ONLINE COURTS: BRIDGING THE GAP BETWEEN ACCESS AND JUSTICE

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***Abstract*:** This article analyses the introduction of online court proceedings through the prism of access to justice. It distinguishes between the two major recent developments in terms of justice and court accessibility – ie the institutionalisation of alternative dispute resolution mechanisms and the expansion of online dispute resolution within public courts. Whilst both movements appear to be driven by similar theoretical forces, the practical adoption of fully online judicial proceedings constitutes a step towards a different direction, opening up new opportunities for attenuating the apparently intrinsic efficiency-fairness trade-off. Due to the unique features of digital technology, the emergence of state-provided online courts and tribunals for the resolution of minor civil disputes could significantly improve the efficiency of formal adversarial litigation processes, without the risk of sacrificing proper procedural protections. Overall, this article advocates that the balanced combination offered by online court systems, albeit not a panacea, may be translated into a potential enhancement of both 'access' and 'justice'.

A. INTRODUCTION

The lack of access to justice is currently one of the most urgent justice issues globally. In 2016, the Organisation for Economic Co-operation and Development (OECD) estimated that only about half of the world's population lives under adequate protection and entitlements of the law.[1] Every year, one billion people suffer from a fundamental justice problem, but a third of those problem-owners in many countries do not even feel empowered enough to resolve their disputes.[2] Even in the most advanced jurisdictions, courts are too expensive, slow and complicated for ordinary people to use without legal assistance.[3] Meanwhile, the COVID-19 pandemic is having an unprecedented disruptive effect on the operation of courts globally,

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[1] OECD and Open Society Foundation (OSF), 'Issue Brief 2016: Leveraging the SDGs: Delivering Justice for All' (OECD 2016) 2 <https://www.oecd.org/about/secretary-general/leveraging-the-sustainable-development-goals-delivering-access-to-justice-for-all htm> accessed 14 September 2021.

[2] Hague Institute for Innovation of Law (HiiL), 'Understanding Justice Needs: The Elephant in the Courtroom' (2018) 14 and 31 <https://www.hiil.org/wp-content/uploads/2018/11/HiiL-Understanding-Justice-Needs-The-Elephant-in-the-Courtroom.pdf> accessed 14 September 2021.

[3] Hazel Genn, 'Online Courts and the Future of Justice' (2017) 4 <https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf> accessed 6 December 2021.

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which has led to an increased duration in judicial proceedings and has contributed to staggering case backlogs.[4] In varying degrees, most human beings are excluded from justice systems.

Access to justice is not a novel problem. For decades, it has been common for researchers, policymakers, and practitioners to talk about modernising court and legal services and making them more accessible to all.[5] A first step in this regard was reforming procedural laws in the last quarter of the 20th century, institutionalising the so-called alternative dispute resolution (ADR) processes into the formal court system. The expectation at that time was enhancing access to quicker, more efficient, and proportionate methods of resolving legal controversies, though such a hope was only partially fulfilled. Indeed, underlying the adoption of ADR methods was the understanding that an intrinsic trade-off exists between the efficiency of formal processes and their fairness.[6] The second major development in terms of justice and court accessibility was the incorporation of digital technology and expansion of online dispute resolution (ODR) in court proceedings as of the 1990s. While the introduction of technology might seem like a refinement of existing judicial operations, the adoption of fully integrated ODR systems in courts could be transforming the nature of processes as we know them,[7] thus having the potential to mitigate the apparently intrinsic efficiency-fairness trade-off.[8] The recent emergence of state-provided online courts and tribunals for the resolution of minor civil claims in England and Wales (England) and British Columbia, Canada, is a strong illustration of this transformation.[9]

The analysis of this new phenomenon can take many forms. The focus of this article is to determine what online courts mean from a justice accessibility perspective, assuming that access to justice is a fundamental principle of the rule of law[10] and a key element for sustainable

[4] UN Development Programme and UN Office on Drugs and Crime, 'Guidance Note: Ensuring Access to Justice in the Context of COVID-19' (2020) 7 <https://reliefweb.int/report/world/ensuring-access-justice-context-covid-19> accessed 19 September 2021.
[5] Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 Yale Journal of Law & the Humanities 397, 399.
[6] Orna Rabinovich-Einy and Ethan Katsh, 'Access to Digital Justice: Fair and Efficient Processes for the Modern Age' (2017) 18 Cardozo Journal of Conflict Resolution 537, 642-643.
[7] Julio César Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?' (2013) 79 International Journal of Arbitration, Mediation and Dispute Management 256, 258.
[8] Orna Rabinovich-Einy and Ethan Katsh, 'The New New Courts' (2017) 67 American University Law Review 165, 188.
[9] Terence Etherton, 'The Civil Court of the Future' (Lord Slynn Memorial Lecture, 14 June 2017) 6 <https://www.judiciary.uk/announcements/the-lord-slynn-memorial-lecture-by-sir-terence-etherton-master-of-the-rolls-the-civil-court-of-the-future/> accessed 26 August 2021.
[10] Policy Department for Citizens' Rights and Constitutional Affairs, 'European Parliament: Effective Access to Justice - Study for the PETI Committee' (2017) PE 596.818, 21 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf> accessed 23 September 2021.

development.[11] It will be argued that the adoption of online civil courts may provide the basis of a significant solution to some of the access to justice problems by improving both the efficiency of courts and the protections for due process.[12] The option of accessing the court system in an affordable, timely and effective manner through an Internet-based service tailored to the needs of users provides a unique chance for simplifying court systems and delivering substantively just and procedurally fair outcomes.[13] In this sense, online court proceedings would be able to help bridge the gap between the understanding that individuals might have about their legal entitlements and the enforcement of their rights or, in other words, between being educated about their legal rights and actually securing compensation.[14] While these pioneering courts create extraordinary opportunities to increase effective access to justice, they also present new challenges for some disputants and serious concerns about the integrity of the judicial system.

Section 1 of this article will discuss the structural crisis in civil justice systems. It will first examine the origins of the access to justice problem. The section will then analyse the rise of ADR avenues as well as the unrealised promise that the adoption of alternatives would increase accessibility. Section 2 will present the adoption of online court proceedings for minor civil claims as a suitable partial solution to people's global exclusion from court systems. After exploring the most notable technological developments in the resolution of civil disputes, it will discuss the roots of online courts and provide some landmark examples of such courts that are already functioning. Then, the section will argue that online court proceedings hold enormous potential to increase access to justice broadly, delivering both efficiency and fairness. Section 3 will rebut common objections and criticisms associated with the design of online court proceedings in civil justice systems. Section 4 will conclude that, although these challenges and concerns are critical to consider, overall the balance favours the adoption of online courts.

B. THE CRISIS IN CIVIL JUSTICE SYSTEMS: THE ORIGIN OF THE PROBLEM AND ATTEMPTS TO INTRODUCE NEW APPROACHES

[11] United Nations, General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015) A/RES/70/1 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf> accessed 6 December 2021.

[12] The scope of the adoption of online court proceedings will be confined to civil cases, especially those of low-value.

[13] Rabinovich-Einy and Katsh (n 8) 169.

[14] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 108.

The purpose of this section is not to provide a thorough analysis of the various structural issues within the civil justice system. Instead, it will describe access to justice as a global legal problem and the need of implementing alternatives to litigation to enhance the quality of justice as well as the speed and affordability of proceedings. The aim of providing this description is to lay out the groundwork for analysing the accessibility crisis on a pair with the establishment of online court proceedings on civil disputes as a potential answer to that crisis.

1. Reasons behind the crisis

Legal concerns about the crisis of civil justice are not new.[15] The excessive cost, delay and complexity of procedures have made civil courts the target of severe objections throughout the last two centuries.[16] As Lord Woolf observed in his 1995 Interim Access to Justice Report, the cumulative impact of these issues constitutes a 'denial of access to justice'.[17] Typically, civil justice has been reserved only for those who have enough time and money to afford the process in its entirety. These issues have been attributed in large part to a number of elements of the adversarial system of dispute resolution that are characteristic of common law countries, such as its excessive formalism and its over-dependency on an all-embracing trial.[18]

While all of these problems connect with each other, the most pressing one relates to the cost of justice. For years, it has been claimed that the legal process costs, court fees and retaining a lawyer represent a material barrier to justice accessibility. More recently, concern about costs has been expressed as a result of a widespread drop in justice system funding and a significant reduction in legal aid provisions for welfare and civil cases. For instance, as part of the state's general deficit reduction programme,[19] in April 2013, civil legal aid in England was subject to budget cuts of £300 million (a 40% reduction).[20] The withdrawal of legal aid from most civil claims has led not only to an increase of individuals who do not litigate at all but also to greater numbers of litigants-in-person (LiPs) for whom legal representation is prohibitively expensive. According to Professor Adrian Zuckerman, this flood of LiPs before

[15] John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press 2014) 12.
[16] Hazel Genn, 'Understanding Civil Justice' (1997) 50 Current Legal Problems 155, 165-166.
[17] Lord H Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (1995) para. 1.
[18] Bobette Wolski, 'Reform of the Civil Justice System 25 Years Past: (In)Adequate Responses from Law Schools and Professional Associations? (And How Best to Change the Behaviour of Lawyers)' (2011) 40 Common Law World Review 40, 44-45.
[19] HM Treasury, 'Spending Review and Autumn Statement 2015' (2015) Cmd 9162 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/479749/52229_Blue_Book_PU1865_Web_Accessible.pdf> accessed 6 December 2021.
[20] John Sorabji, 'Taking Justice Online: Developments in England and Wales and Their Potential Influence on European Procedural Harmonisation' in Burkhard Hess and Xandra E Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2017) 213.

courts has resulted in two broad difficulties. It first creates an 'efficiency deficit', arising from unrepresented litigants having a lack of knowledge of substantive and procedural law, which results in courts being forced to dedicate disproportionate temporal and financial resources to solving their cases. Even more, the situation also creates a 'justice deficit': because individuals are not familiar with the relevant law and court practices, they are in a disadvantaged position to enforce their entitlements effectively.[21] These deficits are highly detrimental to their access to justice as they increase delays and costs within the legal system.[22]

In addition, the high costs associated with slow-paced and overcrowded court proceedings have become a critical issue for governments. Traditional civil courts were historically designed to handle a considerably smaller caseload than they do currently. Furthermore, the complexity of modern societies and the growth of the state have caused the emergence of many new sources of potential conflicts and the consequent expectations of citizens.[23] Overwhelmed by a progressive increase of cases and routine administration, courts are not well prepared to meet the demand that exists for their services.[24] For example, the total number of civil claims lodged in the English County Court rose by 72.26% from 328,000 in the period between April and June 2012 to 565,000 in the period between April and June 2017.[25] A court system set up to handle a certain number of claims is unlikely to work the same way if that number dramatically increases in a few years. The growing backlog has only worsened since 2020 due to the measures put in place to tackle the spread of COVID-19. These excessive delays might render the justice system even more inaccessible.

Reforms that have attempted to reduce litigation costs, delays and procedural complexity have as long a history as civil justice itself.[26] Because civil procedures are permanently evaluated in reference to their aims, courts and tribunals have always been in an almost constant process of review and improvement. Nonetheless, the history of reforms is not promising. Besides the continuous development of civil justice systems, the basic structure of procedures has remained immune to substantial change. Across the years, it has been challenging to reduce the costs of litigation, shorten the length of procedures and simplify civil

[21] Adrian AS Zuckerman, 'No Justice Without Lawyers — The Myth of an Inquisitorial Solution' (2014) 33 Civil Justice Quarterly 355, 355.
[22] Sorabji (n 20) 4.
[23] Frank EA Sander, 'Varieties of Dispute Processing' (1976) 70 Federal Rules Decisions 111, 113.
[24] Susskind (n 14) 29.
[25] UK Ministry of Justice, 'Civil Justice Statistics Quarterly, England and Wales, January to March 2020 (Provisional)' (2020) 3.
[26] Sorabji (n 15) 12.

processes.[27] Above all, and notwithstanding these reforms, there has been a reluctance to move away from traditional approaches to civil process. This caution is exemplified by the fact that until the end of the 20th century, civil proceedings had the sole purpose of resolving disputes through judicial decision-making, without considering the possibility that such disputes could be terminated in advance by using an ADR mechanism.[28] This view has affected the work of civil courts negatively, since many cases that could have been terminated at an early stage of the trial, or whose entry into courts could have been avoided, have ended up going the whole way, from claim to judgment, thereby demanding significant time and effort from both parties and courts. A material change in litigation culture was needed.

2. Legal reforms of civil justice adopted to address the crisis

Though civil justice has been the subject of scrutiny and report for a long time, only after the last quarter of the 20th century changes were radical. Up until then, the sole avenue for tackling court cases was the use of traditional adversarial litigation proceedings. There were no alternatives in legislation or professional practice to resolve conflicts other than adjudication. However, in the 1970s, mediation, arbitration and other ADR mechanisms were gradually incorporated into judicial settings as a way to resolve cases outside the litigation route.

While the sources of the ADR movement are multiple, the Global Pound Conference of 1976 is generally considered a key turning point in the making of potential solutions to the ills of the court system in the United States (US).[29] During the conference, Professor Frank Sander introduced his 'multi-door courthouse' concept, thereby supporting the diversification of court proceedings through the adoption of various dispute resolution mechanisms based on different sorts of conflicts and parties.[30] He conceived a dynamic model aimed at removing some controversies from the court system, as well as tailoring those disputes that reached the court to less expensive, quicker and more flexible mechanisms than adjudication.[31] Influenced by Sander's ideas, the US Federal Rules of Civil Procedure in 1983 provided that one of the purposes of pretrial conferences is to facilitate settlements between parties.[32] Then, the 1998

[27] Adrian AS Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press 1999) 14.
[28] Genn (n 5) 401.
[29] Rabinovich-Einy and Katsh (n 6) 639.
[30] Frank EA Sander, 'Varieties of Dispute Processing' in A Leo Levin & Russel R Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (St. Paul MN, West Pub Co 1979) 83-84.
[31] John Sorabji, 'The Online Solutions Court - A Multi-Door Courthouse for the 21st Century' (2017) 36 Civil Justice Quarterly 51, 53-54.
[32] Federal Rules of Civil Procedure, Rule 16. Pretrial Conferences; Scheduling; Management.

US Alternative Dispute Resolution Act required federal trial courts to make ADR mechanisms available to litigants.[33]

Sander's 'multi-door' model became the leading approach for ADR programmes that arose in a number of countries, such as Singapore and Nigeria.[34] However, other jurisdictions embarked on reviews to modernise their civil procedures by promoting ADR processes without adopting Sander's approach. In England, for example, two major reforms were carried out in 1999 and 2013 to reduce the complexities of civil process and the costs of civil litigation.[35] In Germany, a new civil procedural regulation came into force in 2002, whose overall goal was to make the system more citizen-friendly, efficient and transparent by accelerating civil proceedings.[36] Similar legislative approaches continue to be accepted around the world.[37] As these reforms have been focused on fostering the role of ADR within proceedings, courts have shifted from litigation-centred institutions to ones that frequently replace judgments with consensual resolutions.

The primary driving force of the ADR movement and settlement-encouragement was to enhance the efficiency of proceedings.[38] The promise was that the incorporation of tailored and flexible mechanisms of ADR would diminish pressure on courts, which would allow them to reduce their caseload and the associated litigation costs. These efficiency-related considerations were reinforced by qualitative rationales based on calls for change in the dispute resolution's focus, from parties' rights, positions and rules to their underlying interests and needs. It was claimed that the implementation of ADR could result not only in more satisfactory procedures for parties, improving their perception of legitimacy and fairness, but also in longer-lasting and better outcomes than those reached by litigation.[39] By uncovering parties' needs and interests, more imaginative and tailored solutions would emerge, overcoming the 'limited remedial imagination' of courts.[40]

Alongside this ADR revolution, an access to justice movement arose in the 1970s, advocating for a legal system equally accessible to all and also able to lead to individually and

[33] 28 U.S. Code § 651 - Authorization of Alternative Dispute Resolution.
[34] Ericka B Gray, 'Creating History: The Impact of Frank Sander on ADR in the Courts' (2006) 22 Negotiation Journal 445, 450.
[35] Genn (n 5).
[36] Felix Maultzsch, 'The Right to Access to Justice and Public Responsibilities -- National Report: Germany' 247, 248.
[37] Brian Farkas and Lara Traum, 'The History and Legacy of the Pound Conferences' (2017) 18 Cardozo Journal of Conflict Resolution 677, 690.
[38] Rabinovich-Einy and Katsh (n 6) 640.
[39] Rabinovich-Einy and Katsh (n 8) 171-173.
[40] Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 19 Florida State University Law Review 1, 7.

socially just outcomes.[41] The original approach to access to justice proposed by Cappelletti and Garth contemplated the creation of new methods for deciding legal claims, such as arbitration and conciliation and even the incorporation of economic incentives to reach agreements out of court. They argued that the right of justice accessibility cannot be limited to the provision of legal aid services for the poorest, but its improvement and expansion also involves considering other procedural avenues that allow people to prevent and process their conflicts. As the access to justice movement's agenda evolved, the introduction of ADR was seen as a pivotal element in fulfilling its aims.[42]

Although the expanded use of ADR was viewed as an encouraging path to diminish barriers to accessing the legal system, the reality was more complicated. Indeed, the hope that institutionalised ADR would increase accessibility was not realised in full, as evidenced by the strong critiques against the increased privatisation of justice. For some, it was a major concern that ADR mechanisms would not increase access to courts since they are specifically non-court based. In particular, processes such as mediation would not contribute to substantive justice as they require parties to renounce their legal entitlements and instead focus on problem-solving.[43] For others, the introduction of ADR would undermine the objective of judicial processes with an excessively optimistic view of these alternative mechanisms and an oversimplified concept of the role of courts – when parties are encouraged to settle, then ADR would be thereby curtailing precedent-setting and law development.[44] Further critics emphasised that the secret nature of institutionalised ADR processes could jeopardise certain types of disputants belonging to disadvantaged groups, such as minorities[45] and women,[46] in relation to more experienced and powerful counterparts. In fact, some of the core features of ADR mechanisms, such as their confidentiality and flexibility, have indeed made it more complex to eradicate cognitive bias, ensure quality monitoring and guarantee procedurally just outcomes.[47]

At the heart of many of these critiques, therefore, lies the claim that the adoption of ADR has on occasion provided greater 'access' at the expense of 'justice'. Indeed, ADR

[41] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 182.
[42] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 The Modern Law Review 282.
[43] Genn (n 5) 411.
[44] Owen Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073, 1075.
[45] Richard Delgado and others, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) Wisconsin Law Review 1359, 1360.
[46] Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 Yale Law Journal 1545, 1601.
[47] Orna Rabinovich-Einy, 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation' (2006) 11 Harvard Negotiation Law Review 253, 263.

advocates have been willing to tolerate some problematic aspects of alternative avenues, based on the idea that attempts to increase the efficiency of courts are unavoidably costly in terms of the fairness of processes.[48] This is a consequence of the assumption that there is an intrinsic trade-off between the enhanced efficiency gained by tailored ADR mechanisms on one hand, and the fairness of formal proceedings as reached through adequate procedural protections associated with courts on the other.[49] This trade-off, in turn, reflects the subsequent tension between the growth of justice accessibility and the privatisation of justice due to the rise of ADR. The choice of efficiency at the cost of fairness posed an important challenge in efforts to overcome the access to justice crisis by way of ADR.

Given that the fostering of ADR processes has not been sufficient to address the crisis in civil justice systems, a judicial modernisation process through digital technologies and the diffusion of ODR into the courtroom has arisen.

C. A SOLUTION: THE CREATION OF ONLINE COURT SYSTEMS FOR THE RESOLUTION OF CIVIL DISPUTES

This section will examine the impact that online courts have had on the civil justice system in terms of justice accessibility. It will contend that although the initial steps for introducing new technologies in dispute resolution were aimed at increasing procedural efficiency, the adoption of full-fledged ODR systems in a number of jurisdictions is taking a different course and has the potential to improve both efficiency and fairness of court proceedings in ways that previously were not conceivable. This section will also argue that the possibility of deploying online court proceedings for the resolution of civil claims could secure much broader access to justice.

1. The technological shift in civil dispute resolution: from automation to transformation

Court systems are conservative, risk-averse institutions and have historically been resistant to change their traditional methods of working.[50] Likewise, lawyers and other key stakeholders are generally reluctant to innovate and embrace digital technologies.[51] This resistance to innovation has been called 'irrational rejectionism' – ie dismissing the use of technology

[48] Orna Rabinovich-Einy and Ethan Katsh, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017).
[49] Rabinovich-Einy and Katsh (n 8) 181.
[50] Susskind (n 14) 43.
[51] Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press 2015).

without direct evidence or personal experience[52] – and may explain courts' caution in exploring better formulas of administering justice based on radical technological changes.

In spite of their tendency to maintain the *status quo*, courts and the legal profession have undergone considerable modifications over the last decades, mainly through the adoption of technological solutions. The incorporation of technology in courtrooms and dispute resolution has occurred in an incremental way. Initially, workplaces and offices introduced computerisation, legal manual processes were automated, email became the standard means of communication and online case-law databases were established. The next stage was the introduction of technology into court proceedings, such as the submission of court documents over the Internet (e-filing), the use of videoconferences for the practice of certain hearings, the digital display of evidence in court and the digitisation of historical files and work processes.[53] Over time, these early efforts have placed digital technologies at the centre of the legal landscape.[54]

While these changes have been significant, their main driver has been making courts and other pre-existing avenues of dispute resolution more efficient, convenient and accessible – considerations that echo those that guided prior procedural reforms.[55] Instead of enabling novel processes for handling disputes, re-reconceptualising courts' role or fulfilling the objectives the users seek through technology, these changes have mostly been used to enhance, streamline and refine traditional working practices.[56] Under such an instrumental conception, these technological shifts have only 'automated' rather than 'transformed' the litigation process, and hence, their application to the courtroom has resulted in a marginal improvement rather than a comprehensive transformation on civil process.[57] Sadly, most court systems are still far from fulfilling the full potentiality of new technologies in improving justice accessibility.

Parallel to these technological shifts, a major development in terms of courts and access to justice has been the spread of ODR in civil proceedings.[58] ODR refers to a wide range of

[52] Susskind (n 14) 3.
[53] James Cabral and others, 'Using Technology to Enhance Access to Justice' (2012) 26 Harvard Journal of Law & Technology 241, 247-255.
[54] Rabinovich-Einy and Katsh (n 8) 185-186.
[55] Orna Rabinovich-Einy, 'Beyond Efficiency: The Transformation of Courts Through Technology' (2008) 12 UCLA Journal of Law & Technology 1, 4.
[56] Richard Susskind, 'The Future of Courts' (2020) 6 The Practice <https://thepractice.law harvard.edu/article/the-future-of-courts/> accessed 21 September 2021.
[57] Susskind (n 14) 112.
[58] Avital Mentovich, J.J. Prescott and Orna Rabinovich-Einy, 'Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality' (2020) 71 Alabama Law Review 893, 927.

digital tools and online processes that disputants and third-party neutrals utilise to prevent, manage, and resolve controversies.[59] This phenomenon emerged in the 1990s as a branch of ADR. Often labelled 'e-ADR' or 'online ADR', ODR used at that time various methods under the ADR umbrella, including e-negotiation, e-mediation and e-arbitration, for those cases in which litigation and ADR mechanisms were inadequate or absent.[60] Since then, the use of ODR systems has broadened, and technological tools have gradually become appropriate for more categories of traditional offline disputes where the lack of face-to-face interaction would be less relevant.[61] The maturation of ODR processes is evidenced by their implementation in new settings such as private and public justice systems, encompassing judicial, administrative and ADR proceedings.[62] While the use of ODR has faced significant critiques, such as providing second-class justice, challenging the role of lawyers and preventing access from those digitally excluded,[63] these online processes are moving full steam ahead in the contemporary judicial scene.

In part, the advancement of these innovative systems has been a consequence of the expansion of online communications and the impact of new technologies in legal procedures.[64] As a result, in recent years, fully developed ODR processes have been offered by courts to replace traditional avenues and tackle disputes in specific contexts. This change has brought new opportunities for improving justice accessibility. In particular, the emergence of online-based court services reflects this transformative approach.

2. Evolution of online courts

Originally, ODR processes were not meant for courts. They arose towards the end of the 20th century as the use of online services and e-commerce platforms began to flourish.[65] The explosive growth of web-based transactions led to an increase in the number of disputes associated with them. Given that these conflicts regularly involved low monetary sums in which disputants were often at a physical distance, leading e-commerce companies like eBay, Amazon and Alibaba concluded that the only viable alternative to handle them was through the Internet, using digital platforms specially designed for that purpose. Thanks to the remarkable

[59] Ethan Katsh and Colin Rule, 'What We Know and Need to Know about Online Dispute Resolution White Papers' (2015) 67 South Carolina Law Review 329, 329.
[60] Betancourt and Zlatanska (n 7).
[61] Rabinovich-Einy and Katsh (n 6) 646-647.
[62] Orna Rabinovich-Einy and Ethan Katsh, 'Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment' (2014) 1 International Journal of Online Dispute Resolution 5, 23.
[63] See Section 4.
[64] Rabinovich-Einy and Katsh (n 6) 649-650.
[65] Orna Rabinovich-Einy and Ethan Katsh, 'Technology and the Future of Dispute System Design' (2012) 17 Harvard Negotiation Law Review 151, 164-168.

results achieved in the e-commerce arena, along with the growing sophistication in the design of online processes,[66] eventually some forms of ODR became an accepted method of dealing with disputes that arise in face-to-face contexts,[67] mainly through their adoption by courts.[68] Over time, more advanced ODR systems have understood the role of technology more soundly by embracing online solutions to redesign civil courts' work, providing a transformative view of the dispute resolution environment.

Currently, there are several examples of courts or tribunals that are already up and running online, a transformation that is rapidly gaining momentum.[69] In March 2018, as part of an ambitious £1 billion court reform programme with technology at its core, England launched the Online Civil Money Claims (OCMC) pilot project, a digital service allowing LiPs that are owed small sums to resolve their controversies entirely online.[70] Two years earlier, British Columbia introduced the Civil Resolution Tribunal (CRT), an online avenue initially designed for condominium disputes, and probably one of the most well-developed online court systems in the world.[71] In the Netherlands, the Hague Institute for the Internalisation of Law developed Rechtwijzer 2.0 as an ODR platform to tackle divorce proceedings and neighbour disputes, but its activity was halted in 2017 for financial reasons and replaced by Justice42.[72] Moreover, since 2017, China has deployed three Internet courts in Hangzhou, Beijing and Guangzhou, which address several Internet-related legal claims.[73] Many US district courts in at least eight states have adopted the Matterhorn platform for the online court handling of a wide variety of disputes,[74] while Utah became the first US state to develop a fully-fledged ODR

[66] Rabinovich-Einy and Katsh (n 48) 33.
[67] Rabinovich-Einy and Katsh (n 6) 647-648.
[68] Early court ODR initiatives involving the adoption of ODR mechanisms for simple disputes include the Michigan Cyber Court (US) and the eCourtroom (Australia). *See* Rabinovich-Einy and Katsh (n 8); J.J. Prescott and Alexander Sanchez, 'Platform Procedure: Using Technology to Facilitate (Efficient) Civil Settlement', *Selection and Decision in Judicial Process around the World: Empirical Inquiries* (Cambridge University Press 2020) 38.
[69] Currently, there are more than one hundred known ODR providers. *See* The National Center for Technology & Dispute Resolution, 'Provider List' <http://odr.info/provider-list/> accessed 5 September 2021.
[70] Terence Etherton, 'Civil Justice After Jackson' (Conkerton Memorial Lecture 2018, Liverpool Law Society, 15 March 2018) 16; Peter Kenneth Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 Macquarie Law Journal 39, 45; Susskind (n 14) 166-167.
[71] Shannon Salter and Darin Thompson, 'Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016) 3 McGill Journal of Dispute Resolution 113.
[72] Maurits Barendrecht, 'Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement' (*HiiL*, 21 June 2017) <https://www.hiil.org/news/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/> accessed 9 September 2021.
[73] Sara Xia, 'China's Internet Courts Are Spreading; Online Dispute Resolution Is Working' (*China Law Blog*, 24 December 2018) <https://www.chinalawblog.com/2018/12/chinas-internet-courts-are-spreading-online-dispute-resolution-is-working html> accessed 28 August 2021.
[74] Matterhorn, 'Online Dispute Resolution with Matterhorn' (*Get Matterhorn*) <https://getmatterhorn.com/> accessed 9 September 2021.

system for small claims in 2018.[75] Other notable examples of the use of ODR in courts can be found in Singapore and the Australian state of New South Wales.[76]

The effect of these online courts and tribunals is striking. Rather than merely optimising current methods of dispute resolution through new technologies, they have transformed the nature of the processes, along with the goals and values sought by way of these processes. This transformation makes them less adversarial and more efficient, dynamic, flexible, and accessible court systems.[77]

In a recent article, Professors Orna Rabinovich-Einy and Ethan Katsh distinguish between three disruptive changes related to the transition to digital means of tackling disputes.[78] The terminology used by these authors can be instrumental in identifying common characteristics of the ODR platforms described above. The first disruptive change Rabinovich-Einy and Katsh discuss is moving dispute resolution from a face-to-face setting to a virtual one. All the previously mentioned initiatives of court ODR systems either operate on all-online platforms or rely on mechanisms that combine physical presence with online models.[79] The CRT in British Columbia is, for these purposes, an interesting case study. It operates in four stages: first, it helps users to explore potential solutions to their differences using an online tool called 'Solution Explorer'; second, it serves as an online negotiation platform; third, a case manager tries to mediate online or on the phone; and finally, if a settlement has not been reached, an adjudicator engages with the parties online, by phone or by video conferencing, and delivers a binding written decision.[80] Although all court forms can be completed and submitted on paper, the CRT service is mainly delivered online, without having to attend the court in person during specific hours or even to communicate with others synchronously.

Moreover, ODR systems were initially adopted to deal with simple, discrete disputes between parties that were physically distant from one another.[81] This approach is followed by England's OCMC and Utah's ODR, where online court systems resolve only low-value claims under specific monetary caps.[82] With more advanced technology, the jurisdiction of court ODR has expanded to additional contexts. For instance, some jurisdictions are also using ODR

[75] Deno Himonas, 'Utah's Online Dispute Resolution Program' (2018) 122 Dickinson Law Review 875.
[76] Susskind (n 14) 172-174.
[77] Rabinovich-Einy and Katsh (n 8) 189-190.
[78] Rabinovich-Einy and Katsh (n 48) 162-163.
[79] ibid 162.
[80] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor Yearbook of Access to Justice 112, 120-121.
[81] Rabinovich-Einy and Katsh (n 6) 650.
[82] Susskind (n 14) 166-175.

processes in more sophisticated disputes (eg divorce proceedings,[83] spousal- and child-support actions,[84] small motor vehicle claims,[85] online copyright, e-commerce, and domain name issues[86]), as well as in local situations (eg condominium disputes).[87] As the scope of ODR continues to broaden, the lines between online and offline controversies, and between ADR and ODR avenues, have become increasingly blurred.[88]

The second change concerns courts moving from relying on human intervention to employing automated processes.[89] While automation allows courts to handle vast numbers of disputes in less time and with lower costs,[90] the incorporation of algorithms into the dispute resolution arena is also reshaping or even removing the need for a dispute handler or lawyer. In terms of removing dispute handlers, the CRT is already employing rule-based expert mechanisms for its 'Solution Explorer'. In England, the early version of the online court proposed by Lord Justice Briggs in his 2016 Civil Courts Structure Review (Briggs Review) recommended the adoption of decision trees to assist parties to articulate their cases in the automated 'triage stage'.[91] China's Internet courts have also been using artificial intelligence (AI) tools to help with the adjudication process and provide legal information to claimants.[92] The use of these AI systems has the potential to limit human discretion, enhancing consistency and reducing biases, thereby improving not merely 'access' but also 'justice'.[93]

Automation is also having a substantial impact on lawyers' work as more sophisticated automated systems provide new self-help alternatives to settle a case.[94] As a result, legal professionals are finding new occupations, as evidenced in the Netherlands' Rechtwijzer 2.0, a system through which lawyers were used to evaluate the legality and fairness of any agreement negotiated by the disputants.[95] In a similar vein, the English online court contemplated in the Briggs Review is meant to boost access to justice by making the civil

[83] eg Netherlands' Rechtwijzer 2.0. *See* Barendrecht (n 72).
[84] eg Singapore's court ODR system. *See* Theresa Tan, 'Family Justice Courts Launch Cheaper and Faster Way for Users to File Applications' (*The Straits Times*, 2 October 2019) <https://www.straitstimes.com/singapore/family-justice-court-launches-cheaper-and-faster-way-for-users-to-file-applications> accessed 7 September 2021.
[85] eg British Columbia's CRT. See Salter (n 80).
[86] eg China's Internet courts. See Xia (n 73).
[87] eg British Columbia's CRT and Netherlands' Rechtwijzer 2.0. See Salter (n 80); Barendrecht (n 72).
[88] Rabinovich-Einy and Katsh, 'Access to Digital Justice: Fair and Efficient Processes for the Modern Age' (n 6) 652.
[89] Rabinovich-Einy and Katsh (n 48) 163.
[90] Susskind and Susskind (n 51) 101-102.
[91] Susskind (n 14) 274.
[92] Xia (n 73).
[93] Rabinovich-Einy and Katsh (n 48) 163.
[94] ibid 163.
[95] Barendrecht (n 72).

process more navigable for parties and minimising the assistance from lawyers,[96] as shown by the fact that conciliation and case management are transferred to 'case officers', a new role created in the system.[97] The widespread use of online court proceedings is likely to reduce the number of court lawyers.

The third disruptive change Rabinovich-Einy and Katsh reference involves a new conception of the data produced during proceedings, ie 'big data'.[98] Traditionally, courts have collected and processed limited amounts of information, mainly because of confidentiality concerns. However, as courts rely more and more on digital technologies and ODR processes, they have a growing interest in collecting, processing and using available judicial decisions and statistical data from all cases.[99] The CRT, for instance, unlike conventional court procedures in British Columbia, was designed to collect comprehensive data on disputes resolved through the platform in order to generate meaningful knowledge on different categories of cases, such as their origins, course of evolution and common resolutions used.[100] This use of big data improves case handling and may even prevent disputes from arising.[101]

As it can be seen, the online court programmes described earlier are not only more efficient and convenient than brick-and-mortar courts but represent an opportunity to reimagine how disputes can be addressed. In light of the three major changes in technology associated with court operations, there is a tremendous potential to mitigate the supposedly intrinsic efficiency-fairness trade-off that has influenced previous efforts to improve access to justice in public dispute resolution.[102]

3. The case for online courts as a promising way to enhance both 'access' and 'justice'

As identified by Professor Richard Susskind, there are several prisms through which one can make a case for adopting online court proceedings to resolve civil disputes. In the current context of budgetary cuts, some politicians claim that the introduction of these proceedings would reduce the costs associated with judicial services, thus benefiting both the state and taxpayers. Legal technologists argue that the operations of today's courts are becoming progressively out of step in the Internet society and that considerable improvement is

[96] *See* Section 3.3; Lord Justice Briggs, 'Civil Courts Structure Review: Final Report, Judiciary of England and Wales' (2016) 45 < https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> accessed 30 August 2021.
[97] ibid 59.
[98] Rabinovich-Einy and Katsh (n 48) 163.
[99] Rabinovich-Einy and Katsh (n 8); Etherton (n 70) 20.
[100] Rabinovich-Einy and Katsh (n 48) 161.
[101] Rabinovich-Einy and Katsh (n 8) 205-206.
[102] ibid 188.

necessary. Other commentators contend that present judicial systems would not otherwise be delivering high-standard outcomes to court users.[103] While all of these are plausible arguments in favour of online courts, there is a more powerful motivating force for a radical change. The vision presented here is that the introduction of and investment in online court systems may provide the basis for a significant answer to some of the most persistent problems of access to justice.

Access to justice is a core principle of the rule of law.[104] Supported by the state, the court system enables people to have their voices heard, enforce their legal rights and interests and, ultimately, hold decision-makers accountable. Effective justice accessibility implies having access to judicial and court processes for resolving rights claims and disputes through fair procedures (procedural justice) that lead to enforceable solutions based on the merits of each case according to existing law (substantive justice).[105] In a pure sense, therefore, access to justice means securing equal access to the legal system and courts at the formal-procedural level, but also procuring individually and socially just outcomes at the material-substantive level.[106] Within this framework, the access to justice movement that emerged in the 1970s exposed the serious problems of court systems. Specifically, it uncovered the considerable gap between the liberal ideals of the rule of law and equal justice on one hand, and a reality in which members of disadvantaged groups are deprived of their means to exercise their rights and reach those ideals on the other.[107] Even though access to courts is a hallmark of justice, only 3-4% of civil problems end up in tribunals and courts, with most of them being solved through other avenues.[108]

This gap in access to justice has been one of the most prevalent deficits of the judicial system. Over the years, long waits, massive backlogs, and high costs related to the court system have been significant sources of discontent. To a large extent, the perceived dissatisfaction with the current system has been associated with the lack of effectiveness in terms of time and cost spent in resolving claims. As discussed earlier, ADR processes were expected to provide a remedy for these access to justice problems.[109] The introduction of interest-based, flexible mechanisms promised cheaper, quicker, simpler, and more satisfactory proceedings for parties

[103] Susskind (n 14) 8.
[104] Policy Department for Citizens' Rights and Constitutional Affairs (n 10) 21.
[105] Genn (n 3) 6.
[106] Cappelletti and Garth (n 41) 182.
[107] Sagit Mor, 'With Access and Justice for All' (2019) 39 Cardozo Law Review 611, 612.
[108] Christine Coumarelos and others, 'How Are Legal Problems Finalised in Australia?' (2013) 19 *Updating Justice* 1, 2.
[109] Rabinovich-Einy and Katsh (n 6) 640.

compared to court litigation.[110] Despite the existence of different drivers for the institutionalisation of ADR mechanisms in courts,[111] systemic efficiency became the dominant paradigm for the vigorous operation of courts and judicial performance. This is evidenced by the fact that some ADR schemes were evaluated by the number of resolutions reached and the case closure rate.[112] Unfortunately, in practice, a focus on resolving disputes efficiently has tended to undercut commitment to, and judicial oversight over, the realisation of other important procedural values and objectives.[113] In effect, the keen pursuit of efficiency through ADR mechanisms has often come at the cost of reaching procedurally fair outcomes, hence providing greater 'access' at the expense of 'justice'.

The creation of online courts for civil dispute resolution offers a more excellent equilibrium, one in which the unique qualities of these systems can substantially improve both judicial efficiency and procedural fairness.[114] This balanced combination can be translated into a potential enhancement of both 'access' and 'justice'.

As courts acclimatise to the technological advances of these new proceedings, mutating from being a 'place' to a 'service',[115] it is crucial to appreciate how this transformation is shaping the processes, values, and outcomes of the legal system, as well as the roles played by lawyers and judges. In this regard, the benefits associated with court-based ODR systems over ADR and traditional courts have to do with both efficiency, such as reducing the caseload of courts and streamlining court capacity, and perhaps more importantly, fairness, in terms of increased consistency, quality control and neutral decision-making, as explained below.

In terms of efficiency, the hope is that the adoption of online court proceedings will alleviate judicial backlogs related to the court system, bringing convenience and enormous cost savings to the average litigant.[116] One of the defining features of these ODR systems is that parties submit arguments and evidence, and judges come to their decisions and make these determinations known to the parties, largely without setting foot in a physical courtroom and outside regular business hours.[117] In contrast with traditional courts, where communication and interaction are synchronous, the process of online courts involves asynchronous forms of

[110] Rabinovich-Einy and Katsh (n 8) 171-173.
[111] See Section 1.2.
[112] Orna Rabinovich-Einy and Yair Sagy, 'Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements' (2016) 4 Stanford Journal of Complex Litigation 1, 8.
[113] Rabinovich-Einy (n 55).
[114] Rabinovich-Einy and Katsh (n 8).
[115] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press 2013) 109.
[116] Rabinovich-Einy and Katsh (n 8) 207.
[117] Ibid.

engagement.[118] These characteristics not only remove face-to-face barriers, but also drastically reduce the direct and indirect costs of participation, such as missed work, transportation and childcare.[119]

Further, the enhanced capacity of courts because of online automated processes that are independent of limited space and human intervention increases the number of disputes that can be handled, offering swift and low-cost outcomes.[120] As British Columbia's CRT designers stressed, the freedom from these limitations makes court services significantly more accessible and affordable.[121] This is not just making it easier for those who would have had access to justice previously to gain access in the future, but also is enabling so-called 'digital outlaws', ie the individuals belonging to disadvantaged social groups who would never have brought claims before, to gain access to the system.[122] Consequently, equality is promoted and access is increased across the board.[123] At the same time, the move to online court proceedings covers both increased access to judgment and increased access to ODR mechanisms through the incorporation of facilitation stages into the new processes, as seen in the CRT and the English online court envisioned by Lord Briggs.[124]

In addition, the customised legal alternatives and plain language provided in some of the online courts that are already functioning[125] simplify court processes and, ultimately, address another major barrier to justice accessibility: the informational deficit.[126] For example, both the 'triage stage' proposed in the Briggs Review and the 'Solution Explorer' of the CRT are specifically designed to provide tailored tools, using algorithms that help inexperienced parties obtain the legal information relevant to the specific dispute.[127] These improvements notably allow LiPs to understand their entitlements better and interpret their legal interests to make them enforceable.[128]

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[118] Ayelet Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation' (2016) 26 Cornell Journal of Law and Public Policy 331, 359-360.
[119] Prescott and Sanchez (n 68) 38.
[120] Rabinovich-Einy and Katsh (n 48) 47.
[121] Salter and Thompson (n 71) 134.
[122] Ernest Ryder, 'Securing Open Justice' (2018) 3-4 <https://www.judiciary.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>.
[123] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report, Judiciary of England and Wales' (2015) 47-74 <https://www.pla.org.uk/2015/12/lord-justice-briggs-interim-report-on-civil-courts-structure-review/> accessed 8 September 2021.
[124] Genn (n 3) 11.
[125] Cabral and others (n 53) 249-251.
[126] Dorcas Quek Anderson, 'The Convergence of ADR and ODR Within the Courts: The Impact on Access to Justice' (2019) 38 Civil Justice Quarterly 126, 139.
[127] Susskind (n 14) 274.
[128] Rabinovich-Einy and Katsh (n 8) 208.

Alongside improved access and efficiency, the introduction of online courts has also opened the door to other potential benefits associated with justice and fairness. First, the use of algorithms in the dispute resolution field encourages limited discretion, reduced bias and improved consistency across cases, as opposed to the broad discretion with which human mediators operate.[129] This reflects a natural expectation for similar cases to be tackled analogously. Well-designed software employing algorithms can uphold and facilitate due process, without benefits for or against certain groups of litigants,[130] thus helping to level the playing field between experienced 'repeat-players' and 'one-shotters'.[131] Online court proceedings that incorporate pre-fixed algorithmic options into the ODR system, as the 'Solution Explorer' of the CRT,[132] have the potential to limit human biases, guaranteeing more procedurally just outcomes.[133] Algorithms might also function in an inconsistent and biased way,[134] and their lack of transparency can thwart expectations of fairness.[135] While the problem is far from settled, the key seems to be to rigorously keep an eye on the underlying values that guide algorithms' design and the fashion in which they operate so as to prevent procedurally defective rulemaking.[136]

Second, the collection and use of big data allow for better monitoring and quality control over human decision-making and software design in ways that are not possible in traditional courts.[137] Such control can promote impact studies of the procedural design of some elements of online court proceedings upon specific parties. These studies may show that some processes are not properly delivering justice to disputants belonging to disempowered groups (eg women, ethnic minorities, individuals with a low socio-economic background) and signal the need to redress for unfair treatment.[138] For example, it has been found that the shift from oral, synchronous, face-to-face interactions to text-based, asynchronous, remote judicial proceedings has a significant impact on group-aligned disparities in the outcomes in judicial decision-making.[139] By limiting judges' exposure to parties' demographics and identity

[129] Rabinovich-Einy and Katsh (n 48) 48.
[130] Leah Wing, 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field' (2016) 3 International Journal of Online Dispute Resolution 12, 26.
[131] Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95, 96-98.
[132] Salter and Thompson (n 71) 129.
[133] Rabinovich-Einy and Katsh (n 8) 210-211.
[134] Rabinovich-Einy and Katsh (n 48).
[135] Danielle Keats Citron, 'Technological Due Process' (2008) 85 Washington University Law Review 1249, 1253-1254.
[136] ibid 1308.
[137] Rabinovich-Einy and Katsh (n 6) 649.
[138] Rabinovich-Einy and Katsh (n 48) 49.
[139] Mentovich, Prescott and Rabinovich-Einy (n 58) 895.

markers when making decisions, court-based ODR systems can mitigate unjustified incongruences related to implicit and structural biases, thereby boosting the impartiality of judicial processes.[140] A recent study conducted by Professors Avital Mentovich, J.J. Prescott and Orna Rabinovich-Einy concluded that despite the fact that decision-makers might have some identity-relevant information available, the removal of physical encounters seems to diminish or eliminate disparate judicial decisions that correlate with some identity traits, such as age and race.[141] As data collection becomes a key feature in the design and evolution of online court systems, new opportunities arise to redirect attention towards proactive dispute prevention.[142]

Lastly, the move from human intervention to automated processes also offers greater opportunities for users' preferences and interests to shape the design of court ODR processes.[143] Specifically, the participation of new professions and disadvantaged actors (eg non-profits representing LiPs) in this design phase opens up the possibility of broadening the sorts of conflicts the system attempts to cover.[144] It also may offer dispute resolution services more attuned to the rights, needs and values of those individuals whose voices are typically overlooked in conventional court processes dominated by lawyers.[145] For instance, the 'user experience' played a central role in British Columbia's CRT software design, which continually seeks feedback from disputants to identify issues, improve the system and help prevent future claims.[146] This emphasis on 'users' is critical as procedural choices and avenues of redress inexorably shape legal outcomes.

As shown, the shift from traditional in-person judicial proceedings to online court proceedings avoids the trade-off between efficiency and fairness that has influenced the debate over conventional courts and the emergence of ADR. It could boost both goals at the same time, therefore improving 'access' and 'justice'.[147] This distinctive potential to simultaneously enhance courts' efficiency and procedural fairness illustrates how online court proceedings are different from their predecessors in terms of access to justice.

The adoption of fully integrated ODR systems could transform the nature of court processes. However, it also poses new and unprecedented challenges for some disputants as

[140] ibid 967.
[141] ibid 962.
[142] Rabinovich-Einy and Katsh (n 48) 49.
[143] Rabinovich-Einy and Katsh (n 6) 653.
[144] Rabinovich-Einy and Katsh (n 8) 212-213.
[145] ibid 209.
[146] ibid 191-192, 205.
[147] Mentovich, Prescott and Rabinovich-Einy (n 58) 963.

well as legitimate concerns over the integrity of the judicial system. These issues will be examined in the next section.

D. BEYOND ACCESS TO JUSTICE: POTENTIAL LIMITATIONS AND DRAWBACKS OF SHIFTING JUDICIAL PROCEEDINGS ONLINE

This article will now analyse common objections and criticisms which have been levelled at the adoption of online court systems for civil dispute resolution. The unique qualities of online proceedings to enhance both efficiency and justice is exciting, however, attaining such objectives might put other goals and legal values at risk. This situation may jeopardise public perception of the legitimacy of online courts. In the following section, the main potential limitations and drawbacks associated with the design of online court systems are outlined, focusing on how they could be tackled and mitigated.

1. Second-class justice

Online courts are intended to address high-volume, low-value civil claims at a low transaction cost. These disputes usually involve unrepresented parties whose preference is for a quick resolution of the conflict. In this regard, an often-heartfelt objection to online court systems, frequently cited by litigation lawyers, is that their design provides 'second-class' justice for people of limited means and less important claims, as opposed to the current, conventional civil courts.[148] In other words, these systems would confine poorer users to an inferior service by keeping them away from the benefits of representation and professional legal advice. Thus, while online courts might be envisioned as a way of bridging the gap in access to justice, they would worsen the gap between socio-economic classes.[149]

The basis of this concern seems to be that the quality of online services is, by definition, lower than that of traditional services, and that parties with no financial constraints would always opt to file their cases in a physical in-court process in lieu of a digital platform.[150] However, it is far from clear that online court proceedings provide an inferior, 'second-class' service. From the court user's perspective, a cheaper, quicker, more convenient and intelligible system should be considered the superior service.[151] In England, for example, the online court proposed in the Briggs Review recommended the provision of automated triage advice to help unaided litigants with the articulation of their cases effectively and clearly, which allows the

[148] Briggs (n 96) 37.
[149] Susskind (n 14) 187.
[150] ibid 188.
[151] ibid 190.

court and each party to know about an opposing party's case at an early stage, in contrast to the County Court's Small Claims Track.[152] Under any concept of online courts, even though the procedures and modes of dispute resolution may differ, the outcomes will be the same as – or even better than – a face-to-face proceeding.[153]

Furthermore, this criticism is based upon an incorrect assumption. It implies a comparison with an allegedly 'first-class' justice – namely, the traditional adversarial litigation where lawyers are engaged on both sides.[154] Unfortunately, in reality, with the significant reduction of legal aid and the disproportionate costs of legal representation, such 'first-class' justice is rarely available to the average person but is available only for those who are better off. Thus, if the parameter is no access to justice at all for low-value claims, a system designed to enable LiPs or disputants with limited options for affordable legal assistance to bring their claims to courts would be preferable. In light of the current litigation landscape, therefore, the optimal decision appears to be a 'second-class' service for all instead of a 'first-class' service for a few.[155]

2. The digital divide

The only route to online court proceedings is through technology. As a result, a common objection to them says that the potential advantages in justice accessibility should be measured against the lack of access to and availability of digital systems suffered by some disputants.[156] Broadly speaking, people can be digitally excluded in many forms, including through an incapacity to access the Internet or use of an adequate device, lack of fundamental digital abilities or problems with motivation or confidence to use an online service.[157] Digital technologies are taken for granted by many, but such media remain out of their reach for a considerable number of citizens. The United Kingdom Ministry of Justice, for instance, estimates that 70% of the country's population were either 'digitally excluded' or 'digital with assistance' in 2016.[158] Although Internet usage rates have likely improved significantly since then due to the reorientation of preferences towards online use and the proliferation of

[152] Briggs (n 96) 38.
[153] Susskind (n 14) 189.
[154] Briggs (n 96).
[155] Rabeea Assy, 'Briggs's Online Court and the Need for a Paradigm Shift' (2017) 36 Civil Justice Quarterly 70, 80.
[156] Quek Anderson (n 126) 139.
[157] JUSTICE, 'Preventing Digital Exclusion from Online Justice' (2018) 4 <https://justice.org.uk/our-work/assisted-digital/> accessed 5 September 2021.
[158] UK Ministry of Justice, 'Transforming Our Justice System: Summary of Reforms and Consultation' (2016) Cm 9321, 13 <https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/consultationpaper.pdf> accessed 6 December 2021.

smartphones,[159] there is still a risk that moving judicial proceedings online might perpetuate and exacerbate barriers to justice.[160]

There is, nonetheless, a realistic solution to tackling the so-called 'digital divide', ie the gap between those with and without ready access to the Internet. Although the technological shift can be a source of legitimate concern for a group, the distinctive qualities of online court systems, such as their broad reach and the possibility of help in legal aid centres and official kiosks, present valuable means of mitigating most of the issues related to digital exclusion.[161] The solution should be to provide practical assistance and support to those who cannot access online court services by electronic means – sometimes described as 'assisted digital'.[162] This approach has been advised in the Briggs Review, where such assistance includes making access to online systems accessible through phones and tablets instead of just desktop and personal computers.[163] The Briggs Review also recommends helping users via physical support, telephone services and webchat facilities, either by guiding them through the digital service or registering users' data in the platform on their behalf.[164] With regard to less technologically skilled, motivated or confident users, the answer to minimising digital exclusion from online justice services should lie in thoughtful design and technologies.[165] High technical and design standards can enhance accessibility and user experience, and simplify the communication of information.[166] The design of online courts must incorporate appropriate mechanisms for all these groups.[167]

3. Exclusion of lawyers

The incorporation of digital technologies into the justice system and the implementation of online courts are disrupting the authority of the legal profession.[168] But, perhaps more importantly, the adoption of online court proceedings – along with the significant cut in state funding of civil legal aid across the world – is challenging the entrenched role lawyers play in the litigation process.[169] This radical departure from conventional courts involves making the justice system more intelligible and accessible for those navigating the process by themselves

[159] Susskind (n 14) 216.
[160] Rabinovich-Einy and Katsh (n 6) 649; Mentovich, Prescott and Rabinovich-Einy (n 58) 972.
[161] Rabinovich-Einy and Katsh (n 8) 207-208.
[162] Etherton (n 70) 19.
[163] Briggs (n 96) 40.
[164] ibid 125.
[165] JUSTICE (n 157) 53.
[166] ibid 78.
[167] Pablo Cortés, 'The Online Court: Filling the Gaps of the Civil Justice System?' (2017) 36 Civil Justice Quarterly 109, 122.
[168] Susskind and Susskind (n 51).
[169] John Sorabji (2020) 2-8.

or, at least, less expensive for those who previously might have paid for legal advice.[170] While the main driving force of most online court programmes is not to dispense with lawyers, their widespread adoption in different jurisdictions is likely to reduce or even eliminate the need for assistance of court lawyers in minor civil claims.[171] In this context, the wider exclusion of lawyers from the courtroom – whether by design or through the economic consequences of the new legal processes introduced – is said to improve court efficiency but at the expense of the justice the system is supposed to offer in cases where there is not a level playing field.[172] As Professor Zuckerman notes, there is no justice without lawyers.[173]

This phenomenon must be assessed on a case-by-case basis. The English online court proposed in the Briggs Review, for example, was designed for litigants to use end-to-end without legal help.[174] Lawyers are not entirely excluded from the process,[175] yet their participation would be minimal, given the limited cost recovery permitted.[176] The British Columbia's CRT, on the other hand, was designed as a lawyer-free system unless the parties are given permission to be represented by counsel.[177] Considering that LiPs are consistently unable to understand the court procedure and the substantive law applicable to their claims, lawyers have increasingly concerned about whether the system adequately represents individuals' rights.[178] In varying degrees, therefore, lawyers' legal advice is being replaced by the application of technological developments.

The place of lawyers in the civil litigation process has been hotly debated.[179] For some commentators, the need for lawyers representing litigants need not be a necessary feature of the delivery of justice for certain sorts of litigation, such as in straightforward and low-value claims.[180] As a consequence, there could be fewer opportunities for the legal profession to bring added value via advice in these cases.[181] Conversely, a more compelling point of view claims that the absence of the legal profession from civil proceedings runs counter to any justice system aimed at securing the public participation, open justice and democratic accountability

[170] Genn (n 3) 8.
[171] Susskind (n 14) 235-236.
[172] Briggs (n 96) 41.
[173] Zuckerman (n 21).
[174] Briggs (n 96) 41.
[175] Etherton (n 9) 10.
[176] Briggs (n 96).
[177] Rabinovich-Einy and Katsh (n 8) 190.
[178] Mallory Hendry, 'B.C. Lawyers Worried About Exclusion from New Civil Resolution Tribunal' (*Canadian Lawyer Magazine*, 2 September 2013) <https://www.canadianlawyermag.com/news/general/b.c.-lawyers-worried-about-exclusion-from-new-civil-resolution-tribunal/272170> accessed 28 August 2021.
[179] Sorabji (n 169).
[180] Richard Susskind, *The End of Lawyers?* (Oxford University Press 2010).
[181] Susskind (n 14) 236-237.

of judicial processes.[182] Thus, the necessity of lawyers would become apparent not only because of the immediate interests of individual litigants, but due to a broader public interest in the effective access to courts and the provision of civil justice.[183]

This is not to suggest that lawyers' involvement in litigation cannot properly be minimised in some areas of the procedure. Greater application of technology in guiding disputants through the court system will clearly lead to more simplified procedural rules and less need for legal advice.[184] Nevertheless, these developments should be undertaken only when carefully considering the societal functions of the legal profession.[185] Hence, instead of merely elaborate procedures for lawyer-free online courts, as it is already taking place in British Columbia, the focus should be placed on overcoming the legal aid funding and technology challenges to redefine and strengthen the essential role of lawyers in the civil litigation process.[186]

4. Threats to open justice and transparency

Open justice and transparency are foundational constitutional principles inherent in civil justice systems.[187] These principles require the entire court system's operations to be open and subject to professional and public scrutiny. This rule applies to all hearings and judgments, save in exceptional situations, where necessary for the appropriate administration of justice.[188] Even though the call for open justice is generally confined to the proceedings and decisions of individual cases, which are accessible to the media and public, it also may come into effect when orders are made without a hearing or when members of the public want to access the content of court files.[189] Public scrutiny of courts, therefore, not only guarantees judicial accountability and prevents judges from becoming unjust and arbitrary in their decision-making,[190] but also ensures public debate over court outcomes, thereby building and increasing confidence in the whole civil justice system.[191] Within this framework, shifting traditional judicial proceedings to an online platform might seem to pose a challenge for the principle of open justice.

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[182] Sorabji (n 169) 19-20.
[183] ibid 14, 19.
[184] Clayton Christensen, Michael Raynor, Rory McDonald, 'What Is Disruptive Innovation?' (2015) 93 Harvard Business Review 44; Susskind, *The End of Lawyers?* (n 176).
[185] Genn (n 3) 6; Sorabji (n 169) 15, 20.
[186] ibid 2.
[187] Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 Federal Law Review 385, 388.
[188] Cashman and Ginnivan (n 70) 55.
[189] Nigel Bird, 'Open Justice in an Online Post Reform World: A Constant and Most Watchful Respect' (2017) 36 Civil Justice Quarterly 23, 23.
[190] Sorabji (n 169) 15.
[191] Etherton (n 9) 18.

Diverting justice to an unobservable online forum could obscure the judicial process, leading to an erosion of the visibility and scrutiny of the court system.[192] The loss of transparency in the English online court envisaged in the Briggs Review has been a source of serious concern for some judiciary members.[193] Nevertheless, improved use of technology can also massively expand open justice by making cases' data much more accessible and transparent than accessing the same data through traditional courts. Indeed, online court proceedings can improve public participation and engagement in the justice system in various ways.[194] In England, for instance, mechanisms under review to secure openness and transparency in the proposed online court include providing booths installed in court buildings to permit the public to access the proceedings, as well as livestreaming physical hearings.[195] In this regard, judges have expressed that digital courts must be open to scrutiny by the public and the media,[196] while some commentators are confident that open justice does not represent an insuperable obstacle to the adoption of online courts.[197]

Early allegations that online court proceedings may impede open justice have generally not been supported. However, the degree of transparency required in their design is a problematic issue. Lord Justice Briggs is optimistic that the imaginative use of technology can improve rather than maintain the level of openness in civil proceedings, although through different mechanisms.[198] Lord Justice Etherton argues that the ability to observe justice online should be as transparent as Parliamentary debate.[199] In a different vein, other authors suggest that the high standard of transparency proposed for the English online court – specifically, the observation of the online process – would be undesirable and unnecessary in the regular run of civil proceedings.[200] Still others believe that the principle of open justice cannot be upheld effectively in digital proceedings unless it is redefined for a new online context.[201] It remains unclear whether this discrepancy will be diluted in the design of online court systems in the coming years.

[192] Susskind (n 14) 195.
[193] Etherton (n 70) 19; Ryder (n 122) 5.
[194] JUSTICE, 'What Is a Court?' (2016) 43.
[195] Etherton (n 9) 18.
[196] Ryder (n 122) 5.
[197] Susskind (n 14) 200.
[198] Briggs (n 123) 45; Briggs (n 96) 53.
[199] Etherton (n 9) 18.
[200] Bird (n 189) 32.
[201] Sue Prince, '"Fine Words Butter No Parsnips": Can the Principle of Open Justice Survive the Introduction of an Online Court?' (2019) 38 Civil Justice Quarterly 111, 124-125.

In implementing online court platforms, simply focusing on efficiency is insufficient. Other issues that must also be weighed include the importance of access, procedural fairness, open justice, and the design of court proceedings in themselves. As one can see, the growing sophistication of design choices can not only mitigate the concerns associated with the adoption of online court systems, but may also hold the potential to overcome most of their objections. On balance, it is strongly arguable that online courts are, in reality, more conducive to overall access to justice than conventional, physical courtrooms.

E. CONCLUDING REMARKS

This article has considered introducing online court proceedings through the lens of access to justice – one of the most prevalent deficits of the judicial system. It has been argued that whilst the two principal recent developments in terms of justice and court accessibility – ie the institutionalisation of ADR processes and the expansion of ODR within public courts – appear to be motivated by similar driving forces, the widespread adoption of fully online judicial processes is a step towards a different, more balanced direction. In particular, the emergence of state-provided online courts and tribunals to resolve minor civil disputes could improve the cost-effectiveness of and streamline formal adversarial litigation procedures, without the risk of sacrificing proper procedural protections pivotal to the operation of a robust public justice system.[202]

The unique features of the Internet communication and digital environment in delivering inexpensive and convenient justice, as well as in providing customised legal options, generate fertile ground for reducing the length and cost of proceedings and simplifying court processes. The digitisation of judicial processes, then, makes court systems more accessible, particularly for those individuals who would otherwise be 'digital outlaws'.[203] Likewise, the incorporation of algorithms and the collection of dispute resolution data can ensure consistent sentencing outcomes and quality control over processes and enhance the design of ODR systems with the user at their core. In this sense, online court platforms are not only more accessible, but also promote due process by striking the right balance between automated processes and human engagement and oversight.[204]

[202] Rabinovich-Einy and Katsh (n 8).
[203] Ryder (n 122) 21.
[204] James J Prescott, 'Improving Access to Justice in State Courts with Platform Technology' (2017) 70 Vanderbilt Law Review 1993, 2017.

Each of the institutional design choices around online court proceedings provides concrete solutions to the most persistent problems of access to justice by increasing both judicial efficiency and procedural fairness. These two elements can be rendered as a potential improvement of both 'access' and 'justice'. However, each design choice also poses legitimate concerns about the integrity of the judicial system and raises new challenges for some disputants that need to be accommodated in some way. If their promise is realised, nonetheless, online courts will be able to help bridge the huge existing gap between individuals' understanding of their legal positions and exercising their entitlements.[205]

[205] Susskind (n 14) 297-298.