Transform justice, but don't wreck it

The principle of digitalisation has been left without Parliamentary backing in the wake of Brexit, says Roger Smith

Transform Justice is a young charity established in 2012 by a former magistrate, Penelope Gibbs. She is clearly a formidable operator and has edited a devastating report (*Defendants on video – conveyor belt justice or a revolution in access?*) on digitalisation in the English and Welsh criminal courts.

A background issue, to which Ms Gibbs alludes but does not draw out, is that senior figures in the judiciary have been persuaded to support government policies which may sound fine in theory but are problematic in practice. This is the downside of the more public role given to judges like the Lord Chief Justice with the demise of the former role of the Lord Chancellor. The support of senior judiciary like Lord Leveson, Lord Justice Briggs and Lord Thomas for the principle of digitalisation has perhaps impeded their objective articulation of the practical deficiencies. The judges are particularly exposed because promised legislative authority for the digital arrangements was first stalled by the 2017 election and is now overwhelmed by the Brexit legislative logjam. The programme, thus, is left without Parliamentary backing— and, indeed, without very much appearance of ministerial oversight.

In the absence of such political and statutory authority, issues of policy are being dealt with as details of implementation. It is worth restating some basic principles widely held around the world about the value of a public hearing—which are threatened by the use of virtual reality implemented badly. For those steeped in the common law, the right to a public hearing can be traced back to opposition to the Star Chamber. For those with a US orientation, the right to a 'speedy and public trial' forms the eighth amendment to the US Constitution. While those who still retain a European perspective will remember how all this was translated into Art 6 of the European Convention on Human Rights: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Public hearings preserve the rights of

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defendants but they also serve another purpose: the manifestation of a public interest in personal action. They are an indication of the engagement of the public in the criminal justice system. Hence, the importance of the debate about media access to the courts.

> *"It is time for ministers & Parliament to seize back control over this process"*

The report points out that the Ministry of Justice has commissioned no research on the impact of the growing use of video communication in the criminal process since a study of prison-court links in 2000 and police station-court links in 2010. Yet, there has been a massive expansion of both since then. The draft Prisons and Courts Bill would have removed virtually any statutory constraint on the physical presence of the defendant in a court except in a Crown Court trial. That is a major change whose effects have not been considered by any empirical study conducted by this or the previous Coalition Government. And, there is plenty to examine. The report documents the deficiencies of the current systems on which almost any criminal practitioner will, if encouraged, mimic a version of the Ancient Mariner. The live links do not to work. The sound or the vision drops. Video is hopeless with defendants suffering from mental deficiencies or language difficulties. Pre-hearing slots are limited to 15 minutes and even then hampered by uncertain start times and poor communication.

A defence lawyer reported what is probably a systemic breach of the consultation provisions of Art 6: 'Often you resort to bullet points and end up rushing the client to make a decision. Similarly, with sentence hearings you barely have enough time to discuss [all relevant matters]. If you have a client who is telling you about personal matters such as addiction, childhood abuse etc, you find yourself rushing them in order to cover everything you need to cover.' Furthermore, the right to confidential consultation is often thwarted by insufficient privacy. The defendant loses, by virtue of the technology, the practical right to consult with their lawyer during a hearing—and can usually say goodbye to a post-hearing consultation. Video communication lessens respect for process. A defence lawyer reported: 'I have had communication break down entirely with defendants who become agitated—it's a lot easier for them to become frustrated and take out their anger with a "face on a screen" than a human being in the room with them.' And a magistrate agreed: defendants 'appear disengaged and remote. They often give a nonchalant/poor account of themselves and we are left to infer that they couldn't care less/ that they are disrespectful of the court.'

Transform Justice calls for the criminal court digitalisation process to be brought to a sharp halt. This is disturbingly similar to the view of Parliament on Universal Credit where the Government ran away from a vote demanding the end of its digital roll out. The criminal justice recommendation, thus, fits within a wider narrative of concern at the Government's obsession with digitalisation as a cost-saving, austerity-driven measure. It is time for ministers and Parliament to seize back control over this process. This report does us all a service in documenting a process which lacks adequate supervision both of its execution and its principles. We should pause to examine where video connection can properly be used; where not; and the minimum standards required. In the absence of anyone else to take this role, the senior judiciary should do so—at the very least, demanding Transform Justice's moratorium pending further research. They have the authority: let's see them use it. **NLJ**

Roger Smith is an *NLJ* columnist & former director of Justice.