



Swansea University
Prifysgol Abertawe



Cronfa - Swansea University Open Access Repository

This is an author produced version of a paper published in :

Modern Law Review

Cronfa URL for this paper:

<http://cronfa.swan.ac.uk/Record/cronfa33804>

Paper:

Donoghue, J. (in press). The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice. *Modern Law Review*

This article is brought to you by Swansea University. Any person downloading material is agreeing to abide by the terms of the repository licence. Authors are personally responsible for adhering to publisher restrictions or conditions. When uploading content they are required to comply with their publisher agreement and the SHERPA RoMEO database to judge whether or not it is copyright safe to add this version of the paper to this repository.

<http://www.swansea.ac.uk/iss/researchsupport/cronfa-support/>

The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice

Jane C. Donoghue*

This article addresses a little discussed yet fundamentally important aspect of legal technological transformation: the rise of digital justice in the courtroom. Against the backdrop of the government's current programme of digital court modernisation in England and Wales, it examines the implications of advances in courtroom technology for fair and equitable public participation, and access to justice. The article contends that legal reforms have omitted any detailed consideration of the type and quality of citizen participation in newly digitised court processes which have fundamental implications for the legitimacy and substantive outcomes of court-based processes; and for enhancing democratic procedure through improved access to justice. It is argued that although digital court tools and systems offer great promise for enhancing efficiency, participation and accessibility, they simultaneously have the potential to amplify the scope for injustice, and to attenuate central principles of the legal system, including somewhat paradoxically, access to justice.

Keywords: information technology; access to justice; virtual courts; digital justice; public participation

INTRODUCTION

In an article published in this journal two decades ago, Robin Widdison posed the question: 'What will legal practice be like a quarter of a century from now?'¹ In attempting to predict how information technology (IT) would transform the way that future lawyers practice law, Widdison concluded that 'law practice will be subsumed and metamorphosed by the information revolution', ultimately changing the legal landscape 'out of all recognition'.² Acknowledging that prediction is 'a risky business', Widdison nonetheless accurately identified, with an impressive degree of foresight, the introduction of

* Professor of Criminology, College of Law and Criminology, Swansea University. Sincere thanks are due to Nicola Padfield, John Martyn Chamberlain and the two anonymous reviewers for their invaluable comments on an earlier draft of this article.

¹ R. Widdison, 'Electronic Law Practice: An Exercise in Legal Futurology' (1997) 60 MLR 143.

² *ibid*, 162.

numerous technological innovations which are now beginning to permanently alter the paradigm of legal praxis, including the adoption of electronic documentation, digital case files and case management systems; the implementation of audio/video links and conferencing; the development of online plea systems; and the growth of 'virtual' legal advice.³ Nearly a quarter of a century has passed since Widdison's article was published and the legal profession stands at a precipice. Rapid technological advancement in recent years has meant that law is at a pivotal point in its development: the legal profession is changing as it tries to keep pace with new technologies and devices that empower and enable and yet which can also threaten and divide. Digital technologies are colonising both civil and criminal legal procedure, resulting in a radical transfiguration of evidential, procedural and documentation mechanisms.⁴ The automation of high volume, low level processes and the increasing prevalence of digital applications and artificial intelligence (AI), raises critical issues concerning the use of data, privacy, digital intellectual property, security, and human rights and ethics compliance in digital settings.

This article addresses a little discussed yet fundamentally important aspect of legal technological transformation: the rise of digital justice in the courtroom. While there have been a number of influential studies on the impact of technology more generally upon the future of the legal profession,⁵ and much has been written in recent years about the legal regulation of new technologies such as nanotechnology, robotics, information and communications technologies,⁶ far less attention has been devoted to examining the significant ramifications of technology specifically for courtroom practices and procedures and there is a scarcity of literature which seeks to theorise what the consequences of digital courtroom innovations may be for enhancing public participation in the administration of justice, or the impact of technology upon access to justice, particularly for historically marginalised and disempowered populations. Indeed, Widdison frames his analysis of the future of legal technology

³ As is to be expected given the difficulties inherent in predicting technological futurology, not all of Widdison's predictions were entirely accurate and he understandably he did not foresee the formidable impact of social media, the development of litigation digital applications ('apps'), or the increasing prevalence of digital evidence presentation resulting from the advent of 'big data'.

⁴ E. Murphy, 'Databases, Doctrine, and Constitutional Criminal Procedure' (2010) 37 *Fordham Urban Law Journal* 803.

⁵ Most notably, R. E. Susskind, *The Future of Law* (Oxford: Oxford University Press, 1996); R. E. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2010); R. E. Susskind, *Tomorrow's lawyers: an introduction to your future* (Oxford: Oxford University Press, 2013); see also, B. Simpson, 'Algorithms or advocacy: does the legal profession have a future in a digital world?' (2016) 25 *Information and Communications Technology Law* 50; H. Sommerlad, S. Harris-Short, S. Vaughan and R. Young (eds) *The Futures of Legal Education and the Legal Profession* (London: Bloomsbury Publishing, 2015); S.I. Friedland, 'Adaptive Strategies for the Future of Legal Education' (2015) 61 *Loyola Law Review* 211.

⁶ R. Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford: Oxford University Press, 2008).

around the concept of 'professional ethos' to explain how IT advances might alter and fragment existing professional organisational structures, rather than seeking to develop a theoretical approach to understanding technology in the context of fundamental legal principles. Elsewhere, analyses of courtroom IT have tended to focus upon specific, individual innovations which have been examined in isolated silos. In this regard, it is important to recognise that although advances in courtroom technology have simultaneously proliferated internationally, a comparable situation is to be found in other jurisdictions where attempts to theorise courtroom technology have been limited. In the United States (US), for example, 'very little interest and attention has been given in literature to the changes that have occurred in association with the digitization of the judicial system despite their relevance for the operation of almost every other activity of the State'.⁷

Although it is *sine qua non* that courts ought to reflect advances in society, historically in the United Kingdom (UK) and elsewhere, the courts and to a lesser extent, the legal profession, have been amongst the most conservative professional domains in terms of technology adoption and in harnessing advances in technology to improve practice.⁸ In recent years, this has begun to change dramatically as a result of the large scale diffusion of technologies throughout the courts in most European countries, the US, Australasia and beyond.⁹ As a consequence, there are now a range of inter-related technological advances which will fundamentally impact upon and irreversibly change the ways that courts conduct their business, which include *inter alia*, cloud computing; 'big data'; mobile and wireless technology; and social media. In particular, the potential for the use of technologies in court to expedite processes and procedures which would otherwise be protracted and laborious has been identified as one of the principal benefits of increasing digitisation.¹⁰ However, the inevitability of greater courtroom technological innovation also raises many urgent and challenging questions for systems of justice globally, particularly in respect of defendant rights, procedural justice and ensuring that new technological structures and tools systematically enhance, rather than diminish, participation in the courtroom.

⁷ F. Contini and A. Cordella, 'Assembling law and technology in the public sector: The case of e-justice reforms' in *Proceedings of the 16th Annual International Conference on Digital Government Research* (New York: ACM, 2015).

⁸ H. B. Dixon, 'The Evolution of a High Technology Courtroom' in *Future Trends in State Courts* (Virginia: National Center for State Courts, 2011); B. Schiffner, 'Lights, Camera, Action: AV Technology is changing the landscape of the courtroom' (2012) 9 *Courts Today* 16.

⁹ M. Velicogna, 'Justice Systems and ICT: What can be learned from Europe?' (2007) 3 *Utrecht Law Review* 129; G. Lupo and J. Bailey, 'Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples' (2014) 3 *Laws* 353.

¹⁰ M. Workman, 'Advancements in technology: New opportunities to investigate factors contributing to differential technology and information use' (2007) 39 *International Journal of Management and Decision Making* 318.

The recent emergence of new forms of justice system technology has precipitated increasing scholarly interest and debate about how digital tools and innovations may ameliorate traditional courtroom practices. To date, the majority of academic attention has focused upon various types of administrative and cultural challenge as a barrier to successfully adopting and implementing courtroom technology; and the corresponding analytical frameworks that have been developed have tended to adopt an instrumental approach to account for the success/failure of technological implementation, drawing as they do upon information technology and change management literature. This literature has predominantly been concerned with what 'success' in court digitisation 'looks like', how it can be achieved, and practical barriers to effective adoption.¹¹ Although a number of scholars have raised important concerns about how legal, social, economic and technological issues variously intersect with notions of due process and procedural justice in the legal system,¹² scant attention has been devoted to providing a theoretical analysis of how advances in court technology, which appear to collectively privilege efficiency and cost reduction, ought to be reconciled with enhanced public participation and access to justice.¹³

Against the backdrop of the government's current programme of digital court modernisation in England and Wales, I consider the implications of advances in courtroom technology for fair and equitable public participation, and access to justice. In this article, it is not my intention to review the full panoply of new technological tools and innovations but instead to concentrate on several of the most salient digital components of the court reform agenda (video link technology; systems for online convictions; and access to courts and digital services). I posit that the pervasiveness of technocratic

¹¹ M. E. Heintz, 'The digital divide and courtroom technology: Can David keep up with Goliath?' (2002) 54 *Federal Communications Law Journal* 567; F. Gelinias, 'Interoperability and Standardization of Cyberjustice Systems: The Challenges Ahead' (2006) 10 *Lex Electronica* 1; L. Bachman, 'How to Take Advantage of Courtroom Technology' (2013) 40 *Litigation* 14; B.A. Aubert, G. Babin and H. Aqallal, 'Providing an Architecture Framework for Cyberjustice' (2014) 3 *Laws* 721.

¹² D. Reiling, 'Doing Justice with Information Technology' (2006) *Information and Communication Technology Law* 152; F. Senécal and K. Benyekhlef, 'Groundwork for Assessing the Legal Risks of Cyberjustice' (2009) *Canadian Journal of Law and Technology* 41; L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Oxford: Routledge, 2010); E. Rowden, 'Virtual courts and putting 'summary' back into 'summary justice': merely brief, or unjust?' in J. Simon, N. Temple and R. Tobe (eds.), *Architecture and Justice: Judicial Meanings in the Public Realm* (Oxford: Routledge, 2013).

¹³ See, however, E. Rowden, A. Wallace, D. Tait, M. Hanson and D. Jones, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (Penrith, N.S.W: University of Western Sydney, 2013); E. Rowden, *Remote participation and the distributed court: an approach to court architecture in the age of video-mediated communication* (Melbourne: University of Melbourne, 2011); L. Mulcahy, 'The unbearable lightness of being? Shifts towards the virtual trial' (2008) 35 *Journal of law and society* 464.

discourse and economic rationalism within the facilitating institutional landscape fails to take proper account of the way that access to legal institutions and processes shapes the way that courts serve as arenas for public participation. Legal reforms have omitted any detailed consideration of the type and quality of citizen participation enabled by newly digitised court processes which have fundamental implications for the legitimacy and substantive outcomes of court-based processes; and for enhancing democratic procedure through improved access to justice. I conclude that while digital court tools and systems offer great promise for enhancing efficiency, participation and accessibility, they simultaneously have the potential to amplify the scope for injustice, and to attenuate central principles of the legal system, including somewhat paradoxically, access to justice.

TECHNOLOGY IN THE COURTROOM

Courtroom technology has broadly been defined as: 'any system or method that uses technology in the form of electrical equipment to provide a clear benefit to the judicial process'.¹⁴ More specifically, the various technologies used in court can include IT equipment, such as laptops, iPads, court recording, transcription and video/audio conferencing technology; as well as administrative software such as case management systems, e-filing systems, e-libraries, case law indexes, and sentencing support systems. Over the last two decades, many jurisdictions internationally have sought to embed and extend digital justice processes within the framework of their court systems, resulting in substantive transfigurations in digital court architectures. In the US, for instance, Wiggins observes that the use of new forms of technology within courtrooms has 'fundamentally changed the administration of justice, and has revolutionised judicial practices'.¹⁵ Integral to these developments have been reforms to pre-existing and *ad hoc* forms of working and court practice, premised upon the notion of greater economic rationalisation to achieve reductions in expenditure and meet fiscal imperatives. As a consequence, determinations of 'success' in court modernisation have largely been concerned with the quantification of economic benefits associated with reductions in traditional resource allocation and the reconfiguration of court practices and procedures. The momentum of reform has spawned a rampant generation of new technologies and tools; yet little is currently known about how the use of courtroom IT impacts upon case outcomes, or how virtual technologies are experienced differentially across participant populations, despite the extensive diffusion of technologies across courtrooms internationally.

In England and Wales, technological innovations in court have taken much longer to gain traction than in other comparable international jurisdictions and the courts and tribunals system has for many years operated without even basic systems of IT, utilising archaic and resource intensive paper-based ways

¹⁴ M. Gruen, *The World of Courtroom Technology* (Virginia, USA: Center for Legal and Court Technology, 2003).

¹⁵ E. C. Wiggins, 'The courtroom of the future is here: Introduction to emerging technologies in the legal system' (2006) 28 *Law and Policy in International Business* 117.

of working.¹⁶ Despite the considerable historical legacy of (largely unsuccessful) efforts to encourage greater utilisation of technology and the inculcation of digital processes across the courts system in England and Wales,¹⁷ the courts were traditionally viewed in silos, situated 'on the margins' of the justice system.¹⁸ As a consequence of the advancement and diffusion of technology across a multitude of professional and private domains over a number of years, the courts can no longer be seen as a marginal entity but are now part of the wider inter-linked technological strata. The growth of the 'internet of things',¹⁹ resulting from the integration of mobile devices including smart phones, together with embedded networked communications and emergent platforms into modern life, has inevitably brought about greater technological assimilation into legal domains. Once prohibitively expensive for most courts, technology costs have been reducing resulting in greater and more widespread use of technological support tools in courts. As a result, the integration of technology has since become central to government reforms of Her Majesty's Courts and Tribunals Service (HMCTS) in England and Wales.

The first virtual courts were trialled in South East London and Kent in 2009, enabling these magistrates' courts to conduct first hearings of criminal cases by a live link between the court and police stations.²⁰ Subsequently, the Conservative-led Coalition government began outlining plans for the broader introduction of virtual courts as well as prison to courts video links in their *Swift and Sure Justice* White Paper in 2012.²¹ In 2013, the government then committed £160 million to improve digital working across criminal justice agencies; to create 'digital courtrooms'; and to make Wi-Fi

¹⁶ P. Darbyshire, *Sitting in judgment: the working lives of judges* (London: Bloomsbury Publishing, 2011).

¹⁷ *Civil Justice Review: Report of the Review Body on Civil Justice Cm 394* (1988); H.K. Woolf, *Access to Justice: Final Report* (London: HMSO, 1996); P. Creswell and J. Winegarten, *Modernising the Civil Court, the Judges' Requirements for IT in the 21st Century* (London: Courts Service, 2001).

¹⁸ H. Brooke, 'The Legal and Policy Implications of Courtroom Technology: the Emerging English experience' (2004) 12 *William and Mary Bill of Rights Journal* 699.

¹⁹ F. Wortmann and K. Flüchter, 'Internet of things' (2015) 57 *Business and Information Systems Engineering* 221.

²⁰ M. Terry, S. Johnson and P. Thompson, *Virtual Court Pilot Outcome Evaluation, Ministry of Justice Research Series 21/10* (London: MoJ, 2010). Although the terms 'virtual court' and 'e-court' are often used interchangeably, a virtual court generally refers to a court which has implemented video conferencing technology to enable remote testimony, while an 'e-court' is now associated with a high specification, fully outfitted courtroom (which encompasses different types of court including aspects of both 'paperless' and 'virtual' courtrooms): F. I. Lederer, 'The Road to the Virtual Courtroom? A Consideration of Today's and Tomorrow's High-Technology Courtrooms' (1999) 50 *South Carolina Law Review* 799.

²¹ *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (London: MoJ, 2012)

available to all professional court users as well as in all the places defence practitioners conduct business.²² Evidence presentation equipment, in the form of tablets for magistrates and large in-court TV screens were introduced via the Magistrates In-Court Presentation Project (MiCP), which was set up in 2014, removing the need for hard copy evidence.

While modernisation had begun to take shape in a rather piecemeal fashion, movement towards wholesale reform was bolstered by the publication, in January 2015, of Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*, which reported on current practices and procedures from charge to conviction or acquittal, with a particular focus on pre-trial hearings and made recommendations about how such procedures could be streamlined, or improved, with the use of technology.²³ Thereafter, in November 2015, the government began an ambitious £700m five year digital modernisation programme to improve efficiency within the courts and tribunals system, which is set to be achieved primarily through the automation of routine administrative tasks and a reduction in the amount of etiolated and outdated paper processes, thereby minimising duplication between agencies and unnecessary attendance at court.²⁴ A further £270m is being made available to develop a fully connected criminal courtroom by 2020. As of September 2016, more than 12 million pages of evidence have been digitally uploaded and video link systems have been installed in 130 Crown, magistrates' and civil courts.²⁵ A government update on the programme of reforms was published on 15 September 2016, in the Ministry of Justice's consultation paper *Transforming Our Justice System*, which included details of plans to digitise every court and tribunal in England and Wales as well as the

²² The service (known as HMCTS' Professional Court User Wi-Fi) was rolled out across courts between 2014 and 2016. It should be noted that unrepresented defendants do not, however, have access to court Wi-Fi.

²³ The Rt. Hon. Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (London: HMSO, 2015). The *Review* made a number of key recommendations, including the use of video and audio hearings as the 'default position' for courts; the widespread adoption of 'appropriately locked-down computers linking lawyers and in-custody clients via internet-based video conferencing [to] allow instructions to be obtained far more efficiently and with considerable saving of time and public money'; greater emphasis upon digital evidence gathering, including the use of evidence gathered from police body worn cameras; and the adoption of improved case management systems, at [50, 58, 274].

²⁴ Since early 2016, the Crown Prosecution Service and HMCTS have been developing a shared digital platform (the 'CJS Common Platform Programme') for criminal cases to permit multiple agencies to work from the same digital information, facilitating greater integrated working; and a cloud-based 'Digital Court Store' to enable the criminal justice system to operate digitally by default, including in interactions with the public.

²⁵ Ministry of Justice, 'Courts reform gives stronger protection for victims and witnesses' (MoJ Press Release, 15 September 2016) at: <https://www.gov.uk/government/news/courts-reform-gives-stronger-protection-for-victims-and-witnesses> (last accessed 25 November 2016).

piloting of a new system of online convictions and fines for summary, non-imprisonable offences.²⁶ Full automation and digitisation of the entire process of civil money claims is to be achieved by 2020.²⁷

The programme of digital reforms has been accompanied by widespread court closures across England and Wales. During the last Parliament, the Coalition government closed 146 courts, with a further 86 courts and tribunals planned for closure by the current Conservative government, leaving just over 300 courts remaining across England and Wales. In common with other jurisdictions internationally, economic rationalisation has been at the forefront of this agenda; and the policy emphasis has been on replacing inefficient and under-used courtrooms with courtroom IT projects designed to address existing problems of courtroom delay and expense. Yet determining how to successfully implement justice system technology, and indeed even defining success with respect to technological change, is not a simple matter, particularly when the programme of modernisation is motivated chiefly by an external rationale of cost reduction and efficiency, rather than a logic derived from a principled application of technology which recognises that although technologies are themselves morally neutral, their application is not always benign. Technologies must therefore be built and deployed in ethical ways which enhance rather than compromise court user participation, while simultaneously upholding fundamental legal principles such as fairness, impartiality and access to justice. In the second part of this article, I contend that the nature of (public) participation in court and legal processes is central to the democratic legitimacy and equity of digital proceedings. Herein, I posit that access to legal institutions and processes shapes the way that courts serve as arenas for public participation. By focusing upon: (i) the type and quality of participation and communication that is enabled by digital court processes conducted remotely and (ii) policy/political frameworks which impact upon access to courts, legal information and legal services, I examine the associated implications for the legitimacy of digital court-based processes; as well as the scope for IT to enhance democratic procedure through improved access to justice.

PUBLIC PARTICIPATION, PROCESS EFFICIENCY AND OUTCOMES

Scholars have to date identified a range of benefits associated with enhanced public participation in both law and governance.²⁸ Much of the literature on public participation frequently tends towards

²⁶ Ministry of Justice, *Transforming Our Justice System* (London: MoJ, 2016).

²⁷ *ibid.*

²⁸ M. N. Herian, J. A. Hamm, A. J. Tomkins and L. M. P. Zillig, 'Public participation, procedural fairness, and evaluations of local governance: The moderating role of uncertainty' (2012) 22 *Journal of Public Administration Research and Theory* 815; D. A. DeCaro and M. K. Stokes, 'Public participation and institutional fit: a social-psychological perspective' (2013) 18 *Ecology and Society* 40; T. Aitamurto and H. Landemore, 'Crowdsourced Deliberation: The Case of the Law on Off-Road Traffic in Finland' (2016) 8 *Policy and Internet* 174.

conceptualising participation in terms of improved transparency and decision-making through participant involvement as an alternative to more traditional autonomous bureaucracies, in providing a response to the actual and perceived failures of expert regulation by public administration.²⁹

Moreover, public participation encompasses mechanisms of public involvement including access to information, consultation, and dispute resolution, through which participation may improve the substantive output of regulation and enhance the quality of decisions via input from a wider range of (expert and non-expert) participants.³⁰ While access to justice has been identified as associated with public participation,³¹ it has not generally been conceptualised as its primary objective, although public access to information on law and legal processes is nonetheless understood as a key facilitator of participation through improving (public) legal education, access to advice/services, and in raising awareness.³² For the purposes of this article, my analysis here is not concerned with public participation in the sense of enhancing the direct incorporation of citizens into complex policy-making and decision-making processes, rather it attempts to broaden our understanding of how a theoretical framework built around a notion of public participation may influence access to justice ideals.

The nature of public participation in newly digitised processes is inextricably aligned with access to justice because access to justice is based upon a contextual conception of the law which goes beyond a narrow interpretation of 'access' based simply upon the availability of legal aid; instead it operates much more broadly in searching for ways to overcome the difficulties or obstacles which make legal rights and civil liberties non-accessible to many individuals, who, for a variety of social, cultural and economic reasons, have no capacity to accede to and benefit from those liberties.³³ Access to justice therefore encompasses the availability of legal aid *as well as* the opportunity to participate (access to courts as a means for the fair settlement of disputes), and the nature and characteristic(s) of that participation (just and equitable participation in associated court and legal processes). The type and quality of participation is therefore, a critical component in coming to understand how existing distributions of power and inequality impact upon the potential and limits of digital justice processes for improving both access to justice and substantive process outcomes for participants.

However, legal processes are frequently evaluated on the basis of whether they are effective in achieving 'good results', rather than their capacity to serve process values. The disparity between

²⁹ M. Lee and C. Abbot, 'The usual suspects? Public participation under the Aarhus Convention' (2003) 66 MLR 80.

³⁰ J. Dryzek, *The Politics of the Earth* (Oxford: Oxford University Press, 1997).

³¹ *ibid.*

³² A. Brisman, 'The violence of silence: some reflections on access to information, public participation in decision-making, and access to justice in matters concerning the environment' (2013) 59 *Crime, Law and Social Change* 291.

³³ M. Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World Wide Access to Justice Movement' (1993) 56 MLR 282.

process values and good results has previously been well articulated by Summers who notes that 'process values' denotes the standards of value by which we may judge a legal process to be good as a process apart from any 'good result efficacy' it may have.³⁴ In this regard, 'a legal process can be good, as a process, in two possible ways, not just one: It can be a good not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality and humaneness.'³⁵ As Summers notes, modern societies have historically given far less evaluative emphasis to processes than to results and 'even when values such as participation, fairness, and rationality are recognised, they are typically over-ridden.'³⁶ In order to ascertain to what extent the court reforming agenda in England and Wales attempts to inculcate process values (either in improving the substantive fairness of processes, or in enhancing democratic procedure through improved access to justice), it is necessary to consider how the notion of participation is both manifested, and weighted against, economic rationalisation drivers in newly digitised court processes. In the pages that follow, I contend that a concern with 'good result efficacy' is evident in current approaches to the modernisation of court processes wherein little interest has been paid to designing legal processes to implement or serve process values. Instead, what constitutes good process results has invariably been linked to the notion of efficiency in court productivity and specifically, the speed at which case proceedings are completed.³⁷ In support of my conceptual argument, I now consider several of the most pertinent aspects of the government's programme of reforms: video link technology for defendants and witnesses; systems for online convictions; and access to legal services.

Video link technology for defendants

In numerous jurisdictions including the UK, video link technologies are increasingly being used to enable defendants to appear in court from prisons and police stations; to enhance the delivery of expert evidence;³⁸ and to provide vulnerable victims and witnesses with the opportunity to provide

³⁴ R. Summers, 'Evaluating and Improving Legal Processes – A Plea for Process Values' (1974) 60 *Cornell Law Review* 1, 3.

³⁵ *ibid*, 4.

³⁶ *ibid*, 5

³⁷ Historically, reviews of the courts system have similarly focussed upon improving or delivering greater efficiency: *Report of the Royal Commission on Criminal Justice Cm 2263* (London: HMSO, 1993); *Criminal Courts Review* (London: Royal Courts of Justice, 2001). For an instructive discussion of the notion of 'efficiency' contained within the Leveson Review, see L. Marsh, 'Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process' (2016) 45 *Common Law World Review* 51, arguing that the overly narrow conceptualisation of efficiency used by Leveson fails to elucidate how cost-savings should be weighted against the accuracy of verdicts.

³⁸ J. Horan and S. Maine, 'Criminal Jury Trials in 2030: A Law Odyssey' (2013) 41 *Journal of Law and Society* 551.

evidence in a secure, convenient and less traumatic environment, as well as to pre-record their witness testimony.³⁹ In England and Wales, the Police and Justice Act 2006 made provision for the attendance of a defendant at preliminary hearings and sentencing hearings by live link so that the defendant may appear from custody or a police station, rather than being taken to court to be physically present.⁴⁰ Previously, sub-section 57C (7) of the Crime and Disorder Act 1998 made it a requirement that a defendant must consent to participate in a live link hearing. This requirement was subsequently removed by the Coroners and Justice Act 2009; accordingly it is no longer a requirement that a defendant consent to appear in court by way of video link from a police station; and magistrates' courts may continue to use live links for sentencing hearings following a preliminary hearing provided that the accused attending through the live link 'is not contrary to the interests of justice'.⁴¹

Many magistrates' courts now utilise this form of virtual court for first hearings and sentencing hearings, which has resulted in a significant increase in defendants' participation in video link technologies. Virtual court first hearings may take place in respect of any offence, including youth court cases, and assessments of the suitability of defendants to appear by video link are initially made by police custody officers. Importantly, determinations about suitability are not uniform and are subject to geographical variation across custody and court areas. In some regions, eligibility/suitability criterion have been abolished (or do not exist at all) meaning that all cases will be put into the virtual court,⁴² while in other areas the applicable criteria may make provisions for exceptions based upon, for example, evidence of the defendant's mental health issues.⁴³ As a consequence of the relaxation

³⁹ Rowden *et al*, n 13 above; K. Leader, 'Closed-circuit television testimony: Liveness and truth-telling' (2010) 14 *Law, Text, Culture* 1.

⁴⁰ Section 45 of the Police and Justice Act 2006 replaced s 57 of the Crime and Disorder Act 1998 with new sections 57A to 57E, which together constitute Part 3A of the 1998 Act. Section 57C applies to a preliminary hearing in a magistrates' court where the defendant is either in police detention at a police station and likely to remain there until the beginning of the hearing, or is at a police station in answer to 'live link bail' in connection with the offence. Section 46 of the 2006 Act amends the Police and Criminal Evidence Act 1984 s 34 and s 47 and inserts a new s 47ZA (person granted live link bail).

⁴¹ Section 106 of the Coroners and Justice Act 2009. These arrangements came into effect on 14 December 2009.

⁴² In Kent for example, the Virtual Court Eligibility Criteria has been abolished in order to facilitate a seven day remand court.

⁴³ The Virtual Court Eligibility Criteria in London police stations states that all indictable only cases, serious either way cases, breach of bail cases and applications for further detention must appear by virtual court without exception. Other cases must appear by virtual court unless there are more than two co-defendants; there is significant evidence of the defendant having mental health issues; or where the defendant at the police station is being actively aggressive and poses an imminent and

of the criteria by which custody officers initially assess the suitability of defendants to appear by video link, many more defendants are eligible to appear in this way at their first court hearing and without the requirement that they consent to their participation in the use of live link technology.

Evidence suggests that some defendants prefer the convenience of video link technology as a means to avoid the delay and upheaval associated with travelling to and from court,⁴⁴ although providing evidence remotely may not always be in their best interests and defendants may also misunderstand aspects of the video link process. An instructive comparison can be made with the adoption of live video link proceedings for immigration bail hearings which were first implemented in England and Wales in 2007. A small scale study conducted by the British Refugee Council found that almost half of the bail applicants sampled reported that they had not received information about how their video link bail hearing would work.⁴⁵ Those who did receive this information did so through a variety of sources (interpreters, legal representatives, court officials), suggesting that the process of informing bail applicants about the nature of live link proceedings was not standardised and would not therefore ensure that all applicants systematically received this information. As a result, nearly a third of the sample said that they did not understand how the process would work before their bail hearing began. These findings raise particular concerns about the use of live links in criminal hearings because many defendants at police stations are not represented and there is no reason to believe that those defendants, having previously declined legal advice, would opt for legal representation when a determination has been made to proceed by way of live link.⁴⁶ This aspect is all the more significant given that so many defendants are vulnerable as a consequence of mental health problems, learning, intellectual or social functioning impairments, or physical disabilities and disorders. In these instances, the availability and provision of appropriate legal advice becomes especially salient, particularly with regard to assessing the defendant's fitness to take part in video linked proceedings; including in respect of the defendant's physical and mental fitness as well as in determining whether the client has

immediate risk of violence which an appearance in handcuffs would not address: *Terry et al*, n 20 above.

⁴⁴ S. Forell, M. Laufer and E. Digiusto, 'Legal assistance by video conferencing: what is known?' (2011) 15 *Justice Issues* 1.

⁴⁵ Refugee Council, *Immigration bail hearings by video link: a monitoring exercise by Bail for Immigration Detainees and the Refugee Council* (BiD: London, 2008).

⁴⁶ In a recent US study of virtual bail hearings, Cimino *et al* found that defendants participating in live link proceedings were more likely to have bail reduction requests denied than defendants whose hearings were conducted in person. They attribute this finding to defendants' lack of adequate legal representation in virtual hearings, whether as a result of the absence of a defence lawyer or a reduction in the time spent being advised by counsel; E.F. Cimino, Z. Makar and N. Novak, 'Charm City Televised and Dehumanized: How CCTV Bail Reviews Violate Due Process' (2014) 45 *University of Baltimore Law Forum* 57.

been subject to inappropriate police pressure and whether they have the necessary communication skills and abilities to enable fair participation in a live link virtual court.

However, the final decision to proceed by way of a live link hearing is made by the court: section 57C (6)(A) of the Crime and Disorder Act 1998 states that a live link direction 'may not be given unless the court is satisfied that it is not contrary to the interests of justice to give the direction'. In this respect, judgments about the suitability of a defendant to give evidence by video link are ultimately decided on the basis of the court's discretion, which in practice means the court's view in the light of the facts of the particular case. The criteria by which the courts decide whether video link evidence should or should not be admitted is often relatively unclear: references are casually made to factors in favour or against it, depending on the facts of each case but the courts rarely address this question with a comprehensive, fully structured approach. Presently, the courts exercise a large amount of discretion in deciding whether to proceed by way of a live link hearing and they have offered little guidance on how this should be exercised in the context of the multifarious factors potentially impacting upon defendant fitness to participate in live link proceedings. To date, in considering making a live link direction, the courts have primarily been concerned with the potential for delay and additional expense which may accrue if live link evidence was to be refused,⁴⁷ rather than factors relating to the suitability of the defendant to participate in live link proceedings or indeed the quality of the defendant's participation that would be enabled by the video link technology available at court.

In *R v Akhtar (Siddiqua)*,⁴⁸ the Court of Appeal upheld the decision to stay proceedings on the basis of 'complete technological failures' whereby the live link had not been set up in such a way that would have enabled the defendant to have meaningfully participated in the trial. The Court held that the mental health position of the defendant and the anxieties the court process was placing upon her meant that the judge had been entitled to refuse to grant an adjournment. However, aside from cases involving the complete failure of technological systems for live link evidence, the courts appear less willing to consider whether poor quality live links may be contrary to the interests of justice. In criminal cases, under the provisions of the Crime and Disorder Act 1998 as amended, a court may make directions for the use of live links provided that defendants are able to see and hear the court and are able to be seen and heard by it.⁴⁹ Yet it appears that these requirements are being interpreted relatively broadly: in many magistrates' courts operating with live link facilities, video sound quality is poor, screens will sporadically freeze and are often too small (making it difficult for defendants to communicate effectively with their lawyer) and evidence can frequently be distorted by blue or green lighting on the screen. In addition, it was recently reported by the President of the Family Division that

⁴⁷ *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10.

⁴⁸ [2016] EWCA Crim 390.

⁴⁹ s 57(1).

video links in numerous family courts are 'prone to the link failing and with desperately poor sound and picture quality'.⁵⁰

Although the technology required to establish a video link is relatively simple, investment in the use of high quality video equipment is essential: where video link footage is not of a good standard, this negatively impacts upon the perceived standard of witness evidence for the purposes of a trial and compares unfavourably with the immediacy of witness evidence given in-person in court.⁵¹ Poor quality video link technologies also have implications for judicial assessment of demeanour, which is important in questioning testimony; or for example, when a defendant has facial or other injuries that are not clearly visible on a video link and which can be relevant to a defendant's claim of acting in self-defence or which can support mitigation and bail applications. While video link technologies used in the private sector are of a considerably higher quality than those currently utilised by the courts and tribunals,⁵² recent government initiatives indicate a clear policy emphasis upon increasing the quality of courtroom IT, as well as the expansion of video link technology in criminal proceedings and greater public participation in court and tribunal proceedings conducted by video or audio link.⁵³ Given the pace and degree of digital incursion into modern ways of working, technology is likely to continue to feature on political agendas over the coming years and will, in all eventuality, become an omnipresent feature of the courtroom. Therefore, although improvements in technology are evidently required, it is important that the modernisation agenda is also informed by knowledge about how the use of courtroom technology transforms the existing parameters of social interaction and communicative rituals in digital proceedings in order to understand the conditions under which remote technology can be utilised and adapted to enable fair participation.

To date, concerns about the impact of remote proceedings upon participatory justice have been embodied within empirical legal scholarship on courtroom architecture both nationally and internationally.⁵⁴ Herein, the defendant's 'physical exclusion' from the more 'dignified space' of the

⁵⁰ J. Mumby, *View from the President's Chambers (16): Children and Vulnerable Witnesses – Where are We?* (Judicial Office: London, 2017).

⁵¹ For example, one of the difficulties encountered during the pilot scheme conducted at Kingston Crown Court related to the use of poor quality technology: in one case this resulted in tape recorded evidence from a child witness obtained months previously, deteriorating in quality to such a degree that it was unusable in court: A. Timan, 'Preparing for the Reality of Virtual Courts', London Law Expo 2015 conference, October 2015.

⁵² A. Marks, *What is a Court? A Report by JUSTICE* (Justice: London, 2016).

⁵³ Prisons and Courts Bill 2017. It should be noted that although the Bill was abandoned in April 2017, (prior to the dissolution of Parliament in May 2017 and subsequent general election in June 2017) it is likely that the plans for court modernisation detailed in the Bill will only be temporarily affected, with government seeking to progress with digital justice initiatives over the course of the next Parliament.

⁵⁴ Mulcahy, n 12 above; K. Biber, 'The spectre of crime: photography, law and ethics' (2006) 16 *Social Semiotics* 133.

courtroom has been a central focus of a number of legal and socio-legal scholars who contend that defendants are placed at a disadvantage by such technologies.⁵⁵ For example, it has been suggested that video links may alter the nature of sentencing proceedings by undermining the 'experience and legitimacy of justice' when legal participants no longer enter the courthouse.⁵⁶ As a consequence, the important symbolic function of the courthouse as the home of justice and the presence of law is eroded and effective communication between parties, and the importance of non-verbal cues, is lost. Although there is a lack of evidence to suggest that non-verbal cues (such as emotional responses) offer any reliable basis for determining truth or detecting lies,⁵⁷ beyond this, we know little about how the changing communicative dynamics associated with remote proceedings in England and Wales affect defendants' experiences of justice psychologically, or with regard to substantive case outcomes.

Across and within national and international jurisdictions, there are currently no standardised formats for producing remote testimony or remote appearances by witnesses or defendants; as such there is significant variation between courts with regard to how remote participants should be presented on screen.⁵⁸ A range of factors including the processes for determining the type of frame used for different remote witnesses (full body view or head only view of the speaker); the range and distance of the camera to the defendant; and the presence of the defence lawyer in the courtroom or remote location, are key variables affecting how remote proceedings are designed and engineered. At present, very few empirical studies have been conducted on the effects of video conferencing upon non-verbal behaviour and participative status in the courtroom. However, an emerging body of evidence is now beginning to elucidate how the production of remote proceedings impacts upon the substantive nature of courtroom social interactions.

Licoppe's recent research on the production of wide video shots in French courtrooms with remote defendants observed that wide shots (featuring six or more courtroom participants) were almost never used in trial openings, or during interrogative sequences. Instead, medium shots (focussed solely on the current speaker) were favoured.⁵⁹ In the latter stages of the hearings, however, wide shots were

⁵⁵ E. T. Bellone, 'Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom' (2013) 8 *Journal of International Commercial Law and Technology* 24; N. Feigenson, 'The Visual in Law: Some Problems for Legal Theory' (2014) 10 *Law, Culture and the Humanities* 13.

⁵⁶ E. Rowden, 'Distributed Courts and Legitimacy: What do we lose when we lose the courthouse?' (2015) *Law, Culture and the Humanities*, online early edition at <http://journals.sagepub.com/doi/abs/10.1177/1743872115612966> (last accessed 15 January 2017).

⁵⁷ S.L. Sporer and B. Schwandt, 'Moderators of non-verbal indicators of deception: A meta-analytic synthesis' (2007) 13 *Psychology, Public Policy and Law* 1.

⁵⁸ J. Smith, 'Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights' (2013) 2 *Administration of Justice Bulletin* 1.

⁵⁹ C. Licoppe, 'Video communication and "camera actions": The production of wide video shots in courtrooms with remote defendants' (2015) 76 *Journal of Pragmatics* 117.

routinely used; for example during counsel's closing arguments or to capture the final announcement about the future scheduling of the decision process. Licoppe contends that the type of video shot used in courtroom proceedings serves to make visible a particular member's interactional competence; the presentation of individuals on screen in video-mediated courtrooms are designed and treated as a visual formulation of their participative statuses. The form of participation enabled by remote proceedings therefore becomes contingent upon the production and communication of images, which is heavily reliant upon the 'cameraman' as a key player within the mediated courtroom.⁶⁰ Moreover, Licoppe *et al* observe that courtroom hearings are multi-party interactions during the course of which (much) more than two parties can become ratified speakers.⁶¹ Tensions are evident when more than one person is involved in any given interaction: these occasions invariably create difficulties for the individual responsible for capturing the interaction, 'who must accomplish constant adjustments to the video frame' in their role as 'producer, filmmaker and film editor on a moment to moment basis with respect to the ongoing hearing'. Licoppe *et al* observe that the 'strains' upon the individual responsible for filming proceedings are further compounded because no provision for training has been made available for individuals 'to learn how to accomplish such delicate tasks, nor have any guidelines been given to manage screen views, which is striking in such a sensitive institutional setting as a judicial hearing, where equity in terms of access and participation rights and resources is crucial.'⁶² Similarly, in their analysis of video-mediated interpreting in the criminal justice system in England and Wales, Braun *et al* observed that a commonly encountered difficulty was to be found when participants were conferred an unjustified level of prominence or 'visibility' by virtue of their image being displayed on a large screen, or by being situated directly in the centre of a video screen.⁶³ Seating arrangements also led to interactional difficulties when these arrangements gave the impression that the participants on one side of the video link spoke 'as one' or could be perceived 'as one' when in fact their roles ought to have been clearly distinguished. Thus, the type of camera shot produced, as well as the broader spatial organisation of video mediated proceedings, are both meaningful and influential actions in altering the communicative dynamics of the courtroom which require careful consideration in the future planning and implementation of digitisation initiatives.

⁶⁰ *ibid.*

⁶¹ C. Licoppe, M. Verdier and L. Dumoulin, 'Courtroom interaction as a multimedia event: the work of producing relevant videoconference frames in French pre-trial hearings' (2013) 23 *Journal of Electronic Communication* 1.

⁶² *ibid.*, 20.

⁶³ S. Braun, J. Taylor, J. Miler-Cassino, Z. Rybinska, K. Balogh, E. Hertog, Y. V. Bosch, L. Hogeschool, D. Rombouts, C. Licoppe and M. Verdier, 'Assessment of Video-Mediated Interpreting in the Criminal Justice System: AVIDICUS 2 Research Report' (European Commission) at <http://wp.videoconference-interpreting.net/wp-content/uploads/2014/01/AVIDICUS2-Research-report.pdf> (last accessed 20 April 2017).

A related issue concerns the communicative dynamics of the increasingly common use of remote settings (video link conferencing) for the provision of legal advice, which are being adopted as an economical replacement for face-to-face conferences between lawyers and their clients. In jurisdictions internationally, video link technologies have been described as representing a significant shift in the paradigm of the provision of legal aid to incarcerated clients and in providing a 'major portal for prisoners to access justice'.⁶⁴ However, to what extent remote settings for the provision of legal advice are able to maintain appropriate and effective standards of communication is a matter of some contention.⁶⁵ Many defendants have cognitive, mental or physical health issues that may affect their rights while in police detention and/or they may be under the influence of drugs or alcohol, or suffering the effects of withdrawal. Safeguarding defendant rights requires that they are able to communicate effectively and confidentially with their lawyers: where solicitors are unable to take instructions from their client in person, there is the potential that appropriate assessments of physical/mental impairments, as well as the client's level of understanding of the court process and the consequences of any decisions made may be impaired, especially if the technology used is inadequate and/or of poor quality.

More broadly, the benefits associated with face to face legal advice potentially go beyond simply de facto assistance from lawyers: clients who meet in person with their solicitor can also experience psychological benefits in terms of relieving the anxiety and distress that is associated with the conduct of formal legal matters.⁶⁶ Face to face advice given in 'real time' can therefore be extremely important, especially for those who are potentially facing losing their liberty. Nonetheless, we should also be mindful that the quality of legal advice which clients receive exists on a continuum,⁶⁷ and it should not be assumed that advice given in person will necessarily be of better quality than that which would be imparted by video conferencing - nor is it currently possible to conclude that the quality of interaction, reassurance and support that may be provided by face to face advice cannot in fact be replicated via video link. Indeed, Susskind and Susskind suggest that many recipients of professional (legal) services are in fact seeking a reliable solution or outcome rather than a trusted adviser per se.⁶⁸ Where remote technology and online services are provided to a high standard, it may be that this provides a sufficient level of comfort and support to users, obviating the requirement for what Susskind and Susskind call the 'warm adviser'.⁶⁹

⁶⁴ C. McKay, 'Video Links from Prison: Court "Appearance" within Carceral Space' (2015) *Law, Culture and the Humanities* 1.

⁶⁵ Marsh, n 37 above, 55.

⁶⁶ n 1 above.

⁶⁷ B. Jeffrey, *Independent Criminal Advocacy in England and Wales* (London: MoJ, 2014); R. Lewis, 'Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?' (2011) 74 *MLR* 272.

⁶⁸ R. E. Susskind and D. Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford: Oxford University Press, 2015).

⁶⁹ *ibid.*

To date, there is no empirical support to affirm or disprove that remote legal services cannot provide an appropriate setting in which standards of communication and reassurance are maintained. Both nationally and internationally, empirical evidence examining the implications of (or quality associated with) the provision of legal advice that clients receive in custody through video conferencing is extremely limited.⁷⁰ Very few evaluations have been conducted on video conferencing to clients in custody, despite this form of technology being used widely in Australia,⁷¹ and it has also proliferated across state and federal jurisdictions in the US.⁷² In other domains beyond law, the research literature on video consultations is sparse despite the increasing prevalence of remote technology across a broad range of professions.⁷³

As I have previously noted in my earlier discussion of the nature of public participation, above, the type and quality of participation is a critical component in coming to understand how existing distributions of power and inequality impact upon the potential and limits of digital justice processes. Emerging evidence suggests that when courtroom communication is mediated by video link, the courtroom becomes spatially distributed and the relationships between participants are reshaped. Remote technologies may well have the capacity to produce (or even replicate) effective communication and interaction of the type experienced in traditional face-to-face settings. Therefore, in designing and implementing remote technologies, system architects must endeavour to understand the actual interactive experiences of remote participation for court users rather than making

⁷⁰ n 44 above.

⁷¹ *ibid.*

⁷² Bellone, n 55 above.

⁷³ For instance, within the field of medicine, remote video consultations between clinician and patient are being introduced alongside (and occasionally replacing) face-to-face or telephone consultations. Consequently, there is now an emerging parallel literature on online doctor-patient consultations investigating how technology can transform patient interactions with their doctor which is beginning to illuminate the strengths and weaknesses of this medium, and the quality of communication that it enables. This work remains in its infancy, however findings suggest that digital communication does not negatively impact on patient ability to communicate effectively with healthcare professionals, although it is significant that remote participation appears to work best in the context of a pre-existing clinician-patient relationship. Moreover, this literature indicates that the implementation of alternatives to face-to-face consultations have the potential to overcome practical access issues, especially for marginalised groups; H. Brant, H. Atherton, S. Ziebland, B. McKinstry, J. L. Campbell and C. Salisbury, 'The use of alternatives to face to face consultations: a GP survey' (2016) 66 *British Journal of General Practice* 648; T. Greenhalgh, S. Vijayaraghavan, J. Wherton, S. Shaw, E. Byrne, D. Campbell-Richards, S. Bhattacharya, P. Hanson, S. Ramoutar, C. Gutteridge and I. Hodkinson, 'Virtual online consultations: advantages and limitations (VOCAL) study' (2016) 6 *British Medical Journal* 1; C.J. Huxley, H. Atherton, J. Watkins and F. Griffiths, 'Digital communication between clinician and patient in General Practice and the impact on marginalised groups: a realist review' (2015) 65 *British Journal of General Practice* 641.

hypothetical assertions about the nature of that participation and the quality of communication that this technology enables.

Live link evidence for witnesses

The burgeoning use of video link technologies also extends, of course, to vulnerable victims and witnesses, to enable them to provide their evidence in advance through pre-recorded video testimony. In England and Wales, statutory provisions for the cross-examination of vulnerable witnesses have existed for a number of years. The Youth Justice and Criminal Evidence Act 1999 was passed to bring in a comprehensive range of special measures: witnesses and defendants have since been permitted to give evidence by live link provided that they meet the vulnerability criteria set out in the Act which includes the defendant or witness being young and/or suffering from a physical, mental or learning disability. Section 28 of the Act gave the court power to direct that cross-examination of the witness should also be by way of video recording. Until recently however, this provision was never implemented and was only enacted in 2013 when the Ministry of Justice began piloting the pre-recording of cross examination of vulnerable witnesses at Liverpool, Leeds and Kingston upon Thames Crown Courts.⁷⁴ An evaluation of the pre-recorded cross-examination pilot was published by the Ministry of Justice in November 2016 which heralded the project a success, and the facility to pre-record cross examination is now being rolled out nationally.⁷⁵

One of the primary benefits associated with the pre-recording of evidence is the potential to elicit fresh evidence soon after the initial police interview has taken place and to remove the risk of memory deterioration, particularly in cases involving child complainants. In *R v Powell*,⁷⁶ for example, a conviction of indecent assault against the three and a half year old complainant was quashed on the basis that the seven month interval between initial interview and trial rendered her incompetent under

⁷⁴ A witness will be eligible for the special measures available under s 28 if they are under 16 years of age at the time of the special measures hearing or they have a mental disorder (within the terms of the Mental Health Act 1983) or they suffer from a 'significant impairment of intelligence and social functioning', or they have a physical disability or a physical disorder. The court will also need to find that the quality of evidence given by the witness is likely to be diminished in the absence of this measure.

⁷⁵ J. Baverstock, *Process evaluation of pre-recorded cross-examination pilot (Section 28)*, Ministry of Justice Analytical Series (London: MoJ, 2016). It should be noted that the study objectives were limited to an evaluation of a small number of interviews with practitioners (n=40) and witnesses (n=16) about their 'experiences' of s.28, and the collection of monitoring data on case speed and progression. The evaluation did not seek to provide robust evidence of impact on case outcomes, therefore the findings from the study are not generalisable to other courts and no conclusions can be drawn about the impact of s.28 on cases outcomes.

⁷⁶ [2006] EWCA Crim 3.

section 53 of the Youth Justice and Criminal Evidence Act 1999. Subsequently, the Court of Appeal followed this decision in *R v Malicki*.⁷⁷ Although the recently published findings of the Ministry of Justice's pilot scheme note (as would be anticipated) that witnesses reported the benefits of the avoidance of the trauma of a live hearing; improved witness recall was not found because witnesses were cross examined many weeks, and in some cases months, after the events in question. A key issue therefore relates to the proximity of cross-examination to the commission date of the allegation. While it is intended that in most section 28 cases this takes place close to the date of the allegation, it does not always occur and delays are therefore not necessarily reduced to the extent often assumed. Disclosure may not be a quick process and witnesses can wait to report an old allegation, but still remain eligible under section 28 by the time they choose to do so. Here, the cross-examination does not occur by any appreciable margin closer to commission date. There are examples in other cases of a delay in charge, despite the witness having acted promptly in reporting the matter, and the court thereafter in litigating it under section 28.⁷⁸ Notably, under section 28, the jury hears no testimony from the witness which is actually current and immediate: they will hear a pre-recording of cross-examination some weeks prior, and an even older Achieving Best Evidence (ABE) interview.

In effect, section 28 cases must be trial prepared before cross-examination occurs, which raises multiple challenges relating to any potential late change in instructions, or fresh disclosure of evidence that surfaces after recorded cross-examination has taken place, such as the emergence of another complainant. Clearly, material of relevance may, and often is, served late in the proceedings and yet will need to be put to the witness for comment. As such, there is the potential to have to recall the witness if something vital was not asked.⁷⁹ Section 28 does not, therefore, remove the possibility of multiple cross-examination, or indeed the anxiety associated with it for vulnerable witnesses. Moreover, although the Crown Prosecution Service (CPS) is expected to seek to obtain third party material voluntarily within seven days of charge, and local authorities are to be made aware of the section 28 process and the need to act swiftly in response to any third party production orders, it will remain to be seen whether the problems routinely encountered with third party disclosure can be overcome.

Insufficient disclosure occurring pre-cross-examination is an issue which is yet to be fully tested by the courts. Section 28 cases require that a list of questions in cross-examination must be drafted for the ground rules hearing. The ground rules hearing in the Crown Court is intended to plan the parameters, nature and length of questioning of the witness. In instances where the witness says

⁷⁷ [2009] EWCA Crim 365.

⁷⁸ n 75 above.

⁷⁹ Section 28 (6) (a-b) states that the court will direct that further cross-examination and/or re-examination may take place where the application arises from the party 'having become aware, since the time when the original recording was made, of a matter which that party could not with reasonable diligence have ascertained by then' or for any other reason it is in the interests of justice for such a direction to be made.

something during pre-recorded cross-examination which is unexpected, or otherwise gives an answer which it would be plainly wrong to go unchallenged (for the purposes of how this evidence will appear when played to the jury weeks hence), there is a small degree of latitude for questions to be modified. However, the practice of the court imposing restrictions upon the scope and content of cross-examination of children and other vulnerable witnesses is well established.⁸⁰ In practice, and almost without exception, the presumption is that video-recorded cross-examination questions will be asked verbatim as they are drafted.⁸¹

Therefore, while pre-trial recording of evidence offers significant potential benefits to individual witnesses and the truth finding process, there are undoubtedly evidential challenges, particularly where the investigative interview is used as evidence in chief, or where pre-recorded cross-examination is conducted at a much later date than the evidence in chief. The adversarial mode of trial magnifies these difficulties and challenges, although it is not yet possible to draw any generalisable conclusions about whether pre-recorded cross examination, following the enactment of section 28, prejudices the strength of the prosecution case in terms of juror perceptions and the evaluation of evidence at trial; or whether it will have any impact upon conviction rates. Indeed, although lawyers and legal scholars alike have speculated for some time about whether the recording of evidence in trials could disadvantage the prosecution case because it may appear too remote or 'rehearsed', the issue has to date received scant empirical attention.⁸² There are, however, a number of instructive national and international 'mock trial' studies which provide some further illumination

⁸⁰ In *R v Lubemba* [2014] EWCA Crim 2064 at [45], the court observed: 'It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right 'to put one's case' or previous inconsistent statements to a vulnerable witness. If there is a right to 'put one's case' (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidating or distressing a witness.'

⁸¹ *R v RL* [2015] EWCA Crim 1215.

⁸² This is primarily a result of perceived difficulties inherent in undertaking such forms of research; in particular, the substantive content of the deliberations of real jurors is prohibited by the Contempt of Court Act 1981. Section 8 of the Act makes it a criminal offence to 'obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations'. The Act does not, however, prevent all research about and with juries although its existence appears to have created confusion about what jury research can and cannot be conducted and has contributed to 'an information vacuum' about juries in this country: C. Thomas, *Are juries fair?* (London: MoJ, 2010).

about juror perceptions of video testimony.⁸³ A recent study in England and Wales assessed whether, and in what ways, perceptions of adult rape testimony are influenced by different modes of presentation.⁸⁴ The study investigated the influence upon mock jurors of live-links; video-recorded evidence-in-chief followed by live-link cross-examination; and protective screens. It concluded that there was no clear or consistent impact as a result of these divergent presentation modes, and the researchers suggested that concerns over the use of special measures by adult rape complainants (at least in terms of juror influence) may be overstated.⁸⁵

There are a number of psychological studies, however, which suggest that the use of pre-recorded evidence may have some bearing upon the perceived credibility of testimony when it affects the complainant's emotional responses whilst giving evidence.⁸⁶ In these studies, an emotive and visibly upset complainant was perceived to be more credible than complainants who appeared calm or relaxed. Witnesses may be less upset or nervous when giving evidence in settings outside a live courtroom: for example, if the investigative interview is used as evidence in chief, the witness may be more emotional and thereby appear more credible.⁸⁷ Beyond the psychological literature, legal scholars have highlighted concerns that remote testimony may affect how jurors process demeanour evidence and make credibility assessments. Roth, for example, notes that the 'editorialising' of transmitted images (via alteration of the shot size or the camera's location in relation to the witness)

⁸³ N. Taylor and J. Joudo, *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Canberra: Australian Institute of Criminology, 2005).

⁸⁴ L. Ellison and V. E. Munro, 'A "special" delivery? Exploring the impact of screens, live-links and video-recorded evidence on Mock Juror deliberation in rape trials' (2014) 23 *Social and Legal Studies* 3.

⁸⁵ *ibid.*

⁸⁶ G.C. Bollingmo, E.O. Wessel, D. E. Eilersten and S. Magnussen, 'Credibility of the emotional witness: A study of ratings by police investigators' (2008) 14 *Psychology, Crime and Law* 29; E. M. Wessel, G. C. Drevland, D. E. Eilersten and S. Magnussen, 'Credibility of the emotional witness: A study by court judges' (2006) 30 *Law and Human Behavior* 221.

⁸⁷ Researchers have observed that this is generally reflective of societal expectations and beliefs, so that witnesses who do not show the emotional behaviour expected of them in a given situation may be assessed as lacking credibility: M.R. Rose, J. Nadler and J. Clark, 'Appropriately upset? Emotion norms and perception of crime victims' (2006) 30 *Law and Human Behavior* 203. There is no evidence to support the conclusion that increased nor decreased emotionality is an indicator of truthfulness, although professionals and lay persons may believe that it is, and often share the same misconceptions about how people behave when they are lying: A. Vrij, P. A. Granhag and S. Porter, 'Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection' (2010) 11 *Psychological Science in the Public Interest* 3.

may impact upon perception of emotion and demeanour.⁸⁸ Consequently, in some jurisdictions, the increasing prevalence of video conferencing has been accompanied by greater awareness of the requirement for training in how to interpret and mediate visual images transmitted by video links, particularly in respect of witness demeanour. In the US, immigration tribunals routinely use video conferencing and training has been introduced for immigration judges which emphasises aspects of credibility beyond demeanour, such as factual inconsistencies in the applicant's testimony so that judges are taught to focus on the content of testimony rather than nonverbal cues.⁸⁹

In summary, remote participation and the receipt of testimony via video link technology undoubtedly have associated advantages, including reducing the expenditure and disruption associated with the transportation of prisoners to and from court; as well as potentially improving victim and witness experiences of and participation in the trial process. Here, the utilisation of high quality technology is necessarily a precursor to effectively harnessing improvements in the conduct of digitised proceedings, and current policy initiatives appear to be cognisant of the requirement for investment in this regard. However, there remains a pressing need to assess the impact of remote proceedings upon participative status and communicative rituals, and to develop a coherent evidence base with which to inform future modernisation agendas. Concerns regarding the nature and degree of defendants' participation that is substantively being enabled by live video links and the scope for adequate examination and cross-examination of witnesses should not be underplayed. The use of high-quality remote IT ought therefore to be complemented by sufficient provision for training of legal professionals in video mediated proceedings, in order to develop familiarity with new systems and digitised ways of working but also to build awareness of the impact of remote proceedings upon court user participation and mediated forms of communication. Unfortunately, such provisions are currently absent from government policy proposals for digital modernisation.

Online convictions

A consistent thread running historically through all proposals for court reform has been the requirement to improve efficiency across the court system; and concerns about efficiency remain at the core of the current modernisation programme. This is well exemplified by the government's intention to create new systems for online convictions. The Criminal Justice and Courts Act 2015 introduced the Single Justice Procedure (SJP) which applies to cases involving adults charged with summary-only non-imprisonable offences. It enables such cases to be dealt with by a single magistrate sitting with a legal adviser on the papers without the attendance of either the prosecutor or

⁸⁸ M. D. Roth, 'Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth' (2000) 48 *University of California Law Review* 185.

⁸⁹ I. V. Eagly, 'Remote Adjudication in Immigration' (2015) 109 *Northwestern University Law Review* 933.

defendant.⁹⁰ The defendant is instead able to engage with the court in writing and the case does not require to be heard in a traditional courtroom: the SJP allows one magistrate to consider a defendant's plea and the evidence, including any mitigating circumstances, 'on the papers', alone and outside a physical courtroom. By channelling low-level, routine summary cases through the SJP, it is intended that magistrates and their legal advisors will have more time to focus on complex cases, while defendants are able to resolve their cases entirely online, faster and more conveniently, with the certainty of the penalty imposed and the ability to pay fines immediately online.⁹¹ Following an initial pilot phase in April 2015, use of the SJP was rolled out across England and Wales from March 2016. The Ministry of Justice has not been able to provide any quantification of the costs and benefits associated with the SJP,⁹² yet it nonetheless plans to fully digitise the process with implementation of the online system of convictions commencing in 2018. The Ministry of Justice proposes to test the system with a small number of summary, non-imprisonable offences in the initial phase of introducing the online conviction and fixed fine scheme (railway fare evasion; tram fare evasion; and possession of unlicensed rod and line): if this initial phase is 'successful', other offences, particularly certain road traffic offences, will then be brought into the system in future.⁹³

While the new system for online convictions and fines is intended to benefit defendants by bringing about speedier case resolution, it is possible that the convenience of avoiding the 'formal' court process altogether may lead a defendant to admit to something for which he or she would otherwise have a defence, thereby resulting in an increase in guilty pleas in online courts. It may be the case that some defendants are willing to make a false admission and accept a conviction in order to have the matter resolved quickly, and avoid the anxiety associated with attending court in person. There is also the associated issue of whether those individuals who plead guilty are indeed fully aware of, and understand, the serious and complex implications of a criminal conviction such as consequences for employment, foreign travel, and immigration status. The implications of a criminal conviction, in common with out of court disposals including cautions, are not well recognised by the public as a

⁹⁰ Approximately 890,000 cases a year involve summary-only, non-imprisonable offences.

⁹¹ n 26 above.

⁹² Ministry of Justice, *Impact Assessment: Online convictions/statutory fixed fine*, at https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/onlineconvictioniaandeia.pdf (last accessed 5 January 2017).

⁹³ At present, the traffic penalty tribunal (TPT) provides an online service for appeals against minor driving and parking offences. Service uptake is low, however, with only 0.5 per cent of those issued with Penalty Charge Notices (PCNs) appealing to the tribunal, although half of those who appeal have their fine overturned. It is likely that there are so few appeals because drivers are only required to pay half their fine if they settle a PCN within 14 days; which is an obvious disincentive to proceed with an appeal via the TPT. Fine tariffs continue to increase during the tribunal appeal process and so it is understandable that drivers prefer to accept the original PCN rather than risk a substantially higher fine if they are unsuccessful upon appeal.

whole.⁹⁴ Where it is known that a criminal record exists, this can act as a barrier to rehabilitation and/or reintegration and may prevent opportunities for employment, or for example, the ability to obtain a tenancy or to purchase insurance.⁹⁵

A further difficulty is that unrepresented defendants often do not realise the strength (or weaknesses) of their case,⁹⁶ and can feel pressurised into pleading guilty despite possessing a legitimate defence.⁹⁷ The online plea system which currently exists for the prosecution of fare evasion provides a useful illustration of how these dynamics can be manifested. All those prosecuted for fare evasion (railway, bus, etc.) are encouraged to enter pleas either by post or online, and cases are heard in the defendant's absence in the magistrates' court by a single magistrate sitting in private. The fines associated with a guilty plea can be high, and it is not clear that defendants who do plead guilty are fully aware of and understand the consequences to them which can far exceed the seriousness of the offence committed - in terms of costs, or with regard to the criminal record which is inseparably attached to it. Here it is worth observing that, at present, out of court settlements can be reached in cases of fare avoidance, enabling more affluent defendants to avoid prosecution in the magistrates' court.

⁹⁴ J. Donoghue, 'Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales' (2014) 77 MLR 928.

⁹⁵ In England and Wales, the maintenance of criminal records is a police, rather than a judicial function and criminal records are stored on the Police National Computer (PNC). In *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079, the Court of Appeal made it clear that the law permits the police to keep all convictions on the PNC forever, and as a result, there is currently no opportunity for a criminal record to be permanently deleted from the police database. Although recent changes have extended the scope of the Rehabilitation of Offenders Act 1974 so that prison sentences of up to and including four years in length can become spent (thereby protecting an offender from disclosure), the reality of English law today presents a very complex picture: *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; *C v Chief Constable of Greater Manchester* [2010] EWHC 1601 (Admin). The courts have no power to shorten the sentence/rehabilitation periods under the 1974 Act and many offenders continue to be forced to disclose their convictions before they can obtain employment. Evidence suggests that the current regime of disclosures and criminal record checks would benefit from further reform; in particular, to reduce the number of jobs for which checks are made, and to reduce the number of unlawful or erroneous checks being made: N. Padfield, 'Judicial Rehabilitation? A view from England' (2011) 3 *European Journal of Probation* 36.

⁹⁶ N. Padfield, 'The right to self-representation in English criminal law' (2012) 83 *Revue internationale de droit penal* 357.

⁹⁷ P. Gibbs, *Justice Denied: Unrepresented Defendants in the Criminal Courts* (London: Transform Justice, 2016).

The government's intended transference of a range of summary justice cases from magistrates' courts to systems for online conviction also does not, in itself, do anything to address the existing underlying problems which defendants encounter when they appear unrepresented in court. The general absence of legal aid means that the majority of defendants in magistrates' courts do not currently obtain legal advice, which in many instances results in defendants representing themselves; a high rate of guilty pleas; and a low number of appeals against sentence. According to CPS data for 2015-16, the rate of guilty pleas in the magistrates' courts was 70 per cent,⁹⁸ for which the conviction ratio was 84 per cent in the latest year.⁹⁹ Moreover, there has been a steady decline in the number of appeals against magistrates' court sentences: from 0.7 per cent in 1992, to 0.37 per cent in 2016.¹⁰⁰ As previously observed, few defendants are well equipped to defend themselves (even in circumstances where they have a good case to make): in these instances there is an obvious incentive to plead guilty in order to avoid trial costs and unrepresented defendants are concomitantly less likely to seek to challenge any conviction by way of appeal against sentence as a result of legal and financial barriers. These issues are further compounded by financial pressures upon the CPS to reduce the number of hearings, which leads to lower-level charges being brought, for example in assault cases, in order to obtain a guilty plea and avoid a more costly trial at Crown Court.¹⁰¹ Indeed, legal scholars have begun to speculate that the pre-existing priorities underlying the justice system such as efficiency, crime control and the minimisation of false negatives may serve to intensify disadvantage in online criminal proceedings, particularly given the 'uneven, unsystematic manner' in which digital justice has been developed and deployed.¹⁰² The creation of online systems for summary offences provides few safeguards to mitigate against these problems and may in fact serve only to further entrench existing difficulties facing those without access to adequate legal advice, amplifying the scope for injustice.

Given the scope for defendants to be placed at a disadvantage by virtue of new online plea and convictions processes, not to mention the potential risk of miscarriages of justice, it is crucial that online systems are underpinned by proper procedural safeguards and accompanying guidance which clearly explains the processes to be followed by participants, as well as the direct and indirect consequences of a guilty plea. The government's proposals for its system of online convictions states

⁹⁸ Her Majesty's Crown Prosecution Service, 'Key Performance Measures, Quarter 4 2015/16' (HMCPS, 2016), at:

https://www.cps.gov.uk/publications/performance/key_measures/key_measures_Q4_2015_16.pdf

(last accessed 3 January 2017).

⁹⁹ Ministry of Justice, 'Criminal Justice Statistics, Quarterly Update to June 2016', (MoJ, 2016), at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570022/criminal-justice-statistics-quarterly-update-to-june-2016.pdf (last accessed 3 January 2017)

¹⁰⁰ There has also been a 21 per cent fall in sentence appeals to the Court of Appeal in the last four years.

¹⁰¹ Marsh, n 37 above.

¹⁰² A. Roth, 'Trial by Machine' (2016) 104 *Georgetown Law Journal* 1245.

that 'users will be advised to seek advice from Citizens Advice or a legal provider' and indicates that guidance on how to use the system would be provided by a telephone call centre, at the initiation of the defendant.¹⁰³ However, at a minimum, it ought to be an essential component of any new system for online convictions that the implications of a guilty plea, *as well as* further legal advice on the process of determining guilt/innocence and how to defend an action, are inculcated via substantive website content. The government's proposed safeguards are insufficient: defendants may misunderstand the strength or otherwise of their case (for example by confusing mitigation with a defence) or they may not take the time to seek advice from the telephone service to clarify matters related to what is required in their case.¹⁰⁴ Judicial involvement in the design of new online convictions systems, or indeed the provision for mechanisms of judicial oversight of these systems, are in isolation ultimately insufficient to address the complex dimensions of the operation of new technologies and their use by, and on, court participants deprived of adequate legal advice.

Access to courts and digital services

The opportunity for citizens to have effective access to justice in order to determine and vindicate their rights is a fundamental principle of a properly functioning justice system committed to the rule of law, which was a point well-articulated more than three decades ago by Lord Diplock in the much cited *Bremer Vulcan* decision.¹⁰⁵ However, the principle of 'local justice', wherein it is intended that citizens residing within local communities have convenient access to courthouses in their locales, and that magistrates sitting in local courts 'bring common sense and knowledge of the locality and the local

¹⁰³ Ministry of Justice, 'Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals - Government response' (London: MoJ, 2017) at [75].

¹⁰⁴ Here it is worth observing that the government has also intimated its ambition to move all plea hearings online, with a recent publication stating: 'We will enable defendants to indicate a plea online and enable allocation in all triable either-way cases to be dealt with in writing (preferably online), allowing for early triage of cases through the system without the need for unnecessary in-court hearings'; n 92 above, 41. Defendants will be encouraged to utilise the online plea system, yet there is no accompanying provision to ensure the availability of appropriate legal advice at this stage of proceedings, which ought to form an essential adjunct to proposals for system reform in order to mitigate potential disadvantage to defendants.

¹⁰⁵ Lord Diplock observed that: 'Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy which he claims to be entitled to in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant': *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp. Ltd* [1981] AC 909, 979.

community to the criminal justice process,¹⁰⁶ has been eroded by the closure of many local courthouses and the overall diminution of the courts and tribunals estate in England and Wales. This has resulted in the physical inaccessibility of courts by virtue of the increasing distances court users (including victims, witnesses, defendants and court professionals) must travel to attend court, particularly for those living in remote areas or who find the cost of travel burdensome. In rural areas, the majority of defendants are reliant upon public transport which does not always operate at appropriate times to enable them to attend alternative courts following local court closures.¹⁰⁷ The cost of travel (particularly high train fares), is also unaffordable to many defendants, especially those who are in receipt of state benefits, and can contribute to defendants failing to attend court.¹⁰⁸ In other instances, language and the availability of adequate interpretive/translation services are barriers for court users for whom English is not their first language.¹⁰⁹ Digital courts, forms of video-conferencing, virtual legal advice and online systems can therefore provide an opportunity to improve timely access to court proceedings,¹¹⁰ and may serve to ameliorate the national dislocation between courts and the communities that they serve through improved provision of (national and locally-based) online services.

Nevertheless, access to justice ought not to be superficially characterised as a matter of improved physical access to local buildings, or indeed the convenience of participation in digital court processes such as video link testimony, or online systems for conviction/fine payment. Taken in isolation, digital architectural or physical alterations to the traditional courtroom environment will not be sufficient to provide the full range of associated benefits to victims, witnesses, defendants, and litigants without a recognition that IT will only be able to facilitate proper participation at court (and its associated legal processes) when it is accompanied by a broader commitment to securing adequate access to legal representation and advice. In this regard, the advantages associated with digital justice are heavily circumscribed by the presence of an encroaching political landscape in which reforms to legal aid

¹⁰⁶ M. Davies, 'A new training initiative for the lay magistracy in England and Wales – a further step towards professionalisation?' (2005) 12 *Int'l J Legal Prof* 93.

¹⁰⁷ M. Rogers, 'Senior magistrate criticises court closures in Wales' (*Solicitors' Journal*, 2 December 2016), at <https://www.solicitorsjournal.com/news/201612/senior-magistrate-criticises-court-closures-wales> (last accessed 5 December 2016).

¹⁰⁸ Difficulties in travelling to court has also impacted upon judges and magistrates, with a number of magistrates (who serve in a voluntary capacity and are unpaid) resigning as a result of local courthouse closures: J. Halliday, 'Magistrates quitting in "considerable" numbers over court closures' (*Guardian*, 29 November 2016), at <https://www.theguardian.com/law/2016/nov/29/magistrates-quitting-uk-court-closures-cost-cutting> (last accessed 5 December 2016)

¹⁰⁹ In Wales, for example, widespread closures have meant that court users in rural communities, where Welsh is the first spoken language, are compelled to attend court in predominantly English-speaking areas, running the risk of disadvantage.

¹¹⁰ J. Bailey, J. Burkell and G. Reynolds, 'Access to Justice for All: Towards an "Expansive Vision" of Justice and Technology' (2013) 31 *Windsor Yearbook of Access to Justice* 181, 202.

have resulted in serious impediments to obtaining legal representation as well as the absence of satisfactory structures and processes for communicating advice, guidance and support to those facing the prospect of legal proceedings against them.

Much has been written about the pernicious adverse effects of changes to legal aid in England and Wales which have occurred by virtue of the Legal Aid, Sentencing and Punishment of Offenders Act ('LASPO') 2012.¹¹¹ Changes to legal aid eligibility rules means that the majority of cases involving housing, welfare, debt, immigration, medical negligence and family law no longer qualify for legal assistance. However, LASPO also introduced the Exceptional Case Funding (ECF) scheme, which was intended to act as a 'safety net' to ensure that funding would still be available if needed to ensure that an individual's rights would not be breached. One particular restriction brought in by LASPO was to remove article 8 (the protection of private and family life) matters from the scope of mainstream legal aid so that immigration proceedings would require ECF if legal aid was to be granted.¹¹² In *R (on the application of Gudaviciene & Ors) v The Director of Legal Aid Casework & Ors*,¹¹³ the Court of Appeal upheld Collins J's finding that that the ECF scheme had been operated unlawfully and that ECF can be available for immigration matters.¹¹⁴ The Court held that the guidance issued by the Lord Chancellor on eligibility for legal aid was defective as it set too high a threshold when stating that the test was whether the withholding of legal aid would make assertion of the claim practically impossible or lead to obvious unfairness.

While the judgment in *Gudaviciene* appeared to provide redress for some significant problems associated with the ECF scheme, it did not in fact address the wider vitiating features of the scheme, in particular its inaccessibility to litigants in person (LiPs) and the lack of any adequate financial incentive to encourage solicitors to participate in it. These matters were subsequently considered in a systemic challenge against the ECF scheme, in *R. (on the application of S) v Director of Legal Aid Casework*.¹¹⁵ The Director of Legal Aid Casework and the Lord Chancellor appealed against a declaration,¹¹⁶ that the ECF scheme for the administration of legal aid pursuant to section 10 of LASPO was unlawful in that it gave rise to an unacceptable risk that an individual would not be able to obtain legal aid. The Court of Appeal found that the ECF regime for legal aid is lawful, and in the leading judgment of Laws LJ, his Lordship made clear that *Gudaviciene* should be clearly

¹¹¹ A recent study found that basic advice cases (civil legal help) have dropped by 75 per cent since April 2013: L. Logan Green and J. Sandbach, *Justice in Freefall* (London: Legal Action Group, 2016). See also, Amnesty International, *The Impact of Legal Aid Cuts in England on Access to Justice* (London: Amnesty International, 2016); S. Hynes and J. Robins, *The Justice Gap: Whatever Happened to Legal Aid?* (London: Legal Action Group, 2009).

¹¹² The Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) at [60].

¹¹³ [2014] EWCA Civ 1622.

¹¹⁴ *Gudaviciene and Ors v Director of Legal Aid Casework and Anor* [2014] EWHC 1840 (Admin).

¹¹⁵ [2016] EWCA Civ 464.

¹¹⁶ *R. (on the application of S) v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin).

differentiated from the present case because *Gudanaviciene* was a case in which the claims were by individual prospective litigants and the facts of the individual cases were considered and decided. Laws LJ noted that: 'In this appeal the judicial review is generic: the assault is upon the ECF scheme as a whole. It therefore requires proof of a systematic failure; and this is not, certainly not necessarily, to be equated with proof of a series of individual failures.'¹¹⁷

Although the Court of Appeal allowed the appeal on the basis that there was not proof of systematic failure, their Lordships nonetheless reflected that there had clearly been substantial difficulties with the scheme, and there was room for improvement, particularly concerning lay applicants. Notably, Briggs LJ, dissenting, observed that the combination of an application process inaccessible to most LiPs and the absence of an economic business model sufficient to encourage lawyers to apply on their behalf, rendered the defects in the scheme systematic, inherent and unfair.¹¹⁸ Although many solicitors worked pro bono to assist people in obtaining the funding, this did not rescue the scheme from inherent unlawfulness because the number of solicitors undertaking pro bono work was 'insufficient to meet anything approaching the demand for their services' and as a consequence, there are 'a substantial class of deserving applicants who can neither obtain ECF on their own, nor obtain the legal assistance necessary for them to do so'.¹¹⁹

The issues raised by Briggs LJ, particularly in relation to the position of LiPs, reinforce the tenuous and fundamentally unsatisfactory status of the depleted availability of legal aid. Access to justice is of course an indivisible right, in that it is one that applies as much to defendants as it does to victims and claimants; and a body of evidence now exists, from empirical studies as well as case judgments, illustrating the consequences of citizens having no access to legal advocacy.¹²⁰ A lack of eligibility for legal aid and an inability to afford counsel (together with a perception that lawyers increase the expense and complexity of resolving cases and litigants' belief that they can adequately represent themselves) has resulted in more cases involving self-represented litigants, many of whom are vulnerable and have been forced into a position where they must act on their own behalf, contributing to the overall detriment of the administration of justice. Cases involving litigants without representation take longer and can be more costly to resolve, with poorer outcomes for those without legal representation.¹²¹ The impact of LASPO, together with substantial increases in court fees, has

¹¹⁷ At [11].

¹¹⁸ At [75], [78], [83-84].

¹¹⁹ At [84].

¹²⁰ Lewis, n 67 above.

¹²¹ n 97 above; A. E. Bottoms and J. D. McClean, *Defendants in the Criminal Process* (London: Routledge, 2013); R. Birnbaum and N. Bala, 'Views of Ontario Lawyers on Family Litigants without Representation' (2012) 63 *University of New Brunswick Law Journal* 99; K. Souza and V. Kemp, *Study of Defendants in Magistrates' Courts* (London: MoJ, 2009); H. Astor, 'The unrepresented defendant revisited: A consideration of the role of the clerk in magistrates' courts' (1986) 13 *Journal of Law and Society* 225.

resulted in a form of participant legal disenfranchisement through lack of access to legal representation.¹²² Although advances in technology have improved the capture, preservation, and dissemination of legal knowledge and have resulted in greater access to online legal resources (including the public availability of online judgments and case information); as well as increasing scope for client choice and reducing cost, it would be unwise to assume that such benefits accrue universally. Indeed, the remarks of the dissenting judge in *R. (on the application of S)*, are instructive in highlighting the fundamental inadequacy of both telephone and website information services for LiPs attempting to access legal aid.¹²³

Furthermore, of particular salience is the type of cases and categories of advice services that providers select to make digitally available. Although increasing the availability of legal information and advice, and broadening the remit of its distribution through technology, ought to form an essential component of any serious ambition to substantively improve access to justice in the digital age, implementing commoditised (private) online services for some of the most common legal problems in the areas of welfare, debt, housing, immigration and family law, which are mostly ineligible for legal aid, will be challenging. At present, the general absence of standardised online services for these types of cases can be explained in part because they are more difficult to design and engineer but also because there is less of a paying market for them, particularly given that parties to such actions are often in financially precarious and socially vulnerable positions.¹²⁴ While much work is currently being undertaken to develop new legal tools and digital court services, lawyers' participation in providing digital services are constrained by the marketised nature of the legal profession and lawyers' defence of their existing business model and associated profit margins.¹²⁵ In addition, government has failed to support capital investment in the development of standardised,

¹²² It should be noted that the status of access to justice is also an area of significant contention across other jurisdictions including Australia, the US, and Canada, with many international debates mirroring those that exist at national level within the UK. For further discussion, see R. W. Staud, 'All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice' (2009) 42 *Loyola of Los Angeles Law Review* 1117; D. Rhode, *Access to Justice* (New York: Oxford University Press, 2004); J. Baliley and J. Burkell, 'Implementing Technology in the Justice Sector: A Canadian Perspective' (2015) 11 *Canadian Journal of Law and Technology* 2; A. Willems, 'The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (2014) 17 *New Criminal Law Review* 184; A. Rebuli, 'The cost of cutting legal assistance funding' (2015) 37 *Bulletin (Law Society of South Australia)* 20.

¹²³ Briggs LJ observed at [77]: 'Although there is limited guidance for LiPs on a website, and on a telephone helpline, it is demonstrably so inadequate for that purpose that only one LiP applicant has ever navigated the scheme successfully.'

¹²⁴ *Report of the Low Commission on the future of advice and legal support, Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales* (London: Legal Action Group, 2014).

¹²⁵ Lewis, n 67 above.

commoditised online services, especially high volume, high demand cases where the participant population is generally economically marginal and disadvantaged. Instead, government attention is focussed (narrowly) upon investment in digital court architecture and technologies which will increase efficiency. The paucity of a clear and strategic approach to bolster access to justice evident in the government's current reform agenda suggests a tokenistic approach to improving participation, whereby the introduction of technological 'tools' to enhance participation and equity in the justice process are utilised for their symbolic and communicative properties to suggest a representative and fully inclusive process and to provide legitimacy to new supposedly 'open justice' oriented initiatives. Digital innovations, when designed and engineered appropriately, have the potential to harness and capture gains in advancing access to justice objectives but they are ultimately reliant upon the existence of a rudimentary (political) framework for the provision of basic legal representation and services.

CONCLUSION

Visions of 'digital justice' and 'virtual courts' have been held up as a utopia for technology and law, wherein the benefits of efficiency, accessibility and the timely resolution of disputes are typically associated.¹²⁶ Given that confidence in the legal system is heavily reliant upon a proximate relationship between crime and punishment (as well as the timely the resolution of civil disputes more generally), improving the efficiency of the courts is of significance not simply as a matter of convenience, rather it holds wider social benefits in terms of enhancing public legitimacy and confidence in the delivery of justice. Delivering justice at reasonable speed is, therefore, quite rightly a legitimate concern for the executive, judiciary and broader public. Moreover, it is self-evident that an inefficient, overburdened and sometimes 'chaotic' courts system,¹²⁷ will be unable to function optimally in delivering justice processes and outcomes to court users. Yet determinations of efficient court productivity are not being evaluated alongside a consideration of substantive values including, most notably, participation and fairness. Awareness of the type and quality of (especially defendant) participation in digital processes is absent from the discourse of modernisation: to date, government research on new court technologies have primarily measured the 'good result efficacy' of processes (in terms of cost and speed), and not the broader process outcome(s) in relation to access to justice and equal treatment before the law. In the course of this article, I have sought to demonstrate the ways in which the appeal of digital justice and court technologies for policy-makers emanates primarily from the superficial depiction of efficiency and the speedier resolution of disputes in the context of greater economic rationalisation, rather than from their instrumental capacity to enhance the quality of court user participation or improve access to justice for court users. The new

¹²⁶ R. Mohr and F. Contini, 'Reassembling the Legal: "The Wonders of Modern Science" in Court-Related Proceedings' (2011) 20 *Griffith Law Review* 994.

¹²⁷ J. Jacobson, G. Hunter and A. Kirby, *Structured Mayhem: Personal Experiences of the Crown Court* (London: ICPR, 2015)

technologies, digital processes and tools brought into being by recent reforms are concerned, above all else, with achieving reductions in expenditure and meeting fiscal imperatives.

The use of court technologies has many associated advantages and there is the potential for new digital innovations to support the administration of justice, and elevate the quality of justice. Although improving the quality of courtroom technology is a necessary precursor to enhancing digital practices, here the more pertinent concern must be with coming to understand the conditions under which remote technology can function to serve the interests of justice (both fairness *and* efficiency) by ensuring that digital procedures are designed to facilitate effective participation in courtroom communication and interactive social rituals. In a digital world, technology creates new possibilities and challenges for the dynamics of court user participation in ensuring that access to and engagement with digitised processes is systematically enhanced, rather than diminished. At present, the pace of technological change and the growth of court technologies both nationally and internationally has not been accompanied by sufficient scrutiny of technology's impact upon court user participation or case outcomes or indeed any rigorous analysis of the normative or social consequences of these increasingly rapidly enacted series of legal reforms. Our grasp of the ethical and moral questions concerning the use of IT lags significantly behind the burgeoning technological advances. Digital justice means (and requires) a cultural shift in how we approach the use of technology in courts: this necessitates a reorientation of current policy approaches to ensure that proper attention is paid to developing greater knowledge about, and training in, the participative and communicative dynamics of courtroom IT to inform the design and implementation of future reforms.

In addition, a focus upon the participative status of court users must be accompanied by a recognition that (despite the paradoxical policy emphasis upon technology as the gateway to improved access) technology cannot, in isolation, adequately address such a complex issue as access to justice when policy frameworks fail to incorporate measures to explicitly counteract the erosion of legal aid. Simply moving services online may in fact be counter-productive and serve to further entrench access to justice impediments when existing limitations are not factored in. Many – although by no means all – users of new court technologies, will be disadvantaged and disempowered groups who possess little by way of access to legal advice/services. In this respect, the government's current approach to digital modernisation fails to take adequate account of the availability of legal services within *and* outside of the courtroom as an essential condition for realising improved participation and outcomes in court through digital innovation. Government has simultaneously withdrawn funding for legal aid while closing local courthouses and eroding local justice, while anticipating that digital technologies will provide the 'transformative' panacea for improving efficiency and access to justice that will 'liberate tens of thousands of individuals from injustice'.¹²⁸ Digital processes do not in themselves obstruct or hinder the realisation of access to justice objectives: digitisation is merely a process tool and it is in the context, design, and management of new technologies where the scope for process values to be compromised arises. In particular, reform agendas ought to take account of how technology manifests

¹²⁸ Speaking at the Legatum Institute in June 2015, the previous Justice Secretary Michael Gove.

transformations in communicative dynamics, and perhaps more crucially, policy makers must consider how the institutional landscape in which that technology is deployed may diminish or preclude the attainment of enhanced (digital) justice. As Widdison reflected some two decades ago: 'While it is generally accepted that IT is morally neutral, our management, mismanagement or non-management of it is not.'¹²⁹ Presently, the discernible potential embodied within new digital innovations is hampered by the lack of a facilitating institutional landscape. Changes to legal aid in England and Wales amount to no less than the systematic destruction of access to justice.¹³⁰ A failure to conceptualise digital justice within this broader paradigm will result in the attenuation of central principles of the legal system, including, counter-intuitively to prevailing policy narratives, fair participation and access to justice. This is the challenge facing court reformers; in the absence of a policy framework designed to promote greater participation and access to legal aid, the promise of digital justice will remain unrealised.

¹²⁹ n 1 above, 163.

¹³⁰ *The Crisis in the Justice System in England and Wales: The Bach Commission on Access to Justice, Interim Report* (London: Fabian Society, 2016); P. Sanderson and H. Sommerlad, 'Colonizing law for the poor: reconfiguring legal advice in the new regulatory state' in V. Bryson and P. Fisher (eds) *Redefining Social Justice* (Manchester: Manchester University Press, 2011).