

Keynote address by Professor Richard Susskind, to the Southern African Chief Justices' Forum, September 2021

Around the world many [court] hearing rooms are closed. Large backlogs are building up. But even in legal systems that we dare to call advanced, if you take civil disputes as an illustration, to resolve them takes too long, costs too much and is not understandable unless you are a lawyer. Increasingly, the way we practice law and administer justice feels out of step in a digital society. The problem is not unique to Africa; it's a global problem. It's the global access to justice problem. In some countries, the backlogs are staggering. In Brazil for example there's a backlog of some 80m cases.

We have to think more fundamentally. In a digital society when we're not solving that problem satisfactorily, there might there be different ways of resolving legal disputes.

Today we are not offering sufficient access.

I draw a distinction between automation and innovation. Automation is what most people think of when they think of technology. They think of taking some task and streamlining it, computerizing it, automating it, but not fundamentally changing it.

The first 60 years of court technology has been about automation, crafting new technology onto our old ways of working, systematizing our traditions. Often that delivers mess for less. And it doesn't address the fundamental problem. Instead, I ask you to think beyond automation to innovation, by which I mean using technology not to support or enhance our old ways of working but fundamentally to change our old ways of working, to disrupt, to replace, to displace, to allow us to deliver better access to justice in a digital society. I don't think you should be assembling in your room to discuss automation. You have to go beyond computerizing what you already do if you want to deliver better access.

So, what of Covid-19? Well, I was heavily involved since March 2020 with the design of a system called remote courts worldwide www.remotecourts.org

And in that resource, on that website, you can find news of how jurisdictions around the world adapted to Covid, how they set up remote courts, as we call them. And 168 countries moved at least in part from a physical court room to some kind of remote hearing. And there were three kinds of remote hearing. By audio. Essentially telephone conference call. By video conference, using the kind of video systems we

use today and then some paper hearings, not a hearing at all, but arguments on evidence submitted in electronic form without oral evidence or a physical hearing.

But the technology that has been the most successful has been the video hearing.

I want to make six observations about the video hearing.

The first is that they have worked rather better than most lawyers and judges would have expected. If you had suggested video hearings in early 2020, most lawyers and judges would have said it's not possible and certainly not desirable. But in practice, for many cases, they have worked rather well.

Secondly, we find that judges and lawyers actually can adapt quite quickly. It's often said that lawyers and judges are conservative, resistant to change. But that doesn't mean if the platform is burning, if the iceberg is melting, that judges and lawyers cannot adapt. The response to Covid has shown that judges and lawyers can indeed embrace technology.

The third observation I would make is because of the use of these systems and services online many legal minds have been opened to new ways of working. Some legal minds in fact have been changed. I also acknowledge that an absence of technology in some jurisdictions and poor technology in others, has been a problem. You cannot satisfactorily offer video hearings unless the enabling technology functions. But here's one thing to think about: the enabling technologies you see today are the worst they are ever going to be from now on. Our technologies are getting better and better and as I say, in Africa, increasing investment and deployment of these technologies. We cannot judge the acceptability of Covid technologies for the future simply by looking at today's short-comings. We have to anticipate and indeed urge improvement in technology.

I would say as well, that Covid has had an unfortunate polarizing effect in the legal world. Some lawyers and judges say we should never go back. We should use video hearings more extensively. This is the future. But others are saying we cannot wait to go back. As soon as we can we should dismiss all this technological nonsense and return to proper legal and court work.

I sit somewhere in between. I think the future will be a blend of traditional hearings and video hearing and of online courts. I don't think we should be dogmatic and insist on one way or the other. I think we should find what suits our legal system and what suits different kinds of cases. But I underpin again my major point: that if we continue

as we have always been, offering physical court hearings, we will not crack the access to justice problem.

Covid 19 has accelerated some uses of technology but it's actually decelerated others.

In my view, Covid has accelerated automation, but decelerated innovation.

What we've essentially done is we have dropped conventional hearings into Zoom or Teams or some kind of video conference. We haven't much changed the underlying participants, for example, still judges, still lawyers, still similar rules and similar processes.

I don't think the future has yet arrived. I don't think home working is a full transformation of a court system. I don't think dropping hearings into Zoom is a shift in paradigm as commentators want to suggest. We are still at the foothills of change.

We have seen a glimpse of how we might, in one way, offer different forms of court service. But there's much more to say/see/do. And I think to a large extent, in light of the Covid experiment, this has been like a huge pilot, an unscheduled pilot. Now we should go back to the drawing board and think of the future.

And that is what I try to do in my work and in a book called *Online Courts and the Future of Justice*, and I hope that some of you have been given the latest version of that book.

What I'll try to do today is summarise 400 pages in ten minutes.

But just to give you a sense of the flavour of the argument, when I say 400 pages I want to stress that I have given serious and deep thought to how we might improve access to justice. Some lawyers and judges view me as the enemy. They say my views on technology are a threat. Quite the contrary. My values align, I suspect, entirely with yours. I just want to find ways of plugging the justice gap.

And I see technology in a digital society can play an absolutely vital role here.

Here's a couple of things to think about technology.

Our systems are becoming increasingly capable. Hardly a day passes that we don't hear news of some new development in technology, app or system breakthrough. We live in remarkably changing times. A time of greater technological advance than humanity has ever witnessed. It's happening on our watch and to think that it doesn't apply to the most information-intensive, to the most document-intensive industry of all, all over the world, is simply misguided.

And here's another thought. There's no finishing line.

No one in Silicon Valley or China or South Korea is dusting their hands off and saying, 'Job done. That's technology finished. We can move onto another project.' Or, 'Let's plateau for a while.' Not at all. The pace of change is actually accelerating

It is estimated now that in our world, and this figure changes by the month, 59 % of people have access to the Internet. I mentioned earlier than 46 % of people have access to justice. Isn't it remarkable, that more people today already have access to the Internet than have access to justice? And that figure of Internet access is growing as the days go by.

So how can we use the Internet, technology, as a platform to offer greater reach? To help more people understand and access their entitlements?

I believe we'll see five trends in the coming decade in the use of digital technology in the courts:

Asynchronous online judging

Extended court services

Front ends

Artificial intelligence

Dispute avoidance

Asynchronous hearings. Communications are synchronous when the parties communicating need to be available at the same time. A physical meeting, a telephone call, a video meeting – the people communicating have to be available at the same time.

Asynchronous communication is when we manage to communicate with one another without being available at the same time. A text message, an email, a WhatsApp message. These are powerful methods of communicating that dominate so much communicating in our world and they don't require people to be available at the same time.

I recommend the idea of an asynchronous judicial process. Not for all cases, but my recommendation is for every day, low value disputes, civil disputes, family disputes, administrative disputes. We can use this technology. We can use this method, this technology. I call it online judging. And it's not unlike the paper hearing I mentioned earlier. The idea is simple and not new. The parties submit their arguments in

evidence in papers, using an electronic form, to the judge, there's some kind of online discussion or debate, like an exchange of emails on line, and the judge delivers his or her decision electronically. Certainly, in England and Wales, but in many other jurisdictions as well, we have been deciding cases on the papers alone for many years. In a digital world we can make this more systematic and effective. It's far more convenient for people. They don't need to take a day off work. It's far quicker. It's less costly. There are illustrations in my book how it could work.

I stress, this would not be for all cases, but it's a way of offering access where none today exists. That's online judging.

But on its own it won't be enough to increase access to justice, without my second prediction, and that is **extended court services**.

Traditionally, in a print-based society, the function of a court service above all is to deliver independent, binding decisions for parties. I believe we should think about and introduce a secondary function. In a digital society, where access to justice is prejudiced, I argue that our courts should provide more than the primary function of binding decisions. I argue for extended court services. I want parties, without legal help, to be able to go online and find out more about their legal position, to understand their rights and entitlements. To understand the options available to them.

I want these extended court services to help these parties, without lawyers, to help structure and organise their legal arguments, to help organise their evidence. And I know you'll be thinking this isn't possible, but I have spent 40 years showing this is possible. My doctorate at Oxford was on this subject. We have been able to evolve and deliver these systems for years. They are not perfect but they are so better than the nothing at all that most people receive by way of guidance.

I also want online the possibility of systems that can allow parties to resolve their disputes themselves, through some kind of online negotiation or perhaps mediation. Alternative dispute resolution not as a private sector alternative but baked into tomorrow's court system as an electronic service too. This is what I call the electronic court service and in my book, I provide an architecture for this.

It's not a pipedream. Have a look at the civil resolution tribunal in British Columbia as an example. It uses precisely these techniques of online judging and of extended court services – I admit, for low-value disputes – but these are often the disputes that dominate the work of our system. And these are often the disputes that people don't manage to bring to the system. Have a look at the level of user satisfaction with the civil resolution tribunal and compare that to the levels of satisfaction with

conventional court systems. On eBay every year, more than 60m people have disputes. Almost none of them are sorted out by lawyers – they are sorted out by online dispute resolution.

The 20s is the decade when this technology will come to the rescue of our justice system by upholding the rule of law, enhancing access to justice, building on this phenomenal Internet infrastructure that we are seeing burgeoning around the world.

The third development though, acknowledges what many of you will be thinking. If we cannot provide the primary function satisfactorily, how can we afford extended court services?

My answer to that, first articulated in an article in the online journal of Harvard called *The Practice*, is the idea of **front ends**. And this is the idea of a public-private partnership. It might not be a commercial organisation. It could be a charity or an academic organisation, but bringing the extended court facilities that I'm talking about, tools to help non-lawyers understand their legal position, tools to help them prepare for court and to help them resolve their disputes, that is provided as a preliminary online service connected to the court, but not delivered by the court.

And the Master of the Rolls, the top civil judge of England and Wales, has suggested that these could be accredited providers, given a blue tick as it were. These systems could be connected to the court system, in the event that disputes are not resolved by them. Perhaps, and this is what many of us are thinking through, this would be an accelerated way of enforcing decisions by non-court bodies.

But the idea of the front end is to bring the bigger legal community, the charitable community and others, into the orbit of the court system, almost like satellites around the court system. These front ends that to some extent have the teeth of the court system, the shadow of the coercive powers of the state, are there – but it's quicker, it's cheaper, it's more convenient. This is another way – the front end – that we can increase access to justice.

What about **Artificial Intelligence**? Well, as I say, this has been my life's work in law and I could speak for months on this subject. There are different forms of AI. But for the purposes of our discussion today I think that you should think that there are three ways that AI in the coming decade will affect the work of the courts.

And this maps onto my architecture for the online court.

The first way is by providing online guidance. My idea of the extended court, the front end, is that court users can understand their rights and entitlements online. For

this purpose, we need diagnostic expert systems. A first generation of AI, my own specialty, these are systems that can help people identify and understand their legal positions.

It can be done technically. I've written books on this. Do not assume that because you do not know much about the technology that it's not possible. I put my career on this. We can develop these systems. Think of them perhaps as very complex decision trees or flow charts. The technology is proven. It's just very sparsely understood and available across the legal world. We are, I'm afraid a conservative bunch. Online guidance will help people understand and help them prepare for court.

There's a second and more advanced function that is also part of the extended court system. You may know there are systems that can predict the outcome of court decisions often as well as, if not more accurately than, human lawyers and these systems are getting better and better.

I have no doubt that during the 20s these systems will be way more effective at predicting court outcomes than lawyers. Again, I ask you just to accept what I'm saying. The technology is there, even though I accept you won't be familiar with machine learning and deep learning and so forth. There are tens of thousands of scientists working on this around the world in other areas and some now working in law too.

One of the things clients often ask their lawyers is, what's our likelihood of winning? What's our prospects of success? and that informs their decision as to whether or not to proceed. I believe these predictive systems should be baked into the extended court services to help people understand the likelihood and the sense of them progressing.

The third role of AI is far more challenging. It's whether or not court determinations might ever be made by a machine. There is no system now and there's no technological prospect of there being in the realistic future, of a system that can reason, that can weigh judgments as you do as judges. There is no system today or in the reasonable future. There is no prospect of a system that can provide decisions with reasons, which fundamentally is what most judges do. But there is another way of looking at this. Let's go back to this idea of predictions of outcomes of cases and I'm not recommending this but I want to widen our thinking.

And the idea I have in mind here is predictions as determinations. Remember, I mentioned technologies that can predict the outcome of cases very accurately? So let's go to Brazil. In Brazil we could say to parties many of whom are in the 80 million people queue, 'Your case will never be decided by judges or lawyers. You will not live

long enough for that to happen. But we have developed a system that can predict the likely outcome of your case.’ And all of this is based on all the past decisions of the court. You can say to the parties, ‘Would you accept the output of that system as a binding determination of our court?’ If for example the degree of confidence in the system was say 95 % or higher, I can explain that technology ... My idea is that prediction can become a form of binding determination with the consent of the parties.

Now you may say this is nowhere near as good as a judge deciding a case, but remember, it is based on judges’ past decisions and that my argument is not that it’s better but that it’s a way of providing access where otherwise we have none. There are big debates to be had here about what’s known as the opacity of machine learning systems, because these systems do not provide reasons with their decisions. There’s also the worry of bias but if there is bias in the data of past judicial decisions we are doing no more than holding up a mirror to the judicial system.

The fifth development I think we’ll see far more of is **dispute avoidance**. Most ordinary people want a fence at the top of the cliff rather than an ambulance at the bottom. They don’t want a dispute resolved well by lawyers and judges. Rather, they want to avoid disputes in the first place. And there are a whole variety of techniques emerging under the heading of legal risk management, for example, that will help people avoid disputes in the first place and contain disputes when they do arise.

So that’s the future I see – where we have online judging, where we extend our court services, where we have front ends, where we use artificial intelligence and where we have systems to help people avoid disputes in the first place.

A few words in conclusion about justice.

Judges without court room, justice without lawyers – many people regard this as seditious. They regard me as the enemy. But what’s very interesting is that critics and supporters of the idea of online courts both use the language of justice. Very often judges will say to me you cannot have a just hearing online. Whereas others will say to me it’s unjust that we live in a society where so few people can understand and access their rights. And this has led me to think about what we want of a justice system and I argue that we don’t just want ‘justice’. We want seven different conceptions of justice, whether or not they are delivered in a physical court room or online or virtually or however.

We want substantive justice – fair decisions. We want procedural justice – fair process. We want open justice – transparency. We want distributive justice –

accessibility to all. We want proportionate justice so that the cost and effort of proceedings is consistent with the nature of our dispute. We want enforceable justice with determinations backed by the state. And we want sustainable justice – a system, physical or electronic, that is sufficiently resourced. My argument is that in thinking about the future of courts, and comparing online courts and traditional courts, we should reflect on each aspect. My own research suggests that in some cases, but not all, an online court can outperform a traditional court in ticking more boxes in my seven prong justice test.

Now I know there are all sorts of objections to online courts. Some people say they are economy class courts, a view a quarter of my book is devoted to addressing. But I believe that many young people will think a system that is quicker and cheaper and more proportionate, easier to use – that that's the first class system. People say they are not transparent. A common experience has suggested that in many ways, given the reach of the Internet, an Internet based system can be more transparent.

Many people say that an online court cannot play host to a fair trial. In Europe they say that a fair trial has to be a public hearing. I argue that we are re-thinking our notion of what a public hearing is. Indeed, often, when we say we will make something public, we precisely mean we will make it available on the Internet and I argue that in many cases we can maintain the fairness of our trials.

Vital for you, I appreciate, many people will say that what I'm proposing is digital exclusion because in many countries and many homes people cannot afford access to the Internet. I say again though, that we are increasing access to the Internet every day and we are planning here not for 2021 but for 2030. We are engaged in long term strategic planning. This is our legacy. We are accelerating the use of these technologies. And even if we don't reach every one, we'll reach more people than our physical courts do.

Many people often say that public sector projects fail and that is true, but it's not a reason not to try. That's a reason to do these projects well. The key concern if your issue is about access to justice, is not whether online courts or virtual courts will replace traditional courts or which is the better, but whether the kinds of things I've suggested today can take on some of the work that our traditional courts do not or cannot. And for those who argue from the point of view of justice, I believe that often, in the name of justice, many critics are missing the chance to reduce manifest injustice.

The best way to predict the future is to invent it.

In the end all I am is a commentator on all of this. And I try to be a catalyst. But you are senior chief justices and you have a vital role in the development of your legal systems. So, you've kindly asked me here today to predict the future but I want to put it back at you – what future are YOU going to invent for your justice systems in a digital society?