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ARTICLE

# Encouragement of mediation in England and Wales has been futile: is there now a role for online dispute resolution in settling low-value claims?

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**Abstract**
In England and Wales, the judiciary, Her Majesty's Courts and Tribunal Services (HMCTS) and the Ministry of Justice (MoJ) have embarked on an ambitious reform whose aims are to radically transform and restructure court services and introduce digital justice for the overall purpose of improving access to justice in relation to the resolution of disputes. The reality in the courts of England and Wales is that the current reform means automation of processes. Digital transformation offers a real chance to improve access to justice particularly for low-value claims where a simplified process is more proportionate to the value of the dispute. This paper argues therefore that, for everyday low-value civil disputes, alternative dispute resolution (ADR) processes should be at the core of any design. In addition, fashioning new means to deliver access to justice should not just be about increasing government efficiency, but also about using technology to design and create innovative, new, agile and 'user-centric' pathways.

**Keywords:** civil justice; reform; technology; small claims; access to justice; user-centred

## 1 Introduction

In England and Wales, the judiciary, Her Majesty's Courts and Tribunal Services (HMCTS) and the Ministry of Justice (MoJ) have embarked on an ambitious £1 billion reform of the justice system described as 'the biggest programme to modernise a court system ever attempted anywhere' (House of Commons Justice Committee, 2019, p. 5). The reform programme is responding to a period of evaluation for civil justice (Briggs, 2015; 2016). The future aims are to radically transform and restructure court services, and introduce digital justice (Lord Chancellor *et al*., 2016) for the overall purpose of improving access to justice in relation to resolution of disputes.

Technology is not naturally part of the history and tradition of the courts. In this paper, technology is defined broadly to encompass new and innovative approaches to how we do justice in our courts using digital processes to enable change. This could involve minor changes such as creating digital forms rather than paper ones or more fundamental changes to the structure of the legal system. Susskind states that there are two ways in which technology affects the workings of the courts (Susskind, 2019): either by making routine processes more effective and efficient by automating existing systems or, alternatively, by transforming systems so they do new and different things that were previously unthought-of (Susskind, 2019, p. 34). Lord Woolf described IT used in this way as a 'catalyst for change' (Woolf, 1995). The reality in the courts of England and Wales is that current reform means automation of processes. Transformation offers a real chance to improve access to justice and provides examples of where technology is enabling this to happen in other jurisdictions. It considers whether, as part of a digital transformation, it is also the time for the re-evaluation of the role of alternative dispute resolution (ADR), especially for low-value claims, where a simplified process is more proportionate to the value of the dispute.

Recent reports have highlighted how out-of-date administrative systems as well as cuts to legal aid have slowed down the efficient working of the system and disadvantaged litigants in person (Briggs, 2015). Innovation and creativity are now needed to initiate reform when the legal system is described as being in 'crisis' (JUSTICE, 2015). Over time, decisions have been made to cut costs in a vacuum without any corresponding review of policy. For example, courts are being closed nationwide before it is clear that an alternative, digital modernisation policy is workable (Bowcott, 2018). Instead, a patchwork of provision is implemented. As part of the reform agenda, the government has turned away from face-to-face contact in a court building to invest in more efficient technology and digital approaches, achieved by securing funds through court closures (House of Commons Justice Committee, 2019).[1]

The modernisation programme for the courts has also been criticised as being extremely challenging to deliver effectively (National Audit Office, 2018). In other words, changes have been wrought to cut costs without radically changing the institutional approach or evaluating the impact. This paper determines that, to enhance access to justice, reform should be transformative and innovative rather than piecemeal and cautious, requiring an investment in real change in the legal system. Modern digital technology has historically not been an easy companion to the court system in England and Wales. There have a been a number of past initiatives aimed at increasing the use of IT that have not been successful. Lord Woolf advocated an increased use of technology in his Access to Justice reforms in the late 1990s (Woolf, 1995) and there have been other reports encouraging comprehensive change (Court Service, 2002; Legatt, 2001) but the financial investment required from the government was never secured. Now that there is a large financial commitment to investment in IT, this should be used to review and change the existing system comprehensively. As Cappelletti said: '[T]he institutions are not sacred: they serve to aid or thwart the implementation of social policies' (Cappelletti *et al.*, 1982, p. 666).

This paper argues therefore that, for everyday low-value civil disputes,[2] ADR processes should be at the core of any design for an effective system because a litigation process that is intentionally designed around reaching an adversarial hearing will be increasingly inappropriate in an era driven by digitally driven services. Low-value civil claims are particularly suited to this medium because these claims tend to be seen as the least complex cases in the legal system. Low-value claims also tend to be brought by individuals and businesses who do not have representation in the form of a lawyer and therefore are more likely to be overwhelmed by formal court processes and 'lawyerish culture' (Briggs, 2016, para. 12.4). Modernising the law to shift the focus to be less adversarial and more conciliatory is one way to provide a more inclusive legal system. The number of commercial mediations in the UK is said to be in the region of 12,000 per year (Centre for Effective Dispute Resolution, 2018). This number is growing but is still not significant and therefore mediation has not revolutionised the justice system even though this is the intention of policy, rules and case-law.

Policy in civil justice reform places great emphasis on early resolution, mediation and other forms of ADR with the potential to introduce a more collaborative approach into the adversarial legal system. The principles underpinning ADR such as empowerment, negotiation and co-operation can shape the structure and inform the design of a system that encourages settlement. ADR allows the possibility of a forward-looking approach: finding win–win solutions that parties can live with rather than a determination by a judge as to a winner and a loser. By introducing ADR as a potential solution, through the Civil Procedure Rules (CPR) in the late 1990s, a gateway opened to a more collective focus on problem-solving as a means of achieving access to justice. However, as will be demonstrated in this paper, the focus of the system has not yet shifted away from adversarialism. Cutting costs and digitalising forms will not make the system more accessible and less adversarial. Resort to innovative

[1]The government has closed 127 courts since 2015, with a further seventy-seven listed for closure before 2023.

[2]In England and Wales, the limit for small-claims cases is set at £10,000 for money claims and £1,000 for housing disrepair and personal injury: Civil Procedure Rules, Part 27.

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online solutions that include mediation and pre-action help and advice might enable this shift to happen.

In response to the current crisis within the system, a 'rethink of what constitutes a court and what modern day delivery of justice demands' is required (JUSTICE, 2016). It is recognised that the courtroom itself and the hearing are no longer the focal points of a dispute (JUSTICE, 2016, para. 2.16) and instead dispute resolution should be prioritised at an early stage and only the most complex and difficult cases should end up at trial. In order to accommodate a different process of dispute resolution, the system will require a radical renovation (JUSTICE, 2015). This would mean taking a principled approach to the reform of the system: an adversarial system with a focus on the hearing as the core of civil justice will mature into a system with a greater emphasis on accessibility and problem-solving as underpinning principles. It will offer the potential to use technology to innovatively enhance access to justice through greater resort to public education and collaboration and becoming more inquisitorial in approach. Whilst this principle is articulated already in legislation through the CPR (Rule 1), processes such as mediation are supplementary rather than fundamental to the legal system. It is out of necessity, driven by cuts to services, that the emphasis in civil justice is increasingly moving away from judicial determination of disputes based on the rules and principles of the law and towards creating as efficient a process as possible with the judge acting as more of a proactive manager and less of an umpire (JUSTICE, 2016, para. 1.1).

At senior-court level, it is clearly possible to see the importance of the traditional courtroom hearing. The *Unison* case gave judges the opportunity to assert the role of the court and its importance in upholding the rule of law as a fundamental principle supporting a fair society.[3] The *Unison* case concerned access to justice because of the potentially unaffordable costs paid by claimants to use the Employment Tribunal under a recently introduced Fees Order. Lord Reed, leading a unanimous court, declared that the fees were disproportionate and inhibited access to the court. He emphasised that courts are not merely a 'public service' (*Unison*, p. 68). Courts do not exist to provide a private service beneficial only to those that use them, but are rather a function of state that 'underpins everyday economic and social relations' (*Unison*, p. 71).

Owen Fiss has classically said that the purpose of trial is to engage a public forum rather than a private process to 'help secure all that law promises' (Fiss, 1984, p. 1089). Hazel Genn has led a highly critical academic perspective on the move away from the courts and the increased emphasis on the use of ADR. This perspective views it as a form of second-class justice: 'mediation without the credible threat of judicial determination is the sound of one hand clapping' (Genn, 2008, p. 125). Law is not a service, but an authoritative tool to enforce rights and duties, especially for those who might find it difficult to argue these on their own behalf. Genn argues that the existence of the court operates as an authoritative 'shadow' of guidance under which settlement might be achieved, as ultimately it is the court that is the body that establishes the principles by which we organise society (Genn, 2012, p. 398). But this view appears to exclude those who can no longer afford to participate in traditional justice. It rightly privileges the role of the courts and judge-made law over other less formal means of solving societies' problems and Fiss's promise of the law becomes a 'gold standard' to which most can but aspire (Gove, 2015). The reality, however, is that only very few litigants can afford to go to trial: not just because of the cost of the process, but also because of the stress and time taken to get a determination (House of Commons Justice Committee, 2019, p. 100). The legal process itself is 'ripe for development' and innovation to explore and find means to improve the system for the benefit of participants, perhaps using skills from other professions beyond law (Howarth, 2014, p. 159). Introducing technology with the subsequent focus on increasing access to early resolution and emphasis on public education challenges the traditional framework of civil justice. Prior to the enactment of the CPR, fairness was achieved by determination of substantive justice through the prioritisation of the merits of the case over procedural justice (Neuberger, 2010, p. 16). The changes in civil procedure introduced by Woolf were described as a 'watershed in the development of ADR in

[3] *R. (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51.

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England' (Genn, 2008, p. 93). The greater use of ADR, in the form of informal problem-solving justice with the intention of encouraging a 'less adversarial and more cooperative' litigation process, is no longer at the periphery of civil procedure. Sir Ernest Ryder, Senior President of Tribunals, said that 'Peaceful, mutually agreed settlement is in the public interest as much as resolution via court determination and judgment' (Ryder, 2018, p. 5). As a result of rule changes, settlement and collaboration between parties are now the overriding priority of civil justice as articulated in the CPR but this does not mean mediation is commonly used in this jurisdiction, as will be explained below.

## 2 Encouraging ADR and mediation

Arguably, radical renovation of the civil justice system away from legal rules began tentatively. Civil justice procedural changes have, since 1999, attempted to shift the emphasis of the court from merits-based justice towards an approach based upon efficiency and economy: case management, ADR and the principle of proportionality (Sorabji, 2012). The civil justice system has therefore introduced, through a series of reforms, policies that emphasise the principle that resource devoted to achieving justice should be proportionate to the value of the case. John Sorabji saw this as evidence of the system moving from one based on 'substantive justice' to one based on 'proportionate justice' (Sorabji, 2012). As litigants may no longer be funded or able to afford their own representation and courts are struggling to maintain adequate services (Woolf, 1996; Jackson, 2009; Briggs, 2013), the system is searching to find ways to encourage people to move away from legalised solutions and towards a problem-solving model of dispute resolution, therefore accommodating a sea change in the way justice is carried out. If courts are not meeting legal need, then the system needs a 'fundamental transformation' (JUSTICE, 2016). Technology offers a chance to innovate and rethink from first principles and design a suitable infrastructure to achieve the changes that have for a long time been encouraged by judges and policy-makers.

It is not just the need to drive efficiency that is a spur for change. Carrie Menkel-Meadows identified the 'adversary system [as] inadequate, indeed dangerous' (1996, p. 6). She perceives dissatisfaction with the adversarial model as the reason that ADR has become part of the range of tools encouraged by the legal system. Similarly, Ken Cloke describes rights-based conflict-resolution processes as encouraging alienation whereas the way of resolving conflicts that focus on interests reflect 'not merely what people want, but the reason why they want it' (2008, p. 50). Repositioning justice away from a focus on winners and losers and towards a more co-operative ideal lies at the heart of ADR processes, be it in negotiation or mediation. To summarise, while technology will produce efficiency, ADR will produce solutions that are better tailored to meet the parties' needs, thus arguably improving justice.

## 3 The place of mediation in civil justice in England and Wales

ADR could be described at best as quasi-compulsory in this jurisdiction because of the CPR that emphasise the desire to encourage parties in dispute to co-operate and use ADR (CPR, Rule 1). 'Structured ADR' is mediation used in a formal sense by the court and deployed by the judge when it might be considered effective (Briggs, 2013, para. 5.5). Under the CPR, judges can penalise a winning party in costs for unreasonable refusal to mediate (CPR, Part 44). Pre-action protocols exist that stress the need for early resolution and advocate the use of ADR (Practice Direction – Pre-action Conduct and Protocols). These act more as guidance than enforceable rules of procedure. Pre-action protocols and the CPR are designed to 'strongly encourage' parties to resolve cases out of court, especially where the judge believes they have acted unreasonably (Rule 44.4). Rule 44.4(3) of the CPR allows the judge to award penalties in a case where it is believed the mediation has been unreasonably circumvented. Parties can be penalised if they refuse to mediate but they are not required to mediate before going to a hearing. Dorcas Quek has identified a 'continuum of mandatoriness', ranging from fully voluntary to what might be described as fully 'mandatory mediation' (Quek, 2010,

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p. 488). She distinguishes between referral to mediation with soft penalties (as prescribed under the CPR in England and Wales): referral to mediation with opt-out as well as referral to mediation with no opt-out. Although refusal to mediate can be punished by the courts, mediation is encouraged rather than being compulsory or mandated under Quek's definition.

There have been many policy debates on how to achieve a shift in institutional justice in England and Wales towards a greater use of mediation without imposing a fully mandatory system. Both Lord Woolf and Jackson L.J. supported a move towards an increased prominence for ADR as a process that aids settlement and meets proportionality principles. However, both declined to support making mediation a compulsory part of the civil justice landscape (Woolf, 1996; Jackson, 2010, Chapter 36). Yet there has been much discussion about the role of mediation in the English jurisdiction (Jackson, 2010; Briggs, 2013). Briggs, in his Chancery Review, stressed the need to put more weight on front-loading litigation so that more was done in the use of ADR towards preparation and settlement before getting to trial (Briggs, 2013). The senior judiciary are keen to promote ADR and there is an incentive in the 'remorseless increase in the cost burden of litigation' (Briggs, 2013, para. 5.2).

Although judges and policy-makers in the UK have shied away from mandating mediation, there is more support generally for judicial use of an ADR order in which parties have to state why they have declined to take up ADR and can potentially be penalised in costs. In case-law, many judges are keen to show their support and encouragement for ADR. Ward L.J. described parties in a case in the Court of Appeal as being 'completely cuckoo' for incurring huge litigation costs rather than entering into a mediation.[4] The role of judicial support is described in the leading case of *Halsey v. Milton Keynes NHS Trust*[5] as robust encouragement, which stops short of compulsion (p. 3012). *Halsey* is the leading case on mediation in this jurisdiction. It concerns a claim of negligence against the NHS Trust in which the hospital refused to accept any liability and therefore decided there was no need to engage in mediation. At trial, the Trust won the case, as the claim was dismissed, but the defendant claimed costs on the grounds that the claimants had refused their offer of mediation. The Court of Appeal found in favour of the defendants. The judges considered, as a general principle, whether the party refusing to mediate could be penalised in costs and it was determined that mediation could be encouraged where it was considered appropriate but it could not be required. It was for the party claiming costs to show the other side were being unreasonable in refusing to mediate. The Court of Appeal said there were five factors that should be taken into account when deciding whether a refusal to mediate was reasonable. These are: the nature of the dispute; the merits of the case; attempts at settlement; the cost of using ADR; the impact of delay and whether ADR has a reasonable prospect of success (p. 3009).

Although mediation is encouraged, there is a recognised discrepancy between imposing an adverse cost order for refusal to mediate under the CPR and judicial encouragement (Ahmed, 2015, p. 72). Penalties are remote and therefore the system in England and Wales could not be described as compulsory in most true senses of the term. Requiring a form of attendance at mediation orientation (such as Family Court Mediation Information and Assessment Meeting in the UK) is another form of recognised gradation of mandation. Different approaches taken by different jurisdictions represent 'varying underlying concepts of individual and collective justice' (Ali, 2019, p. 12).

In England and Wales, mediation is not therefore compulsory, but it is also not voluntary and so the situation, especially for those who are unfamiliar with the court system, is confusing. The poor take-up of mediation is likely reflected in the uncertainty around the rules as to whether parties have to mediate in advance of going to court. The lack of consistency has shown how difficult it is to determine when cost penalties should be applied: exposing the problem with the vagueness of guidance that offers 'encouragement' to 'mediate'. In addition, guidelines provided in *Halsey* to determine the veracity of a party refusing to mediate have been criticised as opaque and difficult to apply with any consistency (Ahmed, 2012).

[4]See *Egan v. Motor Services (Bath) Ltd* (2008) 1 WLR 1589, at [53].

[5]*Halsey v. Milton Keynes NHS Trust* [2004] 1 WLR 3002.

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The Halsey guidelines were somewhat updated by Briggs L.J. in the case of *PGF II SA v. OMFS Company 1 Ltd* (2013, p. 56).[6] The appellant in the case argued against a decision not to award costs because he had unreasonably refused to participate in mediation by not responding to requests to mediate from the other side in the case. Briggs suggested that penalties should be applied more robustly when parties were silent in response to a request to mediate, regardless of the nature of the claim. In *Thakkar v. Patel*, both parties agreed to mediate. The defendants were claiming dilapidation from their tenants at the end of a lease. There had been issues with the building during the tenancy and the claimants wanted compensation for rent paid when the building was being repaired. The claimants and defendants each made offers but none was accepted. The attempt at arranging a mediation failed and, at first instance, the defendants were blamed and ordered to pay the majority of the claimant's costs. In the Court of Appeal, the judges felt that mediation had a real prospect of success in this case. It was the defendants who had procrastinated and this had led to the failure to organise mediation and so the severe cost penalty would be upheld. Contrast this case with *Gore v. Naheed* (2017),[7] which concerned a boundary dispute. Here, the claimant rejected the defendant's invitation to mediate. On appeal, based on the decision in *PGF*, Pattern L.J. agreed with the claimant that the case was unsuitable for mediation. These cases, especially coming so close to each other, have been criticised as indicating the lack of a united approach from the senior judiciary towards how parties should approach ADR (Ahmed, 2018). Debbie de Girolamo has also pointed out that there are disconnected views and confusion in England and Wales as to the extent that mediation can be required, leading to a lack of certainty about the value of the process (de Girolamo, 2016). There are tentative moves towards increasing the use of mediation, but there are different views about whether it should be compulsory. One view expressed is that processes should be assigned on a case-by-case basis (Thomas, 2016, p. 45).

Although the rules might suggest that the use of mediation is commonplace in England and Wales, it has been described as being 'semi-detached' from civil justice (Briggs, 2015, para. 2.58), and also that the extent to which mediation operates as an alternative to the 'determination of disputes in court is, at best, patchy' (Briggs, 2015, para. 2.24). The recent review of ADR suggested that mediation was 'not yet culturally normal, and without professional [legal] advice the public are generally not familiar with it or comfortable about using it' (CJC ADR Working Group, 2018, para. 4.12).

The foregoing indicates that, whilst there is a rhetoric around the importance of mediation, it is not used extensively and even judges cannot agree on the place of mediation within the system. In addition, ADR is also viewed as operating as 'an essentially separate part of the dispute resolution process' (Briggs, 2013, para. 5.9), echoing the idea that ADR is not a part of the legitimate adversarial civil justice system. The potential for mediation to favour the better-resourced party is also highlighted: 'Mediation would potentially yield justice to the richer, more powerful or risk-tolerant litigant if the weaker party could not refuse an unjust offer by saying "see you in court"' (Briggs, 2015, para. 2.23). So, despite the appearance of strong rules in favour of mediation, which are supported by judicial rhetoric, there is still doubt as to how mediation should be utilised. As a result, in 2018, the Civil Justice Council established a Working Group to review the use of mediation by the courts and determined that mediation should not be made mandatory (CJC ADR Working Group, 2018). The Working Group noted that the conservatism of rule-makers and the judiciary prevents any conceptual support for a fully mandated ADR process (2018, para. 4.22). It concluded that, at the present time, ADR is both 'under-used and little known' in England and Wales (CJC ADR Working Group, 2018, para. 4.1). This is essentially because the rules around how mediation is used are opaque in practice, as shown in the discussion of relevant cases above.

The ADR Working Group recommended finding the means to increase public awareness of ADR to signal the various types available. They also wished to utilise new ways of engaging parties in mediation, such as the use of a 'Notice to Mediate', modelled on a process developed in British Columbia,

[6]*PGF II SA v. OMFS Company 1 Ltd* [2013] EWCA Civ 1288.
[7]*Gore v. Naheed* [2017] EWCA Civ 369.

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Canada (CJC ADR Working Group, 2018, para. 8.39). In addition, cost sanctions of one form or another are still seen as the future for formal encouragement of ADR in England and Wales (CJC ADR Working Group, 2018, para. 4.25). The recent case of *Lomax v. Lomax* (2019)[8] concerned the courts' power to order early neutral evaluation (ENE) and appears to signal a desire to be more boisterous towards those who do not use mediation. The Court of Appeal held that the court is not constrained by the desire of the parties and, more robustly, that times had changed: 'the court's engagement with mediation has progressed significantly since *Halsey* was decided' (para. 27). Moylan L.J. said that ENE did not prevent access to the court. In relation to the overriding objective, ENE as a method of ADR is an attempt to resolve the case before it proceeds to trial and the same applies to mediation. Arguably, this case signifies a greater desire emerging amongst the judiciary for more mediation and for it to become mandatory. There appears to be increasing recognition that the greater use of mediation is now 'critical' and that HMCTS must provide the resource to make it happen. Sir Terence Etherton, for example, has supported mediation as a 'major aspect' of online court process developments (2019, para. 20).

Mediation is still not seen as the norm in civil justice in the English jurisdiction. H.L.A. Hart described our understanding of the law to be built upon standard cases (Hart, 1958, p. 607). Despite the valiant attempts of judicial rhetoric to embed mediation as usual practice in the legal system, it still rather exists as a 'variant of the familiar', and thus within the 'penumbra' instead of the core processes of the English legal system (Hart, 1958, p. 608). This is far from Woolf's prediction of a 'new landscape' for civil disputes, fundamentally different and based on the availability and encouragement of ADR (Woolf, 1996).

## 4 The rise of litigants in person

A major factor in current concerns over the operation of the courts relates to radical changes introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), which left legal-aid provision for civil cases particularly curtailed and reduced the numbers who were eligible for funding. This led to a dramatic rise of the number of those appearing in court without representation (litigants in person). Such severe funding cuts as well as other severely practical limitations upon access to the courts for ordinary people led to severe criticism, not least from members of the senior judiciary.[9]

Research conducted by the Equality and Human Rights Commission on the effect of the LASPO legislation found that, as the system was designed to be managed by lawyers, most people struggled to resolve problems on their own (Organ and Sigafoos, 2018). Changes to the rules have brought far more people into the justice system who cannot afford the help of lawyers. Although the aim of the original LASPO legislation was to curb adversarialism, the impact on civil justice has been dramatically poor in most other respects (MoJ, 2017). For example, in the Family Court, the proportion of cases where both parties had legal representation was 41 per cent in 2013, whilst, in 2019, the figure sat at 19 per cent – a further percentage decline from 2018 (Family Court Statistics Quarterly, MoJ, 2019a). It is now acknowledged that, as well as litigants struggling their way through the courts with no representation, there are many who are denied access to any form of justice because they leave their claim unresolved (Smith *et al.*, 2013). The former president of the Supreme Court, Lord Neuberger, has underlined 'the serious problem with access to justice for ordinary citizens and small and medium sized businesses' (Neuberger, 2017, para. 4).

A post-implementation review of LASPO by the government acknowledges that legal-aid-funding thresholds are inadequate and funding has been too focused on court hearings (MoJ, 2019c). The action plan to improve access to justice recently published the MoJ calls for increase to legal support to encourage early resolution of cases (2019b). Whilst there are no plans to significantly return to a

[8] *Lomax v. Lomax* [2019] EWCA Civ 1467.

[9] E.g. Sir James Mumby's criticism of the unfairness of the current court process because of the lack of public funding in *Re B* [2015] 1 ||WLR 2040, 2058.

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legal-aid culture, ideas are under discussion to increase the provision of 'high-quality, early legal support' based on a recognition that early intervention to support users of the justice system is paramount (MoJ, 2019c, p. 157). Examples include effective signposting through online guides and telephone support. The move towards funding innovative delivery methods as part of court reform are discussed later in this paper and demonstrate a desire to move away from financing formal justice hearings and focusing the civil justice system firmly upon settlement.

Processes based more firmly on a problem-solving methodology are also becoming increasingly popular, as they are more accessible than courts and invite the sort of early-intervention approach described above. For example, the Financial Ombudsman Service (FOS), a statutory body, operates to resolve disputes arising between those financial institutions regulated by the Financial Services Authority, such as banks and insurance companies, and their customers. The service is funded by the financial institutions themselves, making it potentially more accessible to customers with low-value claims. The maximum value of cases that can be taken to the FOS has recently risen from £150,000 to £350,000.[10] The online mechanism is designed to encourage swift resolution and therefore greater customer confidence in the finance industry. The principle underpinning FOS procedures is to decide a dispute based on 'what is fair and reasonable in all the circumstances'.[11] The FOS procedure is based upon an inquisitorial model, which means the ombudsman can make investigations rather than waiting for the disputant to present their case. The increased popularity of the FOS is shown through its increased workload. It resolved 400,658 complaints in 2017/18 compared to 99,699 in 2007/08 (FOS, 2018). Such data highlight the changes that are emerging in the way some disputes are resolved. The FOS takes a range of relatively low-value financial cases away from the small-claims court. As such, it embraces a form of ADR and a material change from an emphasis on trial, evidence and substantive justice towards a new understanding of justice (Burnett, 2018). In a further example of new forms of dispute resolution, the Traffic Penalty Tribunal, a statutory tribunal, offers telephone resolution by independent adjudicators for parking appeals as an alternative process to court (Traffic Penalty Tribunal, 2016–2017). The Traffic Penalty Tribunal handles appeals against local-authority parking fines, using online processes to speed its service as well as telephone and, increasingly, virtual hearings. Both local authorities and the appellants can upload information to an online platform for review by the independent adjudicator.[12] The platform demonstrates how a stressful but low-value process can utilise technology successfully to assist with swift resolution in a non-traditional form of tribunal.

## 5 User-centred justice

As noted above, technology and ADR are both important elements of a revitalised civil justice landscape offering litigants the opportunity for efficient and tailored solution. New technologies have introduced an opportunity for legal services to become more user-friendly (Hagan, 2018). However, it is not only the potential technological machinery that drives the changes being wrought in the justice system; a more user-centred approach suggests that the way to bring about effective and beneficial change is to test and build a system around the experiences of those who will be using it – that is, claimants and defendants – rather than designing around the needs of lawyers and professional stakeholders (Hagan, 2018). User-centred-justice delivery of this kind is now core to the current justice policy. Lord Burnett, the Lord Chief Justice, made this point, saying that '[court] modernization is "user-centred" in design and default' (Burnett, 2018, p. 9). He stressed that

> 'In organising the way in which our courts operate we should put the needs of court users at the heart of our thinking and remember that high value disputes form only a tiny proportion of the cases we deal with.' (Burnett, 2018, p. 14)

[10]Financial Conduct Authority, 2019.
[11]Financial Services Act 2012.
[12]Traffic Penalty Tribunal. Available at https://www.trafficpenaltytribunal.gov.uk/want-to-appeal/ (accessed 23 April 2020).

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User-centred justice offers a different methodology for policy-makers designing a court system: one that intends to meet the needs of citizens using the courts. This approach contrasts with the sort of institutional perspective promulgated by either *Genn* or *Fiss*, as it requires less focus on legal rules and more on practical problem-solving. It also differs from the traditional adversarial system design that is really only capable of being understood by lawyers. A more 'human, user-centred' design approach to the courts recognises that courts might not always be the best setting for resolving legal problems. Furthermore, since it is an approach that works 'to improve the functionality and experience of a given system, the needs and preferences of the user should be the guide' (Hagan, 2018, p. 202). This approach incorporates softer skills to help the wider public with the understanding of legal terminology and legal education. It requires a cultural shift refocusing away from investing state funds in lawyers and legal expertise and legal aid. It also demands an understanding of what individuals need to problem-solve their way through disputes, as well as an understanding of how co-operative processes can be developed and implemented (Roberge, 2019).

The cultural shift acknowledges that, to find the answer to many low-value legal problems, the solution lies not only in simplifying the law, but also in designing appropriate pathways and navigation tools that signpost people more easily around processes to encourage self-help and empowerment. To achieve this, court processes will need to be mapped and court users interviewed to determine what works and what does not. Policy-makers will need to listen to citizens and court users to understand how the processes work for them. The government's reform programme for the courts claims to adopt this user-friendly approach. It aims to 'modernise and upgrade the justice system so that it works even better for everyone' (Lord Chancellor *et al.*, 2016, p. 3). The reform requires changes to be made across all portfolios: crime, family, civil and tribunals. It does not use lawyers to reform the system; rather, design engineers and experts in relevant processes have been engaged to rethink processes as part of the major reform of the court model. The aim is that, by the 2020s, most civil cases will be dealt with through asynchronous online processes (Lord Chancellor *et al.*, 2016, p. 3). This is a highly ambitious project. In the civil jurisdiction, the focus is upon simplifying court procedures through the greater use of technology to make new processes as easy as possible for court users.

Politically, to make these changes happen, there are significant modifications to traditional justice processes (National Audit Office, 2018). There are moves towards the proceduralisation of data-driven systems and to creating the scaffold for these new approaches. There is a real need for legislation to underpin and structure new processes to help ensure processes are fair. The Courts and Procedure (Online Procedure) Bill failed to secure its path through parliament due to the general election in 2019 but it is sure to be revived in the near future. The Bill would have established a new Online Procedures Rules framework to set out the scope and remit of online procedures for civil, family and tribunal cases and to enable the creation of an Online Procedure Rules Committee to support and develop the rules governing the processes (Courts and Procedure (Online Procedures) Bill, July 2019). The creation of such a structure raised questions about whether the online processes create a fully fledged court or an adjunct of the traditional court service. As argued by Tom Tyler, the courts depend on public co-operation for their legitimacy and effectiveness (Tyler, 2003) and, as public entities, must be designed to contain the legitimacy of the court building. As such, careful thought must be given to ethical concerns over openness and transparency and the incorporation of authority as well as creating rules to govern particular situations (Prince, 2019).

The financial pressure on government to achieve projected reform outcomes and gaps in the funding provision may likely lead to more piecemeal change that focuses on producing online forms and digital versions of traditional processes rather than real innovative change in how civil justice is delivered (National Audit Office, 2018). However, there are some small signs that, within the large court-reform project, there will be a greater reliance on ADR in the future.

One example is the free and voluntary telephone-mediation scheme already integrated into the small-claims process. Further amendments, enacted as part of the civil justice reform programme, will allow the presumption of mediation rather than a purely voluntary procedure. Mediation will

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become an opt-out process: parties who do not wish to mediate will have to say so in advance.[13] This more formal integration of mediation into the small-claims procedure provides an opportunity to design a new form of online mediation to be integrated into a more user-friendly litigation process, especially valuable for low-value cases in small claims, to help people navigate through the system. In small claims where there are limited allowances made to claim legal costs, this sort of alternative support is especially desirable.[14] Mediation can be a significant stage in systemic online engagement for the court user, which starts with general advice on procedure, moves through mediation and, if that does not resolve the case, ends with an online judge (CJC Advisory Group on ODR, 2015). A requirement of formal integration of mediation into an online justice system is that we need to move away from questions as to whether we should use mediation as a adjunct towards thinking about how best to design the process for fairness and equality.

## 6 Online dispute resolution (ODR) as a form of ADR

In itself, ODR can be defined at its simplest as online ADR but, as its relevance grows, ODR can be seen to be a 'disruptor' and a 'challenger' of traditional dispute resolution (Rabinovich-Einy and Katsh, 2014). ODR has a wider remit than ADR, as it involves a mix of advisory techniques as well as actual dispute-resolution processes. It has been embraced with worldwide interest in the last couple of years,[15] mainly because it offers a whole new direction and opportunity for efficient dispute resolution as well as a new place for mediation/facilitation (CJC Advisory Group on ODR, 2015). Different interpretations of ODR underpin much of the civil justice reforms that the government and judiciary are keen to implement.

ODR, in this context, is therefore an approach that privileges the litigant in person rather than the lawyer by focusing on simplifying procedures: guiding a litigant through the system using online tools and signage. The nature of the approach is more akin to a virtual 'multi-door courthouse' as anticipated by Frank Sanders in 1976 (Sanders, 1976). ODR is generally premised on a co-operative model that privileges settlement, ADR and problem-solving, thus creating a new type of 'online court'.[16] Although the use of ODR can conveniently be asynchronous, the lack of direct face-to-face communication can be resolved through the use of video tools, such as Zoom. Some versions of ODR are not yet very sophisticated in the way they operate.[17] Future models offer 3D facilities and a level of refinement in terms of digital tools that will enable the conduct of litigation using smartphones and the 'phone court' will replace the traditional courtroom (Katsh and Rabinovich-Einy, 2017). ODR is a system of dispute resolution that uses technology as a form of mediator, whereby the technology itself operates to facilitate or deliver assistance using a problem-solving methodology. Private corporations such as Ebay have built their own complaint systems around such methodology to encourage disputing parties to settle (Van Loo, 2016).

The idea of technology being utilised to enhance civil justice is currently very topical, but it is not new. Back in 1995, Lord Woolf highlighted its role in securing access to justice. He predicted that technology would 'change altogether the underlying processes by which cases are handled at present' (Woolf, 1996, para. 13.1). Historically, there have been several judicial initiatives to encourage investment and reform of the courts (Brooke, 2004) but, despite much encouragement from the judiciary, they have not been successful (Legatt, 2001, Chapter 10; Court Service, 2002).

[13]111th Update, Civil Procedure Rules Practice Amendment Update (September 2019).

[14]Civil Procedure Rules, Part 27.14.

[15]E.g. in North America, forty-six courts have been identified as users of ODR. Source: the National Center for Technology and Dispute Resolution. Available at http://odr.info/courts-using-odr/ (accessed 20 March 2019).

[16]E.g. the Civil Resolution Tribunal (CRT) in British Columbia. Available at https://civilresolutionbc.ca (accessed 20 March 2019).

[17]Increased numbers of complaints were received about the EU ODR Platform: Cortes P and Martell RP 'Second Annual Report on the functioning of the European Online Dispute Resolution Platform', 2019 CTLR, vol. 25, pp. 149–151.

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Briggs L.J. reviewed the structure of the civil courts, with a view to determining whether existing paper processes could be replaced by ODR (2015). Briggs envisaged a three-stage digital system for low-value small-claims cases designed to guide litigants along an innovative digital pathway, to triage them through the justice system and offer different self-help mechanisms, or an ability to interact with facilitators. However, an online court is potentially more accessible to those who can use a computer or a smartphone, although paper-based alternatives will need to be maintained for those who are 'digitally excluded' (JUSTICE, 2018). Concerns around digital exclusion and accessibility threaten to reproduce the same power imbalances as traditional justice. For those with a weak signal or poor Internet connection or for those who do not own or cannot access a computer, online services are not convenient. Similarly, the system must be understandable and therefore accessible for all. This can be achieved not by implementing complex legal rules, but through a simple-to-use system designed around user needs.

Addressing 'digital exclusion' requires more than the ability to use computers. System designers must appreciate the difficulties faced by those trying to access the courts without legal support. This can require a complete rethink of adversarial approaches towards more inquisitorial methodologies, such as those used by tribunals. For example, lessons can be learnt from moves to develop a policy of no-fault divorce as a practical means of shifting legal procedures from a blame culture towards a more practical and problem-solving approach (Trinder *et al.*, 2017). Yet, alternatively, too much reliance on efficient system design can mask the need for people using the system to understand their rights and to comprehend the consequences of any choices made along the way (JUSTICE, 2018).

An online court for low-value claims can integrate online advice/information/pre-action information and advice to the litigation process, thus enabling litigants in person to create their own pathway through the justice system. It widens the remit of the traditional court by providing more services to divert cases away from a hearing towards self-resolution and settlement by developing online assistance at the pre-action stage. In the future, as digital processes develop, this guidance may become less mechanistic and more diagnostic and sophisticated, especially in relation to procedural advice and guidance. An online court should operate in correspondence with other forms of public legal education (Briggs, 2016, para. 6.116) and an awareness of the need for simplicity in justice design is also a priority to enable this stage to work effectively for litigants in person.[18]

At a second stage, it is envisaged that mediators' interventions will help parties to negotiate a solution for themselves before arriving at a facilitated mediation with the other side. If this process is not satisfactory, at the third stage, an online judge will make a decision, either based on the paperwork or via Skype: a virtual online court.

The use of technology to drive new and different forms of ADR is not without its concerns and problems. It is clearly embraced by governments because it offers an efficient and cheap means of delivering court processes (National Audit Office, 2018), yet meets the need to safeguard litigants through the use of ethical guidance in the creation of regulation and a requirement for supporting infrastructure so that mediation is a step on a pathway or a 'guided intervention' rather than a supplementary process or add-on to the traditional legal system.

## 7 Small-claims mediation as a model of practice

When the jurisdiction of the English small-claims track was first developed in the early 1970s, it was as a provider of informal justice, with less of the structure and rules of traditional courts. The aim was to provide an informal and quick procedure for low-value cases based on the value of the claim. At the time, this route was created because the costs of the existing rights-based process outweighed the gains of achieving a resolution in court (Economides, 1980). The small-claims process is now governed by the CPR (Part 27). The HMCTS Reform Programme will bring large and significant changes to small claims, as the intention is that most small money claims will follow an online process rather than be

[18]See e.g. Citizens Advice. Available at http://advicetracker.devops.citizensadvice.org.uk (accessed 20 January 2020).

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heard in open court. A new online portal for issuing and managing small-claims cases has been developed to deal with cases with a maximum value of £10,000 under the court-reform process (Fouzder, 2018).

Free small-claims mediation is currently offered to all parties once the claimant and defendant have determined to go to court. The mediators are employed by HMCTS and offer a one-hour free telephone mediation. Mediators are civil servants who undergo full mediation training. The mediation process is more akin to shuttle mediation, as the mediator speaks alternately to each party on the telephone. If a case is successfully resolved at mediation, it can reduce the time taken to achieve a settlement. Currently, it takes an average of 34.4 weeks for a case to reach a formal small-claims hearing before a judge (MoJ Civil Justice Statistics, 2018).

An 'opt-out' rather than an 'opt-in' process for very low-value small claims started online via the Online Civil Money Claims portal is now being adopted for cases with a maximum value of £3,000. This will be a pilot project to trial the effectiveness of opt-in mediation and to also see how the system will cope with a process designed to guide more parties towards a more natural take-up of mediation. If successful, the aim is to expand mediation of small claims to cases up to £10,000.

The small-claims process that is being developed reflects an approach that has been introduced in British Columbia in Canada via an ODR tool called the Civil Resolution Tribunal.[19] The Tribunal was created by statute under the Civil Resolution Tribunal Act 2012, which allowed a more innovative ODR tribunal integrated into the justice system in British Columbia for certain types of low-value cases (Salter, 2017). In this respect, it somewhat models the Traffic Penalty Tribunal discussed earlier. The Civil Resolution Tribunal (CRT) operates a system to resolve low-value small-claims disputes with a value of up to $5,000 CDN, as well as motor-vehicle and some condominium disputes. The whole system was built and premised on ADR principles, as there is an emphasis on problem-solving and settlement as a priority. The first stage of the CRT introduces a pre-claim triage process via a system of 'guided interventions' giving options for settlement and alternative solutions such as letter templates. Once litigation is commenced via the online platform, mediation is an automatic step on the pathway through the tribunal system. Facilitators review cases and maintain contact with parties throughout the litigation process. The first signs are that the British Columbia model presents a good example of a clear and seemingly easy-to-use process that aims to demystify and simplify outcomes and procedure for those without representation who are engaged in very low-value disputes. That it is embedded in the legal system is exciting because it provides an interface that is original and simple and that extends the role of court by giving a remit beyond simple determination of an outcome. Although the process seems to be popular at the present time, it is very early days and more comprehensive research and transparency on the role of mediation would be helpful for others developing similar systems elsewhere in the world (Salter and Thompson, 2016–2017).

For those with low-value small claims, there are benefits in using an online process that incorporates mediation. Using an online system can mean that the more efficient use of technology leads to a shorter time between the claim and the mediation. It will allow parties involved in mediations that do not settle the dispute to be directed to online resources on preparing for hearing or other settlement options. This will enable mediation to become a more natural element of an investigative or collaborative process because there is a pathway process guiding litigants. Whilst an opt-out system is not the equivalent of mandatory mediation, it is a step towards an acceptance of mediation as part of the process. The small-claims route offers an example of a process appropriate for a more user-centred approach. The new small-claims procedure is based on the government's vision to ensure disputes are resolved in the most appropriate forum with commensurate processes and costs, allowing citizens to take responsibility as much as possible and courts to handle more complex cases (MoJ, 2012). Furthermore, users will be able to 'manage and resolve disputes fairly and speedily, involving more mediation, fewer hearings, simpler processes and online routes through the courts' (Her Majesty's Courts and Tribunal Service, 2019). The small-claims process already offers a free mediation service

[19]CRT in British Columbia. Available at https://civilresolutionbc.ca (accessed 20 January 2020).

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to court users that could become more efficient and accessible with the introduction of technology (CJC Advisory Group on ODR, 2015). The current use of mediation in small-claims cases demonstrates how it is possible to offer ADR as a more prescribed and integrated element of the litigation process.

## 8 Conclusion

Frank Sander's vision for the future of dispute resolution was 'not simply a courthouse', but rather 'a Dispute Resolution Center' (Sanders, 1976).

In the current English model of civil justice, it is acknowledged that ADR is still *not* considered to be a 'culturally normal' feature of the system despite two decades of promotion through the CPR and Pre-Action Protocols (CJC ADR Working Group, 2018). Mediation exists but it is poorly promoted and operates inside a highly critical academic lens that acts to preserve the institutional status quo. The culture in UK justice is still extremely adversarial in nature. Lord Woolf's reforms were about proportionality and moving away from purely substantive justice. The situation is further clouded by inconsistency emanating from case-law. Some clarity around the difference between 'encouragement', 'robust encouragement' and 'court-ordered mediation' should be available. Policy rhetoric upholds ADR as having a distinct benefit but, in the past, there has been a lack of procedural will to be more directive. It is not enough for the judiciary to cautiously hope in *obiter* comments that the use of mediation will increase through indirectly pressurising lawyers when so many cases that could benefit from mediation are brought by litigants in person. Expanding the remit of what we consider as a court and using technology to encourage early resolution and timely encouragement or mandating of mediation provides a wider suite of dispute-resolution processes integrated into the legal system rather than an adjunct to it. A simple and clear resolution process is important for litigants in person with little access to lawyers. Often, legal principle and evidence are not obvious when a small-claims case comes before a judge (Prince, 2007, p. 336). An online system that integrates mediation into a platform designed to be easily navigable and accessible offers a transformation in approach for those who currently have to steer through a small-claims process that inevitably tends towards a hearing before a judge. An aspect of the reform-programme development is for mediation to become an obligatory element of a technological infrastructure.

A move towards an opt-out system of online mediation for small-claims cases presages a greater use of online ADR in the future for a wider range of cases. Those using online 'guided interventions' to navigate their way through the justice system will encounter online mediation as a formal, cohesive stage in the civil justice process. Once small-claims mediation is fully integrated into a digital court service, more focus can be given to adding legal support and help systems into the online infrastructure. The online court becomes, as Sander states above, 'not simply a courthouse', offering services beyond the remit of a traditional court. Mediation will then become just one step in an automated pathway, beginning with legal advice and help and ending with a determination by an 'online judge'.

Greater customary usage of ADR requires a sea change in perspective, away from binary adversarialism to enthusiastically embracing new methods of promoting problem-solving and effective resolution and advocating mediation more positively by designing it into the legal system itself. ODR can do more than merely reform and digitalise existing processes and create online forms. Instead, it requires judges and policy-makers to consider how to innovatively design, transform and integrate online-advice delivery into the HMCTS civil justice platforms, scrutinising other examples of successful platforms such as the Traffic Penalty Tribunal and the British Columbian CRT. The rhetoric exists in current policy and through the reform programme to drive such change. The Ministry of Justice have said they wish to 'foster innovation in the legal services sector and create an environment that enables innovation to thrive' (MoJ, 2019b). There is acknowledgement in current policy thinking that the court user and their needs present a legitimate conduit as to how dispute resolution will operate in the future. Fashioning new means to deliver access to justice is not just about increasing

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government efficiency, but also about using technology to design and create innovative, new, agile and 'user-centric' pathways, for those who cannot afford or cannot easily access help elsewhere.

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