and tablet technology rather than computer technology is a big remedial factor and is fundamental to what is being done in the reform program, but it's not a complete solution. Assisted digital, with telephone, video, online and face-to-face help is also a vital component in solving this problem, as is the preservation of a parallel paper path for the digitally challenged, at least in the short to medium term.

Secondly, justice must be transparent. Going online risks transparency, unless a new virtual public space is designed. The Supreme Court does well, I think, by live-streaming all its hearings, that is, using IT for bringing about transparency. But of course, the court only streams and makes publicly available that which is actually happening face-to-face in a particular room. The challenge of designing a public forum for what is not happening face-to-face is an altogether different cup of tea. Rest assured, this challenge is being addressed, and nobody regards it as a deal-breaker, but it doesn't prevent it from being a constraint.

Justice is not just about the mechanical application of the existing black letter of law to sets of facts by making reference to a rapid review of previous examples by a robot using a comprehensive database, which is what robots do in medical diagnoses, for example. Incidentally, we don't have such a database in this country; the Chinese are miles ahead of us, in the context of the justice system, in developing such a database, but we will get it soon. It's part of the Reform Program.

Now, robots may well soon do that process of the application of black letter law to fact sets more quickly, and perhaps more accurately, and probably, some would say, with less unconscious bias than judges. But, justice is also about equity, which is a series of principles designed to bring the dictates of human conscience into the justice forum. Justice is also about mercy, that is, tempering the rigid enforcement of the judgement creditor's rights with humanity to the debtor and to mitigate disproportionate hardship both to the debtor and to others; for example, giving time to pay and time to quit if it's a possession case. And if anybody in this room is in doubt about the centrality of mercy as an essential element of a good justice system, just read the book *Just Mercy* by Brian Stevenson, who is a black American lawyer who spent all his career working for prisoners on death row and prisoners with life sentences without parole in the American justice system. And making the losing party feel it has been listened to sympathetically is one of the most important and hardest tasks of a *human* judge. And if we find it difficult, goodness knows how difficult a robot would find it.

Justice is also about molding the common law to address social and other changes. Looking forward, rather than merely back at a database. None of these are suitable for robots, at least yet. There are big challenges in all these respects for their designers.

Ultimately, these constraints may be a matter of democratic choice, or may include a matter of democratic choice. How and by what, or by who, do we, as a society, wish to have our disputes judged and mediated? By people or by robots? Orally or online? Face-to-face or online or on screen? Do we want to have people sent to prison, evicted or ruined financially remotely, or do we want all of these to happen face-to-face? How much are we prepared to take second best because it's cheaper? And these decisions it seems to me are decisions for society to make in a political way, not just for the majority in a poll of court users, still less the government, ministries and judges, although they all have an important contribution to make.

An independent judiciary is currently one of the three foundations of our own written Constitution. Can this judicial arm be replaced wholesale with

robots? And who will design, train, maintain and improve the robots when the judges have all been disintermediated? There is already one recent criticism of online formats that they are looking too much like government, rather than independent court, entities. That criticism was well made in an influential report published by *Justice* a couple of weeks ago. Many disputes involve government as a party; in fact, all criminal disputes do, and almost all public law disputes do, including disputes about the custody of children, as do most tribunal disputes.

Now, I call all these discussions 'constraints', but I don't thereby mean to suggest that we should, therefore, adopt some kind of Luddite resistance movement to these changes. I am uber-keen on bringing as much civil dispute resolution online as is appropriate so as to improve access to justice, though perhaps, I may be unconsciously biased about myself being personally disintermediated. But these constraints are real, and they have to be navigated successfully. So, I'll end this short address by suggesting one or two, although not intended to be comprehensive, rules that might be used as guiding principles in this context.

Let me mention first a few do's. We should be collaborative. There should be collaboration between government and judges as there already is. There should be collaboration with legal professionals, many of whom feel at risk of being disintermediated by these processes, but who have a great deal to contribute. We should be collaborative with related professions and service industries, such as medicine, where huge strides are being made by the introduction of online processes and AI, and we, in the legal profession, would be mad not to listen to their experience. I attended a debate at the Royal Society only a week ago, mainly between lawyers and other professionals – medics, engineers, scientists – in which, for the very first time, the sort of collaboration that I mentioned earlier took place. And the lawyers present readily admitted how much more we need to do of that. There needs to be collaboration with court users and their representatives, including the representatives of those who have no voice of their own, and representatives of those who simply can't or don't go to court in the current environment. There needs to be collaboration with watch-dog bodies like Justice, and there needs to be collaboration as there is this morning, I'm delighted to see, with our overseas colleagues. This problem of collaboration is not something that is related purely to the United Kingdom or that needs a purely UK solution. Colleagues, particularly in British Columbia, have been central to development of ODR for the courts, and collaboration with them has been central to the development of the Online Solutions Court in this country. Blockchains and smart contracts know no national boundaries. And this is another reason why this whole thing has to be done on an international basis. And we must be collaborative with those who are active in politics. For example, in the Westminster Policy Forum, we must talk to politicians, we must bring them on side, we must help them to understand, we must help them to have an informed voice when they go to Parliament and to places where political decisions are made. And we must do this sort of collaboration at conferences like this.

Secondly, there is the issue of public and private investment. I don't think ODR can realistically be entirely funded by the state, nor be entirely funded by private enterprise. There must be a join-up approach between the two. We must

be inclusive in everything we do; we must not leave any class out of the benefits which we are developing. We must retain a perception that justice means more than just resolving disputes. I've mentioned equity and mercy, and I've mentioned that justice also exists for enforcement where there is no dispute. And we must adhere to transparency and develop new systems of online transparency.

A few don'ts. I don't think we should worry too much about getting it perfect the first time. The perfect is the enemy of the good. Modern IT is endlessly adaptable if things aren't quite right. We should not lose sight of or throw away the jewels which make our justice system the best in the world, such as oral hearings where they are needed. People constantly say to me they're astonished how much oral time our Supreme Court gives to really difficult legal issues compared with any other Supreme Court, at any rate in Europe or America that you might mention. Some advice could be given online in a commoditized form, but at the end of the day, there is no substitute for bespoke, early advice on merits. And indeed, there is no substitute for skilled advocacy.. We should not assume that because something can be done technologically, therefore it should, or must be. And we should not assume that one size fits all. Once you get into the justice system, one thing that hits you really hard is how everything is different from everything else. We should not get demoralized when we take wrong turnings. We should, I think, laugh at them and carry on.

And finally, please, we should not disintermediate mediators or judges before my wife, who is a mediator, or I, has retired. But happily, this won't be very long.

Thank you very much.