Digital technology in family justice systems: global benefits, opportunities and concerns

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Three challenges for our discussions

- "It was Ned Ludd who did it" the Luddites still with us
- Superman: "the world needs a saviour"
- Access to digital justice

Three potential obstacles in family law

- Size of law firms
- Multiplicity of family situations
- Common law

Three instances of transformation not automation

- Transforming legal practice
- Transforming research
- Transforming international cooperation: EU and Hague

A tale of three cities

- London
- Cooktown
- Seoul

Conclusion

In 1779, England, the whole of Europe was a predominantly agricultural society. The Industrial Revolution was just starting. That year in Leicestershire, a very rural county in the East Midlands, a weaver named Ned Ludd[1] smashed two machines used to make woollen garments. News travelled and at a time of discontent in England, France and elsewhere, whenever weaving machines, agricultural machines or similar were sabotaged, people would say Ned Ludd did it. By 1812, with revolution around Europe and uprisings against industrialisation, organised machinery breakers became known as Luddites. The name became synonymous with all who seek to hold back progress through mechanisation, now digitalisation.

The Luddites are still with us. We have gathered today seeking to share, learn and make progress using digital technology for the better conduct of family justice nationally and worldwide. In our discussions today we must take full account of those for whom digital progress is uncomfortable, disconcerting and threatening. Even in England in 2020 where we have made huge progress in remote hearings in the family courts, the voice of Ned Ludd is still heard. We have had two reports[2] after detailed consultation into the extensive remote hearings in the family courts during the pandemic lockdown. They have been full of praise for the initiatives and enterprise which has kept our family justice going so well. No one ever suggested remote hearings are applicable in all cases. But the reports were accompanied by strong protests and desperate pressing of the brake pedal in the use of this key element of family justice digital technology.

But I suggest we have another, and greater, pressure placed on us today in our discussions.

In 2006, the Hollywood director, Bryan Singer, relaunched the Superman films. In the second film he gently mocked messianic hopes. Superman goes missing. Huge troubles arrive for the world. And everyone calls out for Superman, saying the world needs a Saviour. Governments around the world faced with the massive volume of family law cases have been looking for a saviour. In the 1990s they found one. Family Mediation. Here was the answer. Cases would not go through the courts. Resolved amicably out of court. Countries put huge funding into mediation. Mediation works. It's great. I'm biased as I'm a mediator. But it was no saviour. The take-up rate has been disappointing and frustrating. So governments looked for another saviour. And they think they have found one. Digital technology. This will save huge amounts of resources of court offices and judicial time. It will avoid unnecessary court applications. It will save legal costs. At last here is the answer, the saviour has been found.

Except however great is our vision and hopes of what can be accomplished, we know today it will not solve the all the many problems of family justice. Not least, it cannot solve the huge backlog of cases in some countries. Just as we must be alert to those who would seek to hold us back, we must be alert to governments with unrealistic hopes and expectations of what can be accomplished. Part of our task today is to speak realism as well as optimism.

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1 after apparently being whipped for idleness

2 From the Nuffield Foundation Remote hearings in the family justice system: a rapid consultation | Nuffield Foundation (nuffieldfjo.org.uk)

The third element in these preliminary remarks is why many of us came into the legal profession in the first place. A concern for the poor, the disadvantaged, those without rights or awareness of their rights, without opportunity for proper representation. We call it access to justice. Around Europe we should be proud of our work to provide this access to justice but equally never complacent about so much still to be done. As we move into far greater use of digital systems, we now have another category: those without access to digital justice. Some have no access to ordinary justice. But our digital developments are creating a new category of disadvantaged: without access to digital technology to use the systems being put in place in our family justice. This may be a matter of age or education. It may be inaccessibility to sufficient bandwidth or technology[3].

In 2015 a survey found that 42% of those living in rural areas in England did not have broadband speeds[4] for online court filing. In the north-east of England, the former industrial heartland with much poverty, some areas have only 59% of households with Internet access. The 2020 lockdowns showed us how desperately we rely on Internet connections and devices and yet concealed is how many in our society are digitally unconnected. Unconnected means without access to justice. Some have said, flying the flag of Ned Ludd, that we should stop our digital progress until we have accessibility. No. We must not stop but we must find a way of bringing along, carrying, nurturing and accommodating, those with connectivity difficulties.

Because the digital technology we are discussing is undoubtedly itself an answer to access to justice. Prof Richard Susskind, who has done so much for digital justice, has said that worldwide only 46% of the population have basic access to justice. Appalling. But another statistic gives hope: 56% of the global population have access to the Internet. We cannot in any way minimise the magnitude of what is happening. We are discussing systems which will allow those presently without justice to receive justice. There cannot be a greater ideal and challenge.

This conference is about digital technology in family justice. In private practice there are distinctive opportunities but also practical challenges. Too often in too many countries digital technology has been a late arrival in family law work. Some of us have looked with envious eyes at what our colleagues, fellow lawyers, in corporate law firms have been able to accomplish. Why is this? What impact does it have?

One reason is the size of the law firms conducting family law work. In many countries, it is small law firms, chambers, even individuals working alone. They have not the funds nor the budget for wholesale introduction of operating systems, technologies and innovations. Singapore is a country much admired for its widespread technological use. Its new Supreme Court building was planned to enable maximum Wi-Fi access. Yet in

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3 It is not dissimilar to the educational disadvantages experienced during lockdown by children in poorer communities without access to laptops or sufficient broadband

4 more than 2 MBPS, the then minimum required for online filing. It has got better but technological demands have increased.

2018 the Singapore Ministry of Law conducted a review[5] to create, they said, *a vibrant legal tech ecosystem for the future economy*. They recognised they had *to drag an entire jurisdiction into the digital age*. They found 80% of legal practices had five or less lawyers with little time or resources to adapt to new ways of working. So, they funded computers and operating system upgrades for the profession so that lawyers could work with what the courts wanted to do digitally. Progress in digital technology in family justice has a significant problem worldwide in who are the practitioners and their consequential lack of use of IT.

Another reason for lack of progress in family law itself is the argument that there is such a huge multiplicity of situations presenting families that any digital solutions are impossible. None of us diminishes the task in hand. But this is why we have big data and where AI will succeed. But just as we have seen in England where reports on how well remote hearings were going were drowned out by voices representing a few areas of family law practice where remote hearings are not suitable, so I fear proposals for adapting law to the outcomes of AI data will be opposed on the basis that it's not appropriate for some distinctive cases. I believe strongly that the huge variety of family life circumstances should not be an obstacle and that digital technologies can cover the multiplicity of most family situations but beware: this will be argued. We must prepare and answer.

With the UK having left the EU, that troublesome neighbour is no longer coming to Europe's parties. One reason for being troublesome in the EU civil law environment was that we are a strongly common law jurisdiction, hugely committed to a discretionary form of justice. Accordingly, it is said, digital interventions in the law cannot succeed in the face of unfettered judicial discretion. Sure, it's possible with the greater certainty and predictability of the civil law system but don't try in common law[6]. There are many reasons for a narrower fettered discretion. Adapting to digital technology is distinctly one of them. We will not today trouble Europe's party with our little common law problems but again I am certain solutions will be found. Another non-existent obstacle

I have mentioned Richard Susskind. One of his strong themes in digital justice is that we must not just automate, we must transform. In the early years of the web, many of us took our firm's brochure and put it straight onto the website. We took court forms and put them into soft versions and congratulated ourselves on our progress. That was short lived and unsatisfactory progress. As the years have passed, we have discovered what we can do with information and interactivity on our websites which were impossible with the written form. Transformation. We have taken court applications and converted them into question-and-answer format so they look nothing like the court form but they make it easier for the public and produce significantly better court applications with less errors meaning less court administration and a faster processing. Transformation. We used to send our clients a simple form to complete before first meetings. I have been privileged to work with an Australian software company, Settify, adapting it for the English market;

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5 Future Law Innovation Programme (FLIP) by SAL

6 Actually, it's a conundrum that some of the countries making huge advances in digital technology in family justice are common law

a program in question-and-answer format which clients complete before the first meeting and which through constant adaption based on the experience of previous usage, what some call AI, asks the questions which are most likely to be needed for the lawyer to give initial advice. Transformation. At every stage of our discussions today and our future work we must turn our back on simply automating previous ways of working and instead transform into new ways of working for the benefit of the public and the benefit of family justice. If by 2025 the way in which family justice is delivered is still recognisable from the way we worked in 2015, something will have gone wrong. I am certain it will be very different and is already different.

The legal profession is ultraconservative and inherently cautious. It does not instinctively embrace change. If it worked okay in the 19th century, why does it need to be different? Judges have perpetuated archaic traditions. But there is a problem. The public has changed. They are no longer willing to play the games which lawyers have invented for our own satisfaction and comfort. Moreover with deference in sharp decline, the public are rightly asking questions and making demands for a different way of working with us lawyers. In reality almost all of us must change our practices and will. We cannot continue our previous way of working. The public will not allow it. Most of the population in our westernised countries live digital lives[7]. It is often the public which is leading the charge in demanding change for a digital form of justice. If I can live most of my life through digital exchanges and initiatives, why does it have to stop when I encounter the law especially family law[8]? Some countries are still holding firm and resisting this transformation in practice. It will not last. Our role at the vanguard of digital technology is to work out how the public are living their digital lives and make sure our family justice adapts. We must meet the public in their digital lives, their digital expectations rather than expecting the public to meet our legal traditions

One consequence of underfunding by many governments in family justice over too many years is the complete lack of any research data into outcomes from court applications, judicial decision-making and similar. A few countries have been lucky. But most of us have no data whatsoever. AI works from big data. One fundamental hindrance for the introduction of various forms of AI has been the lack of reliable information about our family justice systems[9]. This is of course national. But in international family law we have one of the most vital and frequently used international laws namely the 1980 Hague Child Abduction Convention. More than 100 signatories with judicial co-working through the Hague Conference of judges. Cases are invariably dealt with by senior courts and published. They are operating on the same law, the same Convention. About 20 years ago, when websites were very basic, an academic[10] in Texas set about compiling a list of all 1980 Hague decisions by senior courts around the world. A phenomenal exercise but unfortunately without any analysis e.g. which defence was being used, what was in issue

7 Those of us of a certain generation may not be digital natives but we are certainly digital immigrants.

8 We have seen this in the last 12 months in our law firm, where most of our clients are technologically sophisticated and international; their digital demands and expectations of us as their advisers have increased significantly

9 In England there is awareness of this problem and some steps are being taken but it will be many years before we have much that is reliable

10 Sadly now deceased

and outcomes. His example should encourage us to acknowledge that in 1980 Hague we have the big data, from many countries around the world working from the same law and fairly similar sets of circumstances. I suggest that our AI big data analysis should start with international 1980 Hague decisions

Digital technology is not just intra-national systems. Within both the EU and the Hague there are mechanisms for cross-border cooperation through central authorities in family matters. Traditionally in child abduction, service of court papers and taking of evidence. More recently, the collection and enforcement of outstanding maintenance. But systems are chronically slow and appallingly archaic. Around Europe where there should be far closer and therefore quicker collaborations, it can take six months for a divorce petition issued in Spain or Italy to be served through official channels on somebody in England.

On 2 December 2020, the EU launched an excellent digital strategy document entitled digitalisation of justice in the European Union[11]. I commend reading it. We should endorse and support it hugely. It proposes a so-called toolbox approach to greater digitalisation, a period of reflection towards a legislative framework underpinned by comprehensive IT solutions. It encourages electronic cross-border cooperation. It highlights funding sources relating to the creation of IT tools at national and international level. It says it wants to explore the potential of innovative technologies in improving the efficiency of justice. This really is Symphonic Music to the ears and vivid colour in the grey landscape of the profession. It is crucially important this succeeds. The EU original concept of a common justice system was a very laudable and wonderful idea. Its difficulty has been going as slow as the most backward and least digital justice system. On several occasions, the Attorney General of the CJEU has had opportunity to criticise national states for the appalling injustice created by chronic delays but has not done so. A fully digitalised system between central authorities around the EU must be a very high priority in EU civil justice.

One glowing example of digital technology in family law is the iSupport[12] scheme ancillary to the 2007 Hague Maintenance Convention[13]. It works very well. It creates a joined up international digital system. It is an electronic case management system which can be accessed remotely. It manages and monitors maintenance obligation cases. It allows caseworkers worldwide to generate requests and see progress. It can be used with other international family law instruments[14]. But it is not cheap for countries to set up and run. Some have been unable to afford to do so. Here again, international family justice is only as good as the weakest link. It cannot function if some signatories are not able to play a full part. For us wealthier countries, there is a call to help fund poorer countries who want to play a full part in joined up digital family justice.

The good news is that the European commission has just released a legislative proposal to make e-CODEX the backbone of secure communications in the EU and hopefully

11 Digitalisation of justice | European Commission (europa.eu)
12 HCCH | iSupport
13 I know Philippe Lortie of the Hague conference spoke at your annual conference about this in September
14 It is facilitated by e-CODEX which is a secure communication system developed within the EU. It must be the model for international collaboration and co-working

worldwide. It would run both 2007 Hague and 2009 Maintenance Regulation[15]. I suggest we should recognise these Hague and EU initiatives for the opportunities for macro global co-working and collaboration on micro-individual family cases. We must give these initiatives huge support and encouragement including funding as needed.

I end with a tale of three cities, with apologies to Charles Dickens.

I start with London but it could be a few other cities. We are still in the midst of the pandemic. Europe has been very badly hit with demands placed on our population never known outside of war time. But the bittersweet experience in England has been the most incredible innovation and acceleration of digital technology by family lawyers and courts. We are in January 2021 in a place in digital family justice which could not have been contemplated and would simply not have happened if life had been normal in these past 12 months. Some countries[16] notionally stayed open but in reality for many months were closed, building up huge backlogs. But in England, and elsewhere, through private practice initiatives and judicial enterprise we have accelerated so that we are now in early 2021 where we could not otherwise have expected to be for perhaps five years. Paperless offices. Electronic bundles. Remote hearings[17]. Judicial resolution on paper. And much more. Our challenge is to build on this superfast accelerator, to carry along with us the doubters and the deniers of what is possible, and with the progress made to ascertain now where we can realistically go over these coming five years or so using digital technology.

A couple of years ago I was on a cruise on the Great barrier reef. We stopped at a very small town, Cooktown. When Captain Cook ran aground on the reef, he stopped to repair his ship and the town was born. It has barely more than four or five roads. As the 40 or so of us on the cruise boat disembarked, heading up to the museum at the top of the town, I passed the local courthouse. Curious as always, I went inside. There was only one court official. I explained that I was a family court judge from London and he showed me around. There was one court room. But it had more screens, cameras and technology than the most advanced family court in London. Why? Because no one goes to court. It is serving a community of several hundred kilometres each way. Many are on small farms. Many are very poor. They cannot get to court. So hearings are conducted remotely. In each little farmstead way out in the outback, there are booths for access to the local courts as well as other community services. It works exceptionally well. This was two years before the experience of the lockdown. But Cooktown in sparsely populated northern Australia had gone before. Around the world, governments are closing court buildings to save money[18]. Most governments can no longer afford a courthouse in every community. But equally many people cannot afford to travel to the regional court centres. So either the judges go on the road and we have pop-up courts, in community centres a couple of days a week, or we have local court access points,

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15 It would hopefully allow non-signatory states to use it as well and broaden reciprocal opportunities

16 including some leading westernised jurisdictions including in Europe

17 even if the video platform initially being used by the courts is relatively deficient

18 They represent valuable real estate in city centres

where safety, security and speed of Internet access is assured, with access to justice. We should in the future expect far fewer court buildings and far fewer conventional hearings. As lawyers we will learn new skills for this new way of justice. All of us have had a steep learning curve in these past nine months. Many in the younger generation of lawyers can't wait for these changes. The challenge is for the rest of us. Remember that isolated basic tin shack of a courthouse in Cookstown as a model for worldwide family justice using digital technology.

About the same time, I visited South Korea and its capital, Seoul. Again, sad individual that I am, I arranged to meet one of the family court judges and had a tremendous tour of their family justice centre. We have so much to learn here in Europe. Seoul has almost complete Wi-Fi. It is one of the most joined up city populations on earth. It is the headquarters of Samsung. And the family courts and the family lawyers have adapted, by which I mean transformed, delivery of family justice for a digitally joined up population. Everything is available by app. It is unheard of to expect any communication which is not digital. There is full integration from the courts with the lawyers and with the public. I left gasping with admiration and inspiration.

In conclusion, this has been an overview of some of the topics we will be looking at in more detail throughout today. I hope to have presented challenges but also opportunities. Family justice as we have been operating in this past decade cannot deliver in this coming decade. Automation will be dangerously beguiling, yet fatally misleading. It will give us complacency and false comfort. We must discuss today how we can harness the digital technology which is transforming our world and is in the hands or on the wrists of the public. A public which is demanding the practice of lawyers, judges and judicial systems must change. No one country has the answer. We will only make progress by sharing what is happening elsewhere. How we adapt the transformation will vary between civil and common law and with our different, distinctive traditions. But the transformation itself must be international and global.

I am absolutely delighted ERA are covering this crucial topic. There is much we can do in Europe. There is much we in Europe can do for the rest of the world. There is much in Europe we need to learn from the global experience. Thank you

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