

38 Online courts

Abstract: This chapter explores the transformation of courts from physical spaces to digital services. The rise of online courts, particularly through Online Dispute Resolution (ODR) and remote video proceedings, has redefined the legal landscape, leveraging technology to enhance access to justice. Initially focused on civil cases, ODR has expanded to include various types of disputes, facilitated by digital tools designed to streamline and democratize legal processes. However, the transition to online courts has also raised significant concerns about procedural fairness, particularly in criminal proceedings. Challenges related to the right to be present, the right to counsel, and the right to confront witnesses are exacerbated in virtual settings, with studies showing mixed results regarding the impact of remote proceedings on legal outcomes and perceptions of justice. The chapter critically examines these developments, highlighting both the opportunities and the potential pitfalls of integrating technology into the judicial process. As the use of online courts becomes more entrenched, the chapter calls for a nuanced understanding of how different mediums—written, audio, and video—affect various aspects of legal proceedings, from access to justice to the legitimacy of the legal system.

Keywords: online courts, access to justice, dispute resolution, legitimacy

Introduction

Are courts “a place or a service” (Susskind and Susskind, 2017)? To many of us, until quite recently, the answer was clear. Courts were synonymous with central, imposing buildings where synchronous proceedings took place, in the presence of the parties, before a judge. This began to change in the second decade of the 21st century, as several courts launched online proceedings, primarily in the civil context. These proceedings, often referred to as “online dispute resolution” or ODR (Katsh and Rifkin, 2001), involved the use of digital technology to facilitate remote communication, as part of formal and informal dispute resolution efforts (Katsh and Rabinovich Einy, 2017). Initially, these processes, which emerged in the e-commerce setting in the mid-1990s, were conducted through written asynchronous proceedings.

Use of ODR increased dramatically with the onset of COVID-19, in volume and variety of proceedings employed. Practically overnight, courts worldwide were forced to find solutions for the need to continue to hear and decide cases despite court closure

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and social distancing requirements (Engstrom, 2021; Sourdin et al., 2020). While use of written asynchronous ODR processes expanded, the vast majority of online proceedings used during the pandemic relied on videoconferencing (as well as audio) communication, which allowed for remote real-time interaction, with some or all parties communicating from afar. Millions of hearings, including various criminal proceedings, were conducted through what were now termed ‘remote proceedings’—court processes conducted in writing, or through audio or video (Susskind, 2019). These developments raised significant challenges to traditional conceptions of a fair trial and several constitutional rights, including the right to be present, the right to counsel, the right to confront witnesses, the right to a public trial, and the right to a fair and impartial jury (Turner, 2021). At the same time, the introduction of virtual proceedings has also offered opportunities to improve court proceedings with the aid of technology (Rabinovich-Einy and Katsh, 2017).

With the wane of the pandemic, face-to-face proceedings have resumed, but it has become clear that online proceedings are here to stay, and debates over their appropriate scope have come to the fore, including specific concerns relating to criminal proceedings (Turner, 2021).

The rise of online courts

In the mid-2010s, a novel phenomenon emerged in several courts and tribunals in different parts of the world—traditional, face-to-face proceedings were being substituted with ones that relied on remote online communication. Interestingly, the principal motivation for the adoption of these processes was not making the courts more efficient—although the heavy backlog facing courts was certainly a consideration and an added benefit—but rather the promise for increased access to justice (Rabinovich-Einy and Katsh, 2017). To a large extent, the rise of online proceedings was centered on civil disputes. Indeed, ODR emerged in the e-commerce setting, as a specific solution for those disputes that arose online that were typically small scale in terms of value but could have significant impact on those individuals’ confidence and trust in online mechanisms (Katsh and Rabinovich-Einy, 2017). As internet communication spread, technology improved, smartphones became widespread, and social networks proliferated, the distinction between online and offline disputes, and between what seemed appropriate to be handled online as opposed to face-to-face blurred (Rabinovich-Einy, 2021). These developments opened the door for addressing a broad range of disputes and proceedings online and, ultimately, for the adoption of ODR in court.

The early court ODR programs involved the adoption of fully redesigned court proceedings that took place asynchronously and in writing. In some processes, parties were referred to a ‘diagnosis’ stage—allowing them to better understand their rights and options through a series of tailored answers and questions, phrased in everyday simple language. In other cases, technology was used to offer tools for calculating amounts owed, drafting legal documents, or gathering relevant past decisions and out-

comes. Some of these processes were formal and engaged judges. Others were informal, involving online variations of negotiation and mediation, which employ algorithms to suggest texts to parties, highlight areas of agreement and disagreement, and to ‘split the difference’ or optimize their agreed-upon resolution (Katsh and Rabinovich-Einy, 2017). These processes emerged in the US, British Columbia, the Netherlands, England, China, and Singapore, to name a few pioneers (Rabinovich-Einy, 2021). In most of these places, ODR processes addressed small claims, traffic, and family disputes.

While generally targeting civil disputes, several exceptions stood out. In the US, a platform called Matterhorn (now known as Catalis), established by law professor J. J. Prescott, emerged from concerns over access to justice of disempowered parties with outstanding warrants. In this quasi-criminal context, it is the fear of showing up physically in court that drives such individuals to abstain from legal proceedings, resulting in serious consequences (Bulinsky and Prescott, 2016). Similarly, the traffic arena offers a non-civil context where access barriers, such as having to take time off work, have prevented individuals from contesting unjustified tickets, which can result in grave consequences, particularly for those parties belonging to disempowered groups (Crozier and Garrett, 2020).

During the second decade of the 21st century, online courts were expanding at a steady pace. In the US, their number was growing quickly, as two principal private companies—one operating across state courts while the other in county courts—could offer quick, professional, and scalable online solutions to courts looking to better manage their caseload and streamline the litigation pipeline (Rabinovich-Einy, 2021). Alongside the steady expansion of ODR in courts in the US and elsewhere, several concerns hampered the development of online courts in other places. Concerns ranged from abuse of justice and the digital divide (manifested in the lack of access to technology and/or the inability to effectively interact with online systems), to objections by the legal profession driven by concerns over unauthorized practice of law, fear of data security and privacy harms in the online environment (see Data Justice by Redden), and skepticism over the ability of online proceedings that rely on thin communication to fulfill our expectations from legal proceedings (Susskind 2019; Schmitz, 2020; Sela, 2018).

This state of affairs changed drastically in March 2020 with the onset of the COVID-19 pandemic. Many courts around the world were forced to shut down while others continued to operate under strict social distancing requirements and the reality of parties, attorneys, court personnel, and judges contracting COVID or being required to quarantine. To continue offering formal and informal dispute resolution processes, courts and other institutions quickly implemented ‘remote proceedings’ (Engstrom, 2021; Rabinovich-Einy, 2022). While some use was made of written and audio-based proceedings, the most prominent avenue for holding court proceedings in many places worldwide quickly became video (Susskind, 2019). In some places, all proceedings were handled remotely, while in others only urgent matters were addressed online.

Videoconferencing was of course not new to courts, criminal proceedings included. However, while in the past there were limited arenas into which video proceedings

were introduced, such as bail hearings, typically involving only the defendant connecting from afar, during COVID the scope of these proceedings grew dramatically. Remote proceedings expanded both in terms of the types of proceedings that employed video, and in terms of having all or several parties and, in some cases, the judge, participate remotely (Bannon and Keith, 2021).

Both ODR and remote proceedings fall under what can be termed ‘online courts’ in that such processes involve online communication and at least one of the parties communicates from afar. There are, however, important distinctions between these two avenues. While ODR harnesses technology to redesign legal processes around stakeholder needs, remote proceedings center on sustaining and making more efficient existing processes (Mentovich and Rabinovich-Einy, 2022; Rabinovich-Einy, 2022). As we show below, the goals one seeks to advance in the design and adoption of procedures are important and shape both parties’ procedural experiences and substantive outcomes.

Access to justice, procedural fairness, legal outcomes, and legitimacy

While there are only a few empirical studies on the impact written asynchronous ODR proceedings have had on the process and party perceptions, the adoption of remote video-based court proceedings during COVID has resulted in a myriad of studies cited below that generated more knowledge on the impact of the shift to the online arena on various participants across different contexts. One important lesson learned is that context matters in choice of medium (face-to-face, video, or written ODR) for different types of parties (e.g., prisoners, tenants, teenagers) across different types of cases (criminal, civil, family). Context inevitably determines the impact medium will have on procedural justice, access, and legal outcomes, as well as different stages of the proceeding, and for different types of parties (Rabinovich-Einy, 2022).

While there is no study of written asynchronous ODR in the criminal context, there are several studies of traffic cases that study the impact of the shift online, which can provide valuable lessons. Several studies have established that introducing ODR into this context improved the efficiency and accessibility of courts (Prescott, 2017; Prescott and Sanchez, 2019). In addition, it was shown that remote traffic proceedings conducted through asynchronous written communication eliminated race-based and age-based outcome disparities relating to fine levels and charge reduction that existed in similar proceedings conducted in the physical courtroom (Mentovich et al., 2020). Other research established the significance of procedural justice perceptions, alongside perceptions of access to justice, in shaping perceptions of legitimacy in the online setting (Mentovich et al., 2023).

In addition to the study of written asynchronous ODR, research of video-conferencing proceedings explored the impact of the shift to synchronous video proceedings.

Pre-COVID, several studies uncovered findings demonstrating that defendants (or other parties) whose hearings were conducted remotely fared worse than similarly situated parties whose cases were held in court (Poulin, 2004; Walsh and Walsh, 2008; Diamond et al., 2010). Explanations ranged from increased bias towards those appearing on video, through difficulty of establishing credibility online, to opportunities missed due to the absence of a physical encounter (Bannon and Adelstein, 2020).

During COVID, studies and reports of remote video proceedings had mixed findings. While some hailed video proceedings for enhancing accessibility as participation rates of parties and witnesses increased (Ostrom et al., 2021), others emphasized the need to focus on the quality of participation. It was found that for participants that belong to disempowered groups and lack access to high-speed internet, are in prison, or live in small and crowded spaces, and typically access proceedings through phone rather than a computer, connecting to a remote proceeding and participating without interruptions proved challenging (Thornburg, 2020). Indeed, concerns arise regarding the ability to fulfill a sense of voice and whether participants feel that they have been treated with respect and in a neutral fashion. At the same time, one study drawing on mock video proceedings found that they could meet procedural justice standards, and even outperform the physical setting on certain parameters (Mulcahy et al., 2020).

The integration of technology into legal proceedings holds promise for various benefits but also gives rise to concerns over the realization of core rights, particularly within the realm of criminal proceedings. One prominent area of concern revolves around defendants' right to be present, often (but not universally) requiring consent for a defendant's remote participation (Turner, 2021). Another is the right to counsel and, relatedly, the right to confer with counsel privately. For represented parties, however, the new medium presented obstacles for consultation in confidence during proceedings and for those indigent parties who lack representation it became more difficult to access legal aid and obtain counsel (Benninger et al., 2021).

Another principal right that may be challenged by remote proceedings is the right of confrontation, raising many of the same concerns that the previous rights mentioned do. These rights encapsulate the longstanding notion that defendants possess the right to face their accusers in court, a concept that, in contemporary criminal justice, extends to the defendants' entitlement to confront those offering testimony against them (Benninger et al., 2021). Confrontation rights have historically operated within a formal, in-person setting where the jury, the witness, and the accused could mutually observe each other. The widespread shift to video in criminal trials raised concerns over the adequacy of confrontation through such medium for several reasons. For one, concerns arose over the ability of defendants (litigants in person and represented ones) to realize the right of confrontation given both access challenges and the thin nature of communication, as described above. Second, the notion that the formal and unmediated nature of face-to-face proceedings is more conducive to truthful testimony, casts doubt on the effectiveness of remote proceedings in uncovering untruthful testimony (Legg and Song, 2021). Finally, defendants whose trial was conducted from afar may feel that they receive an inferior opportunity to confront the charges.

This notion is significant because such experiences may harm their overall perception of the criminal justice system and willingness to comply with the law in the future (Sunshine and Tyler, 2003).

In terms of credibility of witnesses on video, two recent lab studies have found that the volume level of the speaker (Bild et al., 2021) and camera angles (Bannon and Adelstein, 2020) shape credibility assessments. These findings raise significant concerns vis-à-vis the right to a fair hearing (Turner, 2021), as speakers are often unaware of these elements and may not have control over them, certainly in the case of parties who are less versed in technology. Alongside concerns over the impact of the biases that could shape judicial impressions from the exposure to the living conditions of defendants and parties (Mentovich and Rabinovich-Einy, 2022; Rabinovich-Einy, 2022), other research has emphasized the equalizing effect that seeing defendants' living conditions over video could have in tearing the façade of equality that exists in the courtroom (Ferguson, 2022).

Finally, online proceedings have also stimulated debate on the realization of a public trial, both from defendants' and the public's perspective (Turner, 2021). Alongside concerns over loss of opportunities for participation, various jurisdictions have found different solutions ranging from restricting participation to particular members of the public or press representatives to live streaming the proceedings. In fact, some worry that the new medium may be too public, harming the privacy of defendants and others in much more invasive ways than physical hearings (Armstrong, 2020).

The above shows how a change of medium can dramatically affect access, perceptions of fairness, and outcomes of proceedings, but such impact may operate in different directions. While some of the findings conducted on asynchronous written ODR in traffic cases seemed quite positive in terms of access, procedural justice, and outcomes, the research on video proceedings (in various contexts) raises a more mixed picture, in particular for parties belonging to disempowered groups. Some research raises questions with respect to the accessibility, procedural fairness, and substantive fairness of video proceedings, while other research promises enhanced equality and better experiences. Interestingly, in terms of efficiency some empirical findings also question whether videoconferencing proceedings terminate more quickly than physical ones (Turner, 2021; Horton, 2022). Despite divergences in their evaluation, there is widespread agreement that remote proceedings are here to stay post-COVID, and in mediation and arbitration in the US and Canada, virtual proceedings are already becoming the norm (Schmitz, 2021).

Concluding remarks: future opportunities and challenges

Alongside the shift to virtual proceedings, another important technological change is taking place—the introduction of artificial intelligence into legal decision-making

(see Artificial Intelligence by Van Brakel). While these are two distinct developments, we can expect the two phenomena to reinforce one another. As more and more processes move online, the use of algorithms will grow (see Algorithm by Leese), initially in the procedural and decision-support realms, but more and more we can expect the line between support and recommendations on the one hand, and decision-making on the other hand, to fade.

Interestingly, the criminal arena has been one of the principal domains for the employment of algorithmic risk-assessment tools to generate recommendations for judges regarding a defendant's risk level and their likelihood of reoffending, in deciding whether to release or arrest them (Stevenson, 2018; see Sentencing and Risk Assessments by Ugwudike). These tools were a central reference point in the argument against the employment of artificial intelligence in legal decision-making. The recommendations made by these tools, the vast majority of which were adopted by judges, were found to be heavily biased (Re and Solow-Niederman, 2019; Mayson, 2019). Sources of bias in these systems stem, inter alia, from flawed training data fed into the algorithm, and various approaches have been put forth to address such deficiencies (e.g., Kroll et al., 2017). Some researchers, however, indicate that biases in this context run deeper and cannot easily be addressed (Crawford, 2021), while others suggest that relying on the black box of the human mind carries similar risks (Bonezzi et al., 2022).

As the fast-paced developments with ChatGPT have shown us, despite critiques and concerns, we can expect further developments in this domain. How these changes will shape the accessibility, procedural fairness, and the nature of outcomes produced in legal proceedings has yet to be seen. While the adoption of these mechanisms is already a reality, the particulars of their design and the context they will be adopted into can be premeditated and premised on rigorous research (Amsler et al., 2020).

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