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HOW JUDGES WORK: A REAPPRAISAL FOR THE 21ST CENTURY

JUSTICE: TOM SARGANT LECTURE

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Introduction

1. I have wanted for some time to talk about judging in the 21st century.
2. As many of you will know, judging is seen by many as an unchanging and unchanged activity. Of course, we no longer conduct murder trials in an hour and send people to the gallows before lunch as may have happened in the 18th century. But the business of deciding legal issues and hearing evidence has been largely unchanged for many years and certainly ever since I started studying the law in 1973, now very nearly 50 years ago.
3. The truth, however, is that the lives of the people that our justice system serves have changed hugely in those 50 years. In 1973, there was no internet, no email, no social media, no artificial intelligence, no blockchain, and no big data. Now we have all those things, and, as a result, people's reasonable expectations have changed too. The court-based dispute resolution system that we operate was born in bygone centuries and, despite some attempts at reform before the digital age – such as the Woolf reforms – it is still steeped in its history.
4. In judicial terms, in 1973, we had 18 as opposed to 39 Court of Appeal Judges. We had 70 as opposed to 105 High Court Judges, and 240 as opposed to 660 Circuit Judges. But one thing about these judges that is also notable is their diversity. In 1973, the

overwhelming majority of the 328 judges at the levels I have described were white men. Now the figures are 27% female and/or Black, Asian and Minority Ethnic (BAME) Court of Appeal Judges, 32% female and/or BAME High Court Judges and 34% female and/or BAME Circuit Judges.

5. This evening, I want to explore the way that judges work and their diversity. And I want to ask what changes could be made to create a justice system fit for the 21st century.
6. To achieve this, we need to look at :-
 - (1) First what has changed about our society that requires the reappraisal I am suggesting.
 - (2) What needs to change in our justice system if it is to retain the confidence of our modern population and modern business.
 - (3) What are the ways of working that will be required of judges in order to decide cases within the reformed structures that I envisage.
 - (4) How the judiciary can truly reflect the society that it serves.

What has changed about our society that requires the reappraisal I am suggesting

7. I have already mentioned some of the dramatic technological changes that have occurred in the last 50 years. Some would argue that justice systems provide the consistency and certainty that society needs, and that their unchanging nature is, therefore, a good thing. To an extent, I agree. It is of fundamental importance to every society that citizens have the ability to vindicate their legal rights against other citizens and the state before an impartial judge, at proportionate cost, and without undue delay. These are the underpinnings of the rule of law.

8. I also accept that our justice system is probably more accessible now than it was 50 years ago. It is easier for families to access the courts, and for small claims to be brought, and for tribunal claims to be made than it probably was back in 1973. But the developments that I have mentioned have also given people greater and different expectations. Rapid communication has meant that injustices that ordinary members of society would just have had to swallow in 1973 are now the subject of campaigns on social media and sometimes long-term upset, dissatisfaction and even psychological trauma. The complexities of lives in a digital era means that there is more scope for injustice as between citizens and as between citizens and the state than there ever was before.
9. These changes have crept up on us, which is why I am making my comparison with the time when I started to study law. They have not happened overnight, and there has not been one development that has made it necessary to re-evaluate how our justice system works. It is not because the internet is there and is now pretty well accessible to all, that makes it sensible to put justice online. It is not because artificial intelligence is an available tool that means we must use it to resolve civil claims. It is the combination of changes in our society that all these developments taken together have caused that should, I think, suggest to the thoughtful observer that a re-evaluation of how we resolve disputes is necessary.
10. I often say that young people in the era of social media expect to get everything instantly on their mobile phones, and that they will not for very long continue to accept that justice can only be obtained on paper in a court building miles away after months or years of waiting. This also, however, is only part of the story. In the last 50 years, I have observed a number of fundamental changes in the relationship between citizens and businesses on the one hand and lawyers, the courts and judges on the other hand.
11. The paper-based face-to-face system of seeking legal advice and determining disputes in the 1970s was aligned with the way everything else in our society was done. Limited in the main to those who could pay, you went to see your solicitor in the High

Street, and a claim was typed out by a typist and taken down to the local County Court, stamped and then served in person or by post, before waiting 14 or 28 days for an equally paper-based response. But nobody needs to travel to seek legal advice any more, typists hardly exist, and the post is no longer used for everyday communications. A non-digital justice system is no longer aligned with everything else in society. Banking is now almost universally online. Utility bills are delivered and paid online; shopping is predominantly online, and inter-action with government is generally, as Covid has demonstrated, by apps, email or online.

12. Business life and business communication has changed beyond recognition. We no longer need to sign anything – electronic signatures are commonplace for tenancy agreements, energy supply agreements and commercial documentation. The ubiquitous use of the blockchain and of crypto-currencies and smart contracts is inexorably heading towards us, even if it has taken longer than some may have expected. Transferrable digital documentation will very soon be the norm in transportation, banking, financial services and across other industrial sectors.
13. Against this background, it is perhaps surprising, at least, that anyone should think it sensible to continue to resolve disputes arising from such digital engagements, whether between citizens, between the state and its citizens or between commercial entities, by an analogue paper-based and predominantly face-to-face process.

What needs to change in our justice system if it is to retain the confidence of our modern population and modern business

14. The case for change is, therefore, very powerful. The nature of that change is, however, less obvious.
15. Many of the stakeholders in our justice system are keen to preserve their existing ways of working. Lawyers undertaking IPOs are not well-disposed towards the idea that their documentation

should be digitised, and neither created nor checked by armies of youthful and enthusiastic para-legals and assistant solicitors.

16. Indeed, whilst many judges and lawyers have, over the pandemic, become quickly converted to the benefits of remote hearings, fewer are keen to change the underlying process of taking evidence and hearing legal argument viva voce, which has been the lifeblood of our courts since Sir Edward Coke sat in Westminster Hall as Chief Justice of the King's Bench between 1613 and 1616 – just 4 times a year in terms that lasted only 2 weeks each.
17. So, there is no doubt that many lawyers and judges are content to use electronic methods to do what we used to do on paper without any thirst to change the way disputes are resolved in any more fundamental way.
18. There are a number of reasons why I believe that is not enough. Of course, we can and, in many cases, do use electronic documents in court rather than paper ones. I have been an entirely paper-free judge for 2 years or more. Of course, we can and do use remote video hearings for many short applications even now that the pandemic permits us to return to physical courts. And, of course, we have introduced electronic filing in many of our senior courts and in the Business and Property Courts.
19. All these forms of electronic working do not, however, shorten the process of determining a dispute. In the civil process, 14 days is still allowed for the filing of an acknowledgement of service and another 14 days for a defence. Even small claims can still take 6 months or a year to resolve.
20. Moreover, the dispute resolution process is still not particularly accessible to non-lawyers and ordinary citizens. Some claims can already be brought by litigants in person online, which has been one of the great achievements of the HMCTS Reform Programme, but not yet all claims of whatever complexity.
21. There is, in addition, no middle way of determining a dispute that is defended, which does not involve attending a sometimes

lengthy oral hearing either on a video link or in person. This is an intimidating experience for many and is not always justified by the issues at stake.

22. In my view, we need to reconsider how we resolve disputes taking all the factors I have mentioned, and, I am sure, many more into account, so as to create a system that is proportionate in every case, easily accessible to all, timely, and provides repeated integrated opportunities for consensual resolution rather than exacerbation of the dispute. On too many occasions, we see the process itself creating entrenched positions between opposing parties from which each finds it increasingly difficult to retreat. It is noteworthy anecdotally how parties seem to become increasingly convinced of the justice of their case every time that case is repeated and elaborated in pleadings, witness statements, experts reports and then in written skeleton arguments and eloquent oral arguments.
23. I have spoken extensively about the reforms that I see as being necessary and will not prolong tonight's lecture by going into detail about them. It seems to me that we need an entirely online justice system for civil, family and tribunals. The online space should be accessible to all, whether they are represented or not. I see the justice system as a funnel into which all disputes are poured. There would be three layers: a first layer comprising a website and associated app which directs any would-be litigant to the appropriate pre-action portal, whether publicly or privately funded. A second layer comprising a whole range of pre-action portals or ombuds processes, and a third layer comprising online court platforms for money claims, damages claims, possession claims, public and private family claims, and employment and immigration tribunals to name but a few. A single data-set is created for every case either when the proceedings are commenced or at the pre-action stage when the case is brought to a pre-action dispute resolution portal, such as the existing personal injury portal or whiplash portal. The online programmes will suggest to the parties, whether manually or by the use of artificial intelligence out-of-court solutions, so that the parties

have multiple opportunities to reach a compromise. Directions are given online. Evidence, where required, uploaded online. And most important of all, the ultimate dispute resolution method will be proportionate to what is at stake. Many cases will be resolved by judges online on the materials available online without the need for any hearing at all. Where hearings are needed, they will be remote or face-to-face according to the needs of the dispute itself. There will be no automatic requirement that every dispute, however, trivial, must be resolved in an old-fashioned oak-panelled court room miles away from the parties' homes or offices.

24. For bigger commercial cases, and in some cases with less money at stake, hearings may still be needed, but even then, they should be of proportionate length and broken down into issues, so that the lengthy 'state' trial of business cases, lasting weeks or months, becomes unusual, a rarity, or even a thing of the past.
25. Most crucially, the online process I am suggesting will abrogate artificially long time limits born of the need to use typists and post boxes, and allow people and lawyers to put forward their cases online when it suits them and without the need for any, or at least so many, formally drafted documents that are costly and often unnecessary. The true issue between the parties will mostly be identified by use of sophisticated online decision-trees, making particulars of claim, sometimes evasive or even obstructive defences, and lengthy replies otiose.

What are the ways of working that will be required of Judges in order to decide cases within reformed structures that I envisage

26. If all this happens, and I should say that what I have described is very much work in progress in the courts of England and Wales, how will it affect the working lives of judges? This is, of course a big question, because many of the judges of 2021 signed up for a job that involved a working week of sitting in a physical court and deciding cases between real people represented by real life lawyers all arrayed in person in front of them.

27. Many present-day judges would not take kindly to a working week that was undertaken entirely in front of a screen without the court interactions I have mentioned.
28. So how is this circle to be squared? First, I think that judges and their working practices are already changing. Many judges are actually quite digitally savvy and can see the benefits of an online dispute resolution process. The benefits to the individuals and businesses litigating are palpable. There are concrete examples of cases within the new Online Civil Money Claims system that have been resolved in hours or days. It is appalling that, in county courts up and down the countries, barrows of paper files are still being wheeled around, clogging up the lifts, so that a judge can, for example, write on the top of a massive pile of papers that 21 days is to be allowed to the defendant to file an answer to a request for further information about their defence. It is obviously beneficial for all for such management processes to be done online.
29. Moreover, the misconceptions of a judicial tail should not be allowed to wag the whole justice system dog. The importance of creating a dispute resolution process that takes account of the technological and societal changes I have mentioned must be the dominant objective. It is a rule of law question. If we were to be providing dispute resolution processes fit only for a bygone era, citizens, businesses and indeed the state itself would cease to have confidence in it.
30. The reverse is true. If we grasp the nettle of reform and complete the digitisation of the civil (which in this context includes family and tribunals) dispute resolution, putting it online in a single process accessible to all, we will be fulfilling our role of stewardship, by insulating justice principles against the challenges of the future and giving our justice system the capability to resolve disputes effectively efficiently and at proportionate cost, even once new technologies such as smart contracts and cryptocurrencies immutably recorded on the blockchain are in use across our lives.

31. It is not our role as judges to set ourselves against the inevitable digitisation of society. On the contrary, as I hope I have been clear, I think we should embrace it. The Inevitability of digitisation does also mean though that judges must work to understand it better, and also to identify and set out the value of the essential component of human, judicial, interaction within this system. I have mentioned this point before in the context of AI specifically, but it is no different really with other technologies. We judges must be careful that the value we bring is not simply the rigid adherence to tradition, but is instead the articulation and careful stewardship of the purpose and value of justice.
32. From that high principle to the practical, I don't think that judicial working lives will actually be as different as some may fear. Yes, directions in online cases will be given online. Yes, papers will be replaced by online decision trees and digital documentation. But in the most complex cases, face-to-face hearings, whether remote or in person, will still be needed to resolve complex factual and legal issues. Judges, looked at generally and across the board, actually spend most of their time resolving substantive and complex questions of fact and law, not administering small claims.
33. Moreover, the overwhelming benefit of the smart online pre-action portals and the smart online court systems that HMCTS is already building within the Reform Programme is that they will relieve judges at all levels of a substantial proportion of their current administrative burdens. Once an order is made online, the digital system reminds the parties about its requirement by texts, emails and other communications – automatically. It is just the same as happens with your online Tesco order, when you are texted on multiple occasions to be informed that Kevin in the blue van will arrive at your door shortly, and that the leeks you ordered will be trimmed ones rather than whole ones. If a smart online judge drawn directions order is not complied with, even after multiple, reminders, the system itself will take the appropriate consequential steps. This operates, as I say, to prevent judges having to do so much administration. It is not, as some seem to think, directed either at saving money or getting them, the judges, to

undertake administration that can perfectly well be done by clerks and junior staff nor does it abrogate our responsibilities to have oversight of that system.

34. Judging, then, will be a bit different in the future, but then so will – actually so are - everyone’s ordinary lives. Judges will spend more time online and more time with documents on screen than with piles of papers. There will be less lengthy days in court, but ultimately the constant is the resolution of difficult legal and factual issues between real people or real businesses. The critical feature of judges and judging is that these real people and real businesses have confidence in the system. We have been fortunate that the justice system of England and Wales has always achieved that confidence. And there is no reason why anything I have said should impair that confidence. Judging will continue to be based on the complete integrity of our judiciary and the pursuit of the just solution to legal problems based on the law and evidence in each case.
35. And as I always say, lawyers will not be made redundant by what I am describing. Rather, they will be as much, if not more in demand than ever, advising on difficult issues and representing their clients in contested cases. The bulk of cases may be resolved online quickly and without lawyer involvement, but that will have huge economic benefits in terms of early payment and reduction of the psychological stresses caused by the effect of lengthy litigation processes. Lawyers will continue to be engaged wherever they can add value. They will still be needed by clients in all types of claims, but where the claim can be satisfactorily resolved at the pre-action portal stage or when brought online, by continuous mediated interventions, it is surely better that it should be

How can the judiciary truly reflect the society that it serves?

36. So, in the world as I see it, we have a digital online justice system, governed by online rules that will streamline the dispute resolution process and promote early compromise.

37. In my view, the creation of a digital justice system is highly relevant to improving the diversity of the judiciary. Digital working introduces flexibility into a judge's working life. Much of the preparation and case management and indeed case preparation can be done online at any time of the day. This allows women and judges from different communities to work whenever suits them rather than exclusively during what we now regard as 'normal court hours'. In addition as more and more cases are resolved without lengthy face-to-face court hearings the process becomes more acceptable and intuitive to a younger generation of more diverse lawyers. At the moment, becoming a judge, particularly a senior judge, is perhaps most attractive to a cohort of small 'c' conservative lawyers, who are often disproportionately white and male. The paraphernalia of judging - specifically the contentious process in the courtroom – is hard-wired into that section of our legal community. But once we put the process online in the way I have described, I can see women lawyers and lawyers from all communities being more attracted to the flexibility of online judicial working.
38. Some have said that judicial diversity will look after itself as more women and people from diverse backgrounds enter the legal profession. I am worried that this is not the case. We don't need the precise figures this evening, but it is clear that, in gender terms, around 50% of people entering the bar and the solicitors' profession have been women for years now. And yet, 50% of QCs and senior lawyers are not women – far from it. The pool of those who could join the senior judiciary is not, therefore, as diverse as it needs to be to ensure a diverse judiciary in the future.
39. I said in a speech to the Chancery Bar Association in January 2019 that this was because achieving real success in a litigation practice required our lawyers at all levels to dedicate so much of their time to their professional activities, that there was inadequate time for a proper life. Many people, I said, were simply not willing to countenance the levels of commitment required to sustain a successful practice. The sheer number of hours worked, and the requirement often to be available 24/7 and at week-ends, together

with the demands of lengthy oral hearings placed huge strains on advocates and instructing lawyers alike. It was, I said, often necessary for those involved in synchronous court hearings to stay up much of the night to prepare cross-examinations and speeches for the court. All these pressures took their toll on those with family and other commitments that were entitled to some priority in themselves.

40. The speech was not universally well-received, but remains valid, even after the lessons we have learnt from the Covid pandemic. I explained then that we could hope for a 'win-win' outcome by designing a new system for a new era, with the essential requirements of justice and the diversity of the judiciary in mind. A litigation system could be created that did not make so many of the demands that the present system imposes on its lawyer participants. Much of the preparation could take place asynchronously with lawyers logging on and working at times of day that suited them, with judges making orders online, and the lawyers and parties fulfilling their obligations to the court with shorter deadlines, but outside the confines of a formal hearing. There would be, in that situation I said, be a real likelihood that the composition of the pool from which judges are chosen would come closer to its natural and representative diversity.

Conclusions

41. I believe that the reforms that I have mentioned will have a number of advantages. First, an online justice system will undoubtedly increase access to justice. The vulnerable and the digitally disadvantaged will be assisted to ensure that everyone can use it effectively. Secondly, it will streamline justice and reduce the costs to litigants, whether they are consumers, tenants, businesses, families or employees. Thirdly, it will improve the working lives of judges, allowing them to focus on what really matters, to concentrate on the cases that raise difficult issues of fact and law, leaving the smart systems to undertake the routine processes that currently reflect themselves in masses of boxwork

carted round the courts on the overflowing trolleys I have mentioned.

42. I believe that, once judges understand how the online space can improve their working lives, the judiciary will begin to attract, as salaried judges, whether full time or salaried part time working, more women lawyers and more lawyers from a diversity of different backgrounds. Working online allows for more family and carer friendly working patterns for judges and lawyers alike. Moreover, salaried judges will be freed up to concentrate on the important contested cases that require their attention.
43. The changes I am talking about will come quicker and be more radical than probably any of us can imagine. But judges in 2021 should be receptive to change; they should be driving change. Judges should be trying to ensure that, with a radical revision of the way we provide justice for every single member of our society, we do not lose our grip on the fundamental principles. The need for independent and accountable judges and justice systems to deliver fair and transparent, affordable, and most of all timely justice for our citizens.