Using Technology and ADR Methods to Enhance Access to Justice

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This paper discusses how technology and extrajudicial processes can provide a solution to the access to justice problem for self-represented litigants. The paper first observes the need for efficient dispute resolution processes based on a wider concept of access to justice and it argues for greater integration amongst courts and extrajudicial bodies, especially in the consumer sphere which dispute resolution bodies are currently undergoing an institutionalisation process as a result of recent EU legislation. Accordingly, it is argued that access to justice for consumers will only be achieved if they have access to either an accountable and effective extrajudicial scheme that offers adjudication or a truly user-friendly and accessible online court that incorporates alternative dispute resolution techniques as the UK has endeavoured to deliver. To that end this paper examines the policy options for the English Online Court with a particular focus on the challenges faced by litigants in person. Finally, this paper submits that dispute system design changes need to be informed by empirical research and a holistic policy strategy on dispute resolution.

Keywords: ODR, ADR, online court, mediation, e-court, consumer ADR, CADR, CDR, ombudsman.

I. Introduction

There is a growing recognition that traditional judicial adjudication is not suitable for resolving many civil disputes.[1] This is especially so when parties cannot afford legal representation (i.e. litigants in person or LIPs) or in the event of disputes of low or medium value for which courts are often too slow, too costly, unintelligible and out of step in the digital society. As a result, disputants are increasingly geared towards the use of more user-friendly, specialised, quicker and less costly alternative dispute resolution (ADR) processes such as ombudsman and mediation schemes. These processes are gradually adopting Information and Communications Technology (ICT) tools to deliver their services. This is because a society that is progressively interacting online, especially through smartphones,[2] would normally prefer to take advantage of the online forum for resolving their grievances. When dispute resolution processes do not require the physical presence of the parties and allow for online communications, they are commonly referred as online dispute resolution (ODR) processes. But ODR can also be used in a broader context, encompassing online courts.

In consumer matters, ADR and ODR is increasingly being monitored and regulated because parties have unequal bargaining powers, resources and experience –while the consumer would normally be using the dispute resolution process for the first time, the business do so routinely. In the EU, consumer ADR/ODR schemes have recently undergone important changes as a result of the implementation of the ADR Directive in all the Members States of the European Economic Area (at

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[1] P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge, 2010).

[2] The Economist claims that in 2015 there were over two billion smartphones and that this figure is expected to double to four billion by 2020. See 'The Truly Personal Computer' The Economist (28 February 2015).

the time of writing in December 2018 there are 31 countries).[3] The ADR Directive requires national authorities to accredit those ADR/ODR entities that meet certain procedural standards, including the online processing of consumer complaints. While the Directive did not make business participation in ADR compulsory, there are a number of sectors where EU regulations do so[4] and national laws can also extend the compulsion to cover additional sectors. The Directive is complemented by the ODR Regulation that has created a one-stop-shop, the ODR platform, which enables consumers to submit complaints arising from online contracts in all the languages of the EU. The platform sends the complaints to the trader or merchant and enables parties to choose a nationally certified ADR/ODR entity to assist them in the resolution of the complaints.[5] These ADR/ODR entities, many of which previously relied on self-regulation, are now more firmly imbedded as part of the civil justice system.

Considerable gaps in consumer redress however remain in many economic sectors as the participation in the dispute resolution is not mandatory for traders, especially in non-regulated sectors such as home improvements, second hand car sales and general retail.[6] This paper argues that these gaps can only be met if either the participation of traders in ADR/ODR become compulsory or if an online court or tribunal is truly accessible for litigants in person, such the Canadian Civil Resolution Tribunal or the English Civil Money Claims Online.

Even though a mandatory ADR/ODR body must be in compliance with the right to a fair trial, which in Europe is recognised under Articles 6 of the European Convention of Human Rights (ECHR), this right must be considered in conjunction with the right to an effective remedy (Art. 13 ECHR) which requires the choice of appropriate redress[7] and expeditious justice.[8] The right to a fair trial, for which the right to access to justice originally stemmed from, allows for mandatory ADR schemes before resorting to the courts as long as these court restrictions are considered to be legitimate and proportionate. An analogy can be made between ADR/ODR and the position taken by the European Court of Human Rights in favour recognising pre-action decisions made by administrative authorities as compatible with the right to a fair trial.[9] The European Court of Human Rights held that decisions by out-of-court bodies must be subject to subsequent control by a judicial body (through an appeal or review process),[10] which should cover the facts, the substantive law and offer minimum due process

[3] Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes OJ L 165/63. This Directive is supplemented by the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters OJ L136/3.

[4] There are EU legislations making it mandatory for businesses to be adhered to a publicly certified ADR body in sectors such as telecommunication, gas and financial services. These obligations are pursuant to art. 3(13) Directive 2009/72/EC concerning common rules for the internal market in electricity OJ L211/94; Annex I (1)(f) Directive 2009/73/EC concerning common rules for the internal market in natural gas OJ L211/94; arts. 80 and 83 of the Directive 2007/64/EC on payment services OJ L 319. Art. 10(2) (t) and Art 24 Directive 2008/48/EC on credit agreements for consumers OJ L133/66; art. 14 Directive 2002/65/EC on distance marketing of financial services OJ L271; and art. 10 of the Directive 97/5/EC on cross-border credit transfers OJ L43.

[5] Regulation (EC) 524/2013 on online dispute resolution for consumer disputes OJ L165/1.

[6] UK Department for Business, Energy & Industrial Strategy, 'Modernising Consumer Markets' Consumer Green Paper (April 2018) p. 50.

[7] Council of Europe Committee on Equality and Non-Discrimination 'Equality and Non-Discrimination in the Access to Justice' Report Doc 13740, Rapporteur: Mr V. Riceard Badea (31 March 2015) para. 10.

[8] Council of Europe Committee on Legal Affairs and Human Rights 'Access to Justice through Online Instruments' Draft Report, Rapporteur: J. Xuclá, (2 November 2015) para. 13.

[9] ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium* Appl. no. 6878/75 and 7238/75, Judgment of 23 June 1981 para. 51.

[10] ECtHR, *Zumtobel v Austria*, Appl. no. 12235/86, Judgment of 21 September 1993, para. 29-32.

standards.[11] In a similar vein, the Court of Justice of the European Union held that mandatory online conciliation and mediation are consistent with European legislation insofar as they do not make it too difficult for consumers (time-wise as well as cost-wise) to exercise their right of access to the courts.[12]

Therefore, it is plain that access to justice goes beyond judicial dispute resolution, and it may encompass mandatory ADR/ODR processes that seek early settlements. These processes in the EU are increasingly being publicly certified and offer more than a mere private dispute resolution function since they provide a public service for consumers that complements, and often replaces, the role of the courts. Furthermore, what is quite unique of these certified ADR/ODR schemes is that they are legally required to cooperate with public enforcement bodies[13] whose role is not to provide individual redress, but to monitor businesses compliance and penalise those who infringe consumer protection laws. Yet, paradoxically, whereas courts require litigants more and more to consider or try non-binding extrajudicial techniques such as mediation, in the consumer realm, there is not enough cooperation between extrajudicial bodies and small claims processes.

This paper discusses how technology and extrajudicial processes can increase access to justice, especially for LIPs with low-value claims. The paper argues for greater integration between courts and extrajudicial bodies, which are currently undergoing an institutionalisation process as a result of recent EU legislation. Accordingly, it is argued that access to justice for consumers will only be achieved if they have access to either an accountable and effective extrajudicial scheme that offers adjudication or to a truly user-friendly and accessible online court that incorporates extrajudicial techniques as the UK government has recently endeavoured to deliver. To that end this paper examines the policy options for the English Online Court with a particular focus on the challenges faced by LIP. Finally, this paper submits that dispute system design changes need to be informed by empirical research and a holistic policy strategy on dispute resolution.

II. The Institutionalisation of ODR in the EU

The institutional support for ADR/ODR is not limited by efforts to increase access to justice for those with unmet legal needs, but also to increase consumer confidence in the digital market. It is thus not surprising that the legislative justification of regulatory initiatives in this field are on the one hand the fundamental right to access to justice, and on the other hand, the pursue of a more competitive and sustainable market. In the international arena UNCITRAL Working Group III (ODR) has produced rules for an ODR tiered process that is designed to resolve cross-border low-value disputes.[14] But greater impact on ODR has been achieved through concrete initiatives at regional and national level. As noted above at regional level the EU has produced legislation that requires Member States to ensure the availability of certified ADR/ODR entities that comply with procedural standards and it also requires traders to inform consumers about the EU ODR platform and the ADR/ODR entities therein contained,

[11] L. McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26(3) *European Journal of International Law* 607-634.

[12] Joined Cases C-317/08 to C-320/08, *Rosalba Alassini and Others v. Telecom Italia SpA and Others* (18 March 2010). See also C-75/16 *Livio Menini and Maria Antonia Rampanelli* (14 June 2017).

[13] Art. 17 ADR Directive.

[14] See UNCITRAL Working Group III (Online Dispute Resolution) Thirty-third session (New York, 29 February - 4 March 2016). Note by the Secretariat 'Draft Outcome Document Reflecting Elements and Principles of an ODR Process'. See also P. Cortés and F. Esteban, 'Building a Global Redress System for Low-Value Cross-Border Disputes' (2013) 62(2) *International Comparative Law Quarterly* 407-440.

yet traders are not required to used them unless a sectorial law mandates them to do so.[15] Accordingly, the EU ADR/ODR legal framework has three goals: to ensure the availability of ADR/ODR for consumer matters, to guarantee these entities compliance with minimum standards, and to raise awareness about these schemes.[16] These three goals are examined below.

As already noted the first goal seeks to ensure the availability of ODR in all sectors where there are contracts between consumers and businesses. Although the regulations do not make the participation compulsory, there are a number of sectorial regulations in the UK that require EU traders to be covered by a certified ADR scheme.[17] However, as noted above, gaps remain in important sectors such as home improvements, property rental and traditional retail. It is submitted that these gaps can be filled by having a residual ADR/ODR entity that covers those sectors not already covered by a sectorial ADR body, or by having a truly accessible online court. A number of jurisdictions have sought to meet this gap by making mandatory ADR across all sectors through complaints boards, such as the case of Sweden, or by requiring traders to offer free of cost ADR to their consumers, such as the case in France where traders are legally required to participate in, and pay for, mediation. Yet, these mediation processes do not guarantee the resolution of a complaint, and traders will have very little incentive to reach a compromise knowing that the consumer will not be able to escalate a dispute. Also, accessible courts, especially through small claims processes available online, can help to fill these gaps and ensure an effective consumer redress system. These gaps are expected to be covered in England by the Online Court, but, as it is discussed below, it remains unclear how it would interact with the existing consumer ADR/ODR infrastructure. Arguably, this untapped synergy will be eventually realized as courts continue to adopt or require parties to try ADR processes.

The second goal of the EU legislation is to ensure quality standards for the certified dispute resolution bodies, which are now being certified by national competent authorities (typically the regulators in each sector) when they meet the procedural standards set in the national legislation that transposes the ADR Directive. The legislation has triggered the professionalization of previously unregulated ADR/ODR schemes, and it triggered the launch of new schemes, including for profit bodies which saw a new market opportunity. The new populated ADR/ODR landscape in the EU is favouring forum shopping where there are more than one ADR/ODR provider per sector. This raises concerns about the independence of these ADR/ODR entities because these entities have economic incentives to attract traders, who will not only choose, but often pay for these processes.[18] Lessons should be taken from the experience of domain name dispute resolution bodies, which similar to what is now happening in many European jurisdictions with multiple ADR/ODR providers, the party choosing and paying for the dispute resolution provider will naturally pick a provider based on their performance, that is, choosing more likely to decide in their favour at the lowest cost.[19] Therefore, regulators should

[15] P. Cortés, 'The New Landscape of Consumer Redress: The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution' in P. Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2016) in press.

[16] Communication on ADR for Consumer Disputes in the Single Market COM(2011) 791. See generally, P. Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2016).

[17] These sectors are energy, estate agents, financial services, higher education, gambling, legal services, pensions, postal services, property letting agents, and telecommunications.

[18] See P. Cortés 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16(2) *ERA Forum* 125.

[19] M. Geist, 'Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP' (2002) 27 Brooklyn J. Int'l L. 903.

monitor closely that ADR/ODR entities comply with due process standards, including independence, and limit the number certified ADR/ODR providers per sector when competition amongst providers compromise quality standards.

The third goal is to increase awareness about these certified dispute resolution bodies. Traders in the EU are required to signpost consumers to certified dispute resolution bodies, and those operating online, including online market places such as Amazon, have also the obligation to provide an easily accessible link to the EU online platform.[20] Controversially, all traders, even those who have not signed up with an ADR/ODR body, must inform consumers in writing about the availability of these bodies every time they have an unresolved dispute. The purpose of this information obligation is to encourage traders to opt-in the ADR/ODR process. This information, however, must be provided regardless of the traders' willingness to participate in the process, which inevitably delivers confusing information to consumers who are presented with the details of an ADR/ODR provider and ODR platform will not help them in resolving their complaints.

The first year report of the EU ODR platform found that only around 30 per cent of online traders complied with the obligation to provide the link to the ODR platform. [21] Although this percentage appears to be quite modest, it does represent a notable growth from the beginning of the year where the percentage was much lower. The same can be said about the volume of complaints, with the first year of operations having registered only 24,000 complaints (a very modest number for the half billion EU consumers). However, the number of complaints have increased steadily since its launch receiving 36,000 complaints in the second year of operation between 15 February 2017 and 14 February 2018, which represents an increment of over 50 percent. [22] At the time of writing the Platform has received around 80,000 complaints since its inception, and the website has received over 8 million visits. In terms of the types of claims, 61 per cent were domestic while 39 per cent were cross-border (within the EU). The sectors most complained about were consumer clothing, airline tickets and ICT goods, and the main issues related to delivery of goods, non-conformity and defective goods.[23]

But the most surprising finding was that only 1 per cent of the claims submitted in the ODR platform were resolved by a certified ADR/ODR entity, while the remaining were either resolved through direct negotiation between the trader and the consumer or not resolved at all.[24] The European Commission found that 85 per cent of all complaints submitted were closed automatically after 30 days because the trader did not reply to the complaint through the platform. Yet, further research on these cases found that of this bulk, 40 per cent of consumers were contacted directly by the trader with a view of resolving the complaint. In addition, 9 per cent of the cases submitted to the platform were refused by the trader, of which two thirds of these consumers were also contacted directly by the trader outside the platform. Out of the remaining, 4 per cent of complaints were withdrawn by either party

[20] Online Dispute Resolution platform available at <http://ec.europa.eu/odr>.

[21] Report from the Commission to the European Parliament and the Council on the Functioning of the European Online Dispute Resolution Platform Established under Regulation (EU) 524/2013 on Online Dispute Resolution for Consumer Disputes (December 2017). Hereinafter, the EC First Annual Report (2017). Available at <https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf>.

[22] European Commission, Functioning of the European ODR Platform – Statistics 2nd year (December 2018) p. 2. Available at <https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf>.

[23] See the statistics available at <https://ec.europa.eu/>.

[24] Hereinafter, the EC First Annual Report (2017) p. 7.

before reaching the ADR entity, and only the outstanding 2 per cent were referred to a nationally certified ADR entity, but only half of these reached a final outcome through the ADR/ODR entity.

The data of the second year of operation of the ODR platform are very similar to the first one: 81 per cent of cases were automatically closed but the Commission survey amongst consumers found that 37 per cent of these consumers had been contacted by the trader to settle the dispute outside the platform.[25] Out of the 19 per cent of complaints processed by the platform, most of these cases (13 per cent) were closed because the trader indicated they did not want to use the platform, but the majority of these cases were resolved through bilateral negotiations. Lastly, 4 per cent of cases were withdrew from the procedure, which the Commission indicates it was because parties were likely to have reached a solution, while the remaining 2 per cent were referred to an ADR entity.[26]

Thus, in both years of operation it was found that only 2 per cent of cases reached an ADR entity while only half of these, 1 per cent of total of complaints, were resolved by a third neutral party through an ADR/ODR entity. The Commission highlights that overall 44 per cent of complaints were resolved successfully through bilateral negotiation outside the platform. Therefore, whilst one can agree with the Commission's complacent conclusion that the EU ODR Platform is contributing to incentivise traders to cooperate on an amicable solution,[27] the platform is clearly below its potential. As it has been discussed elsewhere, the Platform should provide additional functions that support the resolution of the majority of disputes, such as a trustmark that encourage traders participation, a negotiation tool that facilitates early settlements, and automatic referrals to ADR/ODR bodies when traders are already adhered to an ADR entity.[28] The European Commission has recently undergone a "substantial overhaul" to make the ODR Platform "more user-friendly, informative and engaging" and it continues to carry out awareness campaigns to promote its use amongst consumers and traders.[29]

Although the goals of the EU legislation have not been fully realised, the European legal framework for consumer ADR/ODR incorporates recognized best practices and an accreditation system, and in doing so, it has started a process of professionalizing a traditionally unregulated sector. The rationale behind this regulatory effort is the promotion of ADR/ODR as the primary form of dispute resolution for consumer disputes. Presently, the EU ODR platform contains a network of over 400 certified ADR/ODR providers that have been publicly certified to resolve consumer disputes within the European Economic Area. This new structure have trigged an institutionalization process which is moving ADR from the unregulated models of redress to an increasingly important part of the civil justice system in the EU. Moreover, as noted above, from an EU view point, consumer ADR, like courts, is more than a mere tool of dispute resolution; it is an essential mechanism to widen access to justice by expanding the avenues to ensure better compliance with consumer protections laws. Accordingly, ADR/ODR entities are delivering a public service which remit goes beyond the provision of individual redress, as under the ADR Directive, they are now legally required to cooperate with the trade industry by identifying common causes of complaints as well as with enforcement bodies in improving standards and compliance with consumer law.

[25] EC Second Annual Report (2018) p. 4.
[26] Ibid.
[27] Ibid.
[28] P. Cortés 'A New Regulatory Framework For Extra-Judicial Consumer Redress: Where We Are And How To Move Forward' (2015) 35(1) *Legal Studies* 114-141.
[29] EC Second Annual Report (2018), p. 5.

III. Mind the Gap in Access to Justice

Mandatory Sectorial ODR and Incentives for Voluntary ODR

This paper has observed that the participation in ADR/ODR is often optional in the consumer realm, saved for a number of exceptions in regulated sectors such as for financial institutions, energy or telecommunication providers, which businesses are subject to independent dispute resolution bodies.[30] With regards to other civil and commercial disputes, a well-known and early ODR process is the one used to resolve disputes between domain name holders and trade mark owners.[31] However, as noted above, there are still many gaps where individuals with legal needs only have available an unsuitable and expensive court avenue to seek redress and justice.

It has already been discussed elsewhere that these gaps in access to justice should be met by ensuring that on one hand, regulated sectors make it mandatory for licensed businesses to be adhered to an ADR/ODR entity as a precondition to benefit from the market participation.[32] As for non-regulated sectors, such as retail, traders must be subject to incentives and penalties that encourage their participation in an ADR/ODR process. In terms of incentives these can come from an online label or trustmark that provides visibility to the business trading standards -e.g. Trustmark in the UK or the BBB in North America.[33] Another strategy is the use of penalties for reluctant participants. In England the Small Business Commissioner resolve complaints regarding late payments from large to small businesses, and while its decisions are only recommendations, the Commissioner can publish cases to promote compliance.[34] Similarly, the main ADR/ODR provider for consumer disputes in Sweden, the ARN, does not require the participation of traders in its complaint boards, but if the recommendations are not followed, then the name of the trader is published online and in a consumer magazine. This approach seems to be quite effective in ensuring that the majority of recommendations are followed. In a similar vein, the UK aviation regulator, the Civil Aviation Authority, gives the airlines the option of either signing-up with one of the two approved ODR providers or the regulator itself will process passenger claims. Interestingly, the regulator only issues decisions in the form of non-binding recommendations, but it charges airlines a fee per case that is processed (currently £150), which is higher to the fees charged by the certified dispute resolution providers –yet, the latter, which are private ADR/ODR entities, issue contractually binding decisions on the airlines once the outcomes have been accepted by the passenger-complainant.[35]

Access to justice will only be met if individuals with unmet legal needs have either access to a residual dispute resolution scheme, which can process the complaints even when the trader has not signed-up with an ADR/ODR entity because it is mandatory for the businesses or because it relies on incentives and penalties, or, as the next section discusses, if there is a truly accessible online court, especially one that incorporates ADR/ODR techniques that promote early resolutions. Furthermore, ADR/ODR processes need to be monitored to ensure that they operate in an impartial and effective

[30] Supra n. 4.
[31] P. Cortés 'Online Dispute Resolution Services: A Selected Number of Case Studies' (2014) 20(6) *Computer and Telecommunications Law Review* 172-178
[32] P. Cortés, 'Consumer ADR in Spain and the United Kingdom' (2018) 7(2) *Journal of European Consumer and Market Law* 82-88.
[33] See <https://www.trustmark.org.uk/> and <https://www.bbb.org/>.
[34] The Office of the Small Business Commissioner was created by the Enterprise Act 2016.
[35] See https://www.caa.co.uk/home/.

manner. The monitoring can be carried out by accreditation agencies, as it is largely the case in the EU, or through court supervision.

Pathways for Increasing Access to Justice

Courts have a fundamental function to ensure that those individuals with legal needs who cannot resolve their complaints through an ADR/ODR process, could obtain redress through the courts. An additional function that the courts can deploy is to ensure that ADR/ODR providers deliver substantive justice. This could be done through pathways from ADR/ODR to the courts (and vice-versa) in order to clarify when necessary the interpretation of substantive law (e.g. on mandatory consumer protection rights) as it currently does the Court of Justice of the EU when a national court is unsure about the interpretation of EU Law.

An online court process would be the most obvious fit to accommodate the collaboration between ADR/ODR bodies and the courts. There are already come examples of this model in a number of regulated ombudsman schemes for pensions, financial and legal disputes. Similarly, the Irish Financial Ombudsman can also refer a point of law to the High Court. However, caution should be employed to avoid courts from deciding the procedural standards of ADR/ODR processes based on judicial due process standards. This is a concern that it was raised in relation to the Financial Ombudsman in Ireland which allows financial institutions to appeal decisions to the High Court. It has been argued that this court monitoring of the ADR process led to an increase of due process standards, and hence formality, in the adjudication stage of the ombudsman process.[36] To counterbalance the descend of the ADR towards a more formal process, the ombudsman decided to implement changes in its process to promote the use of mediation with a view of achieving early settlements and reduce the number of adjudications. Therefore, it is suggested that while statutory interpretation should be largely left to the courts, procedural standards for ADR/ODR processes are better left to the administrative authority, regulator or accreditation agency.

In addition, court processes are increasingly requiring parties to consider ADR in advance of judicial adjudication. These requirements in England come in the form of pre-action protocols or mediation information and assessment meetings (MIAMs) mandating parties to explore ADR options in advance of court litigation, or as part of the procedure where parties are, for instance, invited to participate in a telephone mediation in advance of the judicial hearing or trial. Online court processes are also incorporating these ADR stages, encouraging parties to explore settlements through online communications with or without the assistance of a third party neutral.

The efforts to interconnect different processes, especially formal and informal ones, have been labelled as "process pluralism",[37] which acknowledges the need to provide access to justice in different ways.[38] But this view has faced critics who argue that while ADR processes may increase access to redress, they deliver lower quality of justice for the weaker party; [39] in other words, this critique notes

[36] J. Williams and C. Gill 'A Dispute System Design Perspective on the Future Development of Consumer Dispute Resolution' in P. Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2016) p. 383.

[37] C. Menkel-Medow, L. Love, A. Kupfer and J. Sternlight, *Dispute Resolution: Beyond the Adversarial Model* (2nd ed., Aspen, 2011).

[38] M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law (1981) 13 *Legal Pluralism and Unofficial Law* 1 and M. Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) 56 *Modern Law Review* 282-284.

[39] O. Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073 and R. Abel, *The Politics of Informal Justice* (New York, Academic Press, 1982) and M. Palmer, 'Formalisation of Alternative Dispute Resolution Processes: Some

that there is a trade-off between the goals of efficiency (i.e. access) and fairness (i.e. justice),[40] which is particularly acute when technology is incorporated in the dispute resolution process.[41] The English Online Court is a good example of what has been referred to as "the juridification of private-organised dispute resolution *versus* the growing informality of state court proceedings".[42] This is because the Online Court seeks to benefit from the flexibility of ADR while court-annexed and certified ADR processes are becoming more formalised, particularly in those areas where disputants are signposted to it and parties are likely to have power imbalances, as it is in family, employment, consumer sectors, and arguably in Small Claims, where often at least one litigant does not have legal representation.

The remaining of this paper examines the development of the English Online Court and the policy options that are available to ensure that it meets its goals of increasing efficiency and access to justice.

IV. Policy Options for the English Online Court (the Civil Money Claims Online)

With an effort to revert the deterioration of the civil courts, the UK government has recently committed the investment of £732 million to modernise its courts and tribunals, which are expected to operate "digital by default".[43] A fundamental element of the reform will be the launch of a new Online Court process by 2020 that will process the majority of civil claims under £25,000. The Online Court implements a proposal that originated in the Civil Justice Council and it was subsequently recommended in subsequent landmark reports by Lord Justice Briggs.[44] The large public investment (part of which is being raised by the sale of court estate that is under-used, dilapidated or too close to another court) seeks to modernise all the courts and tribunals so that they can operate under one single software base, or ODR platform. The changes are taking place on a piecemeal manner through a number of projects and upgrades based on an agile methodology. The main transformation is expected to be completed by 2022, but some projects are expected to be finalised earlier. Amongst this project is the so-called Online Court, which is being implemented through an online process called the Civil Money Claims Online. Amongst other recent project are a new digital process to apply for divorce and another one to apply for probate online.

The modernisation program represents the most important change in the field of civil justice in the UK in a generation. Furthermore, given its scale and the novelty of its procedure, the Online Court (i.e. the Civil Money Claims Online) is expected to have a profound impact in the UK and beyond. The Online Court, akin tribunals and small claim courts, will be inquisitorial in nature and its design is

Socio-Legal Thoughts' in J. Zekoll, M. Balz and I. Ambling (ed) *Formalisation and Flexibilisation in Dispute Resolution* (Brill, 2014), p. 21.

[40] For a discussion on justice in the mediation process and the requirements to achieve it see D. De Girolamo 'Sen, Justice and the Private Realm of Dispute Resolution' (2017) *International Journal of Law in Context* pp. 1-21 (First-View 20 December 2017).

[41] E. Katsh and O. Rabinovich, *Digital Justice* (Oxford University Press, 2017).

[42] Zekoll et al, supra n. 39, p. 3. See also The European Law Institute and the European Network of Councils for the Judiciary 'The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution' (2018). Available at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf>.

[43] Ministry of Justice, Transforming Our Justice System (September 2016) Government Response (February 2017).

[44] Civil Justice Council Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Claims' (February 2015); LJ Briggs, Civil Courts Structure Review: Interim Report (Dec, 2015) and Final Report (July, 2016).

hoped to be user-friendly for litigants in person. The Online Court process consist on a tiered procedure with three online stages: (i) a software that will assist litigants to fill in their claims and responses, (ii) a case officer will help litigants to settle their claims, and (iii) the remaining cases will be decided (whenever possible) on the documents by a district judge.[45] This section examines the policy challenges faced in each of the three stages and discusses the particular needs of LIPs which are an important priority for the Online Court as it aims to widen access to justice for this growing cohort.

Stage 1: Online Submission of the Claim and Response

The First Stage allows for the issue of the claim as well as the submission of the response online. This stage however has a more ambitious goal, and that is the promotion of early settlements. In essence this stage seeks to replace the pre-action protocols, which cannot be expected to be complied in full by LIPs as they do not have the benefit or legal representation. Currently the pilot process also allows for the parties to use an online tool to carry out without prejudice negotiations. It can be forecasted that in a non-distant future more sophisticated negotiation tools will be employed, including those where the technology proposes a solution, such as bling bidding systems that compare confidential offers that are only disclosed to the other party when there is a match or overlap in the submitted offers.

A medium term ambition for this stage is to incorporate a triage or diagnosis tool for certain types of disputes. For instance the Her Majesty's Courts and Tribunals Service (HMCTS) has been working on a dispute resolution tree for passengers and airline disputes over delays and cancellations. In this regard a leading example of triage tool is the Solution Explorer employed by the Civil Resolution Tribunal,[46] which procedure, similar to the one offered by some ombudsman, has been hailed as the blueprint for the English Online Court. The Civil Resolution Tribunal boasts that the bulk of the users of the Solution Explorer do not proceed to the next stage of online negotiation. Although it is presumed that most resolved their disputes after using it, research would need to be conducted to ascertain how many of these users have actually managed to resolve their disputes.

When designing an online process and choosing amongst the various Dispute System Design options, it is important to consider the goals of the process, which in terms of court digitalisation programs these are often related to efficiency and increasing accessibility to the courts. But these goals can conflict, for instance, charging court fees at different stages of the process would make the process more cost–efficient and might encourage early settlements, but it may also lead to under-settlements or decrease access to justice for poor claimants or those with low-value claims. Thus, policy decisions need to be taken on how these goals should be prioritised.

Nevertheless, the design of most ODR processes, including online courts, seem to favour tiered processes, where the first tier or stage is self-assessment or triage and negotiation, followed by a facilitation stage where a neutral third party helps litigants to settle their claim. This is what Lord Briggs referred as the Conciliation Stage.[47]

[45] For detailed information about the procedure, See HMCTS Money Claim Online User Guide for Claimants available at <https://www.gov.uk/government/publications/money-claim-online-user-guide>.
[46] S. Salter and D. Thomson 'Public-Centred Civil Justice Redesign: a Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 *McGill Journal of Dispute Resolution* 113.
[47] Briggs, supra n 44.

Stage 2: Conciliation Stage

Like in the Canadian Civil Resolution Tribunal, this conciliation seeks to settle the majority of the cases reaching this stage. At the time of writing this stage has started to operate on a pilot basis and it is managed by case officers who have inherited some of the judicial functions in terms of case management and referring parties to mediation and other ADR methods.[48] This change may produce a significant shift in achieving higher levels of court settlements and participation in ADR processes, as case officers may be more forceful than judges in recommending parties to attempt ADR and to settle their claims since, unlike judges, they will not adjudicate unresolved disputes. Court officers however are not allowed to provide legal advice.

In terms of ADR options, currently the main model is telephone mediation delivered by HMCTS trained staff, but it is expected that more ADR/ODR options will soon be available to the parties, including early neutral evaluation (ENE) carried out by a different district judge to the one deciding on the case in the final Stage 3. A challenge for case officers and policy makers will be meet the "forum to the fuss" (i.e. the dispute) as well as "to the folks" (i.e. the parties' preferences), matching disputes and disputants' needs to the most appropriate dispute resolution processes.[49] An important consideration will be whether the referrals made by case officers are optional or not. In other words, whether the conciliatory stage follows an opt-in model or an opt-out model. In the UK, the predominant model thus far has been the opt-in models for mediation, while the opt-out models have been favoured in certain jurisdictions in Australia and Canada.[50]

A new important change which is due to be tested from April 2019 is an opt-out mediation process for claims under £300, which currently represent 20 per cent of the all the claims below £10,000 (though this limit is expected to be raised in 2020 to £25,000). For these cases parties will be automatically allocated a mediation slot, unless one litigant expressly opts out, without the need to justify it given the low value of the dispute. The Ministry of Justice plans to evaluate these cases and raise the economic threshold progressively.

If an opt out model is adopted, then policy makers will need to consider when litigants will be able to rely on opt-outs, whereas if an opt-in model is chosen, then it will be crucial to imbed incentives into the procedure to ensure an adequate level of participation. Importantly, the online medium may change existing incentives. For example, presently the small claims telephone mediation model has a powerful built-in incentive for opting-in as it is free and parties opting to use it could save themselves from having to take a day off work to attend a court hearing, possibly intimidating, especially for LIP and defendants. Yet, this incentive may disappear once Stage 3 is fully operational, and since parties will not be required to attend physically a court room as the case will be adjudicated based on the parties' online submissions.

In addition to participation, incentives as well as penalties, can play an important role in encouraging litigants to settle in their disputes. In terms of incentives, *ebay* boasts of resolving 60 million disputes a year, mostly without human intervention, and that is because parties have incentives to settle: the

[48] See Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

[49] F. Sander and S. Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10(1) *Negotiation Journal* 68 and T. Heeden, 'Remodeling the Multi-door Courthouse to "Fit the Forum to the Folks": How Screening and Preparation will Enhance ADR' (2012) 95 Marquette Law Review 941.

[50] See B. Billingsley and M. Ahmed 'Evolution, Revolution and Culture Shift: a Critical Analysis of Compulsory ADR in England and Canada' (2016) 45(2) *Common Law World Review* 186-213 and T.M. Sourdin 'Good Faith Participation in Mediation: An Australian Perspective', (2014) Spring ACResolution 31-34.

buyer seeks compensation and the seller positive feedback, and the eBay Resolution Centre provides them with automated settlement options which have learnt from the preferred choice made in millions of similar disputes.[51] With regards to penalties, as noted above, blacklists could be employed in certain cases, and that is the reason behind the English Small Business Commission ability to publish recommendations, especially if they are not followed by the corporation. While an Online Court will not hold black lists, they could penalise litigants who have ignored an invitation to try ADR or who have rejected an adequate offer to settle.[52]

Furthermore, it is essential to ensure capacity. Currently, under the Online Court pilot, only around 50 per cent of small claims where parties requested a mediation are allocated to a mediation slot, and out of those, 62 per cent settle during the telephone mediation. The reasons behind the inability to meet the existing demand are twofold. On one hand, litigants are offered only two time slots that fall between normal working hours (8am -6pm) Monday to Friday, and if they cannot meet any of them, then the case automatically proceeds to trial. There are also a number of cases where one party does not show up (i.e. answer the phone) on the appointed day, so these cases proceed directly to trial. On the other hand, litigants who have opted in trying mediation in the Allocation Questionnaire are subsequently offered more information about the mediation process, which includes that parties are required to listen to each other and work out a compromise. At this point in time some litigants drop out.

Another policy choice would be to choose between doing the conciliation in-house or outsourcing cases to out-of-court ADR/ODR schemes, for example to publicly certified ADR entities or ombudsman schemes dealing with consumer disputes. Inevitably, there will always be a number of disputes that cannot be settled, and those cases will need to proceed to the last stage of the procedure, where a judge will adjudicate the dispute.

Stage 3: Online judges

The final stage of the Online Court, which is expected to be rolled out in 2019, will consist on having District Judges adjudicating the remaining disputes that could not have been settled in the previous two stages. This stage will replace largely the traditional face to face trials for judicial adjudication based on the written submissions, though it will allow for online or telephone hearings when considered necessary by the judge –including continuous hearings, which are already being used in the Social Entitlement Chamber of the First-tier Tribunal, enabling judges to contact the parties as, and when, they need additional information.[53] The expectation is that only in the most exceptional circumstances there will be a face to face hearing, but even that hearing may not require the physical presence of both parties.

Litigants attending online hearings should be able to do it from home as well as from approved hearing centres such as from universities, libraries and consumer associations, where LIPs may find additional support and advice.[54] Clearly, many of court users will need to obtain support to get online access and to articulate their arguments and this support may come from outside the legal profession as well as

[51] P. Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press, 2018).
[52] See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and *PGF II SA V OMFS* [2013] EWCA Civ 1288. See also Pt36 Civil Procedure Rules (England and Wales) 1998.
[53] HM Courts & Tribunals Service, HMCTS Monthly Bulletin (December 2018). Available at <https://content.govdelivery.com/accounts/UKHMCTS/bulletins/21ef201>.
[54] Justice, 'What is a Court?' (2016). Available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf>.

from unbundled legal services, where LIPs can pay for legal advice during specific parts of the dispute resolution process, instead of paying for legal representation during the whole dispute resolution process.

Moving from face to face to online judges opens up the opportunity to re-imagine justice. In the Online Court context this means that by moving from having district judges in county courts to having a centralised system whereby judges will be contacted through an online platform, it allows for the specialisation of judges. There is therefore no longer the need to have generalist judges to serve their local communities, instead there is the opportunity to have specialised judges which can decide cases more efficiently and consistently. Indeed, High Court judges, which are largely centralised in London are fairly specialised –yet, the case volume and the number of district judges in the online court will be much higher than that of the High Court. In a similar vein, currently large ADR entities, such as the Financial Ombudsman Service in the UK which processes over 400,000 complaints per year[55] have case handlers and ombudsman which are specialised in different types of financial disputes (e.g. personal protection insurance, mortgages, current and credit accounts, etc).

Moreover, judges are progressively using technology tools to inform their decisions, even in criminal cases. In the US many criminal judges routinely use a software called Compas which assesses the risk of reoffenders.[56] This is a software that by filling in the questionnaire it provides a calculation of the risk of reoffending. It must be noted that these types of online tools may also have built-in biases and this has been the focus of criticisms levelled against Compas. An academic evaluation has found biased algorithms in the software that resulted in black defendants being frequently predicted to be at a higher risk of recidivism than they actually were, and the opposite was found for white defendants.[57] In spite of that, the Supreme Court of Wisconsin confirmed the legitimacy of judges in using this tool but warned caution about overreliance on these types of software tools.[58]

Open justice will be an important factor to ensure transparency and it could also operate as a powerful incentive to encourage settlements as these will remain confidential, whereas judicially adjudicated decisions will not. In a similar vein, when oral hearings are taking place, these will need to remain open to the public, and technology can make this possible with little disruption by allowing outsiders to connect live.

The main challenge will be however to ensure that LIPs get enough support to guarantee them a fair trial and to avoid under-settlements. For that reason, LIPs need to be empowered with additional safeguards.

Empowering Litigants in Person

The number of LIPs in civil and family courts is growing very fast in the UK, where in 2014 around 80 per cent of all family court cases had at least one party who did not have legal representation.[59] This trend is also seen elsewhere, especially in common law jurisdictions, such as the US where the

[55] Financial Ombudsman Service, Annual Review 2017/2018. Available at <https://www.financial-ombudsman.org.uk/publications/annual-review-2018/index.htm>.

[56] See Northpointe, 'Practitioners Guide to Compass (Correctional Offender Management Profiling for Alternative Sanctions)' (12 August 2012) Available at <http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf>.

[57] J. Larson et al 'How We Analyzed the COMPAS Recidivism Algorithm' (26 May 2016). Available at <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>.

[58] *State of Wisconsin v Eric Loomis* 2016 WI 68.

[59] See National Audit Office, 'Implementing Reforms to Civil Legal Aid' HC 784 2014-15 (20 November 2014) p. 15.

proportion of civil cases where there was at least one LIPs in 2013 was 76 per cent.[60] The needs and vulnerability of LIPs vary significantly and depend on factors such as age, education and IT skills. A crucial challenge that policy makers are consequently facing is how to empower LIP and whether they should be offered tailored made processes that cater for their needs, including adopting different procedural tracks for LIP and represented litigants. This is particularly challenging when only one party has legal representation, and the position in the UK has been recently addressed by the Supreme Court which divided decision tilted against giving special treatment to LIPs.[61] There are however different Dispute System Design options will need to be considered to address the imbalance of power, especially when designing processes for tribunals, small claims and online court processes.

In addition to confidentiality, court fees and cost penalties may have an impact in the number of settlements but also it may impact the level of access to justice. The CPR and case law have already developed economic strategies to promote settlements, such as Part 36 offers to settle in England (what used to be called *Calderbank* offers and still is the case in some common law jurisdictions),[62] and cost penalties for unreasonably refusing to accept or ignoring an invitation to ADR/mediation. Nevertheless these penalties do not normally apply to small claims or LIPs. Over the next few years policy makers will need to consider whether these incentives and penalties should be extended to LIPs, and if so, whether to build-in safeguards to ensure that the most vulnerable court users will not be left out or pushed towards a second class justice of under settlements.

The Internet has empowered individuals with information about their rights that previously was only available to them via professionals.[63] As already mentioned the growth of unbundling of legal services allows clients to pay for expertise for only certain elements of the dispute, whether it is the initial legal advice or the need for cross-examination for the most complex cases. In the next few years we are going to see more provision of information through technology for LIPs, whether it is automatically generated, such as the Solution Explorer of the Civil Resolution Tribunal, or through the provision of human assistance through a mix of technology and human support via chats, telephone and in-person support, as they are already doing in Orange County, South California.[64]

Technology can empower LIPs, but it can also put barriers to access to justice. The limited empirical research available on ODR in courts have thrown paradoxical findings: for instance in Michigan the Online Court has increased efficiency in terms of cost and time as well as in terms of number of users, yet the number of LIPs dropped.[65] Conversely, a recent study of an Online Court pilot process to deal with credit card debts in the State of New York reduced the number of default cases and showed that the number of defences by LIPs raised significantly.[66] Hence, on its face access to justice was improved as a result of brining the process online. Furthermore, research on the small claims procedure in Ireland (and the limited experience of the English Online Court pilot) have found that allowing for the

[60] S. K. Urahn, 'The Modernization Our Civil Legal System Needs' (6 November 2018). Available at <http://www.governing.com/columns/smart-mgmt/col-technology-modernization-civil-legal-system.html>.
[61] See *Barton v Wright Hassall LLP* [2018] UKSC 12.
[62] P. Cortés, 'A Comparative Review of Offers to Settle – Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?' (2013) 32(1) *Civil Justice Quarterly* 42-67.
[63] J. MacFarlane 'ADR and the Courts: Renewing our Commitment to Innovation' (2012) 95(3) *Marquette Law Review* 927, 930.
[64] See Legal Aid Society of Orange County. Available at <http://www.legal-aid.com/>.
[65] Joint Technology Committee, 'Online Dispute Resolution and the Courts' JTC Resource Bulletin (30 November 2016). See also Joint Technology Committee, 'Case Studies in ODR for Courts: A View from the Front Lines' JTC Resource Bulletin (29 November 2017).
[66] D. Larson, 'ODR in the US Courts –What Works, What Doesn't, Where Do We Go from Here' ODR Forum, Auckland University, 14 November 2018.

online submission of claims can reduce their admissibility when an unrepresented claimant did not identify the correct legal name of a business defendant;[67] this also creates problems in the enforcement stage. By contrast, the recent pilot allowing individuals to file for a divorce online using plain-language forms in England has reduced the dismissal rate from 40 per cent of the more legalistic paper-based applications to 0.6 per cent in the online system which helps to ensure that the applications are completed corrected before they are allowed to be submitted online.[68]

V. Conclusion

This paper has examined how technology and ADR processes are increasingly available through ODR processes that seek to widen access to justice. The paper has focused on the European regulation on consumer redress and the English Online Court. It found that ADR/ODR for consumer matters is undergoing a process of institutionalisation in the EU and that approved ADR/ODR providers are gradually being considered public interest companies, which are largely specialised, publicly certified, and expected to cooperate with the industry and regulators. However, it was noted that the EU goals of ensuring the availability and awareness of quality ADR have not been fully achieved. It is submitted that availability can only be ensured if ADR/ODR is mandatory for traders and if it is able to adjudicate complaints when parties are unable to settle them, or if parties have access to a user-friendly online court process. This paper has advocated for mandatory ADR/ODR in regulated sectors and the use of incentives and penalties for traders in non-regulated markets. With regards to the quality criteria, the new standards are a welcome development, but national competent authorities should monitor closely to ensure that there is no a race to the bottom in terms of standards since typically traders choose and pay for the ODR process. Lastly, in terms of awareness, there is still an important gap since the majority of traders still do not comply with the information requirements. While awareness campaigns are very important, regulators and enforcement bodies should also monitor and require compliance.

The paper also observed that while the English Online Court (i.e. the Civil Money Claims Online) incorporates ADR techniques within its procedure, as currently envisaged, it largely disregards the newly certified ADR/ODR bodies. Thus, it is necessary to identify pathways that align the Online Court with the existing publicly certified ADR/ODR schemes, in particular to clarify points of law as procedural standards are better monitored by accreditation agencies. This paper has examined the policy options for the English Online Court with a particular focus on the challenges faced by LIPs. The paper examined the three stages of the online process and noted that the potential of the first stage lies in the design of effective triage models such as those developed by the Solution Explorer of the Civil Resolution Tribunal. The second stage needs to consider whether to make conciliation an opt-out system or develop incentives for parties to opt-in when recommended by the case officer. The final stage has not been implemented yet, but moving to an online written processes with some online hearings will inevitably carry out important implications, hence transparency must be paramount, including publishing judgments and making online hearings accessible to observers.

[67] P. Cortés, In-Depth Analysis "European Small Claims Procedure and the Commission Proposal" Workshop for the Legal Affairs Committee (JURI) of the European Parliament on Cross-Border Activities in the EU – Making Life Easier for Citizens (2015) pp. 249-279. Available at <http://tinyurl.com/gv8hr3v>.

[68] HMCTS, 'Fully Digital Divorce Application Launched to the Public' (6 May 2018). Available at <https://www.gov.uk/government/news/fully-digital-divorce-application-launched-to-the-public>.

Lastly, this paper submitted that the online centralisation of judges will enable their specialisation delivering greater efficiency and consistency in the adjudication stage.

Although it is hoped that the accessibility and user-friendliness of the Online Court would facilitate access to justice to LIPs, this assumption will need to be tested empirically once the Online Court is fully operative. Undoubtedly, maximising access to justice can only be achieved if policy changes are informed by empirical evaluations and by identifying best practices in comparable ODR processes. Currently there is very little information on the impact of the online processes have on litigants –let alone on LIP. But, on a positive note, digital processes enable the capture of information which would help to assess the journey of disputes and adopt dispute system design options that maximise both access and justice; thus, increasing efficiency and fairness. Rigorous empirical analysis will help us to monitor procedural and distributive justice for online courts. Some factors that will need to be assessed will be the accessibility and user-friendliness of the process, identifying bottlenecks and floodgates, the time and costs involved in resolving disputes, and the level of user satisfaction. But also distributive justice factors, such as the socio-economic composition of litigants, and the fairness of outcomes (e.g. whether there are under-settlements). Some of these issues, especially fairness of outcomes, are not easy to measure, but unearthing this information is crucial for making better policy choices that contribute to enhance access to justice.

Cappelletti and Garth identified three waves in the movement of access to justice: the widespread of legal aid formed the first one, collective redress the second one, and ADR the third one.[69] A fourth wave, one could argue, may be come with a widespread of technology in dispute resolution processes, and this may also facilitate the integration of different dispute resolution processes. Now, 40 years later, the rise of ODR could therefore pave the way for a fourth wave.

[69] M. Cappelletti and B. Garth, 'Access to Justice: The Newest Wave in Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181-292.