"Covid, continuity and change: the courts' response to the pandemic"
Lord Hodge, Deputy President of the UK Supreme Court[1]
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It is a great pleasure to be able to address you today. Thank you for inviting me. I am sorry not to be with you even remotely but am engaged in a court hearing.

Those of us involved in litigation and dispute resolution have lived through a most unusual seven months which have caused heartache for the bereaved, social and economic disruption to many, and an emerging significant rise in unemployment and financial hardship for those who lose their jobs or businesses.

The pandemic has also posed serious challenges to the legal systems of the United Kingdom and the Republic of Ireland. I propose to speak about our responses to those problems and the opportunities for improving our legal systems which our response to the pandemic has created.

When I think back to life in January this year, it seems like another world. I had some experience as a first instance judge of hearing evidence from vulnerable witnesses by video link in criminal cases and evidence from overseas in an intellectual property case. In the Judicial Committee of the Privy Council (JCPC) I had sat on panels which heard a few appeals in a similar manner. But it was not a regular feature of judicial life in my experience. All that has changed.

Since March 23 I have become used to virtual events – virtual meetings, virtual hearings, virtual social events, and virtual conferences.

[1] I am grateful to my judicial assistant, Rachel Malloch, who assisted me in research for this lecture.

When I think back to February, I recall the uncertainty about the way in which things were developing. People bumped elbows, smiling jovially, but I don't think that we were aware of the momentous changes which were about to occur. In early March, the Supreme Court continued to sit. Lord Reed and I gave evidence in person to the House of Lords Select Committee on the Constitution in a committee room with no masks to be seen. I attended social events in London and Cambridge at which no restrictions were evident. In the second week in March, the work of the court continued but my diary reveals that outside lectures and other social events were being cancelled. One heard about legal offices and other City offices moving to an arrangement by which 50% of their staff would work from home and swap round in the course of a week; but the court's work continued as before and Justices sat in the courtroom in person on 17 and 18 March.

Fortunately, behind the scenes our IT department was hard at work preparing for what then occurred. On 23 March, the UK Government announced the lock down, the prioritisation of essential services, and the requirement that those who could work from home should do so. By then, most of my colleagues had gone to work from home and Lord Reed, the President of the Court, and I remained in the building. I returned to the Court on Tuesday 24 March to preside over the first virtual appeal, which was an appeal in a Revenue matter. It was strange sitting by myself in a meeting room and seeing my colleagues and counsel on screen. It was also strange to be in the court building with a skeletal staff who had kindly come in to support me and test out our technology on this new venture. There were a few glitches, but the hearing was a success.

It was an online hearing, with all participants, Justices and counsel in separate locations communicating via the Cisco Webex videoconferencing platform. We had to learn by doing the job. For example, in the very first hearing I found that it was necessary to require all participants other than the counsel who was addressing the court and the presiding Justice to switch their computer microphones to mute as

otherwise the camera would switch from a speaker to someone who was rustling his or her papers. When Justices wished to ask questions, they had to attract the attention of counsel, the presiding Justice or the IT official organising the hearing by raising a hand to have his or her microphone unmuted. This hampered any spontaneity. But it worked. Between 24 March and the end of the legal year we heard 34 appeals via Webex and have improved our virtual courtroom skills. Last month we heard 11 appeals. From the start of the legal year in October 2019 until the end of August we have held 114 Supreme Court or JCPC hearings and issued 108 judgments.

We have learned to do things differently. In the pre-Covid world, the Justices on a panel would meet 15 minutes before the start of an appeal hearing to discuss how the appeal was to be conducted and to express their views on matters which they wished to be explored at the hearing. We also met in a conference room after the appeal to discuss the hearing and express preliminary views as to the outcome. Now our court day comprises four meetings on Webex. The first is the pre-conference meeting which is confined to the Justices while our IT staff are briefing counsel in a separate meeting. Then we join that meeting for the morning session. We have a third meeting for the afternoon session, and, after the court has adjourned, we have another private meeting for the post-hearing discussion.

We have had to adapt our working methods to cope with the new norm. For example, it has been essential to have two computer screens available. One is used to see the other participants in the hearing while the other enables us to access the appeal documents in what is in large measure a paperless hearing. When working from home, we have learned the value of connecting to the router by ethernet to avoid disruption to the signal caused by competition within the family for use of Wi-Fi. We have also been aware of the need to establish suitable lighting so that we are clearly visible to counsel who wish to observe our reactions to their submissions and

we have had to think about sitting in front of an appropriate and sober background in order not to create a distraction.

Both the Supreme Court and the JCPC have maintained open justice by live-streaming all remote hearings on their respective websites. This has enabled members of the public to observe the hearings as they take place. It is possible to view recordings of the hearings on the websites and our IT and broadcasting teams have been able to post the recordings on those websites within a day of the completion of the hearings. Initially the public could see only the person who was speaking but our IT team rapidly adapted the system to allow the public to observe the Bench and opposing counsel while counsel made his or her submissions. We are also exploring whether we can make documents available online.

The use of the video-conferencing software has proved successful in allowing the two courts to hear cases during the pandemic. No case has been adjourned because the court was unable to provide a hearing. Early in the lockdown we had to adjourn seven cases at the parties' request, either because their counsel was ill or because they were not able to use the videoconferencing facilities which the court offered them. We have had to alter the dates of some hearings during the lockdown to avoid overlapping hearings as we found that it was not possible to hold and livestream two video hearings at the same time. We have since overcome that difficulty.

We have received generally positive feedback from counsel and other users of the remote hearings. But counsel have observed – and so have we – that virtual hearings are more tiring, and we instituted a five-minute break mid-morning to rest the eyes. There are also difficulties in senior counsel involving junior counsel or obtaining instructions during the hearing. We have tackled this problem by giving counsel permission to seek a short adjournment or lodge further written submissions within a short timescale.

We are also aware, as are counsel, that a virtual hearing does not have the spontaneous interaction between counsel and the bench which is the norm in the courtroom. I miss that. And, of course, the experience for litigants and members of the public is very different. We therefore look forward to returning to the courtroom as soon as it is safe to do so. We had been hoping to resume work in the court building from the beginning of October but the Government's measures to mitigate the second wave of Covid, have caused us to maintain the virtual court format.

We have been very fortunate in two important respects. First, as an appellate court, we do not have witness evidence or require the attendance of jurors. Nor have we encountered self-represented litigants in these hearings as the Registry takes steps to ensure that they receive pro bono representation. Secondly, we were able to adapt our systems quickly as we had already offered hearings by video link in some appeals to the JCPC and it has long been our established practice to record and stream hearings live from the court building. These gave us a head start. But I gratefully acknowledge the skill and dedication of our IT team and support staff in establishing the system, briefing the parties and conducting pre-hearing test sessions with counsel, dealing with technical problems as they have arisen, preparing the footage from previous days for online publication, and ensuring that the live feed is stable and runs without problem.

During the lockdown, we have continued to hand down judgments by means of pre-recorded summaries which are published online when the judgments are released rather than being live streamed from the courtroom. We continue to publish written press summaries of all judgments to enhance public understanding. We have developed a range of online learning resources and virtual tours as part of our commitment to public education and outreach.

The Court building reopened to the public on 24 August with additional measures in place to maintain social distancing. Our staff worked very hard over the summer to prepare the court for a resumption of in-person hearings and to devise systems and protocols to facilitate social distancing. Again, I wish to acknowledge their hard work and am sorry that we had to restrict access to the building again on the arrival of the second wave. Although the resumption of in-person hearings has now been delayed, we will be ready when the clouds part and the sun again shines.

Professor Richard Susskind writing in July 2020 in an article for Harvard Law School[2] stated:

"… the UK Supreme Court has responded more emphatically and successfully than any of its equivalents internationally. Thanks to technology, perseverance, and judicial adaptability, access to the highest court in the United Kingdom has been maintained during the crisis."

Lest I appear to be blowing the court's trumpet in citing that favourable review, I readily acknowledge that the Supreme Court had distinct advantages which other courts in the UK did not in that we had up to date technology and our dedicated IT team had experience of the use of that technology in advance of the crisis.

Many other courts and tribunals have had to adapt from a standing start and often, initially at least, without access to the needed technology. Their success in doing so has been a significant achievement.

The Coronavirus Act 2020 has amended existing legislation to expand the powers of the courts to use video and audio links across a wide range of hearings and to give the public access to view such hearings.[3] When the pandemic was at its peak in late

[2] "The Future of Courts" https://thepractice.law.harvard.edu/article/the-future-of-courts/

[3] The relevant provisions apply to England and Wales and (in part) to Northern Ireland.

April, many courts could not sit and 90% of the hearings which did take place involved the use of either audio of video technology.

In England and Wales, the Court of Appeal (Civil Division) has been conducting remote hearings, using video links through the Cloud Video Platform and audio links, as has the Criminal Division, creating a virtual court. The Court of Appeal has been live-streaming hearings, and HM Courts and Tribunals Service has been facilitating the media to join video and telephone hearings when appropriate, thereby maintaining the public nature of the court. The High Court has been conducting remote hearings, including trials involving witnesses who appear by video link to give evidence to a judge who is sitting in the courtroom, and other courts and tribunals dealing with civil matters have instituted similar procedures. The Lord Chief Justice in his evidence (given remotely) to the Select Committee on the Constitution in July 2020 described the courts' operations during the pandemic as "the biggest pilot project that the justice system has ever seen".[4]

You can find detailed guidance on court arrangements in response to the pandemic, including the conduct of remote hearings, on the judiciary's website.[5]
While there are many obvious advantages in using remote courts in the context of the Covid pandemic, we need to be alive to the difficulties which a remote hearing poses for the "digitally excluded". When the Lord Chancellor gave evidence to the Select Committee on the Constitution in July, he was asked about this and he explained that judges and the Court Service provide technical assistance including a phone line for the court user. If a user could not cope, the judge has a discretion to revert to an in-person hearing to achieve a fair hearing.[6]

[4] Transcript available at: https://committees.parliament.uk/oralevidence/379/pdf/.
[5] https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/.
[6] Transcript available at: https://committees.parliament.uk/oralevidence/768/pdf/.

A problem, which is difficult to surmount, is that our courtrooms, whether old or modern, have not been built to allow people to do their jobs while remaining 2 metres, or at least 1 metre plus, apart. Many commercial cases can be conducted remotely without detriment. But it has been found to be necessary in family cases to establish hybrid courts with the judge and the parties present in the courtroom in what are often emotionally charged proceedings, while the legal representatives address the court remotely. By this means the number of people in the courtroom can be limited.

Many tribunals have adopted similar initiatives to those of the High Court and some have conducted some or all of their work remotely.[7]

The Magistrates Courts, who hear over 90% of criminal first instance cases, have managed to continue to conduct hearings using appropriate safeguards to protect people who come to the courtroom, and by using video and audio technology when appropriate.

A major difficulty in England and Wales and in the other jurisdictions of the United Kingdom has been the resumption of criminal trials involving juries. The numbers of people who have to be in a court building and in a courtroom for a jury trial to operate risked exposing the public to danger unless protective measures were introduced. The holding of trials in the Crown Court was suspended in late March but some jury trials were resumed in mid-May with special measures to ensure social distancing. Adapting existing courtrooms is a major challenge which has required innovative thinking as face masks and screens do not achieve social distancing. Where it can be achieved, court buildings have been used imaginatively. Juries have been spread out in a courtroom in which the trial is heard. A separate courtroom is made available for the jurors' deliberations as jury rooms are too small for social

[7] For example, the Special Educational Needs and Disability Tribunal is conducting all its cases remotely.

distancing. Another courtroom is provided for the media and others to watch the proceedings by CCTV.

Alternative venues, known as Nightingale Courts, have been developed in England and Wales. These "pop-up courts" are different venues which have the capacity to accommodate court hearings safely. HMCTS has identified an eclectic range of venues for these temporary courts including a town hall, a civic centre, a theatre, a hotel and cathedral premises. 13 such venues were operational by late summer and more are planned for the autumn.

In Scotland, similar provision to remove the requirement of physical attendance at court hearings has been enacted in the Coronavirus (Scotland) Act 2020. The Scottish Courts and Tribunals Service (SCTS) is reviewing the operation of the courts and tribunals to maintain essential services and publishes extensive guidance orders and practice notes on its website.[8] The Lord President in a recent talk referred to the SCTS' pre-existing digital strategy and judged that many of its objectives had been achieved in about one-fifteenth of the programmed time in response to necessity.[9] He has called for a thorough review of the way in which court cases are conducted in future. In the meantime, High Court jury trials resumed in Scotland in July with the jury sitting in a separate courtroom viewing the trial remotely; and remote jury centres have been trialled in cinemas in which the jury view the trial on the cinema screen.

In Northern Ireland, during the lockdown, court activity was consolidated into 5 key hubs to tackle urgent business while the court system adjusted to the crisis. Crown Court jury trials, which were suspended in March, resumed in August with physical

[8] https://www.scotcourts.gov.uk/coronavirus-orders-and-guidance.

[9] The Lord President's address to the Scottish Public Law Group, 20 August 2020. https://www.judiciary.scot/home/media-information/media-hub-news/2020/08/21/scottish-public-law-speech.

measures similar to those in England and Wales being implemented to achieve social distancing. Similarly, remote hearings have been instituted in courts and tribunals.

In the Republic of Ireland, the Supreme Court and the Court of Appeal were able to have remote hearings from the start of the legal term in April 2020. The High Court initially sat only for urgent cases such as extradition, bail applications and urgent judicial review applications but was able to resume work across all divisions in the course of the summer, including by hearing oral evidence remotely. As in the UK, the court service seeks to use additional premises to enable jury trials to take place.

Much has been achieved in each of our jurisdictions to maintain our justice systems but there is a major backlog of criminal cases because of the problems of conducting jury trials.[10] It is expected that it will take a long time to clear this backlog and there is a real concern that justice delayed is justice denied.

As is well known, the disruption to parts of the court and tribunal system and the significantly reduced ability to conduct criminal trials has created serious financial problems for many, particularly in the state-funded criminal Bar and solicitors practising criminal law. Many legal practitioners in the civil sphere have also been adversely affected by the unprecedented downturn in economic activity. But criminal practitioners appear to be particularly at risk.

I am also concerned about young lawyers. The pandemic has reduced the opportunities for young lawyers to develop their careers by watching court cases and

[10] For example, in England and Wales in the Crown Court there were about 37,000 outstanding cases in December 2019 but by August 2020 that figure had risen to over 47,000. In the magistrates' Court outstanding cases grew from about 300,000 in December 2019 to over 440,000 in August 2020. In Scotland there were 544 live indictments in the High Court but by October this figure had risen to 844. Similarly, live indictments for sheriff and jury rose from 1564 in April to 2814 in October. Sheriff summary trials which are outstanding increased from 13,967 in April to 25,146 in September.

having easy access to more senior members of the profession from whom they can learn. Training opportunities have been seriously disrupted. It is important that the profession bears in mind the difficulties which the pandemic has created for young lawyers when better times return and acts to ensure that there is not lasting detriment. I am very aware that in the Supreme Court it has been difficult since March for the young judicial assistants to obtain the experience of working closely with the Justices which their job is intended to offer but there is no easy means of remedying this problem.

But not all the consequences are bad. The justice system has adapted and is adapting to the pandemic. In my court, the new working practices, which it has forced on us, have included the online filing by the parties of applications for permission to appeal, case bundles and other papers, and the Justices having to hear and work on appeals without papers. I am confident that, when the pandemic has passed or has been effectively neutralised, these practices will be a permanent change in the way in which we conduct our business when we return to our courtroom. This will save money and have positive environmental benefits.

We will not stick with remote hearings. Given the symbolic role of the Supreme Court at the apex of the UK court systems and its role of deciding legal questions of general public importance, I think that it is very likely that we will continue to hear appeals in our court building. But the way we work will be different.

Many other courts will also revert to hearing cases in their court buildings but there are likely to be permanent changes. The establishment of remote hearings has resulted in the requirement for electronic communication and the use of electronic bundles in place of papers and extensive guidance has been published to assist legal practitioners and court users.[11] I do not see a reversion to the use of papers as likely.

[11] See for example, https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/ in England and Wales, https://www.scotcourts.gov.uk/coronavirus-orders-and-guidance in Scotland and https://www.judiciaryni.uk/coronavirus-covid-19 in Northern Ireland.

It is fortunate for the legal system that the crisis occurred at a time when the UK Government had committed £ 1 billion to the modernisation of the court system and this included "digitalisation" and the increased provision of online services. The process was under way, but the pandemic has accelerated changes which were coming over time. Increased funding to cope with the pandemic has enabled the court and tribunal system to adopt modern technology on a widespread basis much more rapidly than had initially been programmed.

More widely, the justice system is likely to involve remote hearings much more frequently, particularly for incidental and case management business in the senior courts. At a local level, where court closures have removed the local court and require people to travel some distance to attend court, there is surely scope for remote hearings to avoid inconvenience and expense.

The spread of the new technology is enabling the court system to cope with the pandemic and addresses the problem of conducting hearings safely. But can we not use the new technology and the increasing digital experience of judges and court officials as a basis for wider reforms to improve access to justice?

In the UK, as in every country, there is a problem of access to justice. Legal work, if done properly, can be time consuming. Legal services are expensive for the litigant. The decline of public funding of civil claims in the past thirty years is well documented. There is a need to devise means by which people can resolve their civil disputes in ways that are fair, proportionate, cost-effective and readily understandable to the litigating public. There will be many cases which involve complexity and novelty which will require skilled legal services and may be fought up the hierarchy of our courts. But much of a judge's work in many courts is what

Lord Devlin described as "the disinterested application of known law".[12] Can we find a proportionate way to resolve such disputes? Professor Susskind has been campaigning for many years for the creation of online courts and his latest book on the subject, "Online Courts and the Future of Justice"[13] merits careful consideration. He foresees a world in which dispute resolution by online judging will largely do away with oral court hearings in court buildings in many cases. He suggests that the state should not merely provide authoritative and binding adjudication but also assist in resolving disputes without such adjudication. The justice system, he argues, should provide IT which will help unrepresented court users to understand their entitlements and obligations and provide tools to enable them to focus their evidence and formulate their arguments. It should encourage parties to settle their disputes by mediation or other forms of alternative dispute resolution, which could be provided by case officers working for the court service.

Some steps have been taken in the direction of an online court. In a significant joint statement in September 2016, entitled "Transforming our Justice system", the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals committed themselves to exploiting the opportunities which IT has created to modernise the court and tribunal systems. Initiatives have been undertaken to create digital case management generally in court proceedings and to test online services in family law (including divorce and probate), in social security and child support appeals. In the spring of 2020 family public law and certain immigration and asylum proceedings were added to these services which are designed to allow people to initiate cases and move through the system digitally.

Since 2017 and running until 2021 there has been a pilot project in the County Court of "Online Money Claims", a procedure which enables people to pursue and defend

[12] Patrick Devlin, "The Judge" (1979) p 4.
[13] OUP November 2019.

money claims of less than £10,000 online. It seeks to assist people by using non-technical language. It may be able to avoid the expense of oral hearings in many cases. But the task of formulating the legal claim and the defence remains with the unassisted claimant and defendant. It is a useful initiative which contributes to the administration of justice at a proportionate cost but of itself it does not give legal guidance to those who do not have legal representation.

For an initiative which seeks to give such guidance we must look to the Civil Courts Structure Review, which took place in 2015 and 2016, and was chaired by my colleague, Lord Briggs. The Review drew on the work of the charity, Justice, and of Sir Stanley Burnton in proposing a new "Online Solutions Court" for cases of a value under £25,000.

The Online Solutions Court which the review proposed is a virtual court alongside the County Court and the High Court. If it comes into being, it will involve three stages:

The first is an automated online investigative stage. This comprises software involving sets of sequential screens, which are free of legal jargon, which are designed to tease out the relevant components of a party's claim or defence. The aim is to help the party making a claim to identify the nature of his or her grievance and draw out the elements that will create the legal case. It will also provide a facility for the parties to upload their main evidence in the form of documents and statements.

Stage 2 involves a legally qualified Case Officer who will select the most appropriate means of resolving the dispute. This may be telephone or online mediation, or third-party resolution, including early neutral evaluation by a district judge in a hearing centre.

Turning to stage 3, if resolution is not achieved at stage 2, the dispute will be determined by a judge. There will be various options for this determination. It may be online, by telephone or video, or face to face. Selection of the appropriate means of determination will be subject to a test of proportionality: party must justify more expensive types.

There is a fundamental difference between this proposal and the uses of IT which the pandemic has promoted. The latter involves us doing our normal job in the same way as before but remotely and without papers. Where virtual courts have been established, they have succeeded in keeping the justice system in operation and, as I have said, the removal of paper or at least the substantial reduction in its use is a benefit. But virtual courts do not begin to tackle the problem of access to justice for those who cannot afford legal representation or whose claims are small or uncomplicated so that the engagement of a legal team would involve disproportionate expense.

One great attraction of the Online Solutions Court is the assistance which the software can give to the unrepresented claimant. If the software at stage 1 is good enough, it will save the parties much of the cost of litigation as they, rather than lawyers will do the donkey work of building up their case, prompted by the questions which the software will pose. Accessing that support at the vital stage 1 of the process will require assistance to those who find working on the computer intimidating or who do not have ready access to a computer. The development of that support is part of the proposed package.

Unfortunately, an attempt in 2019 to legislate to facilitate the establishment of such a court failed. The Courts and Tribunals (Online Procedure) Bill, which has its inevitable acronym "CTOP", was debated in the House of Lords in the early summer but did not complete its passage in the House of Commons in July before the parliamentary session ended and the Bill fell. The Bill proposed that there be online procedures in civil and family courts and in the First-tier Tribunal and Upper Tribunal in England and Wales, and throughout Great Britain in the Employment Tribunal and the EAT. It aimed to establish an Online Procedure Rule Committee to formulate the necessary rules. The Bill generated some political controversy at a time of heightened political tensions. Concerns were expressed about the power of Government ministers to specify by regulation the proceedings to which the procedures would apply, about the absence of a value limit as Lord Briggs' Review had proposed, and about the need to test the system by pilot schemes. Concerns were also expressed about "the digitally excluded" and the need to maintain the option of more conventional judicial dispute resolution to those who chose it. But in her evidence to the Select Committee on the Constitution in July 2020, Susan Acland-Hood[14] explained that the reform was to provide new routes of access to justice, and did not necessarily involve taking away existing routes.

It seems to me that CTOP had much to offer and could readily have been adapted to address the concerns which it generated. Lord Keen in the House of Lords addressed that concern about Government Ministers determining the proceedings which CTOP would cover by proposing an amendment requiring the consent of the Lord Chief Justice, and (if tribunals were involved) the Senior President of Tribunals. Rigorous pilot schemes could address the argument against moving "too far too fast".

[14] Chief Executive of HM Courts and Tribunals Service.

In his evidence to the Select Committee on the Constitution on the impact of Covid on the courts, the Lord Chancellor gave an account of the changes which the pandemic had prompted and described the prospect of a return to the status quo as "a massively missed opportunity". I don't know if he had in mind the need to promote the Online Solutions Court and similar initiatives as a means of promoting access to justice as well as developing other advances in court practice. But if (as I would like to think) he did, I agree.

Thank you.