Access to Justice through IT

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Last Sunday, Sajid Javid told the Conservative Party Conference that he is going to consult with the judiciary on setting up a Housing Court. He said: "We will consult with the judiciary on the case for a new housing court to streamline the current system. We will explore whether a new housing court could improve existing court processes, **reduce dependence on legal representation** and encourage arbitration, with benefits for both tenants and landlords. We will consult with the judiciary on whether the introduction of a new housing court can meet the aim of saving time and money in dealing with disputes."

Presumably, like HMCTS, Javid is hoping to harness the benefits of technology to make the system more streamlined, more efficient and less costly.

But I worry whenever I read phrases like "reduce dependence on legal representation". It has echoes of Lord Justice Briggs, and his description in his interim report of the Online Court: "In fact the true distinguishing feature of the OC is that it would be the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers." Fortunately he rowed back significantly from that phraseology in his final report, and made it clear that there would be a need for legal advice at various stages in the court process. But it was a worrying thing to read at the time.

So let's get one thing straight from the outset. Access to justice through IT is not an alternative to access to justice through lawyers. Digital literacy should not be conflated with legal literacy - the two concepts are quite different. Whether you use IT or not, people need lawyers. The question is *how* clients access lawyers in a digital system, not *if* they do.

But let's not kid ourselves either. IT has changed the world, and continues to change it more radically every year. If you put someone from 1920 into a 1990s office, nothing would have changed significantly. We moved from typewriters to word

processors. Letters could be sent by fax rather than only physically. But the general office infrastructure and roles would have been familiar.

Now put someone from a 1990 office into a 2017 office. They wouldn't recognise it. The technology has changed what we do, how we do it and who does it. As concepts such as voice recognition and artificial intelligence become more sophisticated, the pace of change is going to continue at least as fast as it has over the past 25 years. Your 1990 office worker is soon going to feel that they have been transported to the bridge of the Starship Enterprise.

Our courts, however, have not changed much since 1990. Cynics would say that they have not changed much since 1890 - and while that is probably a bit unfair, it is not without a nugget of truth to it.

Take the issuing of proceedings. Why, in 2017, do we still have to send proceedings on paper to the Court, where they sit in a pile gathering dust for days and weeks until the Court staff get round to processing them? Why do we send trainees down to the physical court counter to issue emergency applications? Why not enable lawyers to complete the forms online, send them to the Court electronically, and get a sealed copy to print out and serve almost instantaneously? That is one of the projects that HMCTS is working on that should be in our civil courts within the next year or so. By the time this is complete, HMCTS will already be working on the next stage, dealing with defences, and will build on this using agile principles until the whole system is online.

Another area the HMCTS programme is looking at is hearings. Why should a whole bunch of lawyers have to rock up to court to agree directions that are not significantly in dispute, just to have a five minute hearing in front of the judge? There is no logical reason why this cannot be done by telephone or video link, or even online via live webchat, saving your time and your client's money - or in a legal aid case, meaning you have to spend less time to earn your limited fee.

This, I think and hope, is what was behind Lord Justice Briggs's description of how "the Online Court" as a concept was only one element of a court system all of which would be online. He said, "The ambition of the Reform Programme is that the whole of the civil courts should be digitised. Literally speaking, the civil courts of England

and Wales will consist of one or more online courts, probably accessed through a common online portal."

However, we know that the HMCTS plans go even further than this, and would extend the use of technology, further than we might feel comfortable.

Is it right that questions of bail might be dealt with by video link, when this may impair the ability of the lawyer and their client to discuss possible bail conditions and make the necessary arrangements? Is it right that people should be able to plead guilty to a criminal offence online? Is it right that a family litigant, discussing issues that are highly emotional, might find their case decided by a remote figure on a video screen rather than a human being sitting in front of them? Just as we wouldn't expect Mental Health Act claims to be dealt with via an online process due to the vulnerability of the user and the fact that these cases deal with questions of liberty, I find it strange that the HMCTS reform programme is testing virtual bail applications (with the aim to have a national roll out) yet at this first hearing the same issues of vulnerability and liberty could apply.

Technology can do great things, but we always need to be alert to the danger that in the name of efficiency, we end up damaging the quality of justice.

Despite the advance of technology, there remain elements of the grand plans that still, for now at least, seem to be more in the realms of science fiction than realisable fact. The vision for the Online Court seems to be that a member of the public would be able to answer a series of plain English questions, structured within a decision tree, and that the software would then generate the statement of case, removing the need for lawyers to draft pleadings. It is easy enough to see how such a structure could be developed for any given case. It is far harder to see how a system could be designed with a decision tree that could cope with the infinite variety of scenarios that the public will present with. It may be possible to get some basic generic information in this way, but I don't believe it is going to be possible any time soon to do away with free text boxes altogether. As long as you have free text boxes, you are going to have people wanting help to know how they should draft what they write in them.

Outside the Court, there are other ways that technology can change the way people access legal services.

Last year we produced the report Capturing Technological Innovation in Legal Services, setting out best practice and examples of uses of AI and machine learning in legal practice.

For example, in Canada, Step to Justice is a tool that equips people to work through their legal problems with easy-to-understand steps, including practical tools, such as checklists, fillable forms, and self-help guides. It can also give referral information for legal and social services across Ontario.

Another famous example was the Rechtwijzer system. The idea of this system was that a separating couple would each enter into the platform what they saw as the outcome they wanted, across issues relating to the home, finances and children. The system then identified where they were in agreement, and helped facilitate discussion in areas of disagreement. The software was also able to put the parties directly in touch with a mediator or a lawyer. Despite getting good feedback from users, and having to a significant degree proved the concept could work, the Dutch Legal Aid Board ended their engagement with the system in March this year.

The designers of the system have a number of theories as to why the project did not take off as they had hoped. One argument is that it needed a longer term commitment from the Government; and that Government support in other jurisdictions was not forthcoming. Another more contentious argument is that current legal professional regulatory regimes do not support such innovative systems. I would agree with this argument in part. There is a constant tension between innovation, regulation and access to justice. But professional regulation is there for a reason. When plans were being discussed to introduce a British version of Rechtwijzer, we raised a number of concerns, not because we are Luddites but because we believed these concerns were matters that needed to be addressed in the interests of clients.

For example, we were not clear that the system screened effectively for domestic violence, abuse or other imbalances of power between the parties. We couldn't see how the disclosure of assets could be verified. We could see difficulties for solicitors advising through the system to check for conflicts of interest, to be sure they had a complete picture when advising, to check the parties' identities or to assure themselves that the client had properly understood their advice. There also seemed to be provisions under which a single lawyer would effectively be acting for both

parties. You may tend to the view that our regulatory bar to doing that is there for good reason.

I also think that a system such as Rechtwijzer would be far more useful to a couple that would probably have been able to resolve their differences fairly easily anyway, than to those with more intractable disagreements.

So the technology looks interesting and seems to have potential, but it is very difficult to think through all of the implications. Others are looking at the way the system worked, and considering whether there are different ways of building on the good aspects of the system while avoiding the problems it faced. It seems inevitable that sooner or later someone will come up with a variant on this scheme. As Roger Smith observed, "it is not always the early adopters of new technologies that win out in the end. Skype was not the first video communication programme to run on the net: just one of the most successful."

We are also exploring how technology can be used to improve access to justice. We recently won the 'Legal Justice Hackathon', a competition designed to prototype tech based solutions to many of the challenges faced when trying to modernise our courts system and increase access to justice.

The system our team came up with was called CoLin, which is an amalgam of Courts Online. It was a voice-enabled system which would help a person to understand that their problem might have a legal solution, and to point them in the direction of how to resolve that problem. The system could help them to draft initial letters to the other side to help them resolve cases that are easily resolved, and would then help them to understand what to do next if those initial steps did not work.

While it is possible that CoLin, or something like it, could be developed further, we see its real value as being in identifying the sort of features that support services should include. Key to these, in our view, are voice operation, plain English, support for initial attempts at dispute resolution, and appropriate referrals to legal advice when required.

Some lawyers are concerned that there is a risk of such systems ending up replacing lawyers. That is why I think it is so important that the Law Society is engaged in this area. These systems are coming whether we like it or not. If we are involved, we can

make sure that they have regular signposts to people to get legal advice before proceeding. If done right, these products can be a form of public legal education which increases the number of people who understand that their problem might have a legal solution, and what legal advice can do for them. They would thus steer more clients to our members, but they would also help people take early dispute resolution steps themselves first, so that the cases that do come to our members have been effectively triaged before they reach you.

Our report also identified some of the ways in which changes are happening in the way lawyers deliver services.

One lawyer has developed an online platform that cuts down the time taken to obtain basic information from clients by getting them to complete questionnaires online and using the information to populate dashboards for the advisers. The dashboard gives the lawyer the important information about a client and their circumstances in a matter of seconds instead of over a couple of hours. Systems like this are a simple and obvious way to reduce the amount of time a client has to spend with their lawyer, without affecting the quality of the engagement. For privately paying clients, this reduces the cost to them. For legally aided clients, it makes the legal aid fee more economically viable.

CourtNav is an online tool developed by Royal Courts of Justice Citizens Advice in partnership with Freshfields, which helps individuals complete and file a divorce petition. Before the client can print off the document, it is checked by a pro bono lawyer, thus ensuring there is appropriate legal input into the process.

Of course, not all clients will be able to engage with such systems. As the Government rushes to embrace digital solutions, a key role for the Law Society is to continue lobbying hard on the need to ensure that there are effective services in place for those for whom digital solutions are not a viable option. My own view is that if technology-based services are available for those for whom they can be effective, hopefully that will free up resources to support those for whom they cannot.

I come back to my original point: Access to justice through IT is not an alternative to access to justice through lawyers. It does not matter how good, how easy to use, the IT might be. People will still want to be reassured by a human being that they have understood the law correctly and have a valid case. They will want to know what

evidence they need to provide. They will want to know whether there is any merit in any defence that is filed, and how they should respond to it. They will need advice on any offer of settlement, and on the consequences of declining to accept it.

These things will not change just because there are IT-enabled ways of dealing with them. I could have done my own conveyancing. I didn't, I instructed a lawyer. I could maintain my own car. I don't, I take it to a garage. I could replace my garden fence, but I will get a man in to do it. I do now submit my own tax return online, because it is extremely straightforward, but when I was a partner in a firm of solicitors I would not have dreamed of doing so.

In short, there are many, many things that I could do myself, but that I instruct an expert to do for me, either because I don't have the necessary skills, or I don't have the time it would take me to complete the task, whereas an expert can do it much more quickly.

And in my view, that will remain the case for people with legal issues for some time to come, particularly for the sort of clients and issues you deal with. The robots may be coming, but I don't think they are coming for you just yet. But in the meantime, technology may just help you to do your job quicker, more cheaply and for more people.