Briggs's Online Court and the Need for a Paradigm Shift

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Since most activities are shifting quickly from physical to digital realms, the advent of the digital court seems inevitable. Many disputes are already being resolved online, through websites such as Amazon, eBay and PayPal, and the Online Court proposed in the Briggs Report seems to be part of this developing landscape. However, closer examination reveals that the proposed court is likely to suffer from various limitations if assessed within the current paradigm—that courts should never willfully compromise the quality of their judgments.

This article argues that, to address the civil justice crisis, we need to acknowledge that it stems from a paradigm crisis. The sanctification of correct judgments leads to the treatment of cost and time merely as external hazards that should be reduced to the greatest extent possible without undermining the court's commitment to the rectitude of decisions. However, the continuous failure adequately to address the justice crisis means that it is time for a paradigm shift in our conception of justice, so that cost and time are treated as components of justice, parts of its very definition. With this in mind, reducing the length and cost of litigation may legitimately be done through a willing compromise of the court's commitment to arrive at a correct judgment. When the legitimacy of this trade-off is fully appreciated, the Briggs Report could be read in a different light, opening up new solutions for the civil justice crisis.

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The classical paradigm

The basic constitutional function of a court is to enforce substantive law. This elementary function is critical for the maintenance of the rule of law.[1] It is also essential for the promotion of autonomy in two ways: negative and positive—in a negative way by preventing encroachments on individual freedom beyond those dictated by parts of the substantive law, primarily criminal and tort laws[2]; and in a positive way by enforcing expressions of autonomy, that is, choices made by individuals, to further their ends, using tools offered to them by substantive law (e.g. contracts, wills, corporations, personal status).[3] Access to *court* is therefore valued most because of its role in enabling access to *justice*.

In enforcing substantive law, the court should observe the requisites of fairness and legality. The state retains a monopoly over the use of force in return for protecting our legitimate interests, as defined through a political process culminating in the substantive law. By going to court, litigants resort to the state for protection, invoking its power against their opponents.[4] The process, therefore, has a dual function: to facilitate the use of force by the state to aid aggrieved litigants and, precisely because of that, to provide checks and safeguards against arbitrary and unjustified uses of force. These functions inform the well-known notion of fair trial or due process, as often expressed in domestic laws and international conventions.[5]

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[1] See, e.g., J. Waldron, *The Rule of Law and the Measure of Property* (Hamlyn Lectures, CUP 2012) 6–7: "legal procedures should be available to ordinary people to protect them against abuse of public and private power". See also J. Raz, "The Rule of Law and its Virtue" (1997) 93 Law Quarterly Review 195, 201; L. Fuller, *The Morality of Law*, 2nd ed, (Yale: Yale University Press 1969) p.162; and F. Hayek, *Road to Serfdom* (Chicago: Chicago University Press, 1944) pp.145–6, 148.

[2] F. Michelman, "Formal and Associational Aims in Procedural Due Process" in R Pennock and J Chapman (eds), *Nomos: Due Process,* Vol.18(New York: New York University Press, 1977) p.126 and p.129.

[3] R. Assy, *Injustice in Person: The Right to Self-Representation* (Oxford: OUP, 2015) Ch.7.

[4] See, e.g., D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) 255; S Issacharoff, *Civil Procedure*, 3rd ed. (New York: Foundation Press, 2012) 2–4; and K Scott, "Two Models of the Civil Process" (1975) 27 Stanford Law Review 937.

[5] See, e.g., art.14 of the International Covenant on Civil and Political Rights, art.6 of the European Convention on Human Rights, art.21 of the Statute of the International Criminal Tribunal for the former

Jeremy Bentham made a categorical claim that the enforcement of substantive law is the *only* defensible purpose of procedural law; hence his description of it as "adjective law".[6] A body of literature has developed since Bentham's days, arguing that not all procedural rules must be outcome-oriented and seek to give effect to substantive law. Other values, it is said, may also be served by the process, sometimes even at the expense of the court's ability to achieve correct outcomes.

Take, for example, procedural rules that prohibit the obtaining of evidence by torture or adducing of illegally obtained evidence, rules that privilege communication with priests or lawyers, and rules that prohibit the use of the criminal records of witnesses or litigants as evidence against them, or prohibit a lawyer from examining witnesses on their sexual history or posing offensive questions to them. These prohibitions may be justified independently of their impact on the outcome, based on values such as privacy, bodily integrity, reputation, physical liberty or human dignity.[7]

In the same vein, some argue that everyone has a right to have a voice in proceedings that concern them, irrespective of how effective that voice may be. If litigants are to be treated as subjects, rather than objects, they must be allowed to participate in processes that affect them. Respect for their human dignity entitles them to be given

Yugoslavia 1999, art.67 of the Rome Statute of the International Criminal Court 1988, and art.8 of the American Convention on Human Rights 1969.

[6] J. Bentham, *The Rationale of Judicial Evidence,* John Bowring (ed.)(Edinburgh: William Tait, 1843) Vol.2 at p.6: "For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it. … Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of law."

[7] The list of procedural values that have been defended as having intrinsic value unrelated to the correctness of outcomes includes: procedural rationality and legality, intelligibility, voluntariness, peacefulness, legitimacy, fairness and equality, timeliness and finality, transparency, privacy and humaneness (avoidance of torture, racism, etc); see, e.g., R Summers, "Evaluating and Improving Legal Processes: A Plea For 'Process Values'" (1974) 60 Cornell Law Review 1, pp. 20–27; M. Bayles, "Principles for Legal Procedure" (1986) 5 Law and Philosophy 33, 50–57. Such claims have been disputed on different grounds; see, e.g., A. Stein, *Foundation of Evidence Law* (Oxford: OUP, 2005) pp.31–33; L. Alexander, "Are Procedural Rights Derivative Substantive Rights?" (1998) 17 Law and Philosophy 19; J. Mashaw, "Administrative Due Process: The Quest for a Dignitary Theory" (1981) 61 Boston University Law Review 885; and M. Redish and L. Marshall, "Adjudicatory Independence and the Values of Procedural Due Process" (1986) 95 Yale Law Journal 455, 481–91.

reasons for the decisions made concerning their affairs.[8] Empirical research led by Laurens Walker and John Thibaut further demonstrated that high levels of participation in and control of the process induces litigants to perceive the process as fair, irrespective of whether the outcome was in their favour.[9]

Civil justice: a history of crisis

Exorbitant litigation cost is a chronic feature of English courts, hindering them in their function. So are complaints about excessive complexity, which are as old as the law itself.[10] The curious focus on procedural abuses seems to have its historical roots in the infamous system of forms of action, which governed English civil litigation for centuries.[11] During that time, judges treated procedural requirements too rigidly, to such an extent that any procedural default, however minor, would invalidate the process.[12]

Lawyers were often held maliciously responsible for this. When the law was too complex for the public to understand, access to justice became too dependent on access to lawyers—that is, on financial means. Indeed, English legal history is littered with anti-lawyer sentiment and perceptions of lawyers as harmful to the pursuit of justice.[13] Antagonism against lawyers was acidly expressed by Bentham, who accused them (and

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[8] L Tribe, *American Constitutional Law*, 2nd edn (New York: Foundation Press, 1988) pp.666–667: "Both the right to be heard, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one … For when the government acts in a way that singles out identifiable individuals ... it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*." (emphasis in original).

[9] J. Thibaut and L. Walker, "A Theory of Procedure" (1978) 66 California Law Review 541.

[10] For an historical review, see B. Shapiro, "Law Reform in Seventeenth Century England" (1975) 19 The American Journal of Legal History 280, 281; B. Shapiro "Codification of the Laws in Seventeenth Century England" [1974] Wisconsin Law Review 428, 431–8.

[11] For a concise description of this system, see F. Maitland, *Equity: Also the Forms of Action at Common Law* (Cambridge: CUP, 1910).

[12] See, e.g., W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (London: Macmillan and Co., 1901) 203.

[13] See, e.g., Lord Bingham, "The Rule of Law" (2007) 66 Cambridge Law Journal 67, 77.

judges, for that matter) of using all means to promote their "sinister interest", that is, the maximisation of fees exacted from litigants.[14] Earlier, during the Revolutionary era, radical groups, such as the Levellers, described lawyers as "vermin and caterpillars", whose machinations were the only reason for legal complexity.[15]

Many tried to demonstrate lawyers' malice through an exposition of the inscrutability of their jargon. For centuries, the language of legislators, judges and lawyers has been criticized: "sham science", "spun of cobwebs", "a mass of rubbish", "a language of nonsense and solemn hocus pocus", "heaps of filth", "a perpetual source of disgust", "a dark jungle, full of surprises and mysteries" are but a few of the epithets used to describe legal language.[16] Thinkers as divergent as Jeremy Bentham and Karl Marx have concurred that the language of the law is deliberately obfuscating, so as to mystify its content and institutions and conceal their deficiencies.[17]

The fierce criticism of the legal profession over its role as intermediary between the law and its subjects echoes, with clear differences of course, the criticism levelled at the role of the clergy in Christianity. Powerful and wealthy, priests had a monopoly over faith and exclusive access to the sacred text through their command of Latin—the language in which the Holy Book was written. Emerging Protestantism advocated the idea that believers should be able to develop a personal and direct relationship with God. To de-monopolise faith and strip the clergy of its power, it was critical to demystify the sacred text and translate it into local languages.

While priests proved to be dispensable after all, lawyers turned out to be more difficult to set aside. But times have continued to change, and the focus on lawyers has given way to more positive attempts to improve the legal system. During the twentieth

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[14] Bentham, *The Rationale of Judicial Evidence* (1843) Vol.4, Book 8, Ch.17, pp.287–288.

[15] Shapiro, "Law Reform in Seventeenth Century England" (1975) 19 The American Journal of Legal History 280, 290–1.

[16] Bentham, *The Rationale of Judicial Evidence* (1843) Vol.4, Book 8, Ch.17, 290–295; E. Tanner, "The Comprehensibility of Legal Language: Is Plain English the Solution?" (2000) 9 Griffith Law Review 52, 52–53; D. Mellinkoff, *The Language of the Law* (Boston: Little, Brown and Co., 1963) 4, 265.

[17] H.L.A. Hart, *Essays on Bentham: Study in Jurisprudence and Political Theory* (Oxford: OUP, 1982) p.21.

century, criticism of legal language was seized on by flourishing consumer movements, producing the Plain English Movement.[18] The fundamental idea it promotes is that the law should be drafted so as to be fully intelligible to ordinary citizens affected by it, rather than only by lawyers and judges. This is to be achieved, it suggests, by drafting the law in plain language, stripping it of its dense prose, technical terms and convoluted style.[19]

The idea of making the law speak directly to its subjects has proved so seductive that extensive campaigns promoting plain language policies have been adopted in most English-speaking countries.[20] The drafting of the Civil Procedure Rules 1998 (CPR) was made in this climate. Hailed as a milestone in the drafting of legislation in plain English, these rules have been described as "user-friendly and direct" and their new forms as "clear and well designed".[21] They were drafted by Lord Woolf with the express purpose of making the system work for the self-represented and rendering procedure "simple and easily comprehensible to the layman and lawyer alike".[22]

However, the fact that the CPR used "claim" instead of "writ", "claimant" instead of "plaintiff", "without notice" instead of "ex parte", "witness summons" instead of "subpoena" and the like, has not rendered the procedure substantially more transparent to the public or easier for the unaided to use.[23] Nor have the CPR made the legal system

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[18] See in general L.M. Friedman, "Law and Its Language" (1964) 33 The George Washington Law Review 563, and the seminal book Mellinkoff, *The Language of the Law* (1963).

[19] For a critique of the Plain English Movement, see R. Assy, "Can the Law Speak Directly to its Subjects? The Limitation of Plain Language" (2011) 38 Journal of Law and Society 376.

[20] For a detailed account of the intensive activity of the Plain English Movement and its influence, see P. Tiersma, *Legal Language* (Chicago: University of Chicago Press, 1999) Ch.13; and P. Butt and R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge: CUP, 2007) Ch.3.

[21] Butt and Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge: CUP, 2007) p.92.[OR ibid?]

[22] Lord Woolf, "Access to Justice—Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales" (1995) 5, 119. See also N Andrews, *English Civil Procedure* (Oxford: OUP, 2003) p.117.

[23] See, e.g., *Judicial Working Group on Litigants in Person* (Chairman Mr Justice Hickinbottom, July 2013) [5.6]: "the sheer breadth, use of technical terms, need to cross-refer, and supplementation by a host of Practice Directions, Practice Guides, protocols and court forms, present a picture of complexity that can be daunting for lawyers.", available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf [Accessed 28 November 2016]. See also Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (2013) [9.18], available at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf [Accessed 28 November 2016].

noticeably cheaper to use.[24] Complaints about the complexity of the law continued, and the civil justice gap had yet to be bridged.

Then came Jackson's Reform, which addressed various aspects of the costs system, restricting the full application of the cost-shifting rule.[25] The important changes brought about by the Jackson Reform were soon overshadowed by the massive withdrawal of legal aid, which has further deepened the access-to-justice crisis. Briggs LJ's Report is published against this background.

Briggs' Online Court: stages 1 and 3 and their limitations

Briggs LJ proposes to establish a new, online court. He declares that this is "something entirely new",[26] "the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers".[27] The primary aspiration is, therefore, to render self-representation more effective and to reduce dependence on lawyers, though without formally prohibiting legal representation. Briggs LJ stresses that the development of such a court reflects "the single most radical and important structural change with which this report is concerned".[28]

Proposals to reform the English civil justice system in ways that enhance self-representation are not necessarily grounded in anti-lawyer sentiments. Nor is the proposed break from established methods—adversarial proceedings, oral hearings and legal representation—prompted by "anti-establishment" feelings. There is an undeniable civil

[24] See, in general A. Zuckerman, *Civil Procedure: Principles of Practice*, 3rd edn (London: Sweet & Maxwell, 2013) Ch.27.

[25] Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (December, 2009) Ch.39 para.6.5 , available at: http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Jacksonfinalreport140110.pdf [Accessed 28 November 2016].

[26] Lord Justice Briggs, *Civil Courts Structure Review: Interim Report*, (Judiciary of England and Wales, 2015) (Interim Report), para.6.3.

[27] Interim Report, para.6.5.

[28] Interim Report, para.6.1.

justice crisis that has to be addressed. The English system has long been inaccessible to ordinary people, due to the exorbitant and disproportionate costs of litigation. Rather than accusing lawyers of having a "sinister interest" or of conspiring against their clients to preserve their professional supremacy and financial advantage, Briggs LJ adopts a problem-solving attitude and tries to offer practical solutions.

In a nutshell, the proposed Online Court would require litigants to present their cases at the outset in some detail, using online software that would lead both the claimant and the defendant through a set of questions, the answers to which would then be collated and organised online as detailed statements of case, uniformly structured (Stage 1). Next, some case management and conciliation would be attempted by a Case Officer (Stage 2). In the final stage (Stage 3), a judge would decide whether to conduct a trial or to determine the case on the documents. If a trial were deemed necessary, the judge would still have to consider how to conduct the hearings. Phone calls and video conferences are the preferred methods. Oral face-to-face hearings would not only cease to be the default form of adjudication, but would become a last resort. The judge would have to take a leading role and act more inquisitorially than is currently acceptable. This Online Court would have jurisdiction over cases with a value not exceeding £25,000, excepting a few types of case deemed unsuitable.

Briggs makes two very familiar suggestions: first, make the process simpler and less formal, and second, persuade judges to assume an active role. These strategies have been repeatedly proposed by academics inside and outside the UK in relation to self-represented litigants. The solutions typically offered by authors in this field involve adopting a relaxed and informal approach to procedural and evidentiary requirements, tolerating non-compliance and urging judges actively to advise self-represented litigants.[29] Nevertheless, the specific suggestions offered by Briggs LJ, particularly his Stages 1 and 3, are quite novel.

[29] See literature review in R Assy, "Revisiting the Right to Self-Representation in Civil Proceedings" (2011) 30 Civil Justice Quarterly 267.

Stage 1: automated software helping litigants present their cases

According to Lord Justice Briggs, Stage 1 is the most important part of his reform.[30] It

> "will consist of a mainly automated process by which litigants are assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution".[31]

"Triage software"[32] will therefore be developed to help unaided litigants to present their versions of the case effectively, intelligibly and coherently, by winnowing the relevant from the irrelevant, all in a format uniform for claimants and defendants. This is expected to improve upon the current state of affairs, in which self-represented litigants have to turn "a blank sheet of paper into particulars of claim, an adversarial process which LIPs tend not to perform with distinction"[33].

The contemplated software would perform this task by taking parties through detailed questionnaires prepared in advance and tailored to specific types of cases.[34] Designing this software would require the construction of a series of questions for litigants "in the form of a decision tree for each case type" that will "extract from them the alleged facts and evidence about their case which the court will need to know in determining it (and to which the opposing party will need to be able to respond)".[35]

Obviously, once the lists of questions are prepared, putting them together in a program does not require cutting edge technology.[36] The contemplated software would

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[30] Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (Judiciary of England and Wales, 2016) (Final
Report), para.6.68.

[31] Interim Report, para.6.7.

[32] Interim Report, para.6.8.

[33] Interim Report, para.6.8.

[34] Interim Report, para.6.8.

[35] Final Report, para.6.62.

[36] Briggs LJ notes that the design of this part does not present a serious IT challenge: Final Report, para.6.62.

not be "smart"; it would not seek to develop artificial intelligence or use algorithms to replace human discretion or improve upon it.[37] The primary value of the contemplated software lies in saving time and making it possible to utilise complicated questionnaires that would be difficult to handle manually. Apart from this convenience aspect, there would be no value added to human activity or intelligence.

The efficacy of such software in promoting effective access to the court for unaided litigants would depend solely on its developers' ability to imagine the widest range of scenarios and contingencies, and create questionnaires sufficiently detailed to address the vast range of human disputes. Naturally, there are inherent limitations to this exercise, for it is not possible to anticipate all possible scenarios. Legal drafters recognise this and so sometimes resort to vague or ambiguous standards to allow for future adaptations and adjustments by the courts. Life is far too diverse and dynamic to be captured adequately, whether by specific laws or user friendly, predetermined lists of questions—even if these lists were updated on a regular basis.

The inability to predict all, or even a sufficient range, of possibly relevant scenarios is a serious limitation of the contemplated software. For one thing, there will be claims that do not fit into any predetermined series of questions. For another, strict adherence to these lists or questionnaires may distort the way in which unanticipated contingencies are presented by the software.

Failing to accommodate new contingencies properly could unintentionally produce an effect similar to that of the old system of forms of action—where, if a case did not fit the specific form, the whole process would be declared void and the party would fail to obtain remedy.[38] To avoid excluding allegations or new contingencies, the lists of questions used by the software must not be closed. They must be able to

[37] For an excellent analysis of the use of algorithms for dispute resolution, see E Katsh and O Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford: OUP, forthcoming 2017), particularly Chs.2, 3 and 6.

[38] See, in general, F. Maitland, *Equity: Also the Forms of Action at Common Law* (Cambridge: CUP, 1910).

accommodate the needs of litigants whose allegations were not anticipated by the questionnaires' authors or identified by the software.

One way to do this is to offer users who feel that the questionnaire did not allow adequate presentation of their cases, the alternative of using a "blank sheet", or at least the option of adding or clarifying, in open text, points that have been missed or blurred by the software. But this solution would have a damaging side effect. Once a blank-sheet or an open-text rubric option is offered, litigants lacking legal education and, therefore, the ability to identify and focus on what is relevant under the law, might be tempted to use it too frequently. Some might merely skip the triage process and use the blank-sheet option to try to frame the procedure in their own way.

Imposing a word count might force litigants to be concise and focus on the essence, but even then the ability of unaided litigants to use this open-text space wisely would probably be limited. Unfortunately, the Briggs Interim and Final Reports do not explain how these difficulties could be addressed while maintaining a useful automated process.

The framing and narrative of cases are crucial. Creating a tree of questions in advance would mean that the relevant facts were determined by questionnaires' authors, and the facts presented by the software would be offered in a specific, uniform way, whether or not the one size genuinely fitted all. Funnelling diverse disputes into uniform categories and structures must entail a loss of sensitivity to their individual nuances. Furthermore, framing disputes in terms identified in advance would curtail one of the basic principles of litigation, respected both in common and civil law jurisdictions: that the parties have the exclusive power to define the scope and content of their conflict.

Unless the categories of dispute dealt with by the Online Court were very narrow, the amount of relevant information screened out by predetermined questionnaires might be unacceptably high. Some cases are so routine, and courts are so familiar with them, that it is possible to anticipate the most relevant questions. But then, in these cases, the gains from a shift to the Online Court are liable to be low both because litigants are able

to present their cases fairly well even without the help of a questionnaire, and because judges are able to investigate and manage them effectively already.[39]

Stage 3: judicial leadership and optional trial

Briggs's Stage 3 is characterised "by being less adversarial, more investigative, and by making the judge his or her own lawyer"[40]. Judges would be expected to assume an active role, similar to that which they play in most of Europe and in the Small Claims Courts.[41]

An active judicial role would be facilitated by Stage 1, in which the parties had been led through lists of questions so as to formulate the allegations in a standard format. The detailed questionnaires would force both the claimants and the defendants to provide more information than is presently the case. In doing so, Stage 1 would seek to stream as much relevant information as possible between the parties themselves and between them and the court. Bridging information gaps at an early stage could help parties reach a settlement or else help the court to assume leadership and good management of the case.

These may be helpful suggestions, but their benefit for the unrepresented should not be exaggerated. First of all, the effectiveness of Stage 3 depends on the effectiveness of Stage 1, which suffers from the drawbacks identified above. Furthermore, excessive

[39] The proposed use of online software produces some additional practical difficulties that should be addressed. For example, a convenient Online Court might encourage abusive litigants by making it easier for them to trouble others—anonymously or otherwise. Measures should also be taken to prevent fake claims from being filed on behalf of third parties without their knowledge, so as to harass defendants, or to obtain *res judicata* against claimants without their knowledge. Furthermore, the software would need to be able to spot vexatious litigants automatically (so declared under the Senior Courts Act 1981 s.42), or those against whom a civil restraint order (under CPR PD 3C) has been issued (so perhaps obviating the need for a public blacklist, such as is presently available online on the Royal Courts website).

[40] Interim Report, para.6.15.

[41] Final Report, para.6.42.

investigatory activity by the courts might expose judges to a wide range of conscious and unconscious biases.[42]

More importantly, many European countries already have a judge-based system that is largely informal, free from complex procedural and evidential requirements, with very detailed pleadings, and yet legal representation in these systems is compulsory.[43] This is because, even under judge-based proceedings, if litigants are to be able effectively to present their cases, they need partisan advocacy rather than neutral investigations conducted by public officers.

As with Stage 1, when the pertinent facts and law are discrete and simple, the litigants' need for partisan advocacy may not be pressing, and judges could investigate on their own without endangering their impartiality to any significant degree. Suitable cases would typically involve a narrow, well-defined number of facts (e.g., the income of a husband, when making an order for child support), with easy-to-define items of evidence proving these facts (e.g., bank statements, income and tax reports), and an uncontroversial and straightforward substantive law. In most other cases, disposing of the adversarial system and partisan advocacy would have a price in terms of the accuracy of judgments.

In Stage 3, Briggs LJ presents more daring suggestions regarding trials. According to the Interim Report:

> "Stage 3 will consist of determination by judges, in practice DJs or DDJs, either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial".[44]

[42] See the illuminating discussion at: H. Genn, "Do-it-Yourself-Law: Access to Justice and the Challenge of Self-representation" (2013) 32 C.J.Q. 411; and A. Zuckerman, "No Justice without Lawyers: The Myth of an Inquisitorial System" (2014) 33 C.J.Q. 355.

[43] See, e.g., A. Layton and H. Mercer (eds.), *European Civil Practice* (2nd edn, Thomson, Sweet & Maxwell, 2004) vol 2.

[44] Interim Report, para.6.7.

The revolutionary nature of this suggestion is fully acknowledged:

> "A radical departure which stage 3 would make from current practice and procedure is that there would be no default assumption that a live claim would have to be settled at a traditional face to face trial. Rather, the traditional trial would be regarded as the last resort, if the alternatives of resolution on the documents, by telephone or by video conference were deemed to be unsuitable. A face to face hearing could also be confined to the determination of particular issues, where for example live evidence and cross examination was required".[45]

Clearly, Stage 3 affords judges very broad discretion to decide on a critical matter: whether to conduct a trial and in what form. Despite the radical nature of these suggestions, few guidelines were offered for their application.[46] This runs the risk, at least initially, of some kind of palm-tree justice, free from procedural or substantive controls. Rather than helping the self-represented, a high degree of procedural deregulation could increase the need for legal representation as a form of a check on judicial activity and a procedural safeguard against arbitrariness.

It is not obvious on what basis the judge should decide whether a trial is necessary and, if so, on what basis to decide the form in which to conduct it. In most disputes, some factual disagreements between the parties exist. Would the judge be obliged to conduct a trial whenever there is a significant dispute about the facts? How significant would such a factual dispute need to be to require a trial? What would the precise difference be between summary judgment and the proposed conclusion on paper?[47] When would an audio conference be preferable to a video conference, and under what circumstances should the last resort of a face-to-face trial be taken?

Unless one of the parties adduces clear-cut evidence proving one version of the facts, the judge will need to determine which version is more reliable. Concluding the

[45] Interim Report, para.6.14.

[46] See discussion at Final Report paras 6.77–6.84.

[47] When a case is not expected to benefit from a full procedure, it could be resolved through summary judgment (CPR Pt.24). See discussion at Zuckerman, *Civil Procedure: Principles of Practice* (2013) Ch.9.

case on paper only might be considered arbitrary or lacking sufficient evidential basis. Presumably, an audio conference could help to obtain clarifications from the parties, but when the judge needs to determine witness credibility, doing so solely on the basis of phone calls would deprive the judge of important sources of evidence, namely body language, nonverbal cues, and personal impressions.[48]

Potentially, taking testimony remotely, by phone, gives rise to difficulties in confirming the identity of the speaker, preventing fraud or undue influence. This also raises the question of which would be more conducive to truth telling, speaking over the phone from the security of home, or in public in a courtroom with its rituals and intense atmosphere. Logistic arrangements need to be made if expert evidence or non-party testimony is required, or when exhibits need to be handled.

These concerns apply also to video conferences. While these provide more information than phone calls, as the judge could also see the witness, such testimonies would be exposed to various biases caused by equipment quality, angle, zoom, the degree of eye-contact possible, and irrelevant impressions of the visible surroundings. Some experts argue that live testimonies leave deeper impressions and are treated as more serious than those given on video equipment; an aggrieved person is more likely to attract sympathy when speaking in person.[49]

Accuracy aside, the absence of a traditional trial might be said to run the risk of being perceived as a degradation of justice, so undermining public confidence and the court's authority and legitimacy. Such concerns have been expressed in relation to video-conference testimonies in criminal proceedings but might also apply to civil

[48] Although this is the acceptable view among jurists, it is not undisputable. For the argument that people are not generally good at judging credibility based on demeanour, see L. Kittay, "Admissibility of FMRI Lie Detection", 72 BROOK. L. REV. 1351, 1388 (2007); J. Leubsdorf, "Presuppositions of Evidence Law", 91 IOWA L. REV. 1209, 1252 (2006); M. J. Anderson, "The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault" 84 B.U. L. REV. 945, 948 (2004).

[49] See discussion at A. Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant" (2004) 78 Tulane Law Review 1089; and G. Goodman et al, "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions" (1998) 22 Law and Human Behavior 190.

proceedings.[50] However, such concerns need to be taken with caution. Bearing in mind the public's experience of the online revolution, with so many social interactions now taking place through digital devices and social media, people may now actually *expect* court procedures to go online and place less store by the rituals and traditions of face-to-face trials.[51]

In sum, the nature and design of the Online Court, with its reluctance to conduct face-to-face trials, could lead to a reduction in the judicial ability to arrive at correct judgments. To avoid this, the Online Court would have to be restricted to simple and straightforward disputes.

The £25,000 ceiling: a utilitarian calculation

According to the Briggs Report, the Online Court should deal with cases whose value does not exceed £25,000, but a few types of case have been excluded from its jurisdiction as being unsuitable.[52] In justifying this ceiling, Briggs LJ denied that he or his team regard claims in these amounts to be of "secondary importance to the litigants"; after all, £25,000 is at least as much as "the average person's annual take-home pay".[53] However, he points out that given the expected costs of litigating claims below this amount, they are unlikely to be pursued anyway. In fact, Briggs LJ estimates, some claims of even higher value are unlikely to justify their cost for the litigants.[54]

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[50] See discussion at P. Roberts and A. Zuckerman, *Criminal Evidence* (Oxford: OUP, 2010) Chs.7 and 10.

[51] See Katsh and Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (forthcoming 2017), particularly Chs.2 and 6. See also Briggs' note while discussing the objection that Stage 3 results in a loss of the traditional day in court: "Finally, some attenuation of the expectation of a day in court seems to be a necessary reflection of the need to find more cost-effective ways of determining civil disputes, even those which properly command the attention of a judge. In many continental jurisdictions determination mainly on the documents is a cultural norm, with face to face hearings sometimes reduced to a matter of formality", (Final Report para.6.84).

[52] Final Report, paras 6.92–6.102.

[53] Final Report, para.6.7.

[54] Final Report, para.6.10.

As already suggested, in any but the most straightforward cases, the design of the Online Court enhances the risk of an erroneous judgment. Nevertheless, when we come to assess the merits of the Online Court, we need to decide what to compare it with. The objection that such a court would offer "second-class justice"[55] implies a comparison with "first-class" justice, the full adversarial procedure by fully funded litigants.[56] But in practice, with the increasing costs of legal representation and the withdrawal of legal aid, this best path to justice on the merits is rarely taken other than by wealthy litigants. The impecunious and more and more of the middle classes are deterred from litigation by its costs, and prefer to cede their rights or settle for less than they deserve. The class of court-users is becoming steadily smaller and more financially homogenous.

Briggs's Online Court could, therefore, be defended based on its potential to improve upon the actual landscape of litigation, rather than an ideal, unachievable or even imaginary one. A "second-class justice" as its critics call it, would be preferable to the current state of affairs, in which there is no justice at all for these low-value claims. First-class justice is already being denied to those most likely to benefit from the Online Court, and rather than first-class justice exclusively for a few, we should opt for "second-class justice" for all.

This is a legitimate defence of the Online Court, but it is applicable only to those cases which would not otherwise be brought. This utilitarian calculation cannot in itself justify a fundamental change in the civil justice system. That can be done only by adopting a broader conception of justice, which would undermine the foundation of the "second-class justice" objection.

Divorcing "value" from "complexity"

[55] Final Report, paras 6.6–6.10

[56] On the advantages of adversarial proceeding in producing accurate results, see A. Zuckerman, "No Justice without Lawyers: The Myth of an Inquisitorial System" (2014) 33 C.J.Q. 355.

The use of monetary value as a criterion for allocating cases to different tracks is common. At present, cases up to £10,000 are allocated to the small claims court (except for personal injury, when the ceiling is £1,000); cases up to £25,000 are allocated to the fast track, and the rest to the multi-track.

According to Briggs LJ, the Online Court should deal with "simple and modest value disputes".[57] Such descriptions are frequently proffered in an apologetic manner to justify the choice of simple, informal and judge-centred procedure, which deviate from the traditional, sophisticated, and formal procedure. The latter is perceived to be more effective and suitable for complex and high-value litigation.

And yet, there is no analytical relationship whatsoever between value and complexity. Value is not an indication of complexity, and vice versa. Value cannot even operate as an initial filter of complexity (as, for example, the criterion of types of case might do). The low value of a case does not create a presumption of simplicity, and nor does the high value of another case imply complexity.

So why should value be used as a criterion for the choice of procedural sophistication? In practical terms, value is easier to measure and determine than complexity, and so saves the need to argue over whether a case is sufficiently complex to justify a sophisticated procedure. It is easier to draw the line over a number than to create standards of complexity (which themselves are liable to be complex and vague). But convenience is not an adequate justification for using value as a jurisdictional criterion. If the different tracks are designed to suit different degrees of the complexity of the subject matter, fitness for them ought to be determined by a case's complexity. Relying on a completely unrelated criterion—value—is arbitrary.

The persistent reliance on monetary value for the choice of procedural sophistication, despite the lack of any correlation between them, invites the question of whether we should *accept as legitimate* a simple and informal procedure in low-value claims. Current thinking suggests not. Less sophisticated procedures, whether in the small

[57] Interim Report, para.6.6.

claims courts or the Online Court, expressly target "*simple and* low value disputes",[58] which means that they should deal only with cases simple enough to be treated adequately within their simple and informal procedure. In such cases, the ultimate goal of achieving accurate judgments is not compromised, and the use of simpler procedure is thought merely to be a more efficient means than the traditional, full procedure. This may explain why small claims courts in most jurisdictions have a residual power to re-direct a given case to the other tracks, with their tool for handling complexity.[59] In his Interim Report, Briggs LJ proposed a similar arrangement in relation to the Online Court: if established to be complex, whether in questions of law or of facts, a case "should be … transferred to another more appropriate court".[60]

There is, however, another way to look at it, which would make sense of the use of monetary value as a presumptive indicator of suitability for a particular track. Arguably, we tend to accept simple and informal procedures in low-value claims *irrespective of their complexity and even when the simple procedure may compromise the quality of the final outcome*, because we are willing to accept an enhanced risk of an erroneous judgment in order to promote fast and cheap resolutions. The harm associated with the risk of an erroneous outcome, given its low value, is outweighed by the benefits achieved in terms of efficiency.[61] The allocation of cases among tracks reflects an allocation of risk among litigants, expressing the extent to which the system is willing to

[58] Interim Report, para.6.6.

[59] In England and Wales, the reallocation is possible from all tracks; see CPR 26.10. CPR 26.8(1) contains a list of considerations that have to be taken into account in allocating cases, including: the likely complexity of the facts, law or evidence; the number of parties or likely parties; the amount of oral evidence that may be required; the importance of the claim to persons who are not parties to the proceedings and the circumstances of the parties. Similar powers exist in other jurisdictions; see, e.g., Ohio Revised Code s 1925.10; New York Code – New York City Civil Courts 1805; Massachusetts Uniform Small Claims rule 4.

[60] Interim Report, para.6.34.

[61] For a general theory perceiving evidence law as performing a risk-allocation function, see A. Stein, *Foundations of Evidence Law* (Oxford: OUP, 2005).

invest in the determination of disputes.[62] The key here is proportionality: the legal system is willing to invest time and effort roughly corresponding to the value of the cases.[63]

Thus, the use of the residual power to move a case out of the simple procedure should be limited to those exceptional cases in which the final judgment could be of great significance for the parties, beyond its monetary value. Indeed, if financial thresholds operate as a harm-control mechanism, then to exercise the power to reallocate cases based on complexity alone might actually be to defeat the object.

A new paradigm of procedural justice

The present paradigm dictates that justice in a legal process means the enforcement of substantive law, that is, to use Bentham's formula, the application of the correct law on the correct facts. However, it is impossible to achieve completely accurate judgments. Nor should we seek to do so given the cost and time involved. Factual judgments are ever probabilistic, quite aside from the indeterminacy of the law. Not all agree that for each legal question there is a single correct answer. And, even if there is, it is not always easy to determine it given human limitations and constraints. So rather than a binary criterion of either correct or false, accuracy of judgment is better understood as an evaluation scale assessed in degrees. And the only way we can be sure that courts are able to deliver a reasonable degree of accuracy is through a procedural design that provides sufficient tools for resolving disputes effectively.

As rights are not self-enforcing and require a process of adjudication, the inevitability of inaccuracy is combined with the inevitability of costs and time. For this reason, it is unsatisfactory to focus on correctness of outcome as the sole criterion for the

[62] This is why Briggs LJ is right to say that, ultimately, for the system to work, claimants should not be able to choose whether to file their claim to the Online Court. The scheme must be compulsory because litigation is not a completely private matter.

[63] This is a narrower definition of proportionality than that offered by CPR 1.1(2)(c), which requires courts to allocate resources, not just as a function of claim value, but also of complexity and other parameters. The multiplicity of parameters, each of which may point in a different direction, makes such a broad definition largely unhelpful.

quality of a legal system. Adrian Zuckerman has long argued that justice is three-dimensional and advocated a stricter treatment of procedural non-compliance and a greater commitment to timetables.[64] To take this seriously would influence not just our treatment of procedural non-compliance but the whole of procedural design. Time and cost should not be treated merely as hazards or constraints to be minimized in the course of achieving accurate judgments. They, too, are components of justice, parts of its very definition. If so, it is no longer enough to argue for reducing the transactional costs of litigation, because that still gives accuracy too much weight. Our conception of justice must strike a balance between the three components, which means devising a procedure that is not devoted wholly and solely to achieving correct judgments.

The difficult question remains, of course, about the right balance between accuracy, cost, and time. At what point would the aggregate social harm rendered by a reduced level of accuracy cease to be outweighed by the benefits of fast and cheap adjudication? This question is difficult to answer, not just because different people will disagree about where to draw the line, but also because it is difficult to measure the trade-off, namely the precise degree of accuracy that is lost and, correspondingly, the precise gains in terms of cost and time (or vice versa).

The trade-off can be promoted by judges at a micro level through their ad hoc decisions and handling of cases, as well as at a macro level through procedural changes that would affect each of the three dimensions. Small claims courts exercise such a trade-off by disposing of the complex procedural tools generally available in adversarial proceedings (such as extensive disclosure, lengthy cross-examination, and multiple hearings). Informality and simplicity render their process cheaper and faster, but potentially less accurate.

The Online Court would go a few steps beyond this by allowing judges to determine cases either solely on paper or using other forms of hearings, and by using

[64] A Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in A Zuckerman (ed), *Civil Justice in Crisis* (Oxford: OUP 1999) 3, pp.3–10; A Zuckerman, "Quality and Economy in Civil Procedure The Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 Oxford Journal of Legal Studies 353.

software, in Stage 1, which might result in inaccurate or incomplete presentations. Further reduction in the cost and time of litigation can be achieved if the application of Stage 3, with its radical departure from convention, is extended beyond simple and straightforward cases. In other words, the Online Court might be used to produce even less accurate outcomes that are even cheaper and faster.

To allow the Online Court to adjudicate not just up to £10,000, but up to £25,000, would indicate willingness to tolerate a greater number of erroneous judgments in return for more quick and cheap resolutions. In addition, it would indicate willingness to reduce the reliability of outcome even for claims of higher value where an erroneous judgment is more harmful.

When criticised that the design of the proposed Online Court offers inferior, "second-class justice", Briggs LJ's response was curious. He did not expressly deny these charges, but instead stressed that the Online Court's justice would be no more second-class than that of the small claims courts, with the Online Court having a relative advantage over them because it would provide "interactive triage designed to assist [LIPs] to articulate their claim, and to upload their evidence", so enabling parties and the court to obtain as much information as possible at an early stage.[65] Whether these are indeed advantages is doubtful or at least remains to be seen.

But Briggs LJ also attempted to downplay the likely effects of his proposals on the quality of judgments. He stressed that the traditional face-to-face trial would not be abolished, but would merely cease to be the default.[66] Judges would retain discretion to order a trial, as well as having additional forms of hearings open to them. There is also the "exit option", to allow complex cases to be transferred to other tracks.[67] Be that as it may, the utilitarian calculation provided a trump card for Briggs LJ: whatever the quality of justice the Online Court delivered, it would be better than nothing given that the cases in question would otherwise not be worth litigating.

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[65] Final Report, para.6.9.

[66] Final Report, para.6.79.

[67] Interim Report, para.6.34.

In addressing the "second-class justice" objection, however, it is important not to retreat to the old paradigm, sanctifying the correctness of judgments. To do so would fail to recognise a paradigm crisis crying out for a paradigm shift. It is time to acknowledge that because the civil justice system is too expensive and too slow, it would be justifiable to accept a reduced level of accuracy in exchange for cheaper and faster resolutions. The longstanding failure to improve access to justice substantially can be attributed to dogged adherence to accurate outcomes, while treating resources as external constraints over the achievement of justice, rather than as parts of the very definition of procedural justice.

When justice is redefined in a thick and rich way, it is clear that changing the balance between accuracy and resources is not a matter of accepting "second-class justice". To give more weight to time and cost entails a change in the point of balance, but this is not to reduce the quality of justice—as more fully understood. This is a change in the ingredients of justice, not in its quality. We might therefore legitimately prefer less accurate judgments that are cheaper and faster to achieve, to more accurate but also achieved at a higher cost and within a longer time.

This is not just a conceptual refinement, a theoretical insight, or a rhetorical or symbolic point. This is a paradigm shift—a change in the conception of justice itself—that could lead to the acceptance of the Briggs reform as highly valuable and so open up new routes for improved access to justice.

Implications of the adopting a new conception of justice

Given this rich and thick definition of justice in the legal process, one might think of other, equally defensible combinations of the ingredients—cost, time and accuracy. There are various procedural means to reduce the cost of the process and render litigation faster. These include prohibiting legal representation in small claims courts or subjecting it to

judicial discretion (as is the case in other jurisdictions)[68]; enhancing the jurisdiction of small claims courts (up to £25,000 or more); reducing the amount of time allocated for witness examinations; restricting the number of witnesses for each side; enhancing the role of lay assistants (McKenzie Friends) and allowing them to conduct litigation and address the court; providing judges with additional investigatory judicial tools, requiring them to assume responsibility for receiving and developing evidence, and to examine witnesses.

Perhaps a more aggressive way to alter the present balance of the three ingredients would be to abolish the costs-follow-the-event rule, which is responsible for much of the misery suffered by English litigants. This suggestion cannot be considered radical if one takes seriously the severe justice crisis caused by high fees. If, as a result, lawyers still did not charge less for their services, England and Wales could adopt a version of the German system, where the loser pays a fixed, affordable tariff. Reducing the lawyers' financial incentives could lead to a reduction in the quality of legal services, but once again this might be a price worth paying. Our revised conception of justice could tolerate that.

These are merely examples that could be explored. Any combination of these or other tools would present a different version of justice. Willingness to consider a rich and thick definition of procedural justice need not stop with time, costs and accuracy. Those who argue for additional, intrinsic procedural values, such as voice, dignity, and so on could also be accommodated (though assessment of the desirability of such expansions of the concept of justice remains to be investigated).

Conclusion

[68] See, e.g., California Code of Civil Procedure s.116.530; Revised Code of Washington s.12.40.080; Nebraska Revised Statute 25-2803; Magistrates Court Act 1991 s.38(4) (South Australia); Victorian Civil and Administrative Tribunal Act 1998 s.78.

While Lord Justice Briggs saw Stage 1 as his most promising suggestion, it can be argued that the most potent part of his report is Stage 3, if understood as an invitation for a paradigm shift. Without this, the Briggs reform would be just another installment in judicial adaptation, which would ease some pain without bringing about a root treatment that is long overdue. Rather than remaining strongly committed to the application of the correct law on the correct facts at all times, and accordingly perceiving all reform as aiming to minimize transactional costs, our conception of justice should be redefined in terms of costs, time and accuracy. At least in times of crisis, a degree of compromise over the court's ability to arrive at correct judgments, in exchange for faster and less costly proceedings, is a legitimate trade-off. Critics have called this "second-class justice", but when the choice is between inaccessible first-class justice and accessible second-class justice, to prefer the latter is the first-class choice.