



ACADEMIC ARTICLE

Initial Reflections on the Potential Effects of the Covid-19 Pandemic on Courts and Judiciary of England and Wales

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This paper considers the initial impact of the Covid-19 pandemic on the administration of the courts in England and Wales. It explores the early empirical evidence the pandemic has had on the digitisation of justice. It further considers the medium to longer term potential impact the pandemic's consequences, and the effect it has had on digitisation of the courts, on court procedures, the nature of the judiciary, and the legal profession.

Keywords: Covid-19 pandemic; digitisation of justice; courts; judiciary; legal profession

Introduction

The English and Welsh civil justice system has, over the last thirty years, been subject to significant and continuing reform. It has undergone multiple changes to its procedure, not least the introduction of a new procedural code in 1999 (the *Civil Procedure Rules or CPR*) and its reform on an ongoing basis since that time.¹ There have been reforms to the funding of litigation that have reduced the provision of publicly-funded civil legal aid and increased the number of individuals and businesses litigating without legal assistance or representation.² The organisation and management of the judiciary and court service has also undergone fundamental reform. The judiciary became self-governing, at an institutional level, in 2005 following the Constitutional Reform Act 2005, with the Lord Chief Justice replacing the Lord Chancellor as head of the judiciary.³ Consequent to that, the management of what is now Her Majesty's Courts and Tribunals Service (HMCTS), which administers England and Wales's courts and the unified tribunals, became a formal partnership between the executive and the judiciary in 2011.⁴ And, finally, there has been significant liberalisation of the organisation of

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¹ For a summary of the various changes see, D. Dwyer, *The Civil Procedure Rules Ten Years On*, Oxford University Press, 2009; A. Higgins (ed), *The Civil Procedure Rules at 20*, Oxford University Press, 2020.

² See, for instance, Amnesty International, *Cuts That Hurt: Impact of Legal Aid Cuts in England on Access to Justice* (2016) <<https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF>>.

³ Constitutional Reform Act 2005, s.7; see G. Gee, R. Hazell, K. Maleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge University Press, 2015.

⁴ HM Courts and Tribunals Service, *Framework Document*, Ministry of Justice, 2014. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf>.

the legal profession. This latter reform has seen both the expansion in professional categories of lawyer (barristers, solicitors, chartered legal executives, costs lawyers, patent and trade mark attorneys), an expansion in rights of audience to lawyers other than barristers, and the restructuring of legal services regulation.⁵

Since 2016, however, English and Welsh civil justice has been undergoing what has been said to be its most significant reform since the late 19th century.⁶ It is one that, via a £1 billion investment in HMCTS by the government (the HMCTS reform programme), has sought to digitise the civil court process. It has done so in order to, variously, reduce the cost and time of civil proceedings to individual litigants, i.e., to improve the practice and procedure of the courts, and to enable individuals to litigate effectively without legal assistance. It is intended, and continues to intend, to achieve this by reducing the number of physical court buildings and administrative staff and by replacing paper-based procedures with digitised procedures and hearings. It is a reform process that is to render English civil justice 'digital by design and by default'.⁷ Its long-term aim is the introduction of a wholly online, digital, civil process, akin to that in use in the Civil Resolution Tribunal in British Columbia, Canada, for claims that would otherwise proceed in the County Court. As such it is, particularly, intended to incorporate negotiation and mediation into the intended digital civil process, with few claims having to be determined by a judge on their substantive merits.⁸ Underpinning the drive for digitisation was the assumption that it would render the delivery of civil justice, and its provision by the State, quicker, cheaper and more convenient for both the State and litigants.⁹

Progress on the reform programme's implementation has, however, been slow. By way of example the replacement of traditional paper-based filing and case management systems remains partial. Such reforms began to be rolled out in the High Court from October 2015.¹⁰ They remain a work-in-progress and have not yet been expanded to the Court of Appeal.¹¹ In the County Court, where 80% of civil litigation takes place, the use of e-filing remains subject to a limited pilot scheme that was initially introduced in September 2017.¹² E-case management also forms part of a similar pilot scheme, also introduced in September 2017, in the County Court.¹³ Online, which is to say digital, hearings in the County Court for applications to set aside default judgments have been subject to a limited, voluntary, pilot, known as the Video Hearings Pilot Scheme.¹⁴ On 23 March 2020 four years of slow progress ended abruptly. Radical and swift reform became the order of the day.

Due to the Covid-19 pandemic, and the fact that for public health reasons it was not possible to hold hearings in physical court buildings, the traditional paradigm for the conduct of litigation became untenable. Practically overnight, the judiciary determined that the '*default*

⁵ Legal Services Act 2007.

⁶ Sir Terence Etherton MR, *The Civil Court of the Future*, at [1], Judicial Office, 2017 <<https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>>.

⁷ Sir Michael Briggs, *Civil Courts Structure Review – Interim Report*, Judicial Office, 2015, at 4; see further, J. Sorabji, *The Online Solutions Court – A multi-door courthouse for the 21st Century*, (2017) CJK (36) 86.

⁸ An aim reiterated most recently by Sir Geoffrey Vos, *Online Courts: Perspectives from the Bench and the Bar*, Judicial Office, 2020 <https://www.judiciary.uk/wp-content/uploads/2020/11/Harvard.OnlineCourts.ff_.pdf>.

⁹ S. Vara M.P., Ministerial Statement on HM Courts and Tribunals Service, (16 July 2015); J. Sorabji, *ibid*.

¹⁰ CPR PD51O and PD51R.

¹¹ G. Vos (ed), *Civil Procedure 2020*, Vol.1 at 51.2.5, Thomson Reuters, 2020; CPD PD 51O.

¹² G. Vos (ed), *ibid* at 51.2.8; CPR PD51S.

¹³ G. Vos (ed), *ibid* at 51.2.7; CPR PD51R.

¹⁴ G. Vos (ed) *ibid* at 51.2.11; CPR PD51V. There has been no trial or pilot of 'audio' hearings e.g., hearings held via telephone as such hearings are a well-established feature of English and Welsh civil litigation and have been since at least 1999 when the Civil Procedure Rules was introduced: see, for instance, CPR PD 23, para.6.2.

position' became one where *'hearings [would] be conducted with one, more than one or all participants attending remotely'*.¹⁵ Traditional physical hearings became the exception and did so at a pace that would otherwise have been inconceivable, as the previous four years of the HMCTS reform programme so clearly illustrated. This rapid transformation was achieved through the use of online platforms, such as Skype, Zoom, MS Teams and, latterly through the use of a bespoke online platform developed for HMCTS known as the Cloud Video Platform or CVP, which it had been in the process of developing as part of the reform programme. It was also achieved through the enactment of emergency legislation (the Coronavirus Act 2020), temporary procedural rule changes,¹⁶ and guidance issue by the judiciary.¹⁷ Taken together these steps facilitated the use of remote hearings, that is to say hearings held via online video platforms, such that the judge, parties and witnesses were in different locations none of which was necessarily a physical court room.¹⁸

The various changes caused by the pandemic, the main focus of which was on the increased use of online video hearings, resulted in what Lord Burnett, the Lord Chief Justice of England and Wales, described as the *'biggest pilot project the courts have ever seen'*,¹⁹ albeit one done *'at great speed'*.²⁰ It was one that saw 80% of High Court work continue, with only a slight reduction in the work of the Court of Appeal's Civil Division.²¹ It is fair to say that it was an enforced pilot scheme that effected a greater and more significant change in approach in terms of moving proceedings online than the formal reform programme had achieved in four years. Just as significantly, the changes it effected are likely to be permanent. Again, as Lord Burnett CJ put it in evidence given to Parliament, there would be *'no going back to February 2020'* for the courts and judiciary.²² In this article, the question of what *'no going back'* might mean for the administration of English and Welsh civil justice is explored. To do so three specific issues are considered: first, the pilot's effect on the reform process, and specifically on the use of online video, as well as audio, hearings. The reason for this is that the pandemic has had no real effect on other features of the HMCTS reform programme i.e., it has had no real effect on the development and use of e-filing, e-case management etc; secondly, what the pilot means in terms of potential structural changes to civil procedure; and, finally, what it may mean in terms of potential structural changes to the courts and judiciary.

¹⁵ Lord Burnett CJ, Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts, (19 March 2020) <<https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>>.

¹⁶ Coronavirus Act, section 34, schedule 25; CPR PD 51Y – Video or Audio Hearings during Coronavirus Pandemic; CPR PD 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus; Coronavirus COVID-19.

¹⁷ See, for instance, Message from the Lord Chief Justice to judges in the Civil and Family Courts (<https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>); Civil Justice In England and Wales Protocol Regarding Remote Hearings (https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf). For a discussion in the context of criminal justice see, J. Sorabji & S. Vaughan, "This Is Not A Rule": COVID-19 in England & Wales and Criminal Justice Governance via Guidance, *European Journal of Risk Regulation*, 2020 (forthcoming).

¹⁸ Coronavirus Act 2020, schedules 23–26; also see for civil proceedings, Practice Direction 51Y – Video or Audio Hearings during Coronavirus Pandemic.

¹⁹ Lord Burnett CJ, Evidence to House of Lords' Constitution Select Committee, House of Lords, 13 May 2020, at 8.

²⁰ H. Genn, Evidence to House of Lords' Constitution Select Committee, 3 June 2020, at (4).

²¹ Lord Burnett CJ, *ibid*, at 1–2.

²² Lord Burnett CJ, *ibid*, at 7. A point he reiterated in, Bar and Young Bar Conference: Delivering Justice, in 2021 at 5 <https://www.judiciary.uk/wp-content/uploads/2020/11/20201118_Bar-Council-Conference-2020-LCJ-address_FINAL-V2-1.pdf>.

The Effect on the Reform Process on civil court hearings

The most recent history of structural and procedural reform of the English and Welsh civil justice system is one that has almost been entirely bereft of evidence. The Woolf reforms of the 1990s, which resulted in the introduction of the CPR, was not based on any rigorous assessment of what the supposed problems inherent in the system were, and which it was meant to cure. That reform process was, as Genn put, based on anecdote and supposition.²³ The Jackson reforms of the early 21st century, which were meant to cure defects in the CPR, were equally based on an assumption that there was a generalised problem with the cost of litigation. Unlike the Woolf reforms, however, once it commenced, it did gather some evidence from the legal services sector as to the nature of the problem. No independent evidence was gathered though. Ironically, what evidence it did gather demonstrated that for the vast majority of legal proceedings there was no general problem concerning costs.²⁴ Yet it resulted in wide-ranging reform nevertheless.²⁵ Furthermore, neither the Woolf nor Jackson reforms when implemented, unlike, for instance, comparable reforms in Hong Kong that were carried out in the early 21st century,²⁶ were subject to any ongoing scrutiny or assessment. There was thus no evidence-based assessment as to whether and if so how well they were working, and if they were not working, why not. There were thus no ongoing metrics to determine if future remedial reform was needed and, if so, what it might need to be.

The HMCTS reform programme was no different. It was primarily inspired by a need to save money. The courts, as with all other aspects of the public sector following the 2007 financial crisis were required to operate with a much smaller budget. By 2015 this meant it faced a reduction in its budget of a third or £750 million per annum.²⁷ To achieve that, large elements of the court estate were sold i.e., there were to be fewer court buildings and court rooms, which would thus reduce HMCTS capital and maintenance costs. And, there had to be a significant reduction in court administrative staff. In order to enable the civil justice system to operate effectively in these circumstances, the HMCTS reform programme was to transform, by 2020,²⁸ the civil process into a primarily digitised process.²⁹ The move to digitisation, as a means to achieve that end in the light of the reduction in court buildings and administration costs, was based on three assumptions as to its potential efficacy. They were that digitisation of the civil process, as well as the family justice system and tribunals justice system, would render the delivery of justice: less costly to individual litigants and the State; speedier; and more convenient.³⁰ It would, in other words, cure what Andrews has described as the unholy trinity of civil justice: cost, complexity, and delay,³¹ and do so even though the system was to operate with fewer buildings and administrative staff.

At the time the reform programme was being introduced there was however, as Tomlinson, has rightly pointed out *'very little evidence of the impact of digital procedures on public*

²³ H. Genn, *Judging Civil Justice*, Cambridge University Press, 2010, at 62.

²⁴ As the review accepted: R. Jackson, *Review of Civil Litigation Costs: Preliminary Report*, Vol. I, HMSO, 2009, at 53.

²⁵ For an overview see, S. Sime & D. French, *Blackstone's Guide to the Civil Justice Reforms*, Oxford University Press, 2014.

²⁶ Ongoing assessment in Hong Kong was carried out by the Chief Justice's Monitoring Committee on Civil Justice Reform.

²⁷ HM Treasury, *Spending Review and Autumn Statement 2015*, (Cmd 9162, 2015) at 69.

²⁸ By the time the pandemic started in early 2020, the timescale for completion of the reform programme had been pushed back to 2022.

²⁹ Joint Statement of Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor, *Reforming HM Courts and Tribunals Service*, (25 July 2013).

³⁰ See, for instance, S. Vara M.P., *Ministerial Statement on HM Courts and Tribunals Service*, (16 July 2015).

³¹ N. Andrews, *N. Andrews Principles of Civil Procedure*, Cambridge University Press, 1994, ch 21.

justice ... many views [including those of HMCTS were] therefore grounded in speculation.³² There was thus no real evidence that digitisation would achieve any of its objectives. Its assumptions may have been evidence-free, but there were, however, limited pilot schemes testing its impact. They were, though, either of little value due to their limited sample size, or they supported the view that the programme's assumptions were false. By way of example, in respect of the former, a pilot scheme concerning the use of online i.e., video, hearings in civil proceedings failed to yield any real results from its first year and in March 2020, just as the pandemic was starting, was extended for a further period.³³ In respect of the online filing and management pilots, little data has been made readily available nor has it been subject to any real evaluation, or at least not subject to any real public evaluation. What data has been made available in respect of those pilot schemes has, generally, been no more than a limited amount of detail as to use of the schemes and user satisfaction, which has been provided by the senior judiciary.³⁴ Similarly, in the Tribunals, its online, video, hearings scheme pilots, which were said to yield positive results, were based on sample sizes of such limited numbers, e.g., 23 proceedings, as to be of no significant value.³⁵ In respect of the latter, evidence, the release of which had to be secured via a Freedom of Information request in late 2020, showed that rather than being a less expensive means of delivering justice, a form of digital procedure introduced in the Tribunals was six times more expensive than the traditional process.³⁶

With these historic failings to draw on evidence properly either as a basis for reform or as a means to assess it, the first, and arguably most significant, impact that the pandemic had upon the English and Welsh courts was the one it is to have on the reform process. Specifically as a consequence of the pandemic, the role which evidence would play has changed in two ways. The most immediate and practical change is the new-found willingness on the part of the judiciary to subject the emergency measures taken during the pandemic to scrutiny. The enforced pilot scheme provided a basis on which evidence, on a large scale, could for the first time be gathered in real time on changes effected to the justice system, and the judiciary (rather than HMCTS) appears to have embraced that opportunity. Official evidence-gathering exercises were, for instance, undertaken during the course of the pandemic in respect of family justice on behalf of the President of the High Court's Family Division.³⁷ Most significantly for the civil justice system, the Civil Justice Council,³⁸ a statutory body independent of government albeit chaired by the Master of the Rolls,³⁹ commissioned a 'rapid review' of the

³² J. Tomlinson, *Justice in the Digital State*, Bristol University Press, 2019, at 49. And see, National Audit Office, *HM Courts and Tribunals Service, Early progress in transforming courts and tribunals*, HMSO, (2018) at 40–41, <<https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progress-in-transforming-courts-and-tribunals.pdf>>.

³³ CPR PD51V – The Video Hearings Pilot Scheme.

³⁴ See, for instance, Sir Terence Etherton MR, *Rule-making for a Digital Court Process*, in A. Higgins (ed), *The Civil Procedure Rules at 20*, (Oxford, 2020); Sir Terence Etherton MR, *Laws, Procedure And Language; Civil Justice and Cymru*, at [22]–[30] <<https://www.judiciary.uk/wp-content/uploads/2019/10/Legal-Wales-Conference-Address-2019-2-1.pdf>>.

³⁵ M. Rossner & M. McCurdy, *Implementing Video Hearings – Party to State: A Process Evaluation*, Ministry of Justice, 2018; M. Rossner & M. McCurdy, *Video Hearings Process (Stage 2) Final Report*, Ministry of Justice, 2020.

³⁶ M. Fouzder, *Digital appeals system 'cost six times more' than going to court*, *The Law Gazette* (21 December 2020) <<https://www.lawgazette.co.uk/news/digital-appeals-system-cost-six-times-more-than-going-to-court/5106841.article>>. The report is not itself available publicly.

³⁷ M. Ryan, L. Harker & S. Rothera, *Remote hearings in the family justice system: a rapid consultation*, Nuffield Family Observatory, 2020.

³⁸ The remit of which is scrutinise the operation of the civil courts in order to make recommendations to government and the judiciary concerning access to civil justice: *Civil Procedure Act 1997*, s.6.

³⁹ President of the Court of Appeal (Civil Division) and Head of Civil Justice for England and Wales.

impact of Covid-19 on the civil courts (the Byrom Review).⁴⁰ For the first time then the use of remote audio or video hearings in civil proceedings were made subject to significant and real-time evaluation. This stands in stark contrast to the availability of data concerning the various HMCTS reform programme pilot schemes referred to earlier.

In terms of the Byrom Review the level of scrutiny was unprecedented. While it only ran from the 1st to the 15th May 2020, its questionnaire, which examined user experience of remote audio and video hearings and digital processes introduced by HMCTS and the judiciary, received 1077 responses, of which 46 responses were submitted on behalf of professional groups, such as representative bodies of the legal profession.⁴¹ Additionally, 166 individuals took part in an online consultation meeting. In total it gathered evidence from 486 remote audio and video hearings, the majority of which had been conducted via audio link i.e., telephone and with 27% taking place with no participant in a physical court room.⁴² The main weakness of the Review, which it noted,⁴³ was that only 17 responses came from lay users of the system e.g., the litigants themselves. The Review produced a number of important insights into the use of remote audio and video hearings, each of which raise important questions about the assumptions underpinning the HMCTS reform programme.

By way of an overview, the Review found that the majority of remote hearings, both audio and video, were short; lasting no more than three hours. Just over half were interim (or interlocutory) hearings, with a third being trials.⁴⁴ The majority of participants were legally represented, with only 10.9% of hearings involving a litigant-in-person i.e., an individual not represented by a lawyer.⁴⁵ Against this baseline it found that there had been problems concerning effective participation in hearings.⁴⁶ Technical problems were common, and to a significant extent arose from the technology being used by the judiciary; arguably the IT hardware the judiciary were provided with as a result of the HMCTS reform programme.⁴⁷ Technical assistance was, also, generally unavailable because there were no court administrative staff to provide help. Four years into the HMCTS reform programme, it was only in a position in 19.5% of cases to provide such assistance;⁴⁸ a point that may suggest that the HMCTS reform programme's assumption that a digitised system, i.e., one that has digitised procedures such as e-filing and e-management and remote hearings, can run effectively with a significantly reduced court administration was overly-optimistic and may need to be revisited. The Review also noted problems with the way lawyers communicated with their clients, with parties speaking over each other, as well as there being problems as to whether the judge was perceived to have understood their submissions.⁴⁹ Even when the audio or video remote systems worked then, there were problems with the perceived quality of the hearing.⁵⁰

⁴⁰ Additionally, an independent review was carried out into the operation of the Administrative Court. J. Tomlinson, J. Hynes, E. Marshall & J. Maxwell, *Judicial Review in the Administrative Court during the Covid-19 Pandemic*, Public Law Project Research Paper, 2020; also see G. McKeever, *Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19*, *Modern Law Review Forum*, 2020 <<https://www.modernlawreview.co.uk/wp-content/uploads/2020/07/McKeever-Remote-Justice.pdf>>.

⁴¹ Dr N. Bryom et al., *The impact of COVID-19 measures on the civil justice system*, (CJC, LEF, 2020) <<https://www.judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/>> (The Byrom Review).

⁴² Byrom Review at 29.

⁴³ Byrom Review at 6.

⁴⁴ Byrom Review at 29.

⁴⁵ Byrom Review at 29.

⁴⁶ Byrom Review at 36.

⁴⁷ Byrom Review at 38–39.

⁴⁸ Byrom Review at 29, 39.

⁴⁹ Byrom Review at 43ff.

⁵⁰ Similar problems were reported by the independent review of the Administrative Court: J. Tomlinson, J. Hynes, E. Marshall & J. Maxwell, *ibid* at 14.

The Review did provide some, qualified, comfort for the HMCTS reform programme. 75% of respondents reported that they found use of video and audio technology to be either a positive or very positive experience. Satisfaction rates were, however, highest where proceedings were less contentious, or were shorter, interim hearings. They were also higher for video rather than audio hearings, which given that in the former the parties were better able to gauge the judge's view of their submissions and could, to a greater extent, see how far the judge was following the proceedings, is understandable. The highest levels of dissatisfaction were recorded in respect of video and audio hearings that took place in the County Court, where the least progress had been made in the HMCTS reform programme and thus the extant level of digitisation prior to the pandemic was at the lowest level. Overall though, and despite the satisfaction levels, the majority of respondents reported that audio and video hearings were worse than physical hearings. This was because they were viewed to be less effective overall than traditional hearings due to there being less effective party participation.⁵¹ Given the central importance of effective party participation in party confidence in the fairness of proceedings this finding is undoubtedly the most disturbing. It suggests that significant work remains to be done to ensure that participants view their participation as effective,⁵² and thus fair. That this finding was based primarily on responses from professional court users rather than their lay clients, or litigants-in-person, leaves open the question whether the position is actually worse for whose individuals for whom the civil justice system properly exists. At the least though, the Byrom Review makes clear that the assumption that remote delivery is necessarily better than traditional physical delivery of justice needs to be considered further, and lessons need to be learnt as to how the former can be implemented so as to ensure that litigants and their lawyers perceive the former to be as good a form of justice as the latter. This issue may then raise the question whether the singular approach adopted by HMCTS to the reform programme, focused on efficiency and cost-savings is an appropriate metric for determining the nature of ongoing digital reforms generally.

In addition to problems from the court user perspective, the Byrom Review provided further support for the view that the assumption that the HMCTS reform programme may not deliver justice at lower cost to the State may be flawed. Respondents to the Review noted that remote hearings took longer. They did so not only due to technological problems, which might be anticipated would reduce in time given increasing familiarity with and reliability of the remote systems, but because of the inherent nature of a remote hearing. The use of technology meant the participants had to take more breaks than they would during a traditional physical hearing.⁵³ Screen fatigue, eye strain and headaches were a common feature of video hearings.⁵⁴ They each required the introduction of short breaks in hearings. Breaks induced delay. While the Byrom Review did not consider the point, the fact that hearings took longer would also tend to imply that they were likely to be more expensive than traditional, physical hearings for the State.⁵⁵ Increasing time would mean that court administrative staff and the judiciary would have to spend longer on each hearing. Thus there would be an increase in the cost attendant on such increased staff and judicial time. Support for this conclusion that the longer hearings the Byrom Review noted resulted in increasing cost to the civil justice system is borne out by the evidence concerning the effect on the cost to the Tribunals of

⁵¹ Byrom Review at 8, 49, 54.

⁵² See, for instance, T. Tyler, What is procedural Justice?: Criteria used by citizens to assess the fairness of legal procedures, *Law and Society Review* (1988) (22) (No. 1) 103.

⁵³ Byrom Review at 59.

⁵⁴ Byrom Review at 56. This also raises the question of possible physical and mental health issues that may arise from long-term use of digital processes.

⁵⁵ It was noted, however, that the cost to the parties of attending hearings was in approximately 30% of cases reduced: Byrom Review at 58.

their pilot online procedure, which was noted above.⁵⁶ The tentative conclusion to draw from the Byrom Review, supported by the Tribunals evidence, then is that two of the assumptions underpinning the HMCTS reform programme may not be valid: remote hearings, particularly video ones, would appear to be both longer and more expensive than traditional physical hearings. At the very least the Byrom Review suggests that further evidence is required to assess whether HMCTS's assumptions are truly valid.

Finally, the Byrom Review considered the effect that the shift to remote hearings had had on open justice. As with questions of cost and time, this has a direct bearing on the HMCTS reform programme as it was to put in place measures to facilitate open justice via legislative reform. Those measures were to have been implemented in 2017 via the Prison and Courts Bill.⁵⁷ The Bill did not, however, become law due to the general election that year, and the measures had, by March 2020, not been reintroduced successfully.⁵⁸ With the onset of the pandemic, they were, however, introduced via the Coronavirus Act 2020, section 34 and schedule 25, as an emergency and temporary measure. The pandemic thus provided a means to test the 2017 Bill's legislation, to see if – as had been anticipated by the government – it would secure effective access to open justice. Here the evidence was broadly positive in terms of professional user experience. The media reported that video and audio hearings generally provided then with enhanced access to court proceedings, as they could cover more of them remotely than they would be able to do travelling from physical court room to court room. In terms of public access, the evidence was not clear as to the effect. While there was no evidence that members of the public had been prevented from accessing a video or audio remote hearing, equally there was no real evidence that their access had been enhanced, or maintained to the level available for physical hearings.⁵⁹

The judiciary's willingness to engage in evidence-gathering concerning the emergency measures had thus provided a number of important insights into the operation of an almost entirely digital-based civil justice system in terms of hearings. They thus ensured that a degree of evidence was obtained that was lacking in terms of the formal HMCTS reform programme generally. And importantly, they enabled evidence to be gathered that spoke directly to the assumptions underpinning that programme. It can properly be anticipated that the Byrom Review's findings, and those of other such studies in family justice, will be taken account of in subjecting the HMCTS reform programme to detailed scrutiny. This point leads to the second, and longer-term consequence of the judiciary's willingness to engage in evidence-gathering. That is the now clear commitment to obtaining data and testing assumptions and reforms in the light of it. It was not enough to carry out studies like the Byrom Review, further and better information had to be gathered and gathered on an ongoing basis. This contrasts with the position previously adopted by HMCTS. While there had been a commitment in place since 2019 by the government to gather data on, for instance, the impact of the reform programme on access to justice, there is no available evidence as to what steps had been taken to implement it.⁶⁰ Whatever the state of play in terms of that commitment, it is clear now, as Lord

⁵⁶ M. Fouzder, *ibid.*

⁵⁷ Prison and Courts Bill 2017, Explanatory Notes paras. 34 and 81. <<https://publications.parliament.uk/pa/bills/cbill/2016-2017/0145/en/17145en.pdf>>.

⁵⁸ Its provisions concerning video and audio hearings were reintroduced in the Courts and Tribunals (Online Procedure) Bill 2019, which also fell as a result of the general election in 2019.

⁵⁹ Byrom Review at 69ff.

⁶⁰ It should be noted that in 2019 HMCTS had committed to carrying out a formal evaluation of aspects of the reform programme: N. Byrom, *Digital Justice: HMCTS data strategy and delivering access to justice*, Legal Education Foundation, 2019 at 2. An advisory panel to oversee the evaluation was established, see Ministry of Justice, *Advisory panel terms of reference and potential membership longlist*, 2019 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827074/Annex_A_-_Advisory_panel_terms_of_reference_and_membership_list_16.7.19.pdf>.

Burnett CJ in evidence to Parliament put it, the '*need to do a proper evaluation*'⁶¹ was fully understood and accepted. That that evaluation was to focus on the changes implemented in response to the pandemic will inevitably mean that the HMCTS reform programme will itself have to be properly evaluated. The changes effected to deal with the pandemic were both based on and used technology put in place by that reform programme, and they accelerated the use of digital technologies that it would ultimately have introduced over a period of time. Consequently, future reform, and revision of the reform programme and the processes put in place during the pandemic, ought now to be based, for the first time in respect of the English and Welsh civil courts, on an ongoing evidential evaluation, including evidence from lay court users. It is to be hoped that, as Genn and Susskind have both pointed out, this new found empirical approach will be: systematic; comprehensive; and, capable of evaluating what works from the perspective of represented and unrepresented litigants, vulnerable litigants, lawyers and judges.⁶²

Structural changes to civil process

The second major effect of the pandemic is likely to be on the form and structure of the civil process itself. Traditionally, similar civil court procedures existed in the County and High Courts, albeit they were set out in two different procedural codes: the County Court Rules and the Rules of the Supreme Court, respectively. In 1999, the CPR, was introduced as a single code applicable to both courts. It did, however, provide for the application of tailored procedures to different types of case depending, primarily on their financial value.

The pandemic's impact will likely build on this level of procedural differentiation. Rather than claim value primarily determining the process, as under the CPR and as had been intended by the HMCTS reform programme, its likely effect will be to see the nature of the trial process determined in future by the nature of the hearing itself. Given the findings of the Byrom Review concerning the suitability of shorter claims to remote hearings,⁶³ in all likelihood there will be a presumption that all case and costs management and costs assessment hearings in the County and High Court will take place remotely either via audio or video. This development was anticipated by the HMCTS reform programme for low value consumer claims in the County Court, which due to their nature are short hearings albeit they were to take place via remote video or audio systems on the basis of claim value. It was not, however, previously anticipated, at least not in the near or medium term that such remote processes will be used for other hearings, such as those in the High Court or those in the County Court outside the scope of low value consumer claims. Further to the Byrom Review's findings, and the fact that they were predominately focused on user feedback from the High Court, limiting such a development to a specific class of claims in the County Court now appears to be untenable. It is also likely that given the utility of remote, predominately video, hearings in the High Court's Commercial Court, there will be a rapid development and expansion of a more bespoke 'online procedure' as it is referred to in England and Wales,⁶⁴ with significant use of remote hearings for short applications and trials in that court, as well as in other specialist courts in the High Court. We are likely to see then predominately audio or video hearings in low value and short County Court hearings and predominately video hearings in specialist High Court hearings. And for the middle tier of cases in terms of value, which may be heard in the County or High Court, there is likely to be a blend of remote and physical

⁶¹ Lord Burnett CJ, *ibid* at 8.

⁶² H. Genn & R. Susskind, *ibid* at (2)–(3).

⁶³ Byrom Review at 8, 50ff.

⁶⁴ See, for instance, the intention to create an Online Procedure Rule Committee to devise new 'online rules of procedure' to apply to the digitised processes and audio and video remote hearings: Prison and Courts Bill 2017 and Courts and Tribunals (Online Procedure) Bill 2019.

hearings, depending on the circumstances of the case and of the hearing. To all of the above, paper-based and physical hearings are likely become the exception utilised only where necessitated by specific features of a claim or, importantly, by reference to the needs of specific litigants e.g., vulnerable parties,⁶⁵ including, as Genn has noted, the digitally, emotionally or intellectually excluded.⁶⁶

The upshot of the pandemic then is likely to see English and Welsh civil procedure move from being one that was broadly generic in approach centred around a physical hearing process to one that sees it become more of a Wittgensteinian family resemblance concept.⁶⁷ One part of this will be the development of a menu of hearing options from: purely physical to partially physical/partially remote⁶⁸ to wholly remote. Where hearings are wholly remote there is also likely to be a blended approach to participation with some participants taking part via audio and others taking part via video. Trials, as indicated above, will not be immune from this shift. The Byrom Review supports the conclusion that, in addition to low value claims that are within the existing scope of the HMCTS reform programme, short trials i.e., those shorter than three days or less, will generally become, as the judiciary have put it, digital by default i.e., trial hearings will be carried out by video by default. Longer trials, jury trials and those that are document heavy and will involve cross-examination of witnesses are likely to remain physical only, not least because of the physical and mental effects already noted concerning remote hearings. However, it is plain that that will only be a presumption. Throughout the pandemic the judiciary proved to be far more willing than might have been expected to hold trials via video, online platforms. Concerns, for instance, that witness evidence could not be tested effectively via video hearings were set aside, with it being noted that assessing credibility could be carried out as effectively in such a hearing as in a physical hearing.⁶⁹ There may well be many cases in the future where a video hearing, or equally an audio hearing, will be held in circumstances where today we might expect a physical hearing to be ordered.

The final change the pandemic is likely to effect is to accelerate the introduction of e-negotiation, e-mediation and e-ENE into civil procedure. The introduction of such measures was an integral part of the HMCTS reform programme. Only tentative steps had been taken to introduce it by March 2020 via a presumption of referral to a mediation process carried out via telephone in the online pilot scheme.⁷⁰ Due to backlogs, particularly in the County Court, of cases that were adjourned or otherwise could not be heard during the pandemic, increased use of such online dispute resolution processes in 2021 and 2022 to help clear that backlog. Their promotion could also help the courts meet any increased demand arising from pandemic-related claims, and which the courts might otherwise find it difficult to

⁶⁵ Dr N. Byrom, *Developing the detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice*, at (11) <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf>>.

⁶⁶ Professor Dame Hazel Genn, Evidence to House of Lords' Constitution Select Committee, 3 June 2020 at (4).

⁶⁷ L. Wittgenstein, *Philosophical Investigations*, Blackwells, 1953 (2009 ed), section 66.

⁶⁸ A partially remote hearing being one where some participants are present in a physical court room and others take part via audio or video.

⁶⁹ See, for instance, *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 at [7]–[9] on guidance when to hold a remote hearing where witness evidence is to be tested. And see *A Local Authority v Mother* [2020] EWHC 1086 (Fam) at [27], on assessing witness credibility. The courts have not gone as far, however as Susskind in suggesting that there is evidence that the assessment of witness evidence is improved if done via a remote hearing: see R. Susskind, Evidence to House of Lords' Constitution Select Committee, 3 June 2020, at (10)–(11) <<https://committees.parliament.uk/oralevidence/462/default/>>. On that latter point, see further, A. Reed & M. Adler, *Virtual Hearings Put Children, Abuse Victims at Ease in Court*, Bloomberg Law News, Jul 23, 2020.

⁷⁰ CPR PD 51R para.6.7.

deal with through what could be called ‘the adjudication track’ of civil procedure. As such, an aspect of the HMCTS reform programme that was meant, initially at least, to apply to low value consumer claims could, as has been argued cogently by Rabb,⁷¹ become the presumptive resolution track for a wide range of civil claims, leaving adjudication very much as the procedural option of last resort.

How exactly the structural redesign of civil procedure and practice will develop ought however now to be subject to more detailed consideration than was the case under the HMCTS reform programme. Given the acceptance, discussed above, that an evidence-based assessment of the changes effected by the pandemic is to be undertaken, there is a reasonable expectation that that consideration will now take place on a properly principled, systematic basis. However that might be done though, it appears more likely than not that changes such as those elaborated here will be introduced and will form the basis of English and Welsh civil process for the foreseeable future. As outlined by Sir Geoffrey Vos, the newly appointed Master of the Rolls and Head of Civil Justice in England and Wales, the future civil process

‘should not ... be governed by the concept that every case will end up in a traditional court room with all the witnesses, parties, lawyers and a judge gathered together in the same place at the same time. Some may. I am not against traditional court hearings. But when you consider the full gamut of disputes that need resolution, any idée fixe about the end point needs to be carefully managed.’⁷²

In rejecting the *idée fixe* of the traditional, physical court and its process, England and Wales appears to be moving firmly in the direction of an updated, audio and video digitised version of Frank Sander’s multi-door courthouse;⁷³ a movement that has been accelerated by the pandemic.

Structural changes to the Courts and Judiciary

Finally, the pandemic may result in structural changes being made to both the courts and the judiciary. These are, however, unlikely to be short-term changes.

England and Wales’ court structure is hierarchical in nature. The County Court deals with lower value, less complex cases. The High Court deals with higher value, more complex and specialist cases. Since the High Court’s creation in 1873 there have, however, been regular calls for the County Court to be merged with it, to create a single civil court for England and Wales. The last of these calls for reform was in 2007–2008.⁷⁴ They have never been acted upon. In 2015, an alternative proposal to alter the court structure, prior to the HMCTS reform programme commencing, was made. It was a recommendation to create, as part of what would become that reform programme, a new, standalone, online, digitised, civil court, to be called the Online Solutions Court.⁷⁵ It would, initially at least, have had an overlapping jurisdiction with the County Court. In time, it would no doubt have replaced that Court. It

⁷¹ S. Rabb, *Time For Presumptive Virtual Mediation In The UK*, <<https://www.law360.com/articles/1265725/time-for-presumptive-virtual-mediation-in-the-uk>> on the potential for moving to a presumption in favour of mediation as a response to the Covid-19 pandemic.

⁷² G. Vos, *Online Courts: Perspectives from the Bench and the Bar*, Judicial Office, 2020 at [12] <https://www.judiciary.uk/wp-content/uploads/2020/11/Harvard.OnlineCourts.ff_.pdf>.

⁷³ See J. Sorabji, *The Online Solutions Court – A multi-door courthouse for the 21st Century*, (2017) CJQ (36) 86.

⁷⁴ Sir Henry Brooke, *Should the Civil Courts be Unified?*, (Judicial Office, 2008) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/brooke_report_ucc.pdf>.

⁷⁵ See M. Briggs, 2015 at 51; M. Briggs, *Civil Courts Structure Review – Final Report* Judicial Office, 2016.

might also have reasonably been expected over time to have taken over a significant amount of the High Court's jurisdiction. That proposal too was rejected by the government in favour of developing what would in effect become an online, digital, procedural case track in the County Court, with the general expansion of e-filing, e-case and document management. The basic hierarchical model operative since the 1870s has thus, until now, remained in place.

The Covid-19 pandemic resulted in both the County and High Court using the same digital technology to conduct audio and video remote hearings. The same approach was taken to holding remote interim hearings and remote trials in both courts. Furthermore, in order to work effectively, the same technology and technical support was needed in both courts; one of the particular problems reported in terms of County Court remote hearings was the absence of such appropriate technical support for judges, support that was more commonly available in the High Court.⁷⁶ To work effectively in the future, comparable levels of administrative and technical support and ways of working, will be needed in both courts. What is likely to develop then, if the two courts are to work effectively, is the application of the same digital processes, whether e-filing and e-case management, the same approach to remote hearings, and the same administrative systems and personnel. To all intents and purposes the courts will be the same, both in terms of how they operate but equally in terms of how they appear to operate via audio and video media. When this is taken together with the fact that since the Crime and Courts Act 2016, there has been increasing deployment of different types and levels of the judiciary across different courts (and tribunals), differences in judicial personnel between the courts is also likely to increasingly narrow. And, when the new digitally-inspired procedural menu, discussed above, is factored in, the rationale for maintaining a dual civil court structure is likely to come under increasing pressure, not least as to all intents and purposes the two courts simply become in appearance a single, primarily audio and video-based court. That pressure, and the realisation that there is no functional or other principled difference between the two Courts may, in the medium term, see the possibility over 170 years after it was created in 1846, of the County Court finally being subsumed within the High Court, and the latter's transformation into the single, civil court for England and Wales.⁷⁷

Changes to the judiciary are also a possibility. These are likely to arise over the longer term than any potential change to the court structure, and are also likely to arise indirectly. The first potential change is likely to be a continuation of one that was already in train: the transfer of responsibility for case management to legally-trained court staff from District Judges in the County Court,⁷⁸ and the acceleration, noted above, of the use of online dispute resolution as an integral part of case management.⁷⁹ The former is likely to see increasing elements of the pre-trial process shifted away from the full-time judiciary to legally-trained administrative staff, albeit when so acting the court staff will not be subject to direction from the executive.⁸⁰ The latter will see both court staff and judiciary having to be trained in negotiation, mediation and early neutral evaluation techniques. Taken together both changes will fundamentally alter the nature of the judicial role; on the one hand reducing its input into active case management, while on the other moving it away from being a primarily adjudicative role to one that is more focused on promoting and facilitating consensual resolution. More rapid development and

⁷⁶ Byrom Review at 39.

⁷⁷ The merger would need to be effected in this way due to the County Court being a statutory court of limited jurisdiction, whereas the High Court is a superior court of unlimited jurisdiction.

⁷⁸ See CPR PD2E and PD51R.

⁷⁹ See, G. Vos, *Leading the Charge – Our international position*, Judicial Office, 2020, at [16]–[17] <https://www.judiciary.uk/wp-content/uploads/2020/11/BarConference.19thNovember2020.nf_.pdf>.

⁸⁰ Courts and Tribunals (Judiciary and Staff) Act 2018, schedule, part 1.

use of remote technology is likely to facilitate this shift at a faster pace than would have been anticipated under the HMCTS reform programme absent the Covid-19 pandemic.

There is a potential second longer-term impact that the pandemic may have on the judiciary. The English and Welsh judiciary is, as is well-known, not a career judiciary. Judges are appointed via open competition from the legal profession. Appointment has historically been drawn primarily from the Bar i.e., from advocates rather than from solicitors. Over the last thirty years in-roads into the practical near-monopoly on judicial appointment held by the Bar have been made. Predominately, however, judicial appointments continue to be made from the Bar. One potential consequence of the pandemic is likely to be a significant reduction in the size of the Bar, and particularly of practitioners at the criminal Bar. By way of example, a survey taken by the Bar Council, the representative body for the Bar of England and Wales, during the pandemic reported that 38% of criminal barristers were, due to its effect on their practices, uncertain if they would still be in practice in 2021.⁸¹ If such a reduction, or anything approaching it, is realised there is likely to be a comparable reduction in future barrister candidates for judicial office either generally and/or in specific areas. Such a reduction may be, further, exacerbated due to increased competition by solicitors for court-based advocacy work than has historically been the case. Historically and generally, solicitors have not taken up the possibility of acting as advocates in court, leaving that work to be carried out by barristers. The rapid shift to remote hearings could change that. One of the reasons why solicitors have not acted as advocates when they could in principle do so has been the need to travel to and wait in court for hearings to commence. This takes them away from other fee-earning work. The move to remote hearings eliminates travel and waiting time. Solicitors could thus take part in such hearings from their offices, in the same way that barristers were able to do so during the pandemic. Conducting hearings remotely will thus enable solicitors to compete for work that was previously only economically viable for barristers. Thus an additional competitive pressure will arise on the junior bar, particularly, as solicitors will be less likely to refer work to the junior bar, preferring to keep it in-house. This may then result in a further reduction in barrister numbers.

The consequence of any general reduction in the Bar and increased competition with solicitors may well then lead to a practical fusion between the junior and/or non-specialist civil and family bar with the solicitors' branch of the legal profession. This may see the bar become a much smaller specialist referral profession for criminal jury trials or specialist disputes, such as commercial or intellectual property disputes. Such changes would mean that the constitution of the pool for judicial appointments would change significantly. It would mean that it would be both made up of more, and perhaps for some judicial appointments predominately of, solicitors. It would also mean that, in terms of practical experience, solicitors and barristers would compete for appointment on a more even basis than at present. At present barristers apply having had greater advocacy experience. In the future both branches of the profession may well apply on the basis of the same level and type of advocacy experience. The ultimate consequence then of the pandemic in terms of its effect on the judiciary may well be to see it transformed from being predominately drawn from the Bar, as currently remains the case, to one where apart from specialist appointments, solicitors are likely to predominate.

Conclusion

In considering the HMCTS reform programme, Sir Ernest Ryder, then the Senior President of Tribunals (head of the tribunals judiciary) noted Milton Friedman's famous comment that '*... only a crisis – actual or perceived – produces real change. When the crisis occurs, the actions*

⁸¹ See Bar Survey Summary Findings July 2020 <<https://www.barcouncil.org.uk/resource/bar-survey-summary-findings-july-2020-pdf.html>>.

*that are taken depend on the ideas lying around.*⁸² He made this remark in the context of explaining how the HMCTS reform programme was a product of the age of austerity ushered in by the 2007 financial crisis. He took the view that that financial crisis was a spur to radical change – digitisation – of the courts and tribunals' processes. More so than the financial crisis, the Covid-19 pandemic was, and at the time of writing remains, a crisis of a nature and type that is without parallel since the early years of the 20th century; it is certainly one far beyond that of the previous financial crisis. Digitisation and the use of remote hearings, particularly video remote hearings, were the ideas lying around in 2020. They were ideas that were beginning to be introduced, albeit slowly. The crisis precipitated a singular and rapid advance in their use. Where there may have been reticence previously, the pandemic meant there was no alternative. As a consequence the pandemic has produced, and will continue to produce, the greatest degree of reform to the English and Welsh civil courts arguably since the 19th century. And in the shortest period of time.

The effects of the pandemic, the changes it has produced and the broad acceptance of them, will in all likelihood produce real change in structural terms to the procedure and practice of the courts, even if not all the changes are maintained in their pandemic form in the future. They are also likely to produce, indirectly, and as a longer-term consequence, structural change in the legal profession, and hence the future shape of the judiciary, and to the structure of the courts. It is too early to tell exactly how such changes will ultimately be realised, but an outline of possibilities can be seen. It is to be hoped though that, given the manner in which the 'pilot' was forced on the courts and the realisation it has brought that evidence, assessment and analysis is needed before lessons can properly be learned, the changes to come will follow on from a systematic evaluation of England and Wales' court processes, the structure of its courts, legal profession and judiciary as they form an interconnected ecosystem.⁸³ It must also be hoped that any such evaluation is principled as well as evidence-based, an approach that English and Welsh civil justice has not taken in the past but now seems to have accepted as both right and necessary. In that way perhaps the final substantive change brought about by the pandemic will be to the manner in which the modernisation of England and Wales' civil courts and judiciary is affected in the future; that there will be a shift away from the historically ad hoc approach to reform, based on untested assumptions and anecdote, to a more principled, systemic and rigorous one.⁸⁴

Competing Interests

Although I do not perceive it to be a competing interest, I would like to disclose that until April 2020 I was the principal legal adviser to the Lord Chief Justice and the Master of the Rolls in England and Wales. I am currently a member of the Shadow Data Governance Panel of Her Majesty's Courts and Tribunals Service.

⁸² M. Friedman cited in E. Ryder, *Assisting Access to Justice*, Judicial Office, 2018 at [17] <<https://www.judiciary.uk/wp-content/uploads/2018/03/speech-ryder-spt-keele-uni-march2018.pdf>>.

⁸³ Sir Brian Leveson, *The Pursuit of Criminal Justice*, (25 April 2018) at [47] <<https://www.judiciary.uk/wp-content/uploads/2018/04/speech-leveson-ccrc-lecture-april-2018-1.pdf>>.

⁸⁴ As was foreshadowed by Sir Ernest Ryder in his approach to the HMCTS reform programme, see E. Ryder, *Securing Open Justice*, in B. Hess & A. Koprivica), *Open Justice: The Role of Courts in a Democratic Society*, Nomos/Hart, 2019 at 138.

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