HIIL TREND REPORT IV

ODR AND THE COURTS: THE PROMISE OF 100% ACCESS TO JUSTICE?

Online Dispute Resolution 2016

HiiL innovating justice

Executive summary

Courts are essential, but their procedures...

Courts are proud, ambitious and essential organisations. They hold people to account and resolve conflicts, in accordance with the rule of law. The role of a judge is needed and generally appreciated. But courts are self-critical about their services and uncertain about their future. The procedures they have to work with are often not fit for purpose. The process of legal claims, accusations, defences and judgments leads to many procedural side-issues, enhances conflicts instead of mitigating them and is not always solving the underlying problem. Procedures do not guarantee that solutions arrive in time and managing costs is difficult.

Clients are staying away and governments are keeping people out of courts in order to save costs. Many judges are overburdened by casefiles that tend to grow in size and in quite a few countries courts struggle financially. Rules that are key to their operation, such as the rules of procedure, the rules for their finance and the rules for their human resources, are outside their control.

Innovation happens, but does not scale and improve end-user experience wholesale

This report focuses on the procedures courts are offering to individual citizens. Here judges have to assist and incentivise people to deal with the legal problems of everyday life, such as separation, accidents, employment issues, neighbour problems, land problems, grievances against governments, being prosecuted or victimisation of crime. Courts are experimenting and piloting with procedures that are better suited to the needs of their citizens. The main trend here is a focus on problem-solving and settlement instead of the classical approach of deciding on claims and defences through an adversarial debate. Specialisation is happening as well.

With the exception of a few European countries (Switzerland, Austria, Norway) court systems have barely been able to scale up these innovations into a model that is financially sustainable for the entire population. Courts also invest heavily in making their current procedures more accessible through online court forms, case-management and IT systems bringing the court files online. This type of innovation does not seem to have a major positive impact on the user experience, however.

ODR promises to improve user experience and effectiveness of judges (for high volume problems)

Can online dispute resolution provide a breakthrough? Or will it remain just another form of alternative dispute resolution, much talked about as a great method for managing conflict, but operating at the fringes of the legal system? ODR is promising. This report illustrates how ODR can end the administrative frustrations of the courts and disillusionment of their citizens. It can help to standardise, simplify and humanise legal procedures, empowering people seeking access to justice to negotiate, mediate and submit any unresolved issues to courts. The user experience can become that of a fully integrated justice journey.

Well designed ODR can support high quality, fair and effective negotiated outcomes for the 50-70% of disputants that now tend to settle cases in an often quick and dirty way to avoid further litigation. Courts can

fully focus on the most difficult cases. They can also supervise the negotiation process in order to guarantee fairness and to prevent abuse of power. Experts can assist courts with targeted interventions (from calculation of damages to therapy) and get access to all necessary information. Organising information online can greatly facilitate all (legal) professionals working on a case, streamlining their interventions into a more seamless process, and avoiding misunderstandings.

ODR can help to create financial sustainability and scalability

ODR can also solve the eternal dilemma of courts: if they offer more effective and fair procedures they will be overburdened with cases for which they have no funds. The structured ODR process can be costed and priced in such a way that most litigants can afford the necessary fees. Only targeted subsidies will be needed.

Willingness to pay for services is likely to increase if the quality of process and outcomes improves: more adequate solutions, arriving just in time, less risk of escalation, more voice and participation and more control over costs. This builds on the experience and research results from countries as diverse as Austria and Zimbabwe that financing primarily through user fees is the only known way to 100% access to justice.

ODR systems, designed on the basis of user needs for solutions, also enable cooperation between courts from different jurisdictions. Sharing experiences and costs of developments can greatly enhance the quality of adjudication services. The processes for treatment of frequent and urgent justiciable problems can be brought to a level of international best practices, benefiting from a much broader range of trial and error experiences in different contexts.

Rules of procedure and financing have become an obstacle to due and fair process

Chapter 4 of this trend report then analyses the many challenges encountered by ODR providers and courts when they try to realise these benefits. Benefiting from ODR, as well as the many innovations in problem-solving adjudication that can be supported by ODR, requires broad and sustained innovation. The biggest barrier to this are the current rules of procedure, that describe steps, roles and tasks in detail, in conjunction with the rules for pricing interventions and financing of courts and legal services. Innovation of the user experience and the interventions by judges requires redesigning all of this. Steps, roles, tasks and costing need to be different for personal injury claims, financial services disputes or neighbour conflicts, which all require different types of fact-finding, communication and facilitation.

Inadequate access to justice is often caused by a lack of ownership for a good design of legal procedures, including the financial parameters. ODR designs bring to light that the current designs are inadequate. In time, governments offering inadequate court procedures may be seen as violating the fundamental rights of citizens to obtain due process and a fair trial.

A solution that has been tried is implementing new procedural rules for one case category, such as small claims, which is currently proposed as a pilot area for ODR in England and Wales. But this restrains innovation and better user experience to one area with limited resources. Another option, sometimes successful, but not sustainable, is judges just ignoring or bending the rules of procedure to accommodate innovative approaches.

Academics such as Orna Rabinovich have suggested that the legitimacy of procedures should be derived from a good design, focusing on user needs, and guaranteed by ongoing monitoring over the process and its results. Following on this, the responsibility for the design of procedures can better be shifted to courts, operating under general rules reflecting principles of fair trial and working from terms of reference for resolution of specific problems.

The market for effective procedures needs attention

A second challenge is related to the "market" between courts as buyers of ODR procedures and legal (tech) entrepreneurs or NGOs as sellers. Most court systems are local and serve a number of million citizens. Courts tend to develop their IT systems in house, with the help of IT consultants, or have tendering procedures that prevent the necessary co-creation. This limits the incentives for private parties to develop sophisticated ODR systems and partly explains why there are not yet many ODR platforms that succeeded in scaling up.

However, the price of access to a sophisticated ODR-procedure for a particular problem category is now dropping to a few 100.000s of Euros/Dollars. Still, ODR technology may have to be seen as a public good, developed with government money, as was the case with many other technologies such as the internet. Another option is forming an international consortium and public/private cooperation model with shared ownership.

Engaging and challenging the legal profession

Implementation risks include privacy, security and operational IT failure. These are known risks for which government agencies tend to have good practices in place. An issue that is often mentioned is that the legal profession may resist implementing innovative procedures. The reality, however, is that existing ODR platforms have no difficulty to engage lawyers who want to develop and expand their skills and services. Most of the added value of ODR platforms is still provided by humans. The platforms, providing higher quality services and giving clients more control, are thus more likely to increase employment for lawyers than to decrease it.

Professional rules, however, can be a barrier to implementation. Whereas law firms would be perfectly placed to take the lead in ODR innovation, these rules prevent law firms to attract the necessary outside investment and diversity of skills. At the same time, professional rules may make it difficult for non-lawyers to provide legal advice online or to use lawyers in new roles as neutrals, mediators or advisors to both parties about the fairness of outcomes. In the near future, ODR providers and lawyers seeking to provide innovative services are increasingly likely to challenge these rules. Governments, acting in the interest of citizens, are likely to follow up on this.

Four models of implementation

Chapter 5 briefly discusses four models of implementation. Full integration of ODR and court procedures is seen as the preferred option, because it can create a seamless experience for end-users and positions courts as supervisors of fair and effective solutions. The most likely way to implement this is to start with offering complainants a choice between the existing court procedure and the ODR supported procedure. This offers opportunities for learning, minimizes risks and creates choice for users.

Other options include: (2) ODR as a pre-trial stage, aimed at negotiated settlement, with adjudication as a separate service; (3) ODR as a procedure competing with courts, with its own adjudication module; (4) ODR as a market-place for existing (ADR and court) procedures.

A breakthrough agreement between stakeholders

In the final chapter, the report develops the contours of a breakthrough understanding between courts and other stakeholders. What could each do and require, in order to open the door for the next generation of user-friendly court procedures, with evidence-based human interventions by (legal) professionals? How can we combine traditional and innovative court procedures where necessary to sustainably achieve the goal of 100% access to justice, currently promoted by court leaders and the UN Sustainable Development Goal no. 16?

The report, bringing together best practices from various legal systems, illustrates how citizens, courts, ministries of justice and the legal profession can all gain from broad implementation of ODR and related procedural innovation. Courts can improve the services to citizens, regain their market share and avoid being overburdened. Government budgets for courts and legal aid can be brought under control by a smart system of user fees for better services to citizens. The law firms working for individuals, now often struggling as a business, can add more value to more people's lives and serve more people more effectively and efficiently. What is needed is a coordinated effort to open up the legal framework so that new roles and procedural models can freely emerge and continuously improved.

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WE NEED BETTER COURT PROCEDURES

"We have a fundamental global access to justice problem."

– Jin Ho Verdonschot

1.1 A day in court

Dora and Carl are entering the courtroom. Carl notices the wooden furniture, a judge wearing a black gown, piles of paper on her slightly elevated desk. Dora is trying hard to maintain the correct amount of eye contact: not avoiding Carl, no animosity, no denial of their enduring conflict. Both are fully prepared for a stressful confrontation about things that happened in the past and need to be put right for the future. The judge greets them, and then opens a brownish file. Within it lie described three years of things that went wrong between them, neatly translated in the language of lawyers: jurisdictional issues, claims, reasons, counterclaims and defences. Dora tried to hire a lawyer, but she was turned down after she told him she wanted to do most of the work herself, because she could only spend 500 dollars on assistance. On a court website with 131 forms in the family justice section, a social worker helped her to identify the five she needed. The key form had 33 boxes she could tick, specifying the claims she would like to make, and allowing her to bring forward the reasons for her claims. Before she filed the documents, she tried different Google searches and also **shopped around for help**, just looking for assurance which boxes to tick and how to present her reasons. After seven calls, with various helplines offering "free" legal aid, she got the impression she was on the right track and decided just to give it a try.

The judge asks them questions about what happened and about how they feel about settling their conflict. She then switches to some legal issues. Not all the boxes have been ticked correctly, so she will not be able to decide on some issues. She carefully explains how the rules work and what the consequences of a possible decision will be. She is a good listener, putting Dora and Carl at ease after all, making them even a bit grateful for finally getting her assistance in ending **this trialling experience**.

This court scene could happen anywhere in the world. It could be about a separation case, but also a neighbour conflict, a landlord-tenant problem or a late evening fight outside a pub. When people appear in courts, they tend to respect judges and generally see them as helpful and fair. Judges try hard to find solutions for the problems of people like Dora and Carl. But the system within which they must operate is not fit for purpose. A judge has to work from claims and defences, deciding who is right on each of the points brought forward. About half of the time a judge spends on a case is going to procedural issues, rather than to the core of the problem. There is little time to talk about solutions that would be acceptable to both parties. In most countries, there is only one opportunity for the judge and the parties to meet. What is called "your day in court" is much more likely to be 45 minutes. During which so much needs to be achieved: telling your story, listening to each other, covering the legal points, the procedure, exploring possible solutions, reaching a settlement (or at least some form of acceptance) and above all closure. That magic moment that you can let the conflict go and move forward with the feeling that everything needed for a better future has indeed been done.

It is amazing that this system **still works at times**. Perhaps for the large part because humans act as humans do; by trying to do good and ignore the formalities. Too many legal rules, meant to protect rights, have turned into major bureaucratic barriers to reaching fair solutions. The procedures are so complicated, that both the judge and the parties tend to rely on lawyers to navi-

gate the system. Research shows that parties highly appreciate lawyers as personal advisers, but do not see going to lawyers and judges as a good track towards solving a problem.[1] Users of courts watch their lawyers spend most of their time translating normal problems between people into legal language, moving forward procedures, researching unclear laws and communicating with judges through 20th century channels.

Legal professionals have developed scores of alternative practices and creative new versions of procedures, replacing trials with summary judgments and imposed decisions with mediated settlements. Almost no judge, lawyer or government website will wholeheartedly recommend citizens to take their case to court. The procedure at courts tends to turn disagreements into a positional battle, enhancing conflict rather than contributing to solutions. This adversarial procedure may still be a superior method for fact-finding in murder cases or large scale product liability matters. It certainly is a costly one. The **adversarial procedure is still the official religion**, but most lawyers and judges do not regularly attend church anymore.

Judiciaries face a major challenge in developing better, more effective procedures. Leading justices from the UK, Canada and the US have called for reform of procedures that are not designed from the perspective of citizens, and support a move towards 100% access to justice. The UN Sustainable Development Goal no.16 requires "equal access to justice for all". For this, the world is now primarily looking to **online court systems and online dispute resolution** in particular.

In England and Wales, courts are planning to invest £700 million in bringing their procedures online. Led by countries such as Singapore, Austria and Estonia, many other court systems are following a path towards **e-filing and online case management systems**. Essentially, these systems allow courts to become paperless. All people working on a case will have access to the same files and documents. Communication will be done by e-mail, instant messaging and videoconferencing. Standardised building blocks for claims, defences and judgments will be one click away. APIs will allow for the systems of courts to communicate with the ones of law firms and prosecution services.

[1] Voert, M. T., & Haarhuis, C. K. (2014). *Geschilbeslechtingsdelta 2014*.

But there is also talk of online dispute resolution. Although this is a small industry, this is no small talk. One leading report[2] says turning to online dispute resolution will **enable courts to deliver justice that is all of the following**:

- affordable - for all citizens, regardless of their means;
- accessible - especially for citizens with physical disabilities, for whom attendance in court is difficult if not impossible;
- intelligible - to the non-lawyer, so that citizens can feel comfortable in representing themselves and will be at no disadvantage in doing so;
- appropriate - for the Internet generation and for an increasingly online society in which so much activity is conducted electronically;
- speedy - so that the period of uncertainty of an unresolved problem is minimized;
- consistent - providing some degree of predictability in its decisions;
- trustworthy - a forum in whose honesty and reliability users can have confidence;
- focused - so that judges are called upon to resolve disputes that genuinely require their experience and knowledge;
- avoidable - with alternative services in place, so that involving a judge is a last resort;
- proportionate - which means that the costs of pursuing a claim are sensible by reference to the amount at issue;

These then, are some incredible claims. The report, written by a committee chaired by Richard Susskind, indicates that we are well within reach of a legal utopia, and that the means to get there is ODR. Should even a fraction of these claims come to bear (and take some billions of investment) they would be worth it. What other manifestly possible legal innovation could promise affordable, accessible and appropriate court processes? Indeed court processes where the layman is equally as qualified to help themselves (and on an equal footing) as a trained lawyer. And let us be clear, these benefits are not simply for those wishing to access justice. They are also ostensibly for the courts, judges and governments regulating that justice. Court processes that are more speedy, proportionate and avoidable would require less subsidies and relieve overburdened systems.

This then, is no pipe dream and the bill for such an undertaking does not need to break the bank. The average annual spending on IT for courts in 47 member states of the Council of Europe is just 3% of court budgets totalling €33 billion.[3] Access to online dispute resolution platforms for a particular case type such as separation or employment disputes can be obtained for a few 100,000s and a modest fee per case handled on the platform. As we will see, huge economies of scale are possible if court systems cooperate between jurisdictions. **A few years of slightly increasing this 1 billion budget** would easily do the job and would still keep the courts far away of 6% of revenues banks are spending on IT. An attainable goal, with minimal investment, in return for this incredible list of benefits.

[2] Susskind, R., Prof. (2016, February). *Online Dispute Resolution for Law. Value Civil Claims.*

[3] *European judicial systems - Edition 2014 (2012 data): Efficiency and quality of justice."* (CEPEJ).

So why are courts not turning to online dispute resolution wholesale? Why are companies offering online dispute resolution services not as well-known as AirBNB, Tesla or Tinder?

Resolving differences between people effectively, leading to peace and prosperity, is perhaps the ultimate communication technology.

So what stops ministries and parliaments from investing in dispute resolution technology in the same way as they invested in the internet, the smartphone or the GPS system?

1.2 Methodology

This report aims to answer these questions. In Chapter 2, we look at courts. What makes them stick to their current procedures? Is it perhaps the way they are organised that makes it difficult to reap the benefits of ODR? In Chapter 3 we test the claim that online dispute resolution can be the answer to the problems of courts. Chapter 4 zooms in on the practical difficulties of implementing ODR systems that the pioneers we interviewed have encountered. Chapter 5 discusses four models of introducing ODR systems and their implications. In Chapter 6, we will conclude by arguing that innovation of court procedures requires a major change in the way courts are governed and financed by ministries of justice and parliaments. We sketch the terms of a 100% access to justice deal between the major stakeholders that would benefit all.

This report is **based on desk research and interviews** with leading experts in online dispute resolution and innovation within courts. Insights shared at the 2016 ODR conference in The Hague are integrated in the report.

The **organising principle** for this report is: how can we move towards (ODR) procedures that work for people and for courts? In our view, procedures work better for people if they are more fair to both parties and lead to more effective results for them. This is a matter of increasing procedural justice, outcome justice and lowering costs (less monetary costs, time spent and emotional costs). Procedures that work for courts are procedures that benefit people, strengthen the position of a court as guardian of the rule of law, make professional life more appealing for judges, and are sustainable. Sustainability for courts, but also for the state as the provider of resources for courts.

This report is not the result of a formal research project, or a consultancy analysis, but a collection of insights and best practices. The **process has been as follows**:

- In January 2016, a concept note for the report and the ODR 2016 conference was shared with 15 experts, who were then interviewed by telephone.
- Literature research.
- February 2016: sharing of a first outline of the

report with participants to the ODR 2016 conference, asking for feedback and comments.
- Integrating experiences from HiiL experts with ODR and procedure innovation experience.
- First week of May 2016: draft report sent to participants, speakers and workshop leaders.
- 24 and 25 May: ODR 2016 conference at the Peace Palace in The Hague. Experts enriched the draft of the report with best practices and a better understanding of possible ways forward.
- Final version published in June 2016.
- The report will be presented to chief justices and ministers of justice of countries considering ODR in the optimisation of their courts.

1.3 Earlier reports: further reading

This report builds on excellent earlier reports and publications about the potential of ODR. The following reports are recommended as further reading:

- The Legal Education Foundation commissioned a report "Digital Delivery of Legal Services to People on Low Incomes [4] "authored by Roger Smith. It is updated regularly, so it is an excellent source of information on new developments. The project website also has working papers on subtopics.
- Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds.), Online dispute resolution: theory and practice, 2012 provides an overview of the field.
- Two PhD thesis have been published recently that provide a thorough analysis of ODR from the per spective of the French and the German legal systems (Zissis Lekkas, Disputes in the Digital era, The evolution of dispute resolution and the model ODR system, 2015; Nadine Schüttel, Streitbeilegung im Internet - Zukunft oder Irrweg? 2014).
- The National Center for Technology and Dispute Resolution supports the website odr.info with regular blogposts on developments, a list of ODR-providers and much more.
- The Civil Justice Council published a high profile report on ODR and courts. The website also contains commentaries, interviews and supporting papers.
- The International Journal of Online Dispute Resolution.
- Colin Rule and Indu Sen wrote an interesting article about the use of ODR in procedures involving ombudsmen.
- HiiL trend reports Towards Basic Justice Care for Everyone, 2012 and Trialogue, Releasing the Value of Courts, 2014 explore the scaling up of legal services for individuals and show how courts can escape from a low access to justice equilibrium.

[4] Smith, R. (2015). Digital Delivery of Legal Services to People on Low Incomes. Retrieved from https://www.thelegaleducationfoundation.org/digital/digital-report


JUSTICE · UNDER · LAW ·

2

UNDERSTANDING COURTS

"There are barriers between courts and the rest of the world"

- Dory Reiling

2.1 Courts are essential and ambitious

In our 2014 trend report, Trialogue, *'Releasing the value of courts*[5]*'*, we argued that **courts are here to stay**. A third party, public or private, is necessary for resolving the more difficult conflicts and dealing with crimes. Courts can be organised in a highly formal way in sophisticated organisations, or be very informal gatherings of village elders. No country, no city, no community of reasonable size can do without these institutions. Courts can create procedures and make decisions to which all parties have strong incentives to submit to. They also provide a check on governmental power and thus help give government actions legitimacy. Courts act as symbols, providing rituals which aim to 'do justice' and, through their decisions, they further develop customs, laws and regulations. Finally, courts deliver highly valued goods such as recognition, providing a voice, respect, fairness, financial security and proportionate retribution. They contribute to finding peace of mind and to sustainable relationships.

Offering citizens a procedure leading to a fair outcome is the core business of courts.

A dispute or an alleged crime can be brought before a court. The court will hear both parties and then give a judgment, applying the law. Knowing that this procedure is an option makes people observe the law. Knowing that the other party may initiate a court procedure, is an incentive to settle disputes in a fair way.

This simple format can be used for a **broad variety** of conflicts and every type of undesirable conduct can be turned into a court case. So courts are nowadays dealing with the full complexity of a global society: from crimes against humanity to drug abuse; from Lehman Brothers bankruptcy to a dispute between landlord and tenant; from traffic tickets to permits for a nuclear power plant. They handle class actions involving millions of claimants, hear hate speech cases against politicians and talk to boys who do not turn up to school. By and large this has been a huge success story, where courts have been able to contain violence and to contribute to stability and predictability in relationships between people.

2.2 Courts try to improve their procedures

Court procedures have their weaknesses, however. With the exception of a few specialised courts, court procedures tend to be seen as slow, bureaucratic, intimidating, difficult to understand and not always effective at solving the core issues in a dispute. Court procedures tend to look back to what happened in the past, instead of remedying harm done and enabling people to go on with their lives.

[5] *HiiL Innovating Justice Trend Report: Trialogue – Releasing the value of courts* (pp. 1-80, Tech. No. 1). (2013).

One broken relationship may have to be split up in a number of cases before different courts in order to be resolved. Citizens in the EU countries tend to have a fairly positive view of the independence of their courts and judges, but only very few people see court proceedings as straightforward, and many people loathe the cost and length of proceedings.[6]

Court procedures can hardly be used without a lawyer as an intermediary, which adds to the costs. These costs can become uncontrollable if the procedures enable motions, extra phases and appeals, in which lawyers paid by the hour continue to create extra work for each other. In order to guarantee access to justice for all, legal aid has to be subsidised on a scale that is not affordable for most governments.[7] So, besides having to pay for judges, court houses and the supporting organisation, governments now have another budgetary incentive to restrict access to courts.

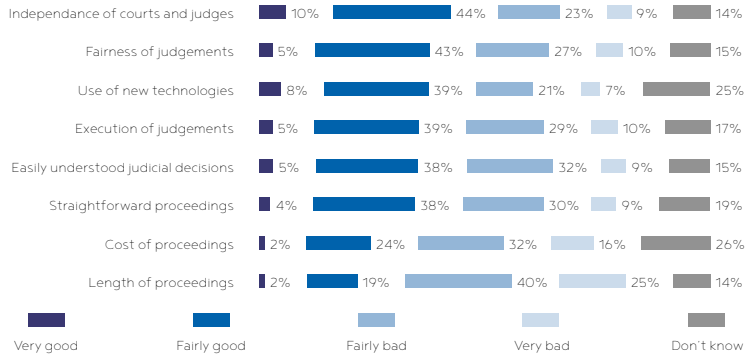
In some countries, courts are beginning to lose their market share (See textbox below). Law firms also see that revenues from litigation are no longer growing.[8]

Like most independent professionals in the public sector, judges are wary of bureaucracy and strive to make a meaningful contribution to people's lives. They are aiming to resolve problems such as the impact of divorce on children or to break cycles of substance abuse, mental health issues and lower recidivism rates. This comes on top of their constitutional duty to render decisions which are legally sound and based on facts established beyond a reasonable level of doubt. Letting people participate, settle or at least feel an "ownership" of the outcomes achieved, has become part of judicial ethics.

[6] *Flash Eurobarometer: Justice in the EU* (pp. 1-146, Rep. No. 385). (2013).
[7] Abel, L. (2013). Designing Access: Using Institutional Design to Improve Decision Making About the Distribution of Free Civil Legal Aid. *Harvard Law & Policy Review*, 7, 1-22.
[8] *Report on the State of the Legal Market* (Vol. 1, pp. 1-18, Tech.). (2015).

THE CIVIL AND COMMERCIAL COURTS ARE IN CHARGE OF DISPUTERS SUCH AS THOSE CONCERNING CONTRACTS OR INSOLVENCY PROCEEDINGS.

From what you know, how would you rate the justice system in (OUR COUNTRY) when dealing with civil and commercial affairs on each of the following aspects? Would you say it is very good, fairly good, fairly bad of very bad?



WEAKNESSES OF CIVIL COURT PROCEDURES (AS LISTED IN CIVIL COURTS STRUCTURE REVIEW: INTERIM REPORT BY LORD JUSTICE BRIGGS, JUDICIARY OF ENGLAND AND WALES, 2015):

1. Courts designed by Lawyers for Lawyers
2. Disproportionate Expense and Risk attributable to Legal Representation
3. Litigants in Person at Grave Disadvantage in the Civil Courts
4. Work Overload and Delay
5. Operational Management and Judicial Training
6. Managing the Civil Workload and Raising the Status of Civil Justice
7. Paper work and administrative tasks
8. Lack of statistics and data
9. Enforcement of judgements and Orders

THE COURT SYSTEM AT A GLANCE

The Dutch trust their courts and judges. Compared to citizens of other EU countries, the largest majority of people in the Netherlands (82%) sees courts and judges as independent. Procedures are not always appreciated, though. Only 39% of the Dutch population has a favourable view of the straightforwardness of (civil) procedures, which is a lower rating than 19 other EU countries.[9] Users rate the trajectories for access to justice in separation cases with 2.81 on a 1 to 5 point scale, on average across ten dimensions of access to justice.[10] Employment procedures at courts performed better, but this system has recently changed so more appeals are now possible. Reports say that the previous system was better geared towards establishing a reasonable amount of settlement pay (severance).

Personal injury cases take years to settle and move slowly through the court system. Medical malpractice claims processing is so adversarial and slow, that they are a recurring item in consumer programs at prime time television. The Dutch insurance companies have sold millions of life insurance policies without sufficiently informing their clients of costs and risks. The class actions and individual claims arising out of this are not yet near final settlement, moving up and down through the layers of the court system. There is little attempt by the judiciary to macro-manage this process.

For neighbour problems, a well liked television show features a judge settling and deciding claims quickly and fairly in a completely understandable way. The reality of having to deal with simple neighbour disputes is that people have to go through a complicated civil procedure with lawyers that may take years. Mediation in neighbour disputes exists, but does not always work, and then there is no obvious next step towards a court decision if it fails.

A day in the life of a criminal court judge consists of talking with people having committed minor crimes. Many witnesses and reports seem to be missing during the court hearing. The judge goes through the rituals with lawyers. Years of prison sentences and alternative

[9] *Flash Eurobarometer: Justice in the EU* (pp. 1-146, Rep. No. 385). (2013).

[10] Barendrecht, M., Prof., Piest, J., & Gramatikov, M., Dr. (n.d.). *The justice of separation procedures* (pp. 1-25, Rep.).

sanctions are dispensed in a single afternoon. The impact of this on the lives of victims and perpetrators is never reported back to the judge, however. Feedback and learning in this system are limited.

The law regarding administrative procedures to be used against government decisions is rather complicated. The initial phase of an informal review of government decisions, with good opportunities for mediating and achieving settlements, has turned into a rather formal procedure before a committee with mostly lawyers, that is then followed by two rounds of appeals before courts who tend to have a legalistic approach as well. Ambitious pilots to change this pattern, and integrate settlement in the process, have difficulties to scale up beyond the court in Utrecht where the approach was invented.

High profile civil or criminal cases eat up vast resources. Procedures become every more complicated because of overlapping rules coming from all levels of government including the one in Brussels and the international treaties on human rights. Smart, well resourced lawyers continuously invent new procedural issues, which take years to be settled by the Hoge Raad (the Dutch supreme court). Ever more documents are uploaded into court filing systems by the police, the prosecution and company lawyers. Briefs filed by lawyers, intended to summarize the case and make it more manageable, have exploded in length over the past decades.[11]

Dutch judges are not happy either. They have issued several manifestos complaining about their workload and the way they are managed. At the same time, they see the number of civil cases drop and every few years the government diverts a big chunk of cases away from the courts: violations of traffic regulation to municipalities; minor crimes to the prosecution services; employment termination issues and migration cases to government agencies. Reports and calls for reform of civil and criminal procedure court procedures get little follow up.

The Dutch council for the judiciary has responded with a huge digitization program, bringing every document in one case file and enabling online communication between the participants. Leading judges see this as "a first step" into the right direction, but there is no clear idea yet what the next steps will be and how these will solve the systemic problems.

What is the impact of this on Dutch society? A recent survey by the Ministry of Justice[12] showed that less people experienced justiciable problems over the past 5 years. 67% reported 1 or more of them in 2003, 61% in 2009, and only 57% in 2014. Is this perhaps a triumph of the legal systems capabilities to prevent conflict in the first place? In a way. The decrease in justiciable problems is mostly concentrated at the consumer end of our existence. A possible cause of this is that product quality and complaint handling at companies has improved. Perhaps deterrence by legal sanctions contributed as well.

[11] File size growth has been quantified in research by Sjerp van der Ploeg & Jena de Wit, *Ontwikkeling zaakzwaarte* 2008-2014, Raad voor de Rechtspraak (2015).

[12] Voert, M. T., & Haarhuis, C. K. (2014). *Geschilbeslechtingsdelta 2014.*

Stories that the social fabric for coping with disputes is collapsing find some corroboration in the data. There is a clear decrease of use of unions, police, social workers and consumer organizations for resolving disputes. Legal professionals are taking over. More worryingly, the proportion of problems resolved by agreement dropped from 53% to 42% between 2009 and 2014. This may partly be the effect of a different mix of problems with less consumer issues. But it is a strange outcome, as you would expect the legal system and its professionals to become gradually better at what they do.

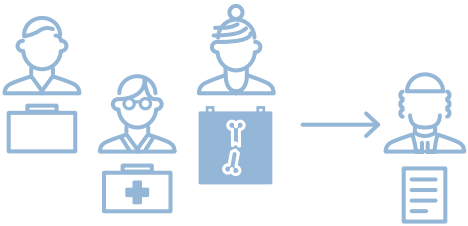
That this is not necessarily true in the Dutch legal system, is also confirmed by the number of people who dropped out of the dispute resolution process on the way. The proportion of disputes not resolved increased from 34% to 42%. A considerable share of problems (5%) still exists after 4 or 5 years. There is also an increase in problem owners remaining passive, doing nothing about the problem (from 6% to 8% over the past 5 years).

Courts are slowly losing market share. The number of disputes in which they intervened dropped from 6% in 2003, to 5% in 2009 to 4% in 2014. It is not mediation where these cases go to. The share of problems where a mediator was used fluctuates: 4% in 2003, 3% in 2009 and 5% in 2014. The non-court third parties (ombudsmen, specialized commissions, government agencies) see an increase in the use of their procedures (from 6%, to 9% to 11% in same period). This does not lead to a higher resolution rate, however.

Is the system underfunded? Not evidently. For a lower number of problems, the legal aid budget and court budgets stayed flat. Legal aid spending on civil and administrative justice was similar in 2009 and 2014 (€190 million, with a higher proportion paid by user contributions: from €30 to 50 million).

There is no indication at all that the Dutch court system is mismanaged. Capable, trustworthy people are doing what is expected of them. A better hypothesis seems to be that it is hard to make the court system work in the current institutional setting.

THE JUDICIAL BRANCH OF CALIFORNIA has 22 headings for innovation programs (see picture). Each heading contains several creative programs, usually offered in one county, or in one court. Examples of programs are a Loan Modification Settlement Conference at the Santa Clara Superior Court, a Civil Discovery Facilitator Program at the Sonoma Superior Court and a Delinquency Caseflow Management Process Improvement at the Orange Superior Court.



Victims and suspects are entitled to procedural justice, which is an ambitious but essential promise. This means a major shift in court activities. Courts have always focused the quality of decisions. Judgments have always been their main output. **Settlement is now seen as an even more valuable outcome**. Judges send people to mediators, hold settlement conferences, oversee plea-bargaining, supervise financial reorganisation and are available for a quick decision in order to break a deadlock in negotiations. Their attention has also shifted to organising the process and case-management.

Ambitious individual judges and entrepreneurial courts are very active in improving procedures. The world of courts is **full of pilots**. The California courts alone have dozens of innovation programs on their website, see box. In the US, a movement has developed around **problem solving courts**. These offer specialised processes for drug crime, domestic violence, juvenile crime, sex offence cases and criminal behaviour associated with mental health problems. Based on an individualised diagnosis, developed in cooperation with the offender, offenders are helped with treatment, but also held accountable and have to comply with treatment. Judges supervise the process, which aims to mobilise legal officials, social service providers, victim groups and schools. The community is also engaged. It is also key that outcomes are analysed for cost versus benefit, and to provide continuous improvement of the process. Problems solving courts are supported by a non-profit organisation in New York, the Centre for Court Innovation.

In the space of civil justice, courts have **attempted to integrate mediation in their procedures**, and other forms of alternative dispute resolution as well. Since 2002, Germany has allowed the provinces (Länder) to make a settlement procedure mandatory before certain civil

court cases can be started. The process takes place before a certified "Gütesstelle" and can only be mandatory for small claims, neighbour disputes and discrimination cases.[13] The court has to attempt settlement as well, unless there is no clear prospect of success. To this end the court should explore the facts and the dispute with the parties during a settlement conference that precedes the court hearing. The court can also refer the dispute to a settlement-judge, who can use all methods of conflict resolution including mediation.[14]

South Africa is one of many jurisdictions with **mandatory mediation** in cases involving children. The mediation takes place in the form of an investigation by a family advocate or another mediator. Courts strongly push mediation in other disputes between ex-partners. South African employment disputes go through a mandatory mediation process of 30 days before being referred to arbitration.[15]

Judicial mediation is also offered in Canada, Australia, China and in the Nordic countries. The Norwegian model is well developed. It obliges the parties to exchange information and to attempt settlement before filing at court. In Norway, judicial mediation is one option and applied frequently and successfully. There are laws restricting this, however. The mediating judge cannot speak to the parties separately, make proposals or give advice. If the mediation fails, the mediating judge cannot be on the decision making panel, unless both parties agree to this. The model is used creatively and with openness to further innovation, however. Family judges can do the mediation together with a psychologist. She is positioned as an expert, who is allowed to speak to each party separately and may also talk to the children.[16]

The Swiss **fully integrated a settlement procedure in their civil justice system**. It is a mandatory process, starting with an informal application to a settlement-authority. The procedure is very user-friendly. The plaintiff simply has to mention what the plaintiff wants to get from the other party and what the conflict is about. The cantons determine how this settlement authority is organized. Of the 26 cantons, 11 opted for lay judges elected by the population. So Switzerland has 600 justices of the peace for a population of 8 million. Then 10 cantons opted for panels of (mostly) jurists sharing facilities with the courts and 5 for judges or clerks fully integrated in the courts. The settlement authority invites the other party and then talks with them during an informal hearing. Settlement rates of up to 70% are reported.[17]

The justice of the peace model also exists in Belgium and a number of Latin American countries. It has **a very informal process by a judge or panel from the community** aimed at diagnosing and settling the dispute. The Facilitadores Judiciales system developed by the Organization of American States originates from Nicaragua and is now implemented in 8 countries. Here the facilitator is elected by the community and positioned as an assistant of the local court. The judge supervises 'his' facilitators, who have the power to mediate, to serve documents and to help people to bring a case to court if needed.

[13] Einführungsgesetz ZPO. (2016, May 1).
[14] Zivilprozessordnung – Gütliche Streitbeilegung. Güteverhandlung, Vergleich 278. (2016, May 1).
[15] Maclons, W. (2014). *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (Unpublished master's thesis, 26 November 2014). University of the Western Cape.
[16] Mota, C. E., & Marquis, L. (n.d.). *New developments in civil and commercial mediation: Global comparative perspectives* (1st ed., Vol. 6). Springer International Publishing.
[17] Schwenkel, C., (2014). *Confidence in Alternative Dispute Resolution: Experience from Switzerland. International Journal for Court Administration*. 6(1), pp.37-53.

COUNSELLING AND PARENTING COURSES IN BRITISH COLUMBIA

In British Columbia, Canada, parents who initiate divorce/separation proceedings in Rule 21 registries of the Provincial Court (17 out of 44 court registries in the province) are obliged to attend a mandatory 3-hour Parenting After Separation course. The course explains the effects of separation on parents and their children. Another four Provincial Court registries (Rule 5 registries) require both of the spouses to meet a Family Justice Counsellor before the commencement of court proceedings. Hence, almost half of the provincial courts in BC have developed out-of-court procedures to facilitate the smoother dissolution of families, increase informed decision making and, whenever possible, decrease the contentiousness of subsequent court proceedings.

COURTS IN UGANDA

Almost nine in ten Ugandans reported justiciable problems in the past four years. Land problems, mostly with neighbours and family members, are most prevalent, followed by crime and family problems. 38% of problem owners do not take any action. Of those taking action, 46% used the local country court, which has informal procedures aimed at reconciliation and dispute resolution. Only 5% of problems went to the formal courts, which is a similar rate as found in high income countries. Across seven dimensions of procedural and substantive justice, both types of courts achieve rather similar ratings. Local council courts are more accessible (lower costs, less time to be spent) but appearing in these courts is more stressful for the average user.

Internet penetration in March 2015 was 32% and continues to grow., Uganda was one of first African countries to be connected. The internet is not yet used for legal information. However, people tend to use their social network for this, go to the local council court or to the police .(Justice needs in Uganda 2016, Legal problems in daily life, HiiL Innovating Justice 2016).

A more general long term trend is that of **specialised courts** or specialised procedures for certain case types. Specialised courts can be more efficient and are generally appreciated. The table below shows for which topics specialised court procedures exist in one or more jurisdictions. This is a slow development though, in which countries may add one or a few specialised courts per decade.

2.3 Court innovation does not scale

Thus, innovation in court procedures is happening everywhere. The overall experience of going to court has not changed much, though. Worldwide the majority of disputes and crimes are still dealt with by courts of general civil, criminal or administrative jurisdiction, following traditional legal procedures. That is because, to put it bluntly: **innovation does not scale**. The number of pilots at individual courts is huge. But very few make it to implementation across one court system. Specialised courts, tribunals, ombudsmen or problem solving courts may exist in some jurisdictions, but they hardly ever scale up to serve a number of jurisdictions. Moreover, many of the new procedures before ombudsmen and tribunals tend to develop the same problems as courts: formalisation, the need to use lawyers, high costs and delays. A very thorough investigation of the extensive tribunal system in Australia calls this process "creeping legalism".[18]

Although settlement is now seen as the core business of courts, few courts have fully mastered the integration of settlement processes in their procedures. Alternative dispute resolution is much hyped. But mediation, it's most prominent form, still only attracts a small number of cases in almost every country in the world.[19] In the EU, a recent report estimated a share of less than 1% of litigated cases.[20]

[18] Australian Government Productivity Commission (2014). *Access to Justice Arrangements*.

[19] Mota, C. E., & Marquis, L. (n.d.). *New developments in civil and commercial mediation: Global comparative perspectives* (1st ed., Vol. 6). Springer International Publishing.

[20] De Palo, G., Prof., D'Urso, L., Trevor, M., Prof., Branon, B., Canessa, R., Cawyer, B., & Florence, R. (2014). *Policy Department - Citizen's Rights and Constitutional Affairs* (pp. 1-235, Rep.).

More generally, **voluntary ADR, and voluntary new procedures added to court procedures keep struggling to attract users**.

This is due to the **so-called submission problem**: both parties have to agree at the same moment to submit their case to the mediator, arbiter, or new procedure. Once in a conflict, people just don't succeed in doing this, which has been explained from many psychological, tactical and strategic perspectives. A pre-dispute agreement to submit future conflicts to a dedicated and well designed procedure is possible, but unlikely to be in place. Neighbours, family members and parties to accidents and crimes do not enter into contracts about handling possible future issues. Even business partners tend to make contracts with one simple dispute resolution clause, choosing a court or arbitration panel that will be addressed in case of a dispute, perhaps with a mediation to be attempted first.

The "market" for good procedures is not a very efficient one.

A procedure has to be "sold" to two parties, who are unlikely to want the same thing at the same time because of the tensions between them. That is, of course, the reason we need courts of law set up by the state in the first place.

2.4 Courts are conscientious and self-critical

So innovative procedures do not scale, ADR is no solution and many clients are deprived of effective access to justice. The awareness of this is growing. Leading judges now publicly say procedures are **"designed by lawyers for lawyers"**,[21] and that they are too costly, lengthy and complex. They are, in short, not delivering what people need.

Courts, for their part, are **overburdened with cases and their decisions tend to arrive too late**. India has the image of having extreme court delays. Actually, Indian courts had 12 million cases pending in 2012, a backlog of 1.3 years at current disposition rates.[22] This is a normal pattern for courts elsewhere, with Italy and Greece as examples at the more extreme end. From the perspective of th user, the duration of a case is not simply measured by the time spent in court, however. Appeals, additional procedures and preceding actions taken by lawyers and appellants must all be taken into consideration. The European Court of Human Rights, which oversees the fairness of domestic trials in member states, has long identified excessive case duration as a fundamental failure of access to justice.[23]

[21] Briggs, M. T., Lord Justice. (2015). *Civil Courts Structure Review: Interim Report* (pp. 1-141, Rep.).
[22] *Arrears and Backlog: Creating Additional Judicial (wo)manpower* (pp. 1-83, Rep. No. 245). (2014). New Delhi.
[23] *Council of Europe/Europe Court of Human Rights*. (2013).

A JUSTICE SYSTEM IN CRISIS: IT AS THE SOLUTION?

Sir Ernest Ryder, Senior President of the Tribunals in **England and Wales**, is one of the many court leaders in common law countries with a new vision on adjudication. In a high profile lecture, he explained the concept of "online continuous hearings".

Here the view of litigation is changed from an adversarial dispute to a problem to be solved. "All participants, the appellant, the respondent Government department, and the tribunal judge, are able to iterate and comment upon the basic case papers online, over a reasonable window of time, so that the issues in dispute can be clarified and explored. There is no need for all the parties to be together in a court or building at the same time. There is no single trial or hearing in the traditional sense. Our new approach is similar to that already used in other jurisdictions, where the trial process is an iterative one that stretches over a number of stages that are linked together. In our model, however, we will not need those stages to take place in separate hearings or indeed, unless it is necessary, any physical, face to face hearing at all. We will have a single, digital hearing that is continuous over an extended period of time."

"Again, and similar to the practice in other countries and the traditional approach of the tribunals, the judge will take an inquisitorial and problem-solving approach, guiding the parties to explain and understand their respective positions. Once concluded, this iterative approach may allow the judge to make a decision there and then, without the need for a physical hearing; the traditional model to which the system defaults at present. If such a 'hearing' is required, for example to determine a credibility issue, technology could facilitate that too. It may be a virtual hearing."

"If we simply digitised our existing courts and tribunals, and their processes, all we would do is to digitally replicate our existing system. Such an approach would fossilise our Victorian legacy. It would embed and continue into the future the systems of the past, and in so doing carry with it the prospect that we would simply carry forward the problems inherent in those systems."

"Digitisation presents an opportunity to break with processes that are no longer optimal or relevant and at the same time to build on the best that we have to eliminate structural design flaws and perhaps even the less attractive aspects of a litigation culture. It also provides us with the opportunity to create one system of justice, a seamless system. I firmly believe that a digital by default system should not just strive to deliver something that is physically more accessible but also something that is better at solving problems that is, the 'one stop shop'[24].

Other court leaders in the UK are expressing similar far-reaching ideas. Lord Chief Justice Thomas has declared that "our system of justice has become unaffordable to most" having become a "justice system in crisis"[25]. Lord Justice Briggs published a Civil Courts Structure Review Interim report[26], finding that the civil courts are currently suffering from "limited, antiquated and inefficient IT systems" and requiring "radical digitisation" as a solution to improve its service. The final report will be published in July 2016. Senior Presiding Judge, Lord Justice Fulford, made a speech in March in favour of Better Case Management (BCM) through Digital Case Systems (DCS), in which he stated that "All Crown Courts will be paperless by the end of this month. This is a monumental change, which will see the end of practices that have endured for hundreds of year[27]."

Lord Justice Carloway gave recommendations for redesigning the Scottish courtroom in accordance to technological advancements, such as digital recording of testimony, display of documents on screen, routine correspondence with the court by email, etc[28]. "We now need to capture the benefits which 200 years of technological advances have given us. We certainly have not done so yet[29]."

In Australia, there is widespread concern that the civil justice system is 'too slow, too expensive and too adversarial'. An in depth inquiry by the Productivity Commission yielded an extensive list of necessary improvements in the entire supply chain. From early diagnosis, to resolution by ADR processes and adjudication, the current services should be upgraded.

[24] Ryder, E., Sir. (n.d.). 'The Modernisation of Access to Justice in Times of Austerity' Lecture presented at 5th Annual Ryder Lecture: The University of Bolton in University of Bolton, Bolton.
[25] *Law in a time of austerity*. (2016, February 27).
[26] Briggs, M. T., Lord Justice. (2015). *Civil Courts Structure Review: Interim Report* (pp. 1-141, Rep.).
[27] Fulford, Lord Justice. (2016, March 8). Speech by Lord Justice Fulford for NPCC: National Criminal Justice Performance Conference.
[28] Carloway, Lord. (2016, January 29). *Lord Carloway's vision for redesigning the Scottish courtroom*.
[29] Carloway, Lord. (2016, January 29). *Lord Carloway's vision for redesigning the Scottish courtroom*. Keynote address: 15th Annual 21st Century Bar Conference, 4 December 20.

Judges are also **overloaded with information in individual cases**. Attorneys paid by the hour have every incentive to add more information to their bundles. The IT revolution makes it far easier to discover information that may be relevant. So videos, e-mail archives and transcripts of telephone conversations are now routinely added, which increases the quality of fact-finding and also adds to the costs of digesting all this information. There are no clear and natural limits to the numbers of GB (gigabytes) that can be filed or discussed during hearings. More information requires better procedures for organizing the information, but these are not yet generally available.

Legal information is also increasing. With more case law being produced and becoming accessible through databases, the number of procedural and substantive legal arguments that have some plausibility have multiplied. Judges have to manage **all this complexity**.[30]

What is new, is that leading judges are now taking initiatives to change this (see Box). In the past, procedural reform was often promoted by professors in civil procedure, by ADR pioneers or by experts from the World Bank. The current wave of reform is **lead by judges at the top of the court hierarchy** in common law countries.

This illustrates the urgency of reform as the courts experience this. So online dispute resolution seems to arrive at the right moment. In the next chapter, we will investigate whether it can really help courts achieving access to justice.

[30] See footnote 11 for a study quantifying this effect for the Netherlands.

TOPICS FOR WHICH SPECIALISED PROCEDURES, COURTS, TRIBUNALS OR OMBUDSMEN EXIST:

Family
Land disputes
Probate (estates)
Landlord/tenant
Neighbour disputes
Debts restructuring
Employment
Insurance claims
Consumer
(many countries have specialized processes for a range of specific goods and services)

Commercial
Patent
Trademark
Other IP rights
Admiralty
Construction
Financial services
Bankruptcy
Antitrust
Small claims/ debt collection

Tax
Environment
Social security
Traffic
Community
Military
Veterans
Health (medical malpractice)
Migration and asylum
Mental health
Natives claims

Juvenile crime
Drug crime
Domestic violence
Human trafficking
Sex offending
Human rights
Crimes against humanity

3

THE PROMISE OF ODR

"We need to look to access to justice and fairness... One major force is the power of technology."

-Roger Smith

Courts are here to stay, but their procedures are the problem. Voluntary ADR does not work. Innovation in court happens, but it does not scale. So how can courts and their users benefit from online dispute resolution? In this chapter, we first look at digitisation in the process of access to justice as experienced by the users. Then we move towards five possible contributions of ODR that are promising.

3.1 Helping clients to navigate procedures

In most cases involving individuals, courts cannot rely on lawyers anymore to assist them.

Increasingly, judges have to streamline the interaction with clients themselves.

Individuals seeking access to justice are less likely to hire a lawyer than they were ever before. Studies and anecdotal evidence from courts suggest that up to 70% of litigants in family cases do not use a lawyer in Australia, Canada, England and the US. This is a matter of costs, and may also reflect a desire to feel empowered, and to stay in control, even during the most difficult moments of their lives.[31]

Citizens of Ontario can go to a specialised site offered by their judiciary: ontariocourtforms.on.ca. In the Family Law section, clients and lawyers can find forms for an affidavit of service, an application for divorce, a response to motion of change and many more, 131 in total. The form for a divorce application allows claimants to tick boxes for 33 different claims, such as "indexing spousal support" or "restraining/non-harassment order". A textbox allows for submitting the reasons for the claims, and the form has a preprinted text for the defendant, with instructions as to how to proceed when the claim is received. Many courts are now making life easier for their clients by having **court forms online**. They are helped by John Mayer, director at the Centre for Access to Justice and Technology at Chicago-Kent College of Law. Almost single handedly, he developed A2J Author, a software tool for developing guided interviews. Non-technical authors from the courts, clerk's offices, legal services programs, and website editors can use the program to develop web-based interfaces for document assembly.

Many US courts now also have **self-help centres**, offering workshops on how to file claims. For people in San Mateo County, right in the middle of Silicon Valley, the local courts offer help by a Family Law Facilitator, who will review documents before people file them.

[31] See the reports and literature on the website of https://representingyourselfcanada.com/ set up by leading scholars in this field, Julie Macfarlane.

CASE STUDY: SHERRY MACLENNAN, MYLAW BC
ODR as a tool for information and guidance in British Columbia

MyLawBC is British Columbia legal aid's first foray into online dispute resolution. The Legal Services Society developed MyLawBC to expand services so that British Columbians who can't afford lawyers can solve and avoid ordinary legal problems. Guided pathways diagnose issues and lead to customized tools and self-help resources tailored to the user's needs in the areas of wills and personal planning, mortgage debt, domestic violence and divorce. The Dialogue Tool for separating couples moves the site from primarily self-help to ODR services. The interactive platform enables separating couples to reflect on their situation, chat with each other online, exchange documents and create a separation agreement. The site was created in collaboration with HiiL and Modria, on the Rechtwijzer platform.

CASE STUDY: COLIN RULE, MODRIA
Beyond eBay; The next generation of consumer dispute resolution

Consumers demand resolution processes that work like the rest of their newly global, connected, online worlds: fast, easy, fair, effective. They want and expect resolutions to work the way the internet works. Large internet intermediaries learned this lesson very early. That is why companies like eBay and Amazon invested tens or even hundreds of millions of dollars in building fast and fair resolution systems within their marketplaces. Now the newer eCommerce powerhouses (like AirBNB, Uber, and Alibaba) are continuing the pattern of investment by building their own Resolution Centers.

These innovations in eCommerce resolutions remain the primary drivers of progress in ODR, which is urging other potential ODR users (such as courts and government agencies) to pay close attention. eCommerce ODR differs from public ODR in some important respects. Most eCommerce ODR is almost entirely extra-judicial.

It is highly automated, with a focus on direct negotiation between parties, only relying on an evaluative layer as a last resort. Outcomes are enforced through private mechanisms (e.g. automatically moving money, or suspending a user account) as opposed to public channels, like courts and jails.But the design priorities gleaned from eCommerce ODR are equally relevant to public ODR processes: 24/7 accessibility, transparency, speed, and ease of use.

The main reason why ODR innovations are happening quickly in eCommerce is the torrid pace of growth and competition in the eCommerce sector. Marketplaces, merchants, and payment providers are under constant pressure to improve or be replaced, so they are forced to innovate in order to succeed. Public sector ODR programs are often not subject to the same kinds of competitive pressure, which can slow the pace of innovation. However, canny public ODR projects should keep a keen eye on developments in the eCommerce ODR space, picking off useful lessons and innovations wherever possible. Citizen expec-tations are being driven by the private sector, and if courts and public agencies can glean best practices and scaled platforms without having to pay for the innovations themselves, they will have the best chance of keeping their constituents and customers satisfied.

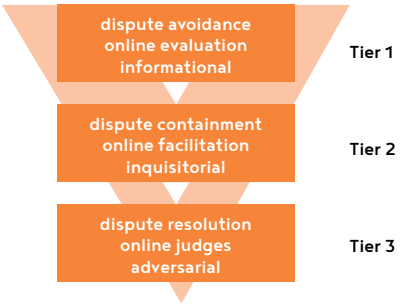
In Austria, a country ahead of most others in **e-court development**, forms can be found on webportal.justiz.gv. at a national court form portal which also allows for e-filing of cases. The judgments are mostly delivered online. Communication with lawyers takes place online as well. Here in Austria, the forms seem to be less numerous and complicated than forms from common law jurisdictions. Perhaps judges from this civil law jurisdiction rely more on their interaction with the parties in the courtroom. Perhaps it is a reflection of the decades long experience of the Austrian judiciary with automating processes. It could also be a matter of funding. A brochure in German and in English proudly states that 75% of expenditures of the Administration of Justice are covered by revenues. This even includes criminal justice costs, a type of services for which citizens tend to show little willingness to pay. What must be added, though, is that financial management is less of a headache for Austrian (and German) courts. They also run the company and land registries, services that can easily be funded from user contributions. Having high volume, user-paid and effective services available, provides a court system with a basis for sustainability, from which other services can be cross-subsidized.

Courts are beginning to **link their procedures to online dispute resolution services**. Sometimes judges even order litigants to use them. The website OurFamilyWizard offers a set of tools for parenting. Mothers and fathers can use a calendar tool, share information about the children, log expenses, exchange messages and keep a diary. According to the website, hundreds of judges and magistrates issued court orders mandating couples to use this website for managing their parenting matters.

This is state of the art. **Courts are looking at ODR, but not yet applying it often**. They see it as one of the options for improving their services. Interesting add ons maybe, similar to mediation and other ADR services in the past. In a resolution confirming the goal of 100% access to justice, the US conference of chief justices and the conference of state court administrators signal the advances made during the past decade. They point to "expanded self-help services for

litigants, new or modified court rules and processes that facilitate access, discrete task representation by counsel, increased pro bono assistance, effective use of technology, increased availability of legal aid services, enhanced language access services, and triage models to match specific needs to the appropriate level of services." This is not exactly a clear message that online dispute resolution is the way forward.

Still, leading judges and reports believe in online dispute resolution. They propose to start using ODR for small claims[32] or as a voluntary process for parties wanting to opt out of the court procedure together.[33] So what is the case for using online dispute resolution technologies in court procedures?



3.2 Designing justice journeys from the user perspective

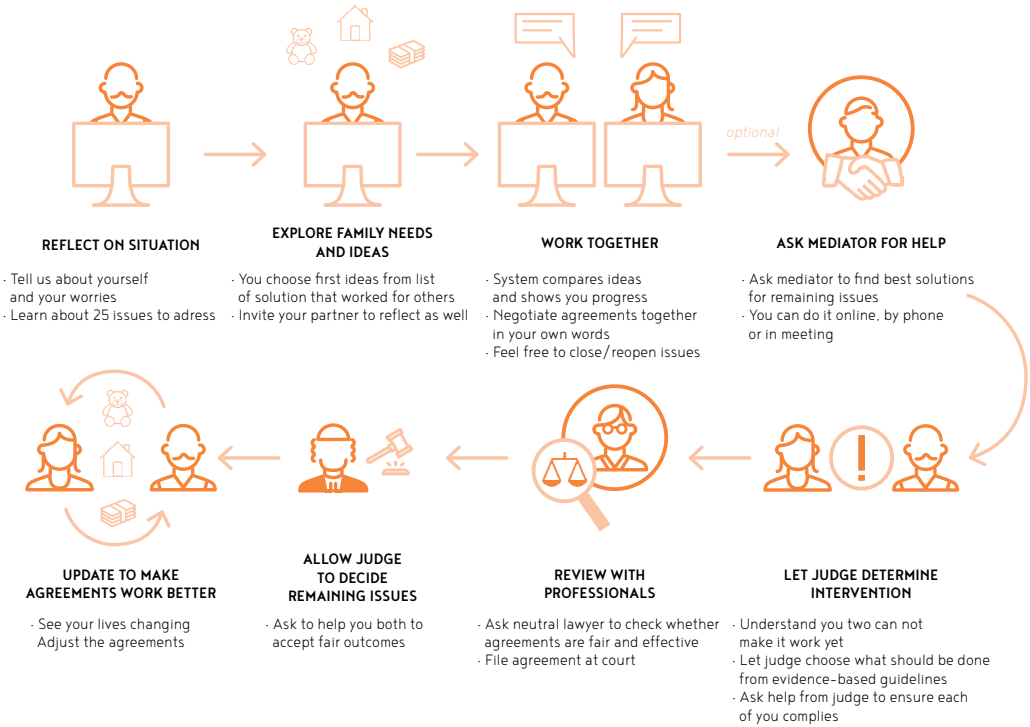
The most recent reports on court reform and online justice have made an interesting further move, however. The talk is now of a three tier system with a **diagnosis phase, a conciliation phase and a decision phase**.[34] In this **three stage system**, the design is much more user centred. People do not just go to court to ask for a judgement. They experience an issue with somebody else. They need to know more and want help with a diagnosis. What is the usual way to tackle this problem? What are relevant rules for solutions? In the proposed system they will be able to do some kind of intake online, where they can identify issues, answer questions and get information about the laws relevant for each issue.

The next step in a procedure is to involve the other party in the process. With the help of an online system, the other party can be invited to do her own diagnosis and be informed as well. Next is a phase where they try to settle. An online system can provide for assistance by a neutral facilitator, who is likely to use the skills and methods of a mediator. The facilitator can also collect additional information from the parties. If they do not settle, the third stage is one of adjudication, where the judge decides. All information is then already available in an electronic file.

[32] Susskind, R., Prof. (2016, February). *Online Dispute Resolution for Law. Value Civil Claims* (Rep.).
[33] Council of Europe/Europe Court of Human Rights. (2013).
[34] Susskind, R. (2016, February). *Online Dispute Resolution for Law Value. Civil Claims* (Rep.).

The basic idea is thus one of a fully integrated customer journey.

People seeking access to justice tend to diagnose their situation first, then attempt to settle, and if this fails, ask a court for a decision. Paths to justice surveys consistently show that around 50% of disputes are resolved by agreement, and in only 5-10% a judge or other neutral adjudicator takes a decision. So facilitating this phase in the court procedure adds a lot of value for the users, and increases the market share of courts.



FOR EACH ISSUE YOU CAN GET ACCES TO:

1. Information, formulas, calculation tools (certified by government)
2. Solutions that worked for others (research based)
3. High quality assistance for special situations, splitting up business, violence issues etc.

CASE STUDY:
CORRY VAN ZEELAND, RECHTWIJZER HUUR.
Landlord tenant disputes within an ODR platform

"There are about 17 serious, frequently occurring housing problems, ranging from bad maintenance and noise from neighbours to rent arrears and eviction that keep tenants awake and landlords worried. Around these issues, and with the help of tenants, landlords, lawyers, judges and mediators, we have built the Rechtwijzer Landlord Tenant platform. This new offshoot from the Rechtwijzer branch offers the same process and quality as the successful Rechtwijzer divorce does to separating couples. So, suppose you are a tenant or a landlord, and you are experiencing one or more problems, what would you find on Rechtwijzer?

Firstly, clear, actionable information. On the applicable rules, on do-s and don't-s; all supported by tools and tips. After you have indicated what your problem is about, Rechtwijzer guides you through the information. Intake questions help you to get a better understanding of what exactly is going on and what your concerns, interests and goals are. You write down your views on the problem and from the presented model solutions you select the one that fit your needs best.

Next, the other party is invited on Rechtwijzer. After going through the same steps, you will meet each other in the collaborative space specifically designed to work on shared solution(s). The dialogue structure supports the communication between the two of you. Step by step, issue by issue, you draft an agreement that works for both. The first ideas on solutions (remember the model solution each of you selected in the intake?) will help shape the final agreement, as it offers standard texts that can be tailor-made to fit your situation.

But wait...what if we get stuck? A third feature of Rechtwijzer is the availability of neutral experts. Mediators and adjudicators are nearby to assist in the decision-making. One way or the other, your issues will be resolved. You will leave Rechtwijzer with a balanced, fair, and sustainable agreement. And if you don't feel confident enough to close it yourself, because you lack the knowledge or you feel the stakes are too high? Then a reviewer is at your disposal. The reviewer is a lawyer specialised in rent issues, who reviews the agreement and, if needed, provides guidance on how to make it better and fairer.

That is it, basically. Work together on the best solution for a serious problem. In a structured way, in your own home, time and pace. Without the stress of a legal fight, and against predictable costs. "

A possible next step is a procedure design that has been proposed by HiiL for family problems (see picture below). Here the **outcome of a procedure is always an agreement**. After diagnosing their situation, the parties are presented with ideas for solutions for the issues that tend to be dealt with in a separation agreement. The system offers them standard solutions, which they can tailor to their situation. After negotiation, which can be assisted by a mediator, their agreement is reviewed by a neutral lawyer. This task can be performed by the courts, or be delegated to a lawyer appointed by the court. If the parties do not agree on solutions for one or more issues, the judge or another adjudicator fills the gaps in their agreement.

If the customer journey is the basis for the design, the **user experience** is likely to be much better compared to the current process. The typical process in a civil case is now that intake, diagnosis and information are handled by a lawyer for those who can afford one. Others will self-help and look for support online or from free or low cost helpers. Lawyers are experienced advisers, but each lawyer has his own way of doing an intake, diagnosing the situation and informing the client. Then the lawyer may or may not try to settle the case first, again following an individual best practice, which may or may not match with the working methods of the opposing lawyer. If no complete and final settlement is reached, the lawyer will bring the case to court fully preparing for the legal battle leading towards a court decision. The other lawyer may again have a different process and

DIMENSIONS OF JUSTICE	TO WHAT EXTENT CAN WELL DESIGNED ODR IMPROVE USER EXPERIENCE?
1. Fairness of procedure	
Procedural justice (voice, participation)	Major contribution
Informational justice (information at the right time and place, sufficient, understandable)	Major contribution
Interpersonal justice (respect, respectful interaction and language)	Some contribution, moderation and off- line interaction may be needed
2. Fairness of outcomes	
Distributive justice (fair outcomes, according to needs, equal treatment, according to contribution, just deserts)	Some contribution, informed consent needs monitoring
Restorative justice (undo harm, compensate, remedy situation)	Little contribution, depending on design of procedure
Effective outcomes (timely, likely to be complied with, solving the underlying problem)	Some contribution, mostly through better monitoring and feedback
Transparency of outcomes (based on clear criteria, comparable to others in similar situations)	Major contribution

different ideas about the relevant issues and rules. Both parties present their own case, which may or may not resemble the case submitted by the other party. Then the court typically tries to settle the dispute again, using a range of tools such as informing them about possible outcomes, asking about their needs and fears, referring to mediation or warning about the costs of continued litigation. This can be a confusing phase for the litigants, who come in fully prepared for bringing forward their arguments, and are expected to switch their attention to reaching a high quality agreement under extreme time pressure. If they fail to make progress in the settlement hearing, they will be back on the adjudication track, waiting for a judgment, which may or may not be helpful to resolve the underlying dispute.

In the new designs, the process is much better streamlined and integrated. **The judge supervises the settlement process and is there to overcome deadlocks.** She decides open issues, which could be about visiting rights, custody or splitting up family assets, by entering a fair, legally sound solution in the agreement. The judge also can add court orders to the agreement, thus ensuring compliance, or tackling complications such as domestic violence, harassment or one partner hiding assets.

The new procedural designs avoid an adversarial battle, where each party should frame the dispute as an accusation or a claim with supporting reasons versus a series of defences. Inspiration for this process came from the work of problem solving courts in the US for drug crime, domestic violence and youth crime.[35] In this vision of a court procedure, the goal of is to find a set of **interventions that are most likely to work**. To this end, courts use information about evidence-based approaches and mobilise the local networks of professionals. Victims, as well as offenders, are stimulated to collaborate, but also held to account for what they did and what they should do in the future to remedy the problem. Prosecutors and lawyers are assisting in this process.

3.3 The promise of fairness

In the United States, consumer mediation, arbitration and online dispute resolution have been criticised for being open to manipulation by vendors. They are the ones who pay the mediators, arbiters and online dispute resolution providers. So what can guarantee that these providers do not tweak the system in favour of their paymasters? Commentators more generally have been expressing worries that alternative processes for dispute resolution replacing court procedures will lead to "second best justice". Court procedures, in the meantime, struggle with their own legitimacy crisis. So what can online dispute resolution do to **guarantee due process and fair outcomes** in the setting of courts?[36]

Fairness is a complicated concept. It is subjective and not easy to define. Research has revealed that people value seven forms of justice in situations where another person makes decisions that have an impact on them. These dimensions of justice are also broadly accepted as objective guidelines for a fair justice system. Online procedures can be designed in such a way that they **optimise the fairness experience**.[37]

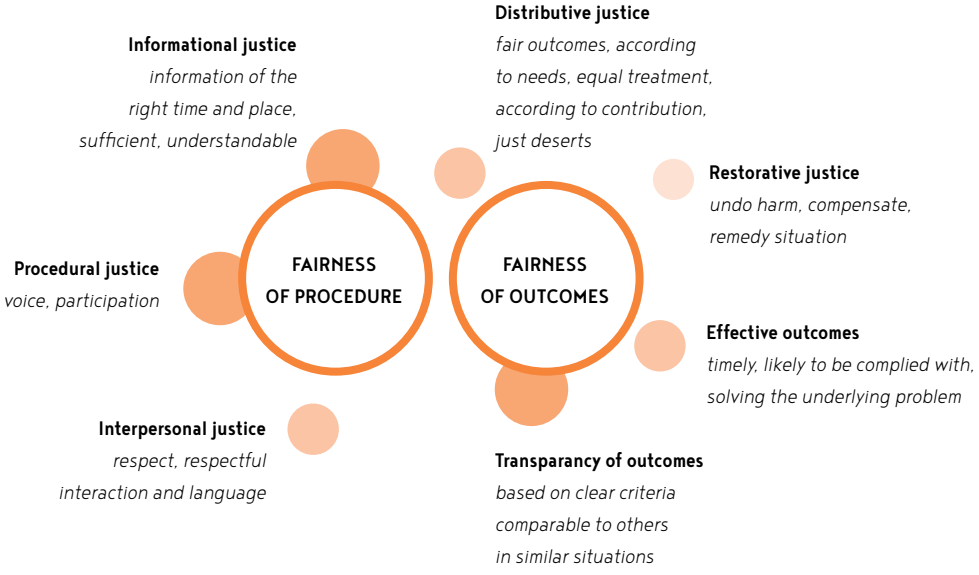
[35] See Par. 2.2.

[36] Rabinovich-Einy, O. (2015). *The Legitimacy Crisis and the future of courts* .

[37] Ebner, Noam and Zeleznikow, John (2015) "Fairness, Trust and Security in Online Dispute Resolution," Hamline University's School of Law's Journal of Public Law and Policy: Vol. 36: Iss. 2, Article 6.

Procedural justice is about **voice and participation**. Well designed online procedures can enable people to give their views about a land conflict, for instance. A diagnosis of the type of conflict can be the starting point. Is it about the way of using the land, or is somebody else claiming ownership of the land? Questions can be asked about the emotions of the parties and about what worries them. In their own words, and in their own time, they can speak about their needs and choose from a list of suggestions for fair solutions. Online procedures reduce stress, because there is no hurry; having to tell a lawyer or a judge everything in an hour. People can reflect, change their mind or refine their answers. They can give their own perspective first, and then be made to interact with the other party. A well designed intake of a procedure provides a structure which ensures that people give all information that is generally needed. A helper or coach can be made available, by telephone, chat or in a meeting, clarifying questions and reassuring users about their input. Documents can be uploaded and made available to other participants in the procedure. Mediators, judges or experts do not have to do their own intake with the parties. They can access the online interface, and see what the parties already agreed to or brought forward, in a well organised way that enables them to work efficiently.

Informational justice means that people get relevant and sufficient information, at the appropriate time. An online procedure for issues around termination of employment can provide a framework for the issues that typically arise: reasons for organisational change on the side of the employer, reflections on the competencies of the employee, options for a next job, education needs, time for the transition and possibly compensation. The rules and legal criteria for each item can be made accessible through links on the page for each issue.



Experts on ODR and fairness during the 2016 ODR conference

"ODR processes are designed and implemented and practitioners function with commitment to reducing bias in the delivery of the process. They are designed and implemented to facilitate and uphold due process; without bias or benefits for or against individuals or groups, including those based on algorithms" (Leah Wing, University of Massachusetts/Amherst).

"It is desirable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest" (Leah Wing, University of Massachusetts/Amherst).

"Does ODR permit people to voice what matters to them? People that use ecommerce yes, but some people do not know how to use a computer, they will not have an opportunity for voice. That is why it is so important to have a parallel system" (Nancy Welsh, Professor of Law at Penn State University).

"Fairness and access to justice in delivering justice online; seven pillars of wisdom:

1. There must be acceptance of the underlying principle of access to courts and tribunals at proportionate and affordable cost.
2. Online determination must be supplemented by off-line: it cannot be exclusive.
3. Individualized assistance must be available to online users
4. Online determination alone is not enough: systems need to integrate with information and assistance.
5. ODR must be developed with clear and precise user-oriented goals and be rigorously monitored against them.
6. Online requires a different culture from the judicial: there must be constant feedback and improvement
7. Online is no excuse for any drop in quality: ODR results must be as legally correct as offline (Professor Roger Smith, former director of Legal Action Group and JUSTICE)."

Online procedures can also frame the conflict in such a way that a **respectful dialogue** is most likely. Disrespect is the most frequently cited form of injustice. When people are asked about their needs and worries, they are less likely to come up with accusations or to denigrate the other party. Once they feel heard, they are more likely to listen to the other party with respect. In a courtroom or in a direct conversation between the parties, there is always the issue of who is listened to first. When both parties can submit their own views first, and then look at the worries and needs of the other party, they are more likely to give and receive recognition. Usually, disturbed communication and unproductive interaction patterns are one of the key problems in a dispute.

A website can frame the communication in more productive ways, using the best practices from mediation. If needed, the communication patterns can be made a separate issue to work on.

On the other hand, a small percentage of online communication tends to be abusive. We haven't heard about online dispute resolution platforms creating or attracting huge quantities of unrespectful communication. **Moderation may be needed** in some situations, however. An online environment should not increase conflict behaviour.

CASE STUDY: JAINARAIN KISSOON, OUR FAMILY WIZARD

How ODR creates neutral spaces to promote communication and agreements

"For high conflict co-parents, disputes can be quick to occur when information is hard to interpret or is not readily available. This is especially true when discussing matters dealing with parenting time or shared expenses. However, with some added structure to facilitate the sharing of complete information in a neutral space, these discussions can be more productive every time. The OurFamilyWizard® (OFW®) platform is designed to promote clear, concise, and timely communication between co-parents in a structured and unbiased environment.

OFW® is comprised of tools that help co-parents to more easily manage all aspects of their parenting plan. Both parents have access to features including a shared family calendar, expense and payment log, family information bank, and more. Templates built into the tools prompt parents to create entries with complete details that will be promptly shared with the other parent. Being able to provide quick and accurate information can be very important in time-sensitive situations such as in the case of a parenting time exchange request.

An OFW® calendar will outline a family's regular parenting schedule and holiday agreement; however, there will be times when each parent will need to propose a brief change to some part of this agenda. OFW®'s patented parenting time modification tool requires that a parent enters the dates being requested, and to give a short reason for the modification. A deadline is put on every request, which cues the other parent to respond in a timely manner. Approved requests will adjust the parenting schedule accordingly without interrupting the rest of the calendar.

The best thing about parenting time modification requests on OFW® is that parents have the option to propose trades in parenting time. Instead of just requesting or forfeiting time, offering to trade or swap time can incentivize the other parent to consider the offer. If a parent receives a trade request but isn't in full agreement, that parent can submit a counter offer with their proposed dates. Being able to offer trades in parenting time opens up the possibility for negotiations to take place, giving parents a chance to mediate their own issues and reach agreements that are favorable on both sides. Regardless of whether a request is approved, negotiated with a counter offer, or simply ignored, a complete history of each request submitted is maintained indefinitely on the calendar in order to preserve a complete record of what was proposed.

Another benefit of using OFW® is that it maintains co-parent communication in a highly organized format. Keeping documentation in order is of great importance for co-parents, especially when communicating about shared expenses and reimbursements.

Costs like unreimbursed medical expenses are ones that can lead parents to quickly threaten each other with going back to court to seek compensation. When they finally reach the courtroom, insufficient or unclear data regarding the costs and reimbursement requests can only prolong litigation or result

DISPUTES PROCESS

Landlords and tenants have options for resolving disputes - Self-resolution, Fastback resolution, mediation or Tenancy Tribunal hearings.

1 Self-resolution

Self-resolution means sorting out problems by talking to the other person. It can lead to a less stressful and more positive working relationship in the tenancy.

2 Fast-track Resolution

FastTrack Resolutiuon is a quick way to confirm agreements reached between landlords and tenants.

3 Mediation

Mediation helps landlords and tenants talk about and solve their problem.

4 Tenancy Tribunal

The Tenancy Tribunal can formalise what is agreed at mediation, or can make a ruling on an issue that can't be resolved and issue an order that is legally binding on the parties involved in the dispute.

in an unfair ruling. In this situation, having accurate facts laid out in a way that is easy to interpret can lead to less confusion and fewer court appearances. Using the expense and payment tracking tools on OFW®, parents can record child-related spending and upload copies of receipts as costs are incurred. They can even take a photo of a receipt on their smartphone and upload it using the OFW® mobile app. Every expense is categorized based on each parent's amount of responsibility for different types of costs. The assigned category will do the math to calculate the amount that the other parent owes in reimbursement. Once submitted, the other parent has immediate access to review and respond to the request. Reporting tools allow parents to readily demonstrate an overview requests, reimbursements, and debts yet to be paid. Organized expense histories and reports that are easy to read make it a much simpler task for the court to get a clear picture of a family's expense history and make a fair ruling.

OFW® maintains a neutral zone for co-parents to communicate about all sorts of matters in a non-hostile environment. Tools and templates cue co-parents for information focused only on one topic in order to help create more order within their communication-something that often lacks in email or text message correspondence. OFW® does provide parents with a tool through which they can send messages to each other, but messages are seldom sent when parents are using the other tools to simplify their communication to just the facts.

While many co-parents are able to communicate and reach resolutions through OFW® on their own, their legal and mental health practitioners can be granted access to oversee client activity. OFW® Professional Access provides a direct view into co-parent communication as well as the opportunity for professionals to interact with their clients directly through the website.

While having activity monitored is always an option, OFW® has proven so effective at helping co-parents to reduce conflict on their own that family law judges in all 50 states in the United States, Washington D.C., and 5 Canadian provinces are regularly ordering its use in contested cases. Whether co-parents are in constant conflict or only have a few issues to sort out, OFW® can improve their chances of coming to resolutions on their own through the help of this highly-structured, neutral environment."

Can online dispute resolution contribute to **fair, balanced outcomes?** If the parties in a court case are shown the most relevant rules for determining child support or the relevant sentencing guidelines, this increases the probability that they obtain outcomes that are fair. Outcomes that are generally fair, or rather standard in judgments and settlement agreements can be offered as suggestions, or as templates to work from. An ODR platform can display the most used model agreement for people in a similar situation. The judiciary could even approve certain categories of solutions. This can lead to an increasing definition and overall vision of what 'fairness' is - fairness as an essentially cultural and democratic concept, but which maintains the opportunity for courts to adjust where needed.

Online dispute processes also increasingly facilitate the **neutral review of settlements**. The New Zealand Tenancy Tribunal, for instance, has a fast-track process for confirming agreements (see picture). The mediator talks privately with the tenant to confirm they have agreed to and understood all conditions of the agreement. If the tenant is unsure about any part of the agreement, or if there is a problem with the application, the mediator will immediately call the landlord. Then a 3-way mediation telephone conference takes place to discuss just the issue that prevented the agreement from being confirmed and formalised. [34] Review by a neutral lawyer or mediator is one way to alleviate worries about fairness and to **protect weaker parties**. Another emerging technology is to let parties check boxes that confirm that they have thought about known risks for fairness, or even made some analysis of this. The Rechtwijzer divorce platform contains such extra warnings for a number of issues, one of them being the calculation of alimony according to a standard calculation method for this. Whether this will really protect people, or just make them tick the boxes, remains to be seen. Another option is to identify signals early on with a high risk for unfair agreements: domestic violence? Huge income differences?

An online dispute resolution procedure is likely to be aimed at agreements.

Is the settlement obtained through informed consent?

This is hardly a new issue for the design of procedures. People's future can be at stake, for instance in eviction proceedings where banks or landlords may want to get rid of a difficult customer, ignoring the impact on the family and the broader community. Most of these disputes are settled between the parties directly, some of them through lawyers, some of them at the steps of courthouse, some of them with only one party represented, some of them inside the courtroom whilst the judge retreated in his chambers. Is this settlement what each of the parties really want? In all of these situations the responsibility for informed consent has to be allocated somehow between the parties themselves and the professionals assisting them.

The platform is a new player in this game that can increase the level of protection, but also cause others to take less responsibility because they assume the platform gives protection already. The same dynamics are known from courtrooms where judges hesitate to interfere when lawyers obviously miss points or a litigant seems to give in to easily. Online dispute resolution providers and courts have to deeply rethink these issues. They can also build in feedback mechanisms where participants are asked to rate the fairness of outcomes or complain about fairness with the provider.

Online dispute resolution can also contribute to timely, effective outcomes. Depending on the type of problem and individual needs, the **timing of phases and actions can be programmed**. An interesting experience of many online dispute resolution providers is that users expect much faster responses than in offline procedures. This is an incentive for professionals working on the plat-

[38] Fast Track Resolution. (2015).

form to deliver their contributions more quickly as well. Delays can be monitored, followed up on and acted on much easier than in off line procedures. A standardised process, with clearly circumscribed tasks for lawyers, experts and judges, is less likely to lead to delays than an open ended procedure, where case-management is not centralised. Of nine proven tools to reduce court delay, eight can be more easily be implemented with the help of online dispute resolution (see Table).

Effectiveness can be monitored in any procedure, but in court procedures this is not built in as a standard. Automated client reviews can be part of the system, leading to data giving feedback about what solutions work or do not work. Online platforms such as ourfamilywizard.com are set up to help parents to monitor their parenting plans and also to reduce uncertainties about what has been communicated between them. This is an example of how ODR systems can log information about compliance, making oversight by courts much easier and court.

An online system cannot directly provide restorative justice. Victims of accidents and crimes need information about what happened. Most of them want some interaction with the persons who contributed to their victimisation, because they look for explanations, motives and acknowledgments, perhaps leading to an apology. They need psychological or medical assistance, and support to reorganise their lives or on a continuous basis. Some victims need compensation for loss of earnings, and a punitive sanction may be appropriate. Whether online dispute resolution can support this, **depends on the design of the procedure.** There is no intrinsic reason why online dispute resolution would be better in providing such remedies than an offline procedure. In some cases it may enable appropriate communication between participants, reducing tensions and fear. In other cases face to face contact may be more helpful and can be supported online.

[39] National Center for State Courts. (n.d.).

CASE FLOW MANAGEMENT TOOLS THAT ARE PROVEN TO BE EFFECTIVE (NATIONAL CENTRE FOR STATE COURTS[39])	POSSIBLE ONLINE DISPUTE RESOLUTION CONTRIBUTION
Case-disposition time standards	Yes
Early court intervention	Yes
Continuous court control of case progress	Yes
Use of differentiated case management	Less so
Meaningful pretrial events and schedules	Yes
Limiting of continuances	Yes
Effecting calendaring and docketing practices	Yes
Use of information systems to monitor age and status of cases	Yes
Control of post-disposition case events	Yes

What do I get compared to what others got in a similar situation? This is an important point of reference for participants in legal procedures. In an online dispute resolution environment, the tendency will be to standardise and to inform people about commonly used solutions and criteria. This may **increase the transparency of outcomes**, and thus the overall user experience. Individualised reasons for decisions or for deviation from standards can be communicated more easily. If the dispute interface is organised issue per issue, a judge or an arbiter can indicate which issues are decided on the basis of a standardised formula, and devote special attention to the more individualised decisions.

At the beginning of this paragraph, we asked whether ODR platforms can deliver high quality outcomes through fair processes. The table above, summarizing the analysis, first confirms that that justice is a multi-faceted concept. Getting procedures right requires working on all these dimensions. Second, the analysis suggests that **online procedures can indeed improve the probability of fair outcomes** through timely, effective procedures, in which parties can have voice and participate on an equal footing. But much depends on how human interventions by lawyers, judges and other experts are integrated in the system.

3.4 The promise of humanising the delivery of justice

Online dispute resolution has the connotation of robotised justice, in which human interventions are stripped away. The reality of online legal services is very different. Leading online platforms such as LegalZoom, Clio, Avvo, Rechtwijzer and the applications of the Modria platform **fully integrate human interventions** into their processes. The added value of the system is the thoughtful organisation of the process, matching clients needs with knowledge about what works best and the best experts for helping people out. Economically, the human interventions are also still very prominent. These experts typically take 75% to 95% of the revenues generated within the platform. ODR is not so much online judge or lawyer, but a far more sophisticated version of ancient rules of procedure. On top of this, it streamlines most if not all administrative processes, payments and archiving needs of courts. For lawyers and experts, a well positioned ODR system also provides marketing and sales.

What this creates in a well designed ODR system, is **time and budget for high quality human interaction** with the parties. Longer hearings, with more in depth dialogue. More support of people during the most difficult moments of their lives; less calls, letters, motions and briefs to keep the court system in motion. More sophisticated and individualised solutions; less arguments and case law summaries that are repeated again and again. More of what lawyers, mediators or judges feel most competent to do and where they can add most value.

NEXT GENERATION CRIMINAL PROCEDURE

Will criminal procedures be innovated and conducted online in a few years from now? One area of innovation happens in so-called problem solving courts, where judges oversee a process of coping with crime. The defendant is expected to participate in hearing that also involves victims, family members and the community. It is a cooperative process, where victims are aided in recovery and offenders are held accountable, but also get access to adequate treatment. Monitoring compliance is essential as well. Logging agreements and monitoring progress could be supported with an online system, which could also help to share information.

Another cooperative process that may be supported online is plea-bargaining and other types of settlement of criminal proceedings. Online processes enable participants to engage with issues at a distance, with more time for reflection and with more access to information. In criminal justice, a substantial number of defendants will need additional, personal assistance, however.

Fact-finding can also be supported online. Inspired by best practices in courts, from investigative journalism, from academic research and from neutral investigations by special committees, innovative procedures have been developed which center on a "map of facts". This is a neutral description of what is known and uncontested, what is seen by participants from different perspectives and what is unknown. During the procedure, the map of fact is continuously improved by contributions from the parties, by experts, by witnesses or by results of additional investigations. An online procedure can provide a structure for this map of facts and visualizations that make the process more transparent for all participants.

The promise of ODR for those working in the legal professions is that they will be saved from repetitive and administrative tasks, and can **move up the value chain** to engage in solving problems between people or organisations. Bringing peace and justice, individualised and in an equal way, earning a fair share of the value they add, that is what most of them went to lawschool for.

Getting the integration of platform and human services right, is by no means easy. **People appearing in courtrooms vary enormously** in their expectations, their motivation and their needs for assistance. Nowadays, all these different clients also expect to be served through multiple channels. This may include a person at a desk, in a meeting, by smartphone, by e-mail, by chat, by video-conferencing and through web-interfaces helping them to navigate complicated procedures, available 24/7. Some people will have difficulties using online procedures, because of low IT or communication skills, just as quite a few people have difficulties understanding current court forms and procedures. For them, personal assistance will remain essential and this has to be provided iin a way that still empowers them. Friends, family-members, social workers, lawyers, citizen advice centres and paralegals may have a role to play here. All these challenges have to be met and it will take a lot of time before courts and ODR providers have sorted them out completely.

The **selection of people appearing in courtrooms** does not make life easier for courts. Difficult people tend to have more difficulties. So quite a few people appearing in courts have little IT skills, cognitive capabilities or may need to be assisted in their interaction with others because of low social skills. In the stages of diagnosing and triaging, who can use ODR and who needs what level of support?

When developing these interactions, and finding out what can be done online and what with live human assistance, **ODR providers tend to rely on research and best practices** from judges, lawyers and mediators. Nowadays, quite a few dispute resolution interventions have been researched. This research supports the plausibility of some dispute resolution trajectories over others. But often, best practices are not very explicit, or even contested, so a lot of new research is needed. In a court hearing, is it generally better to first ask the parties what is most important to them? Or should the facts be clarified first and foremost? How to deal with signals of domestic violence when these come up during separation proceedings? When the answer is: "It depends," a further inquiry is needed.

In order to improve the design process, innovators would benefit from **a culture of working in an evidence based manner**. Procedures can be compared to medical treatments or therapies. In the medical sector, hundreds of treatment guidelines drafted by professional bodies help practitioners to optimise their services to patients. Hospitals setting up new services can also benefit from this way of sharing and updating knowledge. Having such guidelines available, would greatly facilitate the work on designing innovative procedures.

3.5 The promise of financial sustainability and growth

Our 2013 trend report was called Trialogue, Releasing the Value of Courts. The title refers to the trap most courts across the world find themselves in, namely: if courts offer more user-friendly procedures, and add more value to people's lives, there will be more demand for their services. Courts, and judges working in courts, will experience this as being overburdened. There will be delays, increases of costs of lawyers and other procedural hurdles until there is an equilibrium between supply and demand for court services. Usually this is a **low access to justice equilibrium.**

Can ODR change this?

The marginal costs of every new case are low in an ODR system once it is set up and delivered.

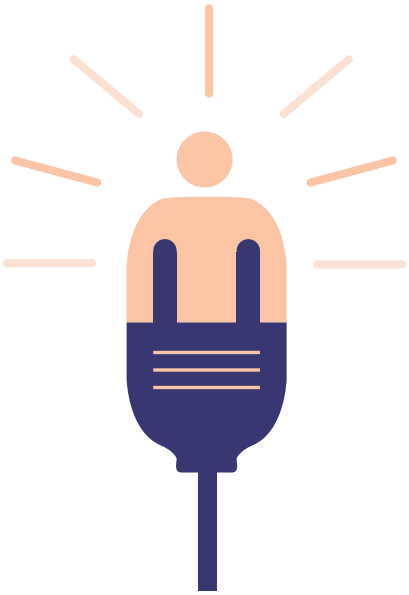
Each extra case is no drain on the budget. It is an extra opportunity to assist people who need the court's assistance.

ODR can also optimise the allocation of tasks between the parties, lawyers, judges and other professionals in a procedure. A lawyer, judge or expert has easy access to all information, well organized. So the time needed for high quality interventions can be reduced. Because tasks are well defined, and users of the justice systems prefer this, **online platforms tend to work with fixed fees that are affordable to most users**. Fees for (neutral) lawyers, arbitrators or mediators are in the 100s of euros or dollars for interventions in standardized scenarios.

ODR procedures at courts can be self-financing through user contributions. This is already a reality in some existing court systems, as is illustrated by the example of Austria. Here court procedures are organized in such a way that **courts are fully financed through user fees**. Legal aid, or a waiver from court fees, is available. The legal aid budget is very low (€19 million in 2012, a little more than 2€ per inhabitant compared to 40€ in the UK and 29€ in the Netherlands). Austrian lawyers tend to be paid by a fixed fee, related to the value of the stakes in court proceedings. According to a recent report, the costs of the system are kept low by a high degree of standardisation and computerisation of the judiciary and the use of assistant judges (Rechtspfleger) especially in the branches with a high numbers of cases. Cross subsidisation funds criminal proceedings.[40]

[40] European judicial systems - Edition 2014 (2012 data): Efficiency and quality of justice (p. 85, Rep.). (n.d.). CEPEJ.

With well organized, ODR-supported procedures, courts can be open to every new case because funding is secure. They will not have to reduce their workforce because of cost savings by ODR, but can use ODR as a tool to **extend their services** to caseloads that are currently not reaching the courts because of high costs. Courts can also use ODR to help clients with the early phases of dispute resolution: diagnosis, intake and negotiation. From a market share of disputes of currently around 5% in which courts are asked for a judgment, they can grow to assisting perhaps 50% of disputants with a track to a fair agreement; mostly negotiated, but if necessary imposed by a court. The early phases of the process do not require any expensive, personal assistance, so they can be offered at attractive prices to the public. Marginal costs may be limited to assistance through a help-desk.



Charging users for court procedures, and financing courts directly from fees, is somewhat controversial. Courts often prefer to be financed from the general state budget. But only a few countries (such as Norway) succeed in securing sufficient budget to give their citizens free access to courts. Jurisdictions with good performance on civil justice, such as the Netherlands, Singapore, Denmark and Germany tend to fund a substantial part of their court budgets through court fees.[41] In the US, the trend is also to increase the proportion of court income raised from court charges. A study found that even in Zimbabwe, 55% to 60% of the costs of civil justice could be financed from user fees. Stakeholders in this very poor country support this.[42] Charging users seems to be **the only known way forward towards 100% access to justice**.

Some ODR procedures at courts would still require subsidies, because refugees or low skilled criminal defendants cannot pay court and lawyer fees. A few general principles for charging are needed as well. Costs of adjudication can be allocated to parties according to their resources and their ability to avoid or resolve conflicts. Organisations then generally pay a higher proportion of fees than individual citizens, employees, customers or tenants. A number of new checks and balances are needed. Overactive courts could perhaps offer procedures and outcomes that are biased against defendants, because plaintiffs would be their target customers. Prices, now set by courts, should be controlled somehow, because a court may be seen as a monopolist.

[41] WJP Rule of Law Index. (n.d.).
[42] Nyangara, D. (n.d.). Funding Civil Justice in the Age of Fiscal Austerity: The Case of Zimbabwe. *World Journal of Social Sciences*, 4(2), 149-159.

CASE STUDY: JIN HO VERDONSCHOT, HIIL RECHTWIJZER TECHNOLOGY

The Rechtwijzer approach to financially sustainable legal processes

The Rechtwijzer ODR system is funded by user fees. After the free diagnosis phase, the person starting a case pays an entry fee of 90€. The other party is invited to take part in the process for free.

This includes the intake and dialogue/negotiation phases. Each party can involve a mediator, an adjudicator or a reviewer, who all operate under fixed fee regimes. It is left to the parties who pays the fee. Add on tools and specialized services are also delivered for a fixed fee. The fixed fees are determined at a level that allows skilled and knowledgeable service providers to work effectively and to generate an attractive income stream. With a sufficient volume of cases, the fees cover all costs of updating the platform and generate income that can be used to extend and improve the platform. Initial investments are covered by an access fee for the organization offering the platform to its clients.

Online procedures require substantial investments, though. They also have to be maintained. These costs have to be added to the court fees, if the procedure is to be financially sustainable. So developing ODR procedures makes most sense for **high volume, recurring disputes, following a certain pattern**. Until now, prototypes and sophisticated online platforms have been developed for: separation/divorce, personal injury, landlord/tenant problems, property tax assessment, consumer complaints and claims, debt collection, employee/employer issues and neighbour disputes.

If this promise can be fulfilled, online dispute resolution can free the court system from the low access to justice equilibrium. Courts implementing online dispute resolution can indeed start thinking about delivering **100% access to justice**. They, and the lawyers and experts working via an ODR platform, can then start improving their services, deliver more value to users, and charge part of it to those users.

Self-financing procedures, supported with ODR, will also change the position of governments, who tend to struggle with financing courts.[39] Governments, trying to get their budgets right, now have **a perverse incentive to limit access to courts**. Why would a ministry of justice support laws that really allow courts to use new, more user-friendly procedures, if that leads to budgetary problems? More access will not only lead to claims from the judiciary, but also for extra legal aid and for extra prosecutors. Currently, ministries of justice are more likely to divert packages of cases away from courts, towards government agencies that can dispose of cases at lower cost, or shift the access to justice problem to other ministries. Ministries of social affairs might pay for employment courts and debt restructuring; health care conflicts can be pushed towards the ministry responsible for health care; financial services claims, why not let the ministry of finance carry that burden?

Online dispute resolution, if well designed and linked to innovative ways of financing courts, **can change these dynamics**. It can open the door for a court system where courts would be responsible for the design of procedures and also would be able to charge the users of these procedures the full costs. ODR can help to achieve this, because it lowers the costs of providing access to justice and makes it more easy to set and charge fees for different problems and user groups.

3.6 The promise of partnership and scale

LegalZoom is a document assembly giant with revenues of $200 million in 2013 and growing. It offers assistance for setting up companies, drafting wills and trusts and other legal documents which are tweaked for all US jurisdictions. The services for small companies are also available in Canada and will be in England soon. **Economies of scale** are key to information technology, where the marginal costs of helping yet another customer are negligible.

Modria, a leading online dispute resolution company in Silicon Valley, has developed **a generic platform for setting up online procedures**. Every phase, action or role that may occur in a procedure can be configured on the platform. Texts informing users and professionals can be implemented by the supplier of the procedure. Business rules allow the system to automate certain steps. Programming procedures is thus becoming much easier.

[43] Kramer, X., & Kaikuchi, S. (2015). Austerity in Civil Procedure and the Role of Simplified Procedures *Erasmus Law Review*.

CASE STUDY: SHANNON SALTER, CIVIL RESOLUTION TRIBUNAL

The building blocks of the world's first ODR court

The Civil Resolution Tribunal (CRT) is Canada's first online tribunal, and currently the only ODR system in the world that is fully integrated into a justice system. In 2012, the British Columbia government passed the Civil Resolution Tribunal Act, creating a voluntary framework for the CRT to resolve small claims and condominium disputes (a type of neighbour dispute). In response to strong stakeholder demand, the government amended the Civil Resolution Tribunal Act in 2015, making the CRT mandatory. The CRT will begin accepting claims of people living in buildings with shared areas (strata claims) on a mandatory basis beginning in the summer of 2016.

The CRT involves four stages, each part of a seamless, end-to-end process focussed on early, participatory, online dispute resolution. The first stage, the Solution Explorer, is a guided pathway system which uses interactive questions and answers to give people tailored legal information as well as tools and resources, like template letters, to help them resolve their dispute consensually. The aim is to help people better understand their problem so they can make informed decisions about their next steps.

If someone is not able to resolve their dispute using the Solution Explorer, the next step is to start a CRT claim, using the online intake process. After serving the others in the dispute with notice of the claim, the parties have a brief opportunity to negotiate directly with each other. The CRT provides some tips and suggestions for this negotiation, but is not otherwise involved. At the third stage, facilitation, the CRT works actively with the parties, either online, or through whichever communication methods work best for the participants, to help them reach a consensual agreement. The facilitators have expert dispute resolution training, and the CRT technology will help connect these experts with the people who need their help, around British Columbia. If the parties reach an agreement, this can be turned into a binding order of the CRT, which is enforceable as if it were a court order. If the parties do not reach an agreement, then the facilitator helps the parties to prepare for the final stage, adjudication.

During adjudication, a CRT tribunal member, who is a lawyer with expertise in the CRT's areas of jurisdiction, hears the parties' evidence and submissions and makes a binding decision. While there is no limit on a participant's ability to get legal help throughout the process, if a hearing becomes necessary, a party will usually have to get the CRT's permission to have a lawyer represent them. CRT hearings will generally take place through electronically submitted written documents, or through telephone or videoconferencing.

CRT decisions will be publicly available through the website. A person who does not agree with a CRT decision can appeal the decision to court. The CRT has effectively been co-designed by the public who will use the tribunal.

The CRT has worked with stakeholders including com-munity advocates, condominium owners, lawyers, mediators, judges, and the general public to user test the technology and consult on the CRT's processes. This has increased the CRT's confidence that they will be able to meet their mandate of providing fair, affordable, flexible, and timely access to justice for the public.

Online dispute resolution designers from Modria developed and offer **standard dispute flows** for consumer issues and property tax assesment. HiiL has done the same for divorce and separation procedures and for landlord/tenant disputes. The same flow is now offered to divorcees in the Netherlands, Canada (BC) and England. Issues between spouses tend to be the same everywhere. The process of informing people, framing the dialogue, mediation and adjudication can also be fit into family law practice across the world, where these phases already tend to exist. Rules about dividing property, custody and child support are different. But they tend to have the same basic structure, so national rules can be plug ins in a flow that is used in many countries.

This hugely **increases the scalability**, but also has the potential to enhance the quality of the process. Experts from different countries and backgrounds can offer suggestions on questions and templates for solutions. By comparing their suggestions, it becomes clear what are particularities of one legal system and what are learnings that can benefit divorcees in other countries.

An international consortium between courts, legal aid boards and other organisations supplying ODR procedures can thus be beneficial. A joint product road map may be part of this. Development costs can be shared, IT risks minimised and quality can be enhanced. If online dispute resolution providers would ever become too powerful, joint purchasing power may be necessary.

So besides promising better customer journeys, leading to more fair outcomes, humanising the delivery of justice and financial sustainability, ODR also opens the door to partnerships that can make courts stronger and more able to deliver on their ambitions. Perhaps the claims in the report by the commission led by Richard Susskind are not that incredible after all.

HOW TO BUILD A PARTNERSHIP?

Peter van den Biggelaar is the former Director of the Board of the Dutch Legal Aid Board (Raad voor Rechtsbijstand) and has experience with building a partnership around Rechtwijzer

In order to successfully arrive at a working and sustainable partnership, common knowledge is one of the key factors. A shared focus on the need of people is paramount to achieve such a cooperation, also in order to share the costs and risks of implementing ODR by helping each other through resistance. Full cooperation and sharing of best practices and ideas is also important, as ODR providing legal aid is quite a new domain - yet for the time being legal aid boards or other providers of judicial aid committing to such endeavours have the privilege of being a frontrunner, thus not facing excessive competition. Thus one can see it as a burden or privilege to take the first steps towards embracing ODR mechanisms, but we see it as the latter, also when considering the reward one gets afterwards. It is also important to start small, and assume a proactive role in the development, being part of and active in innovation, so as to find the best solutions together. Then we have seen rapid improvements in the delivery of our services and satisfaction of our users. Our Rechtwijzer experience also showcases the preferred position of first clients and service providers, as they often receive extra support and privileges being the first pioneers taking on such a challenge.

4

ISSUES TO BE RESOLVED

!

"We can learn maybe more from our failures than from our successes"

- Dory Reiling

Although judiciaries are increasingly open to justice technology in their courts, and some have explored the potential of ODR[40], we do not yet see courts who have fully integrated it. There are clearly barriers to adopting this very promising technology. We see four broad categories of these: legislation barriers, barriers to investing in and buying ODR systems, risk barriers and barriers from the time-honored pact between courts and lawyers.

4.1 Legislative space and framework

Court means **enclosed space**. It is the walled garden where the sovereign and his entourage sat to listen to complaints of citizens, all asking them to intervene on their behalf. Indeed, judicial institutions are very much restrained, nowadays not so much by walls but by rules that are as hard as walls. Courts can not easily leave this rule space. There are extensive rules about allocation of cases between different courts. Rules about who can be a judge. Rules about who can appear in court. Rules guaranteeing independence. Rules about costs and financing of courts. And thousands of rules about court procedures.

These **rules can be a major barrier** to implementing online dispute resolution. Civil procedure rules may talk about documents and assume oral or mail communication. They require claims, whereas an online system may start with one party indicating issues for discussion. A judgment is seen as a decision whether a claim has a basis in the law and in the facts. Solutions of disputes tend to have the form of agreements about who should do what next, however. Facts are to be established by hearing witnesses, a rather unreliable way to establish what is said and done. Videos and mobile phone records have not been considered. Court hearings now have prescribed goals and formats, which do not have a place for exploring emotions or listening to personal experiences of victims. Codes of civil and criminal procedure do not say much about timing and legal costs, whereas these are key for effective access to justice.

Currently, the rules of procedure are set by the legislature or by the judiciary

The basic design of civil and criminal procedure laws dates from the early days of national states. Legal forms of actions and defences, leading to judgments, still determine the flow of court procedures. In the 19th century these rules were exported to Africa, the Americas and Asia by the colonisers of the era. Lawyers in emerging states happily accepted the gift of good rules of procedure developed in London or Paris over centuries. Nobody at the time expected these procedures, established in the time of duelling, neo-classical buildings, gowns and mail coaches, to be there forever. However, the classical rules of procedure withstood revolutions in France and Russia, genocides in Germany and Rwanda and eras of rapid technological change in the US and China. They proved extremely hard to change.

Judges take the liberty to apply the old procedures in more modern ways. Within the framework of rules, some change is possible, such as the shift to settlement during court hearings. Rules can be reinterpreted by judges to get rid of some complications. There may be an amendment of the rules of procedure suggested by a member of parliament with a legal background. But this a slow process. Legal innovation by means of committees, case law and supreme court decisions may take decades to settle down, whereas users of IT are accustomed to weekly updates. **Major change in civil or criminal procedure is a rare occurrence.** No court system has been able to radically simplify procedures or to implement a specialisation program, although countless reformers of procedures, Worldbank/IMF experts and committees have come to the conclusion that this is the way forward. Hearings may now partly be focused on settlements, but the preceding phase of exchanging views in writing is still set up as a battle between positions. Judgments are still meant to be final, whereas implementation of court orders is a huge problem and years of appeals may follow.

Redesigning court procedures from a user-perspective is thus **next to impossible under the current regulatory regime for courts**. If these procedures are really unfit for purpose of resolving disputes effectively, there may even be a challenge of them under human rights law. Are these procedures really delivering citizens due process or the right to fair trial under Article 6 European Convention on Human Rights?

It is surprising how much innovation still has come out of these organisations, illustrating the need for it. Most innovations have been suggested from the outside, with judges implementing them, often ignoring precise rules of procedure. Judges just started referring cases to mediators without any legal basis. They found ways to consult with experts without letting them be grilled by adversarial lawyers. Appeal courts now routinely ask the parties to visit the court for a hearing before any appeal briefs are filed. Most often judges are applauded for doing this. Quite a few family judges just answer the phone and set up a meeting if a couple in distress calls them. **Giving judges the freedom for "case-management" and being the organiser of the process is generally recommended**.

So what are possible strategies for changing the rules of procedure in order to accommodate online procedures? Fitting in **online procedures by counting on courts to ignore the rules of procedure** may work sometimes. But it will also lead to many tensions, and restrain the options for an optimal design. This strategy is suitable for quick win pilots with highly motivated participants. It is unlikely that this is the way to scale up innovative procedures beyond one court and a limited number of years.

Another solution can be to **set up a new online court, under a specific legal regime**. This has been the basis for the civil resolution tribunal in British Columbia.[44] The drawback of this approach is that innovation takes place in a separate organization, with limited scope and budgets. The barriers to scaling up can be substantial. On the other hand, creating a "subsidiary" for an innovative model is a known strategy for incumbents to take part in the innovation process, without being restrained by the old model and organization around it.

Orna Rabinovich, a leading expert on ODR and courts, has argued that a new basis for legitimacy of procedures is needed. Not the legitimacy of rules that is the basis for current court procedures. Not the legitimacy of consensual processes that is the basis for mediation and alternative dispute resolution more in general. But the legitimacy of a good design, focusing on user needs, and guaranteed by ongoing monitoring over the process and its results.[45] In our 2013 trend report we recommended a similar strategy, building on the experience that judges can be trusted to put aside procedural rules in order to accommodate better procedures. We proposed to **shift the responsibility for the design of the procedure to the courts**, letting courts operate under general principles of procedural justice, and goals such as speedy, low cost resolution. The courts can then develop and gradually improve their procedures. In this scenario, accountability is not as much accomplished by higher courts checking whether judges followed the precise rules, but by evaluating their performance against the broad principles and goals. How citizens experience procedural justice can be an element of this. Courts would have to report on the extent they achieve procedural justice, timeliness and other goals.

[44] https://www.civilresolutionbc.ca

[45] Rabinovich-Einy, O. (2015). The Legitimacy Crisis and the future of courts.

CASE STUDY: ZBYNEK LOEBL, YOUSTICE

Reaching solutions, independent of courts

"Youstice is a general and easily customizable trust-building platform that gives retailers and service providers access to full ODR services and at the same time provides opportunities for amicable complaint resolutions through direct negotiation.

Through Youstice, customers are able to quickly describe their problem and propose solutions in their own language. Then the other party - retailer or service provider will review the complaint and either agree or negotiate in its preferred language a counter-proposal. Because of our structured approach, both parties still understand each other even though they communicate in different languages.If an agreement is not reached between the two parties, an option is available to escalate the unresolved issue to one of accredited Online Dispute Resolution (ODR) bodies. The dispute is then seamlessly transferred to the appropriate ODR center via the Youstice platform and the selected ODR center issues a decision. The decision becomes binding on the parties if both parties accept it, unless the parties agree otherwise. Youstice then follows whether the decision has been implemented by the retailer. If decisions are not implemented, Youstice stops servicing such retailer or service provider.

Youstice is independent of common courts. Parties are free to initiate court proceedings independently on resolving their issues via Youstice.

THE SIZE OF THE POTENTIAL MARKET FOR ODR PROVIDERS[46]

What market sizes are we talking about? The average annual spending on IT for courts in 47 member states of the Council of Europe with 800 million inhabitants is 3% of the €33 billion court budgets.[47] So the worldwide market for court IT perhaps has a size of around €5 billion. Only a part of this will be dedicated to high volume procedures providing access to justice for individuals, however.

With online dispute resolution fully integrated in court procedures, new models for financial sustainability of courts are possible as well (See par. 3.5). Online system providers could charge fees for the use of their technology in court procedures and for enabling legal services through the platform. Global revenues of courts are in the order of magnitude of €100 billion. The global legal services market is estimated at $616 billion in 2014.[48] More than half of this is from transactions, and most revenues from litigation are from commercial disputes. If one third of court revenues and of law firm litigation revenues are currently related to high volume dispute types involving individuals, the size of the dispute resolution market is perhaps €60 billion. If providers of improved online procedures would charge 5% of these revenues to courts and lawyers, or to the users of their services, there is a €3 billion opportunity for them.

[46] *European judicial systems - Edition 2014 (2012 data): Efficiency and quality of justice (CEPEJ)*

[47] European judicial systems - Edition 2014 (2012 data): Efficiency and quality of justice (p. 85, Rep.). (n.d.). CEPEJ.

[48] *Research and Markets: The World's Largest Market Research Store* (2015, June).


What is your issue?
Not delivered
I did not receive the item or service
More information
Select this issue
Received late
I received the item or service late
More information
Select this issue
Damaged or defective
I received damaged or defective item or service
More information
Select this issue
Problem with payment
You are negotiating with
Predžovačky E-Shop
predžovačky
The claim is about
Juice squeezer
89 EUR
Order no: 07303-2013
Order date: 2013-11-02
Delivery date: 2013-11-07
EAN:
3d0
YOUSTICE
EN
1. What is your issue?
2. Issue Details
4. Review & Registration
Received late
Agreed final date of delivery *
07.05.2014
Real date of delivery *
08.05.2014
Your statement
Save issue details
Damaged or defective
documents relevant to the case?
Attach documents
Issues are
Received late
Waiting for
Damaged or
defective

This strategy of course requires **a change in the structure of legislation for court procedures**. Instead of setting detailed procedural rules, or requiring the judiciary to set such rules, parliaments should agree on the broad principles and goals. Their approach to civil and criminal procedure would then be similar to how they treat other highly professional services. No member of parliament would ever dream of prescribing in detail the processes to be followed by surgeons, psychotherapists or architects. For judges and lawyers, this is what they do.

Such a more open and **new blueprint for legislation on court procedures can be tested first**. A rule allowing experiments could be implemented. A tryout of the new model for a specific type of disputes for which procedural reform is urgent is possible as well: family justice, for instance, could be an area for this.

4.2 Investing, selling, buying and independent courts

A second challenge for implementation of ODR in courts is associated to how courts should **purchase ODR systems**. For innovators and legal (tech) entrepreneurs, developing ODR platforms and introducing them, courts are a difficult market. Courts tend to develop their IT systems in house, such as Electronic Filing Systems (EFS) and Digital Case Systems (DCS). They do this with the help of IT consultants. Courts have complicated tendering procedures for IT. When they issue the tender, they are also likely to stay close to the judicial procedures that are known from case law and the current legislation. The tender process needs to be carefully designed in order to enable the continued innovation process that is necessary.

Moreover, the size of court systems is small. **Court procedures are currently local products**, developed for a county, a province or a nation, with rather limited budgets. Earlier innovations in court procedures did not scale (par. 2.3). So ODR providers trying to deliver procedures to courts will find it not easy to set up their business.

Indeed, online dispute resolution providers have been offering procedures to end-users and lawyers since the 1990s. There is a lack of clear success stories, however, besides the eBay Resolution centre for consumer disputes. Many promising examples of ODR have not survived the start-up phase, often struggling financially, and only a few platforms have made it to scale.[49] So for courts, it is difficult to select the right partners as well. In short, **the market for ODR procedures serving courts is not well developed**.

A number of solutions for this dilemma have been proposed. First, the technology of online, modern court procedures can be seen as a public good. Recent research has emphasised that the internet, the many technologies now present in our iPhones, innovative medicine and biotech have been developed with public money before entrepreneurs stepped in.[50] The new technology of mechanisms to bring peace in human relationships would be a great candidate for **state backed research and development**. The size of investments needed would be rather limited. Online procedures can be built from components that are already available in the legal and dispute resolution domain. It is mostly a matter of facilitating and testing interactions between

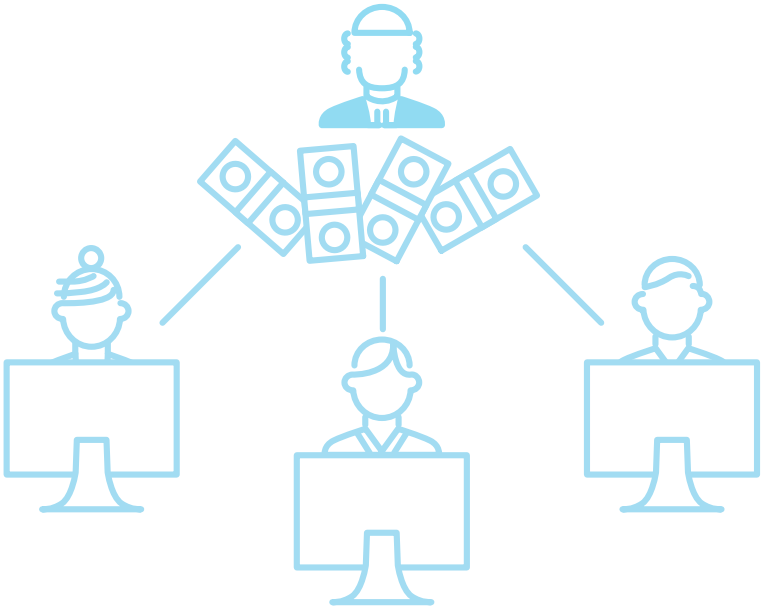
[49] Schüttel, N. (n.d.). *Streitbeilegung im Internet - Zukunft oder Irrweg?*
[50] Mazzucato, M. (2013). *"The Entrepreneurial State - Debunking Public vs. Private Sector Myths"*.

people. No major technological breakthroughs such as a high capacity battery or sequencing the human genome are necessary. There are precedents in legal history: Napoleon and Justinian invested in codes that benefited dozens of countries and are still the basis for property laws, contract law and liability rules throughout the world.

Another option is that courts from a number of jurisdictions become member of **a consortium investing in further development of ODR applications for courts**. Such a cooperation could perhaps be exempt from antitrust rules and tendering procedures. There is a need for collaborative networks that can overcome the technological challenges and achieve the scale that is needed. A well balanced and well governed consortium may be able to bring in the funds and legitimacy that is required.

Courts also face the dilemma whether they want to build ODR in house or buy it as a cloud service. Most courts until now have build **custom IT systems for their procedures** and websites with forms as user interfaces. This gives them control over security, over the procedure and over the supporting work-processes. The approach fits their core value of independence.

This **independence has a price**, however. Courts tend to build tailor made systems for themselves, fitting their immediate needs, but not very innovative. The end-user experience of these systems is often less than perfect. In this way, courts do not benefit from economies of scale. They face considerable IT costs if they want to build a really sophisticated system for the most common and frequent categories of cases. They also need costly updates. There is always the risk of another government



IT-project disaster. In practice, their independence easily leads to dependence on major IT services providers such as IBM, Atos or Hewlett Packard.

The alternative is not very attractive either. Should courts **buy new procedures from ODR start-ups** from Silicon Valley? These organizations may be dedicated to and specialize in online justice journeys. They could still fail as a business, though. Or they could become as powerful as Google or Facebook. A consortium approach, as described above, could make these risks manageable. A joint product road map can be agreed on, and a process for dedicated developments wanted by only one court system. But getting this right may be problematic.

A solution for this can be that courts **do both in order to hedge their risks and opportunities**. A court, wanting to offer a user-friendly procedure could continue to develop a general case-management system with forms and dispute flows for (say) neighbour conflicts. Next to that, it could implement an ODR procedure offered by a trusted commercial ODR vendor or consortium. A plaintiff could then choose between the two procedures, the more tested and conservative one, or the new one offering an innovative access to justice experience. Courts would then learn about new technologies and stimulate their development at the same time. Over time, the in house or outsourced trajectory will prevail.

The good news is that the **costs of ODR procedures are dropping rapidly**. Sophisticated ODR procedures can now be set up for courts at a cost of €500,000 or less. This is a fraction of the yearly IT budget of a medium sized court system serving 5 million citizens. With sufficient case volume, license fees can be in the range of €100 per case filed. A consortium between several court systems can generate sufficient revenues to enable the ODR provider to invest in R&D for next versions of the procedure. So the business case for implementing ODR is becoming better.

Buying online procedures from ODR providers also creates **issues of IP ownership**. Courts now like to be in control of their core business processes (although they never controlled their own procedures and finance in the past). ODR providers invest in IT and procedures and want IP to protect their business and to attract investors. The optimal solution here seems to be that ODR providers get the IP and offer contractual safeguards to the courts. Both courts and ODR providers then have an interest that the procedures conform to (principled, goal based) legislation and are evaluated positively by plaintiffs and defendants. But other, more creative solutions may be needed. And then there is the interaction with the legal profession.

4.3 Risks of implementation

Compared to letting parliaments decide on the operating procedures of courts, the risks of buying and implementing online dispute resolution systems are probably limited. Still, there is a lot of **risk management** to be undertaken. Privacy should be guaranteed. Court systems should be protected against hackers and other security threats. Data should be kept in secure databases with regular backups. Identities of the parties have to be checked. Service level arrangements need to be on the safe side.

Courts and other adjudicators such as tribunals and ombudsmen have experimented in the past with setting their own standards. They found out, however,

that they can build on the experience of government agencies and industries requiring similar safeguards, such as the banking or the medical sector. Besides copying these standards, there is also the option of **jointly developing standards** with other court systems. Courts in Alabama are likely to face similar risks as those in Belgium or South Korea.

Courts also have legacy IT systems and administrative systems, and are investing heavily in digitising current court procedures. New technologies have to be tested safely, scaled up next to the existing systems, and then perhaps more integrated. If the courts would start working with cloud based ODR solutions, they would certainly need **interfaces with their administrative systems** that will require extra IT development.

Finally, the costs of a change in working methods can be substantial. Fine-tuning the interplay between professionals and an IT system can take time. Although the role of judges has been shifting from decision making to managing processes already, the transition can still be difficult for at least some judges. Effective **change-management** will be needed.

4.4 Engaging the legal profession

Working as a lawyer aiming to help individuals is not easy. Employees, divorcees, refugees and people in custody may need a lawyer urgently, but are then reluctant to hire one, fearing high fees, escalation and loss of control. Competition is tough. In high-internet penetration countries, 50% of clients start looking for legal advice online. Lead generating portals set up by IT-savvy lawyers give them a tiny bit of information, and then connect clients by e-mail or phone to a local lawyer. These websites promise solutions and assistance for free or for a few 100 euros.

In this environment where competition is on price and personal trust, most lawyers working for individuals still practice alone. They may share an office and services with colleagues each running their own business, or team up in partnership based on a personal alliance. A few boutique firms may successfully build a brand aiming at rich individuals willing to pay for tailor made solutions. But **most of these businesses are small and personal**, struggling to make ends meet financially. Marketing and sales, administration, office organisation and complying with regulations eat up a lot of time, so they may bill $200 to per hour to clients leading to only $50 per hour in revenues over a year in which they worked 2000 hours. Part of this revenue comes from legal aid, where government agencies or NGOs give a few hundred euros or pounds per case in subsidies. From the 100k revenues, the bills have to be paid first, so these lawyers take little money home. Still, many lawyers find it hugely rewarding to bring order and hope to disrupted lives. In this market, the providers of online platforms do not seem to have any problem finding lawyers to engage with.

ODR platforms overwhelmingly engage trained lawyers for providing advice to clients.

KEI project, Netherlands

The Council for the Judiciary's Quality and Innovation programme (Kwaliteit en Innovatie - KEI) strives towards a modern judicial process that makes the judiciary more accessible to litigants. Using innovation and digitisation, KEI makes the judiciary more accessible and user-friendly for litigants and improves and simplifies the way in which judges and their employees work. The innovations that the KEI programme brings will soon ensure that legal proceedings are dealt with more rapidly. Those involved will know sooner where they stand. The judge will also gain greater control. Furthermore, this programme will ensure greater unity of justice, and will be better for the environment when paper files are replaced by digital files.

At the moment, there is a great deal of work going on behind the scenes to prepare the necessary digital infrastructure for the new judiciary. In 2015, a number of digital work processes were implemented. Meanwhile, it has become possible for all courts to submit asylum and detention cases digitally. Administrators and trustees are increasingly able to communicate with courts through their digital files. Many employees combine their KEI-based work with their normal work. The new way of working requires some adjustments from everyone in the Judiciary. Some of the jobs will disappear in the future. This requires proper guidance. There is a lot of attention and opportunity for training and continuing education. Everyone will receive sufficient time and training to learn how to work with the new work processes, the new legislation and the digital resources. Managers will receive training so that they can guide their employees in this process.

Lawyers have been diversifying their services during the past decades. They now also perform roles of mediators, settlement experts, arbiters, forensic experts, early neutral evaluators, damages assessors, reviewers and providers of complicated legally sound solutions. In new, online supported procedures many of these neutral roles are needed. Judges cannot take up all these roles themselves. For lawyers, ODR is an opportunity to attract clients, and move to roles that are more sophisticated commanding higher fees. Many lawyers also tell ODR providers they like the innovative environment.

They are happy to be relieved of the costs and tasks of marketing, sales, archiving and the many other troubles of running your own office. So online platforms can offer access to discrete packages of legal assistance for a hundreds of dollars or euros, and specialised services for a few thousands. Many lawyers see this as a good enough deal compared to working on legal aid or going after clients themselves.

The organised bar has proven to be more difficult to deal with. ODR providers are not the only ones experiencing this. Perhaps 60% of legal innovators sharing their experiences on the HiiL website innovatingjustice.com mention **resistance from lawyer organisations as a barrier to innovation**. From the Netherlands, to Nicaragua and Nigeria.

The dynamics are always the same. The legal profession is, unsurprisingly, more **heavily regulated** than most other professions. Regulation is also more heavily used or felt as a threat, instead of being a tool to protect customers and generate a level playing field. Online platforms, or lawyers working through them, are told that they cannot provide legal advice, that they cannot share revenues between them, that they cannot bring in outside investors as co-owners, that they cannot set up a venture with psychologists or accountants on an equal basis or that they cannot advertise their service in the way they would prefer. Lawyers are likely to look at new services from the perspective of what is and what is not allowed. So professional rules, often vague and open-ended, written for offline legal services of the 1980s, are tested to see whether they prescribe the use of two lawyers instead of one neutral one. Perhaps the rules require that a lawyer starts each assignment with a face to face meeting? Should each new client show his passport to prove his identity? Is the general duty of care of lawyers towards their clients perhaps requiring that online platforms send clients away if there is the slightest hint of incompetence, inequality, conflict, violence, debts or assets?

This is **not intentional harassment of newcomers** by lawyers wanting to protect their monopolies. It is more what lawyers do all day and night, playing with the rules to find out how to move forward. Lawyers are assertive and very much aware of the need to protect their role in society. Too many governments have tried to curtail their independence. People will trust them if they safeguard the integrity of the profession. Then politicians will support them. So the lawyers who are spending a few years at the end of their career in committees at bar associations do just what they are supposed to do: test how the professional rules should be interpreted and protect the common good of an independent legal profession.

DEMANDER JUSTICE, FRANCE:

Leonard Sellem and Jeremy Oinino having developed an online small claims platform, Demander Justice, which since its launch in 2012 has processed more than 250,000 cases. Earlier this year, the Paris Bar Association pressed charges against the small firm for 'illegal practice of the legal profession', which failed in court as the judgment rid Demander Justice of all charges. This is their personal account:

Since 2012, Demander Justice has been developing websites empowering people to initiate and file a case 100% online for disputes worth up to €10,000 that occur in France. As a first step, Demander Justice's software generates the proper demand letter according to the purpose of the dispute and the location of the plaintiff. The demand letter is then sent via certified mail to the defendant by Demander Justice. If the dispute doesn't get solved in a friendly manner after the demand letter, the case can be filed with the local small claim court. During this second step, Demander Justice proceeds with legal requirements and files the case on behalf of the plaintiff with the court. The plaintiff would only have to present himself to the small claim court for the hearing. Through its websites DemanderJustice.com (consumer disputes) and SaisirPrudhommes.com (labor disputes), it processed more than 250.000 cases, with an overall resolution rate of 82% (50% with the sole demand letter).

For 4 years, the French bar associations have been launching unsuccessful judicial procedures against Demander Justice, claiming it is infringing lawyers' monopoly for assisting and representing people before the court. Like many countries, France grants lawyers a monopoly for legal representation and advisory. This monopoly is strengthened by the mandatory representation by a lawyer before high courts. Some other courts, whose vocation is to remain close to the citizens, allow litigants to represent themselves, even without sharp legal knowledge. Demander Justice's mission is making it easier for citizens to file their cases to these courts. It does not represent them before the court, nor it give them legal advice on the opportunity to file their case or the potential outcome of the filing. The struggle of the bar associations against Demander Justice aims to extend their monopoly to all courts. The Council of French Bar Associations now openly advocates for mandatory paid consultation prior to any legal action and mandatory legal representation before all courts. Though the last acquittals of Demander Justice undoubtedly represent a step forward on the road to upgrade access to justice, it is clear that this road will be long and winding, as numerous trials are still ongoing, all initiated by lawyers. It is interesting to note that none of the 250,000 customers of Demander Justice ever sued the company.

For courts, **lawyers have always been essential partners**. Lawyers relieve courts of the burden of informing users. They organise the facts and legal issues in such a way that judges can make decisions. Many judges started their career as a lawyer, being in the heat of commercial law practice and making some money from it, before changing to a more neutral role that can be continued until the age of 70 or 75. This partnership is less strong in the area of justice journeys for individuals, though. Most individuals are appearing in court without a lawyer nowadays, if they are allowed to "represent themselves" and do not have funding for a lawyer through legal aid or insurance. Being a judge is more of a separate career track now, independent from that of a lawyer.

Innovators of legal services experience all this as **a major risk and a cost**. What the bar sees as a test case about lawyer self-regulation, is a threat to the business model of a start up and thus to its existence. Lawyers and judges in panels deciding cases about online platforms genuinely believe they are interpreting the rules independently and with a view on the best interests of the consumers of legal services. But for providers of online platforms this does not feel like answering to an independent market regulator. They see it as harassment of new entrants by the vested interests.

Is online dispute resolution **against the vested interests of lawyers?** Lawyers specialising in litigation should perhaps fear that they will lose the opportunity to earn big money from assisting rich clients during lengthy court procedures with many stages and appeals. Efficient, online procedures, with clients getting most of their legal information and guidance from the system, diminishes the need for these litigation skills. But there are new opportunities as well. The volume of cases going to court increases, and many clients would still prefer outsourcing to lawyers. New procedures are also likely to be hybrids with many forms of human assistance.

There is also an issue of **professional identity** that should not be ignored. In a world of ancient rules of procedure, clients urgently needing access and overburdened courts, lawyers are used to taking the lead. The ownership of the process is theirs. Online procedures that are truly answering user needs are designed and implemented by innovators with a strong personality who like to own things as well. Hospitals and consultancy firms see similar battles between highly trained professionals and the managers who want to improve systems of service delivery.

For courts, and for online dispute resolution providers, the challenge is to move towards a renewed pact with the legal profession. One strategy is to opt for a gradual route. Courts and ministries often try to **start implementing online dispute resolution at the low end of the market**: small claims under £25,000[51] or neighbour problems between people living in apartment buildings.[52] This will cause less resistance from lawyers, because these disputes are not their core business, and the need for less expensive solutions is most obvious here. The drawback, as we have seen, is that tiny segments of the market at the low end are not an interesting investment opportunity for ODR providers. Many innovations of legal procedures such as (mandatory) mediation or fast-track adjudication routes have also stagnated after being introduced in these areas (see par. 2.2).

[51] Briggs, M. T., Lord Justice. (2015). *Civil Courts Structure Review: Interim Report* (pp. 1-141, Rep.).
[52] Civil Resolution Tribunal Act (2015).

Another strategy is to **face the issues head on**. Successful innovators such as LegalZoom have fully integrated human legal assistance into their services. Lawyers thus get access to more work and are relieved of low value administrative tasks and of high cost marketing efforts. Courts implementing ODR can offer lawyers a similar deal. They will have to find a new balance between dispute resolution tasks they offer themselves and what they outsource to lawyers. An online platform creates access to new client group. Innovative new services or court interventions can be developed and offered through the platform. Legal markets for corporates and governments are thriving. The consumer market can be as lively when innovation really takes off here.

At the same time overzealous defenders of the old rules from the bar and in courts have to be kept at bay. LegalZoom countered litigation by state bar associations by starting, and thereafter settling, an antitrust case against the North Carolina bar and submitted amicus curiae briefs to the US Supreme Court in cases involving restrictive practices of dentists.[53] The only truth in these regulatory matters that should be accepted is **what the users want and need**. Testing this continuously and showing the results to regulators is key to success. Courts, and online dispute resolution providers working with them, are entitled to a level playing field. Traditional and new services should operate under neutral rules and financial conditions.

A third element of such a strategy is to e**ngage lawyers to become co-owners** of the new developments. No online dispute resolution platform can exist without integrating the knowledge and skills of lawyers. Lawyers, with their extensive market knowledge and skills in brokering fair solutions, are of course the first and best placed to take the lead in developing online dispute resolution platforms, and finding out how they best work with clients. But they cannot do this from their single lawyer businesses or from their three partner outfit with five lawyer employees striving to become partner as well. Lawyers are now excluded from taking part in serious innovation. Professional regulations forbid them to bring in outside capital and skills. If lawyers would really be allowed to take part in the game of innovation, the apparent resistance of the bar against change might quickly disappear.

4.5 Can the challenges be overcome?

The history of innovation at courts does not have many success stories. This is not because no one tried. These failures provided a great deal of learning about what does not work to innovate court procedures and a number of plausible strategies that may work. The following Table summarises the results of this Chapter.

[53] North Carolina Board of Dental Examiners v. Federal Trade Commission [Web log post]. (2015, February 25).

ISSUE	POSSIBLE STRATEGIES	EXPERIENCE IN COURT SYSTEMS	LIKELIHOOD OF BREAKTHROUGH SUCCESS
Rigid rules of procedure (4.1)	Reform committees, amendments to codes, new case law	**Major**	Very slow, incremental change
	Voluntary (ODR) alternatives by consent between the parties	**Major**	Very low, only small market share expected
	Counting on courts to ignore rules	**Some**	Works for local pilot, not for scaling up
	New legal regime for court, tribunal etc.	**Major**	Scope tends to be limited
	Wholesale shift responsibility for design to courts, under general principles and goals	**Little**	Plausible, but requiring major change process
	Responsibility to court for one area at the time	**Little**	Plausible
Market for ODR procedures not well developed (4.2)	Tender procedure with requirements set by courts	**Major**	Incremental change, in one jurisdiction; breakthrough unlikely
	Private investments in start ups delivering ODR for courts	**Some**	Investors first need to see courts as buyers in the market
	State backed research and development first	**Some**	Substantial, but long term strategy
	Consortium between courts and ODR providers	**Little**	Substantial
	Developing next generation procedure in house + buying ODR procedure from vendor (plaintiffs choose)	**Little**	Substantial, hedges risks and stimulates learning

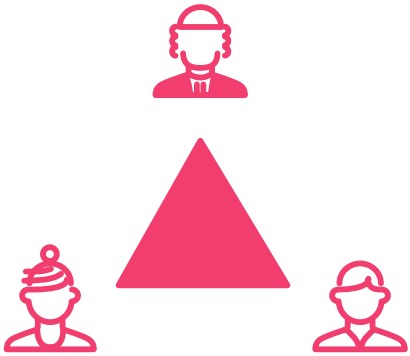
ISSUE	POSSIBLE STRATEGIES	EXPERIENCE IN COURT SYSTEMS	LIKELIHOOD OF BREAKTHROUGH SUCCESS
Risks of implementation (4.3)	Set standards for security, privacy, identity and IT risks for the judiciary	**Major**	Standards may be unrealistic, some risks may be overstated
	Follow standards other government agencies	**Some**	Good, some residual risk
	Develop standards in consortium with other court systems	**Some**	Good, some residual risk
Engage legal profession (4.4) (4.2)	Engaging groups of lawyers to work via an online platform	**Some**	Good start, but not leading to widespread acceptance
	Resolve issues about professional regulations amicably	**Major**	Resource intensive, and may jeopardize innovation
	Start with small segments of lawyer market (small claims, consensual ADR)	**Major**	Low, ODR will not attain good quality and scale
	Offer lawyers high value work and co-ownership, with user needs as criteria	**Little**	Substantial, but requires revised professional rules
	Counter the attacks by overzealous defenders of current rules	**Little**	Needed as part of strategy, resource intensive

5

MODELS OF ODR AND COURT INTEGRATION

"We need to conduct business in a different way, bring the service to the people in a different way."

- H.E. Al Majid

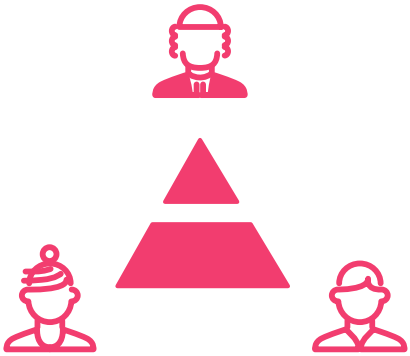


Now that we have explored the possible advantages of ODR for courts and the users of these services, as well as the issues to be resolved, this Chapter investigates four models of cooperation between ODR and court procedures. For each model, the advantages and disadvantages are listed.

5.1 Full Integration

In this model, court procedures merge with ODR processes. An example is the model proposed by the Civil Justice Council report and the HiiL design (see pictures in Section 3.2). In an integrated model, there is a phase of dispute resolution for diagnosis, negotiation and adjudication, with additional phases as add ons. This model builds on the increasing activity of courts in supporting settlement. The process of letting the parties grow into settlement is seamlessly integrated with asking the court for a decision.

According to participants in the ODR 2016 conference, full integration would empower the users, allowing them to have control over the dispute. Parties themselves are invited to log in, see the information, negotiate and can evaluate if the agreement is fair. In that way, the degree of informed consent can be increased. The fairness of outcomes can also be ensured by a reviewer assessing the agreements. Full integration would also reduce the procedural barriers between the negotiation phases and adjudication. As a consequence, the user experience would be more seamless, and a judge can place more targeted and timely interventions. This can lead to cost savings and/or more effective delivery of justice to more citizens needing it.



An informal vote during the ODR 2016 conference revealed that full integration is the preferred option of most participants. Full integration is not possible without the involvement of policy makers, however. New forms of cooperation are needed. Sharing data (with adequate protection of privacy) with charities and other government organisations whose aim is to support people, could be a next step and foster full integration.

5.2 Pre-trial ODR

ODR can also be positioned as a separate pretrial phase. Here, an ODR platform facilitates settlements and possibly mediation and arbitration. If the case fails to be resolved by the ODR interventions, a party can bring the case to court. This is an online version of current mediation and ADR programmes. An example of this is the ACAS[54] mediation procedure for employment cases in England.

This method of introducing ODR in a pre-trial phase would be easier to implement and transition from. It would help courts affected by budget cuts, reducing the number of cases that come to courts. Although having a comparative advantage in terms of finances, there is a possibility that skepticism can occur. How are individuals convinced that ODR is an authoritative system? With ODR being in a growth stage of a product life cycle, users need to be made aware of this alternative existing. So marketing costs will be higher. Will pre-trial ODR be financially feasible for both the producer and end-user? In this scenario, the courts would not be able to claim the successes of the pre-trial ODR and would not likely to take ownership of it.

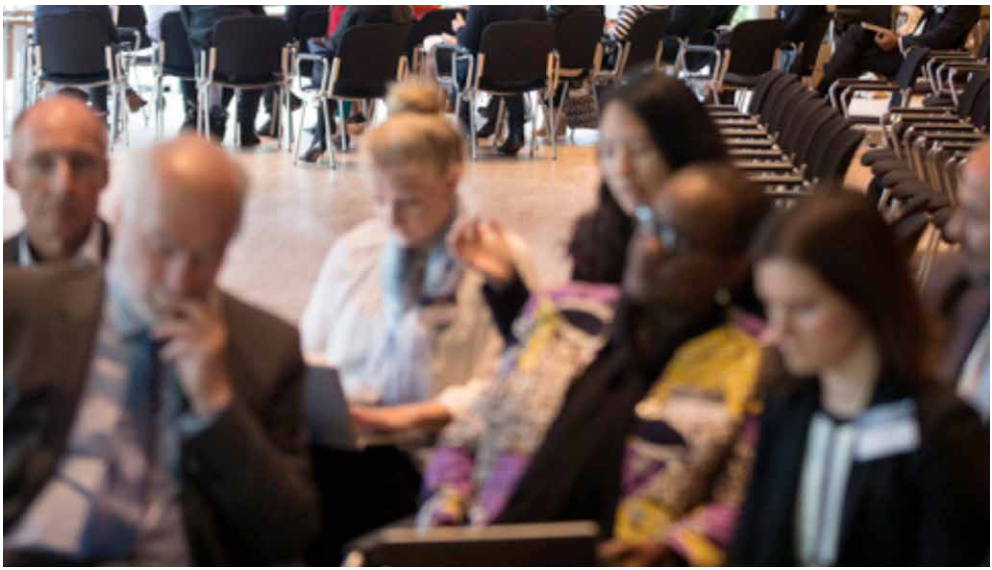
5.3 ODR as competitors to the courts

ODR systems can also be used to replace court interventions. Consumer arbitration schemes, specialized tribunals outside the court system, and consumer complaint systems built into e-commerce platforms, give plaintiffs an alternative path to justice. Unless they are dissatisfied with the outcome, they do not need the courts to enforce their rights.

[54] ACAS Performance Management Conference May 2016.

ODR as a competitor to the courts would substitute the current methods and serve as a judicial system within itself. A sustainable business model would be needed. The system would more easily improve by customizing the procedures specifically to meet the needs of the parties. ODR as a competitor would bring more to the court in a shorter amount of time.

This alternative also requires rethinking the entire model of a court. What constitutes as a court? Is a court a procedure, a process, or does it adhere to specific location? This must clearly be defined to remove the fear of the unknown amongst users. This could be achieved by making ODR (and ADR) compulsory in certain categories of cases, but that would require moving cases from courts to this alternative. This method of implementation would compete with the courts, but also with the lawyers.



5.4 ODR platforms as a marketplace for legal and adjudication services

The European Commission's system for consumer dispute resolution is an example of a platform that is set up as a marketplace for ODR providers, with incentives for complainants and defendants to come to the platform. It is an ambitious Europe-wide system. The system enables a complainant to do an intake, diagnoses the conflict and then notifies the other party of the claim. The parties then have 30 days to agree on the dispute resolution panel. If they agree, the complaint is sent to that body which deals with the complaint.

The ODR marketplace option could benefit the providers and the users. It enables options that go beyond the mere focus on profit, embracing the justice aspirations and the public good. The marketplace fosters cooperation, grants a wider selection of service providers and builds awareness about ODR and justice needs.

On the other hand, the ODR marketplace, although presented as global, is Western designed. How to ensure that different stakeholders have a voice in designing the ODR systems/procedures? And how to build the ODR reputation and quality that is beneficial for the public as well as the private sector?

Finally, the ODR marketplace option should address the submission problem: what if both parties cannot agree on an ODR provider? In that case, a choice has to be made for them. Or no ODR option would be available at all.

COMPLAINT SUBMITTED	AGREEMENT ON DISPUTE RESOLUTION BODY	DISPUTE HANDLED BY THE DISPUTE RESOLUTION BODY	OUTCOME OF THE PROCEDURE
Your complaint form has been submitted	You have agreed with the other party which dispute resolution body will handle your dispute	The dispute resolution body is handling your dispute	This is the outcome that the dispute resolution body has reached
READ MORE	READ MORE	READ MORE	READ MORE

6

DISCUSSION: CONTOURS OF AN ACCESS TO JUSTICE DEAL

"In due course, in my country, ODR will be an integral part of the going digitalisation process. It is absolutely necessary for the survival of the justice system in the UK."

– Lord Justice Fulford

This report focuses on access to justice for individual citizens. They need courts, or another form of adjudication by a third party. Judges tend to be highly appreciated when they finally have time to assist people to arrive at fair outcomes. Too often, people needing access to justice get stuck, however. The trajectories via initial advice, contracting a lawyer, bargaining for a solution and moving through a multi-layered court system are too complicated. They can take too long and are often too costly. Only very persistent people get it done. Instead of recovering from the most difficult moments in their relationships to others, many people lose control and feel stressed, not being able to achieve a fair and workable outcome (Section 2.2).

Everywhere, courts can be seen innovating their services. Alternative forms of adjudication are being developed. But by and large, these **innovations do not scale** beyond pilots or a few jurisdictions (2.3). Courts tend to be overburdened with information and are struggling with ever more procedural complexity.

In the current institutional set up, courts and governments tend to have perverse incentives to stay in a **low access equilibrium**. A procedure that is more accessible will lead to more court cases. It will also strain the legal aid budgets, as well as the funds to be allocated to courts.

What is new, is that leading judges in many countries now publicly state that the procedures used in a court of law are not good enough. They are **ready to take action** (2.4). Online dispute resolution may be part of the solution.

This report contains insights and best practices on how courts can implement ODR. The benefits of ODR can be huge. Courts can become far more accessible for the 80% of individuals who need them with frequently recurring problems for which a standardised justice journey can be designed (Section 3.2). There is the promise of more fair outcomes and processes (3.3), with a more focused and fully human interaction with judges and (legal) professionals (3.4). Financial sustainability of these court services, with citizens paying for most of them, is possible as well (3.5). Partnerships between court systems and cross border cooperation can increase the quality of outcomes (3.6).

The costs of designing and implementing ODR are low compared to the IT budgets of courts

and dropping (Section 4.2). It is mostly the institutional barriers that keeps citizens and their courts away from 100% access to justice to well-funded and independent courts.

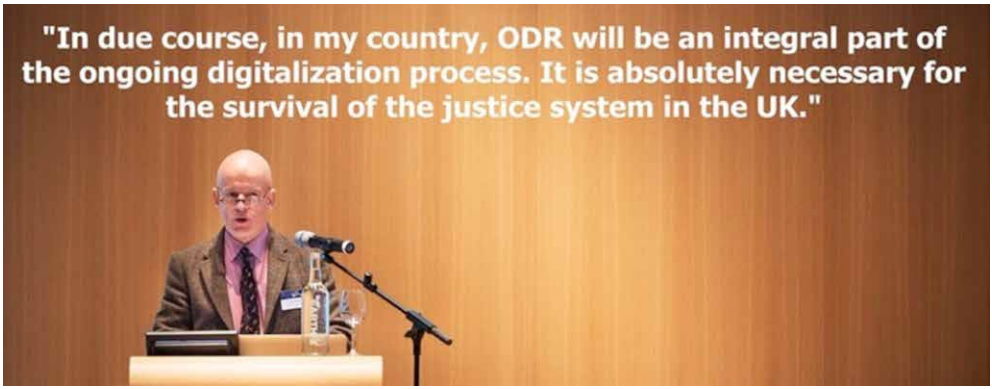
Most reports end with recommendations, perhaps directed to a Ministry of Justice or to politicians responsible for the court system. In the conclusions of this report, we will not move in that direction. Innovating court procedures, and reaping the full benefits of modern forms of dispute resolution, is complicated.

Making it happen requires more than introducing yet another piece of legislation or giving the odd subsidy. Somehow, the many big and small barriers to really innovating our court procedures have to be overcome. What we want to explore is how **a deal between major stakeholders achieving this, or at least a shared vision**, could look like. Building on the findings above, we will sketch the contours of such a deal, as a basis for discussion. Most of the elements of it are present in some legal systems, so they are not entirely new. They need to come together somehow.

6.1 Elements of an access to justice covenant

Joint goals can be very motivating. The justice sector has often left objectives implicit, or used goals that are self-referential. Court strategic plans have tended to promise independence, accountability or high quality access to justice. There is now a trend towards explicit goals for justice systems and court procedures, as seen in the highlight below.

Goals have to be operationalised and measurable. So efforts are under way to measure access to justice,



with an increasing focus on how users of the justice system experience procedures at courts and other dispute resolution processes.[55] Just as access to health care is a very general concept, which requires very different approaches for people with the flu, malaria or heart failure, access to justice goals become much more meaningful if they are specified for specific justiciable problems. In the vast research on paths to justice, the following access to justice issues always surface as being **most urgent** for individual citizens:

- family disputes (including separation, domestic violence)
- violent crime (robbery, assault, sexual assault)
- employment disputes
- neighbour issues
- debts
- land use and ownership (in emerging economies and post-conflict countries)
- personal injury (including medical negligence)
- theft
- protection against police conduct and use of government powers (including detention)
- consumer complaints about goods or services delivered (more prominent in middle and high income countries)

Each type of problem requires a different type of treatment. The trend in courts and online dispute resolution is clearly to focus innovation on procedures regarding particular types of disputes and crimes. **Specialisation is needed and generally works**. So the way forward is probably not to work on broad categories such as civil cases, criminal justice or small claims, but to provide 100% access to justice for the 5 or 10 most frequent problems as experienced by citizens.

Stakeholders could work on more detailed **terms of reference** for each procedure.[56] For separation, the impact on children is of paramount importance. But parents also need to reorganise their lives: their communication and networks of relationships, housing, finance, work and integration of new partners. Good, fair solutions for this are needed, with parents being led to agreement, instead of disputing contested issues. Employment disputes should facilitate a good transition from job to job, with all outstanding issues settled. Different goals could be set for each problem type. For objections against fines for traffic violations an obvious goal would be to maximise compliance, but also to protect a citizen acting in good faith against automated and standardised systems. What are desirable outcomes and impacts of each procedure? How fast are outcomes needed? Who needs to be heard and what issues should get most attention? What range of costs for the entire trajectory is acceptable as a standard, and what can be sustainable in exceptional situations? Our experience at HiiL with this is that experts can develop such terms of reference without much difficulty.

100% access to justice requires a demand led approach, where **access to justice is no longer restricted because of limited capacity or funding for the legal system**. This is a huge issue for ministries of justice and ministries of finance. How could this ever be acceptable?
The answer is suggested by the way governments have ensured that other essential goods are delivered and paid for. 100% access to high quality water, housing, health care, electricity, telecoms or passports can only

GOALS FOR JUSTICE SYSTEMS AND COURT PROCEDURES

"A justice system that contributes positively to a flourishing Scotland, helping to create an inclusive and respectful society in which all people and communities live in safety and security, where individual and collective rights are supported, and where disputes are resolved fairly and swiftly.[57]"

"NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators support the aspirational goal of 100 percent access to effective assistance for essential civil legal needs and urge their members to provide leadership in achieving that goal and to work with their Access to Justice Commission or other such entities to develop a strategic plan with realistic and measurable outcomes."

"Overarching Objective: The Australian civil justice system contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law.

1. People can solve their problems before they become disputes
2. People can resolve disputes expeditiously and at the earliest opportunity
3. People are treated fairly and have access to legal processes that are just
4. People have equitable access to the civil justice system irrespective of their personal, social or economic circumstances or background
5. People benefit from a civil justice system that values the well-being of those who use it
6. People can be confident that the civil justice system is built on and continuously informed by a solid evidence base[58]"

"Sustainable Development Goal 16: Promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels."

100% ACCESS TO ESSENTIAL GOODS: WATER, HEALTHCARE, ELECTRICITY, TELECOMS

Governments that succeed in giving their citizens universal access to such goods generally:

1. Ensure that the services are delivered by efficient providers in a sufficiently open market, who are stimulated to increase the quality of the services and to keep prices low;
2. Make their citizens pay the costs of use of these services;
3. Regulate the providers in order to ensure that consumers are protected;
4. Subsidize delivery for people in the most remote areas and for people most incapable to pay for them.

[57] *The Strategy for Justice in Scotland Summary* (Rep.). (2012). Edinburgh: The Scottish Government.

[58] *Building an Evidence Base for the Civil Justice System* (Rep.). (n.d.). Australian Civil Justice System.

be guaranteed by countries that moved to a public/private delivery model with some market elements, as seen below.

The justice sector has a long tradition of delivery by public/private cooperation. State-funded courts, private sector lawyers and NGOs all have a role in delivery. Moving towards the model that is best practice for other essential goods would position courts as important, if not the primary providers of access to justice. They should be stimulated to deliver more useful services to citizens. Using new (ODR) technologies - just as public and private water companies introduced countless new technologies to provide safe drinking water - **courts would offer complete justice journeys to citizens**.

Like other actors in the economy, courts will only introduce new procedures if they have the power to do so and can benefit from it. The **power to design legal procedures can be transferred to the courts** (see Section 4.1), just as hospitals and doctors are the ones who develop the best possible treatments for diseases. This can build on a trend where judges already do much more than rule following when they have case-management powers. There is broad support for judges taking up a more active role in cases with individuals as litigants. Ombudsmen procedures, mediation, arbitration and processes at informal courts also tend to have less formal rules. Such processes can generate high user ratings, if they are sufficiently neutral, transparent, guarantee procedural justice and are based on best practices. Shifting the power to design procedures over to courts is a logical next step.

The courts should also be able to benefit from better procedures. Like state owned telecoms companies, hospitals or water companies, **courts directly receive the fees from clients**. This is already happening in some countries. In the US, state court fees are sometimes paid in a court trust fund from which the courts are paid. Courts are already claiming a bigger say in the schedules for court fees. It is generally accepted that the extra costs of mediation and other additional services are paid by users of the service benefiting from them.[59]

Many well functioning court systems see that their citizens are willing to pay for effective procedures, with Austria as the leading example, where 100% of court fees are recovered from users, and most people can afford to pay the fixed fees of lawyers (Section 3.5). **Financing procedures, including the legal services needed, from user fees** can thus be another element of an access to justice deal. ODR can reduce the costs of each additional case to a level where courts can welcome each additional client, instead of seeing him as an extra burden.

The quality of access to justice can therefore be increased, and court delays can be reduced to zero. The laws of economics predict more citizens will then be willing to pay for use of procedures. Commercial litigation, employment disputes, landlord/tenant conflicts, conflicts with government agencies and consumer cases can thus easily be funded by the parties themselves. The **proportion of fees to be paid by each party can be fine-tuned** in such a way that both parties have sufficient incentives to settle and to prevent conflicts in the first place. For businesses and government agencies, these conflict costs are part of the costs of doing business. In standard procedures for the most common conflicts, a complainant would then have to pay a fee comparable to the price of a new smartphone or television.

Subsidies for some people in some court procedures will still be needed. We need good solutions for poor defendants in murder cases and other high impact crimes. Adding legal costs in debt restructuring procedures for individuals does not always make sense. Children need protection, and cannot pay costs of court intervention.

In such a system, a market for innovative procedures would be created.

[59] Reynolds, C., & Hall, J. (2011). *Policy Paper - Courts Are Not Revenue Centers* (Rep.). Conference of State Court Administrators.

Providers of online procedures are allowed to offer their innovative and customer-friendly procedures to courts, or partner with courts, and try to market procedures jointly developed to other court systems with similar case-profiles (Section 3.6)

An element would also be that courts offering procedures to citizens face some **competition and that citizens seeking redress are offered choice**. They can choose between - for instance - an adversarial procedure and one focusing on problem solving by working on a fair agreement. Such competition already exists to some extent in the form of specialised tribunals, ombudsmen procedures or administrative law procedures replacing criminal procedures in courts. For users, these procedures are an alternative to going to court. The providers of these alternative procedures are usually created by legislation, however. They are often bound to similar strict rules of procedures as courts and cannot freely use the fees they collect from citizens.

More innovation and better quality can be expected if outsiders, such as suppliers of ODR platforms, would be allowed to compete with courts as well. They could get **the right to "challenge" the current procedure**. England and the Netherlands now allow groups of citizens with an innovative approach to express an interest to run local services. They can challenge the local government. In December 2015, the Dutch parliament asked the government to open a challenge to the current legal procedure for divorce, which a majority in parliament sees as enhancing conflict. Tendering procedures for certain types of conflicts, or offering a particular court a license to operate for a limited number of years, would be alternative ways to create incentives for improving quality.

If the design is done by the courts and other suppliers of procedures, laws of procedure are still needed. **Procedural laws would define the general principles and procedural safeguards**. The ministry of justice and parliament could set (or certify) terms of reference for the procedure. They would still determine the substantive laws to be enforced and applied by the courts.

The regulatory role of the state would also include **monitoring the level of court fees[60] and ensure protection of the users of court procedures**. More active monitoring of the quality is needed than is currently happening through appeals system, which only monitors whether the rules are followed. All goals and terms of reference will have to be safeguarded, ensuring a high quality user experience. A legal procedure should not be something to be frightened about, not for the plaintiff and not for the defendant. Courts will always have the task to impose sanctions that deter people and deliver retributive justice. But going to court should be safe, and lead to an experience of a fair, effective process, with overseeable financial risk, for everyone involved.

Lawyers should also be party to this deal. The volume of cases going to court would increase, and many clients would still prefer outsourcing to lawyers. **New procedures are also likely to be hybrids with many forms of human assistance.** Roles of mediators, settlement experts, arbiters, forensic experts, early neutral evaluators, damages assessors, reviewers and providers of complicated legally sound solutions are already performed by lawyers. Lawyers found it not difficult to

[60] Eaglin, J. M. (2015, September 30). Why Courts Need Guidance on Imposing Fees and Fines

CONTOURS OF AN ACCESS TO JUSTICE DEAL

1. Goal 100% access to justice for family justice, then employment justice, etc.
2. Ministry of justice and parliament set concrete goals and terms of reference for each procedure
3. Courts obtain freedom to design, buy, implement procedures; and to set and use court fees
4. Suppliers of innovative (ODR) procedures can challenge courts and get access to market
5. Complainants get fairness quickly, high quality justice experience, pay lower costs
6. Defendants do not need to fear procedure, pay fair share (as costs of business)
7. Lawyers litigate less, serve more clients, move to higher value services, relax their own regulation, scale up
8. State monitors, pays less in subsidies, more satisfied citizens, conflicts solved, growth.

make a business from these new roles, in which they generally add more value. In new procedures many of these neutral roles are needed, and judges cannot take up all these roles themselves.

6.2 How stakeholders would benefit and what would they lose?

Every deal is a trade off. What would be in it for each of the stakeholders? Ministries of justice and ministries of finance would not be faced with uncontrollable budgets for courts, legal aid and prosecution anymore. They would not need to restrict access to justice, as they currently try to do by increasing court fees, discouraging the use of courts and not upgrading court procedures. They would help society to oversee a court system that would gradually deliver **more quality, at lower cost for citizens and with less risk for the state budget**. Ministries will have to organise the monitoring and supervision of the procedures delivered by courts and other suppliers. This may be risky for them, because they in a way accept more responsibility for the quality of access to justice. Independence of courts, of course, would be an issue here, and should be carefully safeguarded. So direct monitoring by the ministries is perhaps not the best solution.
Members of parliament and legislation professionals at the ministry of justice would see their work change as well. Instead of preparing subtle amendments in detailed rules of procedure, they would work on general principles and help to set goals and terms of reference.

The **work would become less technical and perhaps more inspiring**. Supreme courts and proceduralists at appeal courts and universities, would also transition to new roles. Instead of waiting for decades for highest courts to change the rules, courts will adapt their procedures quickly and work more evidence based: what works for the problems of citizens will become the most important criterion.

Lawyers working for individuals will see their markets expand and will develop new types of services. It is not difficult to find lawyers who want to participate in innovative procedures, not least because working for individuals as a lawyers is not an easy business. So this group of lawyers is likely to gain from an access to justice deal. Lawyers specialising in litigation would perhaps fear that they would lose the opportunity to earn big money from assisting clients during lengthy court procedures with many stages and appeals. Efficient, online procedures, with clients getting most of their legal information and guidance from the system, would diminish the need for these litigation skills. Lawyers would perhaps even see their monopoly erode, because designers of innovative court procedures would try to get procedures certified for which no lawyer is needed.

The organised bar is often seen as a major barrier to innovation, but we saw that this is also a matter of attitude and how lawyers test new developments by applying rules rather than investigating effectiveness (Section 4.4). Lawyers could gain even more from a deal if they were to revise the rules under which they operate. Currently, lawyers have many rules that prevent them from engaging outside investors and cooperating effectively with other disciplines. They are educated in a standard way, with a focus on learning the law and how to apply it. If these rules were to be relaxed, **law firms would be perfectly positioned to develop innovative procedures and challenge courts** to start using them.

Would courts and the judges working in courts benefit from such an agreement? They would be faced with change and uncertainty, but the benefits could be substantial. Judges and courts would deliver more valuable and more fair outcomes to citizens. They would no longer face major backlogs and be overburdened, because they can expect extra income from extra cases which allows them to scale up their resources. They can also adapt their procedures to make them more efficient. Financially, and in how they process cases, they would become more independent. But they would also have to become more entrepreneurial, facing the possibility that other courts or providers of legal procedures will offer better procedures.

Citizens are the ones who can gain most from this deal. As litigants, they would be better served. As taxpayers, they would have to spend less state money on courts. And around them, they would see conflicts being resolved faster, leading to more fairness and better, more peaceful relationships.

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We hope that these findings have given pause for thought, and will serve as a stepping stone to fully implementing ODR into courts and court systems. Thank you to all the sponsors who provided the financial support needed for us to make the ODR conference possible and continue our mission. We appreciate your trust in believing we can make a difference in the current justice system in the near future. A special thank you as well to the following individuals;

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