ENHANCING ACCESS TO JUSTICE THROUGH ONLINE INTERVENTION: WHY ONLINE COURTS SHOULD SHOW RESTRAINT

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Abstract

Those who take an interest in the legal system of England and Wales have long recognised that it has insuperable problems. The cost and time barriers for those seeking legal redress often results in justice not being attainable. Fear not, Her Majesty's Court and Tribunal Service (HMCTS) say, for we are implementing a reform proposal to rectify these barriers. Splendid, says the uninformed onlooker. However, what is the opinion of the informed observer?

This article provides an analysis of the Online Court Reform Programme. It does so by assessing the current reform proposal in light of two pragmatic reform models: (i) real-world behaviour; and (ii) comparative realism.

Following its analysis, the article should provide the reader with the ability to make an informed decision as to whether the imminent introduction of online courts is a reform strategy worthy of support.

Introduction

Lord Diplock summarised the rudiments of any legal system which intends to follow the rule of law when he stated:

> *'Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided*

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> *are courts of justice to which every citizen has a constitutional right of access.*[2]

However, despite the judgement of Lord Diplock, it is widely recognised that previous government policies have resulted in the right to access courts arduous to attain. The Law Society, for example, has evidenced a direct correlation between the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and several barriers denying access to the English Legal System.[3] The Law Society assert that the restrictions on the availability of legal aid have directly resulted in those wishing to enforce their rights being denied the opportunity to do so. In small claim disputes, the expense of obtaining legal advice and representation has resulted in a claimant's right to pursue a claim being economically unviable.[4] Moreover, the Ministry of Justice (MoJ) budget has decreased exponentially since 2012. Consequently, in 2019 funding provided from the MoJ to Her Majesty's Courts and Tribunals Service (HMCTS) was 21% lower than in 2012.[5]

The decrease in HMCTS funding has already resulted in several ideological reforms, such as the "Estates Reform Project". The Estate Reform Project has seen the closure of 90 county courts since 2010.[6] The impact of these closures has led to some truly striking statistics. In 2021, the average time between commencing a small money claim and having an initial hearing was 51.5 weeks.[7] Although many may highlight the impact of the Coronavirus Pandemic as being attributable to such delays, pre-pandemic delays ranged between 32-38 weeks.[8] The Law Society asserts that these delays are primarily the result of Litigants in Persons (LIP's). According to the Law Society, since LIPs are being compelled to self-navigate the intricacies of the legal system, procedural mistakes are causing delays.[9] Nonetheless, it is submitted that court closures are also attributable to the procedural inefficiency currently being experienced.

Fortunately, in 2015 Lord Justice Briggs (as he then was) was commissioned to review the barriers faced by those seeking to access the justice system. Briggs' findings were damning:

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[2] Bremer Vulkan Schibau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909 at 977 (HL) per Lord Diplock
[3] The Law Society, 'Access Denied? LASPO Four Years On: a Law Society Review' (June 2017) https://www.lawsociety.org.uk/en/topics/research/laspo-4-years-on
[4] *Ibid*, p. 6
[5] Sturge. J., et al., *The Spending of the Ministry of Justice* (HC 2019-0217) para 2.3
[6] Cowie. G., and Sturge. G., *Court Closures and Access to Justice* (HC 2019-0156) para 2.1
[7] Ministry of Justice, 'Civil Justice Statistics Quarterly: January to March 2021' (June 2021)
[8] *Ibid*
[9] The Law Society, 'Access Denied? LASPO Four Years On: a Law Society Review' (June 2017) p. 24

> *'The single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals … In short, most ordinary people and small businesses struggle to benefit from the strengths of our civil justice system'.*[10]

Lord Briggs recommendation, for alleviating what he describes as *"a truly shocking state of affairs"*,[11] was to digitalise the entirety of the civil claims process. According to Lord Briggs, digitalisation will provide a user-friendly experience for LIPs and result in quicker legal redress without incurring disproportionate costs.[12]

HMCTS has been significantly influenced by Lord Briggs recommendations and have pledged £700 million into digitalising the civil justice system.[13]

Therefore, the purpose of this article is first to analyse whether the modernisation of the civil justice system can conform with its objectives. Secondly, and more pertinently, it will evaluate whether the reforms should be applauded as an innovative milestone meliorating access to justice or a policy-driven contrivance with profound implications.

1.1. Limitations in this Article

With the above said, it is also relevant to state this article's limitations. The primary focus of this article will be on how the modernisation programme impacts parties to civil money claims. The reasons for such limitations are two-fold. Firstly, HMCTS Reform Programme encompasses digitising several areas of law, including crime, family, and tribunal disputes. Therefore, it would not be possible to analyse all areas within the constraints of the articles word limit. Secondly, the use of technology in small money claims (i.e., up to £10000) has been undergoing pilot testing since August 2017. Thus, user feedback is available.

Technology Driven Redress: The Three Stages to Online Courts

2.1. A Brief Overview of the Current State of affairs

The HMCTS Reform Programme is being labelled as the Online Civil Money Claims Project

[10] LJ Briggs, *Civil Court Structure Review: Interim Report* (2015) 5.23
[11] *Ibid* 5.25
[12] LJ Briggs, *Civil Court Structure Review: Final Report* (2016) Ch 6
[13] Rozenberg. J., 'The Online Court: Will IT Work' (2016), https://long-reads.thelegaleducationfoundation.org/plans-for-2019/

(OCMC) while undergoing pilot testing.[14] The pilot scheme has largely implemented the structural changes recommended by Lord Briggs, which consists of three stages: (1) Triage, (2) Conciliation and (3) Determination.[15]

The Triage Stage requires the claimant to complete a claim form online. Lord Briggs, while writing extrajudicially, states the process is similar to the HMRC online self-assessment platform.[16] Essentially, a box-ticking exercise whereby artificial intelligence (AI) asks pre-determined questions before providing automated particulars of a claim form.

The Conciliation Stage consists of two separate elements. Firstly, legally trained court staff will assist the parties with their case management. Secondly, they will organise and direct the parties to participate in Alternative Dispute Resolution (ADR). However, unlike current practise, this stage is not a pre-action protocol. Instead, it arises after serving the claim form.

The last stage, the determination stage, is the first time a judge will consider a claim. The entire adversarial process (i.e., trial) is expected to take place, at best, through "skype type" conferences or telephone. However, as per Lord Briggs recommendation, the judge has the discretion to decide the case without a hearing.[17]

It is now important to examine these three procedural stages in detail. Firstly, however, in a recent UKSC decision, Lord Reed reasoned that changes to the justice system should be assessed according to their likely impact on real-world behaviour.[18] Therefore, it is imperative to determine whether online courts are likely to encourage positive social behaviour.

2.2. Stage 1: Triage Stage

The Triage stage is, prima facie, effective at overcoming the cost and delay barriers preventing access to justice. According to Rozenberg, when a claimant commences a small money claim and, thus, begins the online box-ticking exercise, the online form will not ask whether the claim concerns a tort or breach of contract.19 Instead, the claimant (often a LIP) will be asked layperson questions, such as whether their grievance concerns a purchase or

[14] See: The Civil Procedural Rules PD 51R
[15] LJ Briggs, *Civil Court Structure Review: Interim Report* (2015) 6.7
[16] Briggs. M., 'The Civil Online Court in England' in Assy and Higgins (eds) *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (OUP 2020) 136
[17] LJ Briggs, *Civil Court Structure Review: Final Report* (2016) 6.14
[18] *(R (Unison) v Lord Chancellor* [2017] UKSC 51 [96]
[19] Rozenberg. J., 'The Online Court: Will IT Work' (2016), https://long-reads.thelegaleducationfoundation.org/how-will-online-courts-work/

whether they are owed money. Therefore, presumably in a consumer action for faulty goods, the claimant will be asked when the goods were purchased to ensure that the claim is not time-barred. Consequently, the Triage Stage provides the claimant with economic advantages that should be applauded. Firstly, immediately following the claimant submitting their answers, the AI technology will determine whether the claimant can proceed with their case. Therefore, a claimant will not incur costs of issuing a claim form in vain because the AI technology will inform the claimant that their claim cannot proceed and, presumably, prevent them from "progressing onto the checkout". Secondly, the need for legal representation to navigate the civil procedure rules is omitted as the AI technology will, in effect, produce and send (by post or email) a claim form to the defendant in accordance with online courts CPRs.

In addition, the Triage Stage should be equally applauded for its potential ability to decrease the procedural delays discussed above. According to Lord Etherton MR, since the Triage Stage can issue a claim instantaneously via email and permits the defendant to respond immediately, some claims can be settled within minutes.[20] Etherton assertion, of course, must depend on a defendant admitting liability in its entirety. However, recently released MoJ statistics allow for an inference to be made into how the Triage Stage alone can substantially ameliorate the delays currently being experienced. Between April-June 2021, 93% of all specified money claims were allocated either to the small or fast track.[21] The MoJ states that the small or fast track claims during this period went uncontested 84% of the time, which is similar to a five-year average.[22] The statistics are astonishing, particularly since it would then take on average 49.2 weeks for a claimant to receive a judgement in default of appearance.[23] In contrast to the truly jaw-dropping statistics above, PD 51R section 5.1(1) of the CPR's provides that a defendant will have 19 days to respond to a claim. If the defendant fails to respond to the claim within this time, the claimant can request and receive a judgement in default of appearance via the online platform.[24]

From the above analysis, it certainly appears that Lord Briggs recommendations and the OCMC project are placing public need firmly in the centre of the structural changes. Moreover, applying Lord Reed's judgement,[25] it is axiomatic that LIP's and small businesses

[20] Etherton. T., 'Rule-Making for a digital Court Process' in Higgins (eds) *The Civil Procedure Rules At 20* (OUP 2020) 60-61
[21] Ministry of Justice, 'Civil Justice Statistics Quarterly: April-June 2021', para 4.2. https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2021/civil-justice-statistics-quarterly-april-to-june-2021#claims-summary
[22] *Ibid*, para 5.0
[23] *Ibid*, Para 5.1
[24] PD 51R s. 11.1(1)-(2) of the CPR
[25] Fn 18 (above)

would embrace a lower cost and more efficient system.

Many may criticise the above assertion by highlighting that the benefits of the Triage Stage are entirely dependent on both parties having access to computers and being literate. Indeed, Lord Briggs was bombarded with such disquietude by The Bar Council, CAB, Chancery Bar Association and Law Society prior to publishing his final report.26 However, to echo Lord Briggs response, such criticism does not raise a pragmatic argument capable of preventing reform. Without wishing to sound uncourteous, this is the twenty-first century. Most of society have access to technology capable of accessing the internet. Furthermore, there is no prohibition in having family, friends, or other associations/bodies, such as the Citizens Advice Bureau or legal clinics, assist the claimant (or defendant) if they are illiterate or cannot access the internet.

Nonetheless, there is an argument that does heed pragmatism. To date, the OCMC project has only permitted non-represented claimants to commence a claim. [27] However, on the 3rd of August 2021, HMCTS Strategic Engagement Group proposed to allow legal representatives to file an online claim on behalf of the claimant. [28] Usually, this proposal would be actively encouraged for reasons that do not need reciting fully. It will suffice to say that every person should have the right to elect for legal representation from the outset regardless of their grievance.[29] However, permitting legal representatives to file an Online Civil Money Claim can, it is submitted, adversely impact real-world behaviour. Lord Briggs stated legal representatives would be able to "bypass" the automated Triage Stage,[30] presumably because it will save litigants from incurring costs through billable hours. It can only be envisaged that Briggs had in mind that legal representatives can continue to file the particulars of a claim using a blank screen, similar to Money Claims Online (MCOL), which has been established since 2002.[31] However, in what should be said is a seminal journal in understanding AI and its limitations, Professor Zuckerman notes that "natural language

[26] LJ Briggs, *Civil Court Structure Review: Final Report* (2016) 6.11-6.21
[27] See PD 51R of the CPR r. 2.1(3)(d)
[28] HMCTS Strategic Engagement Group, 'Chair's Summary – Strategic Engagement Group Meeting 3 August 2021', https://www.gov.uk/government/publications/strategic-engagement-group-meeting-chairs-summary-august-2021/chairs-summary-strategic-engagement-group-meeting-3-august-2021
[29] An alternative argument is the impact the reforms would have on the legal market. See: LJ Briggs, Civil Court Structure Review: Final Report (2016) 6.23
[30] *Ibid*
[31] MCOL does not have the same luxuries as those intended by OCMC. There is no use of AI. Therefore, the particulars of the claim form are not automated by the box-ticking exercise. Instead, what is written on the blank screen will form the particulars of the claim form. Consequently, quick-hand legal jargon used by legal representatives will be presented to the non-represented claimant.

processing" is some time away from being established.[32] Therefore, AI cannot determine the meaning of words and what they signify when legal representatives "bypass" the box-ticking exercise. The consequences of a non-represented defendant receiving a claim form written by a represented claimant can negatively impact "real-world behaviour" in one of two ways. The under-resourced defendant may, of course, seek free advice from legal clinics or the CAB, which would undoubtedly lead to news headlines, such as "civil reform imposing on other governmental departments funding". Alternatively, the defendant may contest the claim without truly knowing the case against them. The latter limitation is particularly concerning as knowing the case against you is imperative to the rule of law.

2.3. Stage 2: Conciliation Stage

The three stages to OCMC are cumulative in that a claim will only progress to the next stage if the previous stage does not settle the dispute. Therefore, the Conciliation Stage is dependent on the defendant wholly or partly contesting the claim. As with the Triage Stage, the aims and objectives of the Conciliation Stage appear at first instance to be fundamentally sound. The concept will save HMCTS on costs since it would be hoped the need to hold a trial will be overcome. As court staff – not judges – engage with case management and mediation, judges time will be focused on the disputes going to trial. Thus, the backlog in cases and delay getting to trial will be lessened, as noted by Katch and Rabinovich-Einy.[33]

However, two issues arise from the Conciliation Stage, which will, undoubtedly, impact real-world behaviour. The first issue is that HMCTS will fund the Conciliation Stage.[34] The notion of requiring HMCTS to fund ADR will open the floodgates to procedural abuse. A small business that is alleged to have delivered faulty goods would be inclined to refuse ADR as part of traditional pre-action protocols because it is offered free of charge when the claimant brings a claim via the OCMC. While this contention pre-determines that a business will act in bad faith, it is not a fanciful contention. The commercial realities of business are to save costs and increase profits. Therefore, this type of procedural abuse has the potential to materialise.

Another criticism of the Conciliation Stage centres around the imminent introduction of legally

[32] Zuckerman. A., 'Artificial Intelligence – Implications for the Legal Profession, Adversarial Process and the Rule of Law' (2020) 136 *LQR* 427, 431
[33] Katsh and Rabinovich-Einy, 'The New New Courts' (2017) 67 *Amer. U. L. Rev*. 165, 171-172
[34] LJ Briggs, *Civil Court Structure Review: Final Report* (2016) 6.112

represented parties.[35] Momentarily consider the following scenario:

Margret – a 68-year-old pensioner – contracts with a construction company to install new gutters to her home. Margret lives by the sea, so she requires specific guttering to protect against adverse weather. The specific guttering was not available. Therefore, in breach of contract, the construction company supplies and installs standard guttering. Margret decides to use the OCMC to claim damages for breach of contract. The construction company appoints a solicitor to resolve the dispute. The solicitor refuses to admit liability at the Triage Stage. Therefore, the dispute progresses on to the Conciliation Stage. Margret now finds herself negotiating against a professional and seasoned negotiator. Using his professional wittiness, the solicitor offers Margret compensation quantified as the difference in value between the guttering installed, and that stated in the contract. Margret, partly influenced by the professional negotiator's skills and partly believing that the settlement offer is adequate compensation, settles. However, what Margret does not know is that at trial, damages could be quantified on the basis of the cost of cure, i.e., the cost of another builder supplying and installing the guttering as agreed in the contract, which, over the long-term, is the more suitable compensation.

The above scenario shows the inherent and disproportional unfairness that a LIP will face when negotiating against a legally represented party. Moreover, as Professor Endicott correctly highlights, *"[t]he rule of law is not achieved if disputes are resolved by the stronger of two parties forcing a resolution on the weaker party".*[36]

Finally, it is worth highlighting that, at present, the Conciliation Stage is not mandatory. Either party is entitled to refuse ADR and probably should in dear Margret's case. However, the Civil Justice Council (CJC) recently researched into whether ADR should be made compulsory.[37] Unsurprisingly, the CJC concluded that when parties do not incur the expense of ADR, compulsory ADR would be *"an extremely positive development".*[38] The CJC findings complement the all-expense-paid for Conciliation Stage. However, in light of the above, there is worrying signs ahead for LIPs.

2.4. Stage 3: Determination Stage

[35] Fn 28 (above)
[36] Endicott. T., 'The Rule of Law and Online Dispute Resolution' in Facheci et al (eds) *Online Dispute Resolution: virtud cívica digital, democracia y derecho* (CEU Ediciones, Madrid 2017) 22
[37] Civil Justice Council, 'Compulsory ADR' (June 2021) https://www.judiciary.uk/wp content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf
[38] *Ibid*, para 118

As per the cumulative nature of the Online Court reform programme, a small money claim will only reach the Determination stage if the Triage Stage and Conciliation Stage does not resolve the dispute. It will be remembered from above that the Determination Stage is entirely remote by default. The judge will have discretion as to whether they should hold a virtual hearing or decide the case on the information acquired during the Triage Stage and Conciliation Stage.39 It is no doubt envisaged that this will save HMCTS costs for several reasons. Firstly, fewer disputes will likely reach this stage; also, the backlog will decrease. Therefore, the need to pay part-time judges will diminish. Secondly, remote hearings will enable HMCTS to continue closing physical courts through the Estates Reform Project, thus further saving costs. More pertinently, however, is that the introduction of remote hearings will save litigants indirect costs. There will no longer be a requirement to travel to county courts, nor will litigants be required to miss work to attend courts. Therefore, in one aspect, public need and further improving access to justice is being observed.

Nevertheless, as with the two preceding stages, there are severe implications that will face not only the litigants but the public in general. A common occurrence between Briggs' interim and the final reports was the responders' discontent at how digitisation would adversely impact open justice. The significance of substantive justice warrants more profound thought and will be the superseding section's focal point. However, open justice is of fundamental importance, as stated by Lord Woolf MR:

> *"… [I]t deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially".*[40]

Under the current reform proposals, a judge will have the discretion as to whether the litigating parties will be required to attend a virtual hearing or whether a dispute can be resolved without the need for further input from the litigating parties.41 Firstly, although the primary concern for judges is the administration of justice, they are also expected to implement policy, for example, by utilising the reform programme. It follows that in 'real-world behaviour' (which Lord Reed said is to form the measuring stick of reform), it would not be too fanciful for a judge to opt to make their decision on the material already submitted, rather than pursue an investigatory hearing with participating LIPs. After all, a non-participatory hearing would result in swifter and cheaper justice for both litigating parties. However, making

[39] See para 2.1. (above)
[40] *Regina v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966 at 977 (CA)
[41] LJ Briggs, *Civil Court Structure Review: Final Report* (2016) 6.14

a decision, in which is essentially closed proceedings, will deny the public its right to know that justice is being administered impartially. In his interim report, Briggs states HMCTS will be required to make documents readily available via technology, so the press and public can inspect them.42 However, such a response in the context of the importance of the open justice principle is inept. Making documents available following a closed decision (i.e., without "skype type" hearings) will lead to arbitrariness. When decisions are arbitrary, public confidence in the justice system will diminish.

In contrast to the above, if the judge determines a "skype type" hearing is required, it is equally contended that the open justice principle will suffer harm. Briggs recommends that these "skype type" hearings are open to the public so they can readily observe the hearing.[43] The rationale behind Briggs' recommendation clearly has the potential to increase open justice. The public could access live hearings from home rather than physically attending courts. However, LIP's will find themselves presenting their arguments to a far wider audience. A LIP who is anxious about public speaking, but forced to represent themselves due to costs, is likely to have one of two 'real world behaviour' responses, depending on their role in the dispute. It could discourage a claimant from proceeding with the Determination Stage and, thus, lead to them dropping the action. Alternatively, in the defendant's case, it could largely influence their decision to settle, despite feeling they have valid grounds to defend their case. In either event, the open justice principle will be infringed as these external factors will inhibit a truly transparent hearing from occurring.

Moving on from open justice, Briggs acknowledges that the Determination Stage will need to be *"less adversarial, [and] more investigative, ... by making the judge his or her own lawyer"*.[44] What is being envisaged is that the reform programme will result in even more LIPs. Consequently, when a judge opts to hold a virtual hearing, arguments and evidence will be presented in a less structured manner than it would be if legal professionals were tasked with presenting the case. Therefore, the function currently untaken by an English judge, namely, to decide the case from what the parties have presented,[45] must evolve to include investigatory judging. Notwithstanding the obvious inefficiency in costs and time that investigatory judging is likely to cause, Professor Zuckerman contends that investigatory

[42] LJ Briggs, *Civil Court Structure Review: Interim Report* (2015) 4.25; Briggs maintained this position in his final report see para 6.85
[43] LJ Briggs, Civil Court Structure Review: Interim Report (2015) 4.25
[44] LJ Briggs, Civil Court Structure Review: Interim Report (2015) 6.15
[45] Official Solicitor of the Supreme Court v K [1965] A.C. 201 at 240–241 (HL)

judging leads to unconscious confirmation bias.[46] In essence, psychology studies have demonstrated that when an investigator (i.e., judge) forms an initial hypothesis, they unconsciously search for evidence consistent with that hypothesis. Subsequently, judges will become less receptive to contrary evidence.47 Two stances could be taken to rebut the phenomenon of unconscious confirmation bias, and both are unconvincing.

Firstly, one may argue that judges can be trained to recognise unconscious bias and, thus, minimise it. However, O'Brian's psychological study has shown that when decision-makers tasked with carrying out criminal investigations were trained to consider additional hypotheses, they failed to alter their initial misconception. In fact, the decision-makers pre-existing beliefs were strengthened.[48] Therefore, it seems that unconscious confirmation bias cannot be averted regardless of training. Instead, a judge tasked with investigatory judging will form an initial hypothesis and, despite formal training, unconsciously seek out evidence to confirm their initial misconception.

The second stance which may be taken to rebut the apparent deficiency in investigatory judging is that civil legal systems, seen throughout Europe, has long practised investigatory judging. Thus, the English reform programme merely mirrors the established judicial practices of other developed legal systems. However, such an assertion cannot be further from the truth. Professor Assy has highlighted that many of the European countries which offer largely informal procedural and evidentiary requirements make legal representation compulsory.[49] The procedural and evidentiary requirements during the Determination Stage will undoubtedly be informal, particularly when the hearing only involves LIPs. The evidence relied on, for example, may not be compelling, so the judge will be required to undertake investigatory questioning. In light of the confirmation bias phenomenon, it would not be fanciful to suggest that questioning may be unconsciously structured to confirm an initial misconception. In conclusion, therefore, while investigatory judging is not novel, Civil Legal Systems have installed safeguards (mandatory legal representation) to negate the risk of unconscious bias. However, the Online Court Reform Programme has failed to acknowledge the risk of investigatory judging.

[46] Zuckerman. A., 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33(4) CJQ 355
[47] Ibid, 361-362
[48] O'Brian. B. 'Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations (2009) 15(4) *Psychology, Public Policy and Law* 315-334
[49] Assy. R., 'Briggs' online court and the need for a paradigm shift' (2017) 36(1) *CJQ* 70, 77-78

A Case for Using Justice as The Yardstick for Reform?

In Section 2, the effectiveness of the OCMC project was analysed through the scope of pragmatism and real-world behaviour. Section 3 will consider whether the online courts' reform programme should be assessed in accordance with principles of justice.

Professor Susskind OBE asserts that principles of justice should be the driving force behind reform, especially when the objective is to widen access to justice.[50] As a leading advocate for the use of technology in court systems for over 40 years, the former chair of the CJC and IT adviser to the Lord Chief Justice,51 Professor Susskind's thesis deserves to be summarised, if only to challenge it.

3.1. A Summary of Susskind's Thesis and How It Relates to Online Courts

According to Susskind, the problem with the activists who campaign against online courts (or any civil reforms for that matter) is that they analyse reform proposals in accordance with transcendental idealism, rather than starting at the more attainable level of comparative realism.[52] Therefore, Susskind states reform activists should retrench their idealistic acuities and assess reform proposals comparatively against current injustices.[53] The rationale behind Susskind's comparative justice reasoning is compelling. After all, one should appreciate that any reform that widens access to justice, no matter how small, is a success. It follows that Section 2 (above), according to Susskind, is too heavily focused on idealism, rather than valuing how the online court reform programme reduces injustices currently seen in traditional court structures. A challenge to this thesis (if not already obvious) will be made in section 3.2 (below).[54]

The second part of Susskind's thesis, which follows from his comparative justice rationale, is that the effectiveness of the online court reform programme should be measured through a method of "outcome thinking".[55] Therefore, the 'real-world behaviour' yardstick for determining the effectiveness of the online court reform programme is, in effect, substituted for a lens that focuses on the outcome court users want. Susskind states that court users

[50] See: Susskind. R., Online Courts and the Future of Justice (OUP 2019) Ch 7
[51] Susskind. R., *Online Courts and the Future of Justice* (OUP 2019) Ch 1
[52] *Ibid*, 87-88
[53] *Ibid*
[54] In the interest of keeping this article structured, it is first appropriate to consider the second aspect of Susskind's thesis and then move on to the rebuttal stage.
[55] Susskind. R., *Online Courts and the Future of Justice* (OUP 2019) Ch 4

want two-dimensional outcomes. Firstly, court users want practical outcomes, such as a "cheaper, better and quicker" process than that currently available through the comparable traditional court systems.[56] Secondly, court users want emotional outcomes, namely the feeling that their grievance has been resolved fairly, with finality, and they have had the opportunity to be heard.[57]

It follows that Susskind's "outcome thinking" model is coated in utilitarianism – the end is more important than the means by which to get there. To put this into context, the use of courts, judges, lawyers, and procedure are, according to Susskind, unimportant to court users, as they only form part of the process, not the desired outcome.[58] Instead, provided the online courts gives a person who wishes to enforce (or defend) their legal rights practical and emotional outcomes, the online court should be perceived as a success.

3.2. Reducing Comparative Injustice Comes at a Cost

Firstly, as noted in section 2.1. (above), it is indisputable that the online court reform programme will be cheaper and quicker for those eligible and who choose to use it. Therefore, when considering Susskind's thesis of reducing comparative injustices, the online court programme will alleviate the injustices of cost and duration currently experienced in traditional proceedings. Access to justice will be increased, which will conform with the "outcome" court users' desire. Nevertheless, it is submitted that a reform proposal pursuing the reduction of injustices is absurd if it leads to new injustices.

For many people, substantive justice (fair result) is not concerned with whether the innocent party to the dispute perceives the outcome to be fair. Instead, it is that the innocent party gets their just deserves, in accordance with what the law states. It is conceded that most small money civil claims are of slight complexity, so substantive justice can be achieved at the Triage Stage or Conciliation Stage. However, there are still some small money disputes where the quantification of damages can vastly alter the outcome and, thus, substantive fairness.[59] To again echo the words of Professor Endicott, *"[t]he rule of law is not achieved if disputes are resolved by the stronger of two parties forcing a resolution on the weaker*

[56] *Ibid*, 48
[57] *Ibid*
[58] *Ibid*
[59] Dear Margret, being an example of perceived substantive justice and not actual substantive justice (see 2.3. above).

party".[60] It is contended that the online court reform programme will result in more LIPs being "influenced" to settle as, to them, the outcome appears to be fair. Therefore, new injustices will materialise.

Susskind's thesis would expose a vital flaw in the above contention: it is resorting to transcendental idealism. Comparative realism would assert that influenced settlement is already apparent regardless of the introduction of the online court structure. Thus, in essence, the reform is still improving the costs and inefficiency barriers. However, such a view suggests that the online court reform programme is only a means that allows the justice system to process more cases in less time and at lower costs, which is a rather narrow understanding of enhancing access to justice. According to Dame Hazel Genn DBE, *"[a]ccess to justice means something more than being able to complete an online form and feel comfortable with the process. It requires the ability to engage, to participate, to be dealt with by fair procedures".*[61] The assertion raises two points. Firstly, whether the online court structure accommodates, or at least does not diminish, procedural justice for the parties to the dispute. Secondly, whether the online court structure truly preserves public participation. Susskind asserts that online courts do both.[62]

It is accepted, albeit by utilising proportionate justice principles, that Susskind is correct in contending that *parties' rights* to procedural justice are respected. By applying a comparative realism lens, it can too easily be contended that disputing parties will now be denied the right to have their dispute settled in court by a judge. Under the traditional court structure, if one party refuses to settle or engage with ADR, eventually, they will have the absolute right to participate and communicate their grievances before a judge, if only to have it struck out. In contrast, the Determination Stage does not provide an absolute right to communicate with a judge verbally. Consequently, Donoghue argues that the denial of the traditional process is *"inhumane in modern society"*.[63] However, with respect to Donoghue, her argument is futile in "modern society". Firstly, it must be understood that justice is more than merely substantive and procedural in the sphere of law. Instead, justice requires, as Lord Hobhouse stated,

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[60] Endicott. T., 'The Rule of Law and Online Dispute Resolution' in Facheci et al (eds) *Online Dispute Resolution: virtud cívica digital, democracia y derecho* (CEU Ediciones, Madrid 2017) 22

[61] Hazel Genn, 'Online Courts and the Future of Justice' (Birkenhead Lecture, Gray's Inn, October 2017) 6 https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf

[62] See Susskind. R., *Online Courts and the Future of Justice* (OUP 2019) Ch 7 and 19

[63] Donohue. J., 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) MLR 995 at 1003

> *"… [for] courts to ensure cases are dealt with … without undue expense and by allotting only an appropriate share of the court's resources while taking into account the need to allot resources to other cases".*[64]

Therefore, the right to procedural values,[65] must be proportionate with economic and wider social considerations. Once proportionate justice is fully appreciated, it should become apparent that The Online Court Reform Programme does not deny procedural values, such as the ability to engage and participate in the process. Instead, it merely substitutes them proportionately and via methods that ensure the whole of society receives substantive justice. Let us briefly revisit Dear Margret from Section 2.3 (above). Dear Margret commences her action by completing Triage (Stage 1), so she has immediately participated and articulated her grievance. The dispute progresses to Conciliation (Stage 2). In ADR, Margret is afforded the opportunity to communicate to the builder how his wrong affected her emotionally, so she is given further opportunity to engage and participate. Suppose the dispute progresses to Determination (Stage 3). In that case, the judge will read all the elements of the dispute and attempt to make a decision while contemplating how the builder's wrong emotionally and legally affected Margret. Furthermore, suppose a decision cannot be made on the material disclosed. In that case, the judge will then resort to more traditional procedural values. It follows that Margret's right to procedural values (right to be heard and engage) are not infringed. Instead, they are substituted so that the justice system can divide its time and resources across the other 80,000 cases awaiting judicial intervention.

Nevertheless, that is not to say that the Online Court Reform Programme should be welcomed. Susskind's whole thesis, be it "outcome-thinking" or "reducing comparative injustices", is fundamentally flawed. The importance of the English Legal System goes much further than two disputing parties. It ensures civil obedience by educating society on economic and social behaviour. Susskind's presumably recognised this element when he was at pains to highlight that digital decisions will remain accessible and intelligible so that social and economic norms can be reinforced in society.[66] However, civil obedience and judicial legitimacy is more than reminding society of how they should behave and providing evidence of impartiality through abstract reports. Physical courts are symbolic of institutionalism. Society is reminded that their behaviour is accountable to justice each time

[64] *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 [153] (Per Lord Hobhouse)
[65] The term "values" will be used rather than justice as what is being discussed here is what a claimant or defendant values in the procedural process, i.e., the preference to verbally communicate with a judge.
[66] Susskind. R., *Online Courts and the Future of Justice* (OUP 2019) 193-194

they pass a courthouse or enter a courtroom by the presence of the coat of arms. Furthermore, the very construction of a courthouse subconsciously allows people to reflect and create distance from their past.[67] Removing these symbolic elements through the removal of physical courts, even in less populated rural areas, will decrease judicial legitimacy and governance.

Overly Reliant? Future Warnings

The preceding sections have provided an overall picture of how the Online Court Reform Programme is intended to operate and analysed whether the reform is advantageous in light of two crucial reform thesis. However, it is no longer a question of whether Online Courts will implement technology as a matter of cause, but when.

Therefore, in light of their imminent implementation, it must be questioned whether HMCTS is throwing caution to the wind.

Firstly, it is accepted that Symbolic AI (which is being used in Online Courts) has provided compelling evidence that machines are more accurate and quicker than human intelligence. Calculators, for example, can consistently solve mathematical problems quicker and more accurately than humans. However, to suggest that AI can always do the right thing at the right time is flawed. AI has already proven a costly mistake in the English legal system. In 2015, the often-proclaimed task that AI can effortlessly performs deductive tasks was proven to be a misconception. The MoJ was left urgently investigating an AI mistake when thousands of divorce settlements were wrongfully settled due to algorithm malfunction.[68] Unfortunately, despite the apparent safeguard of pilot testing, HMCTS has already become overly committed to its policy aims. To provide context for this assertion, it is appropriate to discuss Sheppard's theory on innovation.[69]

According to Sheppard, the effect of innovation can cause social harm when one of two circumstances occur: (i) incomplete innovation or (ii) premature disruption.

Incomplete innovation occurs when disruption precedes innovation. When innovation is

[67] Resnik. J., and Curtis. D., *Representing Justice: Invention, Controversy, and Rights in City States and Democratic Courtrooms* (Yale University Press, 2011) 349
[68] Bowcott. O., 'Revealed: Divorce Software Error Hits Thousands of Settlements' The Guardian (London, 17 December 2015) https://www.theguardian.com/law/2015/dec/17/revealed-divorce-software-error-to-hit-thousands-of-settlements
[69] Sheppard. B., 'Incomplete innovation and the premature disruption of legal services' (2015) *Mich.St.L.Rev*. 1797

incomplete, and disruption occurs, it can harm the aim, but the innovative aspects are not entirely disruptive to a market. Therefore, it places a lesser extent on social harm.[70] As an analogy, the pilot scheme tests the innovation of online courts without disrupting the system. This is because courts can still accept paper forms and retain the capability to hold traditional in-person hearings if the innovation fails.

On the other hand, premature disruption occurs when incomplete innovation harms overall social welfare. Therefore, in essence, premature disruption can be expected when the intended market is being disrupted too early and traditional processes are exiled.[71] As an analogy, if HMCTS were to put its complete faith in AI disclosure, by example shutting physical courts, and the AI failed, it would amount to premature disruption and harm social welfare because the physical courts will no longer exist.

At present, the English legal system is dangerously (if not already) within the premature disruption category. Since 2010, over 50% of courts have closed, and a further 63 courts are set to close by 2026.[72] Without physical courts if an AI malfunction occurs much of rural England will not have access to courts. Many will contend that HMCTS is safeguarding against such occurrences by operating the pilot scheme. However, new software bugs occur daily and can render a system inoperable for hours, days or months. Unfortunately, there are no apparent safeguards in such an event.

It follows that the online court programme is severely volatile. Access to justice, rather than being increased, could quickly become non-existent for some. Furthermore, public intervention is a phenomenon. A few unforeseen system shutdowns could quickly lead to public refusal to engage with the reform and result in the complete collapse of the justice system. The improbable, but not impossible, questions which arise from such an event include: will judges be competent if needed to resort back to the traditional process? Will there be an available market of legal professionals competent in representing clients in small money claims in the future?

Summarising

Legal reform, particularly that which aims to replace the very existence of physical courts, is an area that requires careful consideration. The intention of this article is not to impose a

[70] *Ibid* 1816-1817
[71] *Ibid* 1809-1812
[72] National Audit Office, *Transforming courts and tribunals – a progress update* (2019, HC 2638) 37

determining conclusion on those who read it. Instead, it aims to encourage others to critically assess whether online courts should be welcomed in contemporary society.

It is indisputable that the English justice system desperately requires a transformation to negate the disproportionate costs and time barriers facing those who wish to enforce their legal rights. However, should this transformation alter traditional processes? As a parting shot, is comparative realism enough, especially when other injustices will undoubtedly arise?