

Digital Reformation of Japanese Civil Procedures and its Future Prospects

Stanford Law School, Gould Negotiation and Mediation Program

Visiting Scholar

Monami Nohara

[Introduction]

This paper aims to introduce the recent digital reformation of civil proceedings in Japanese courts, comparing with how the courts in United States were working on implementing technology to maintain their function as dispute resolution organizations during the COVID-19 pandemic.

Even after the pandemic, as the use of technology became highly encouraged worldwide, the courts face how to operate their proceedings in a new norm. From this perspective, this paper also aims to point out future tasks and prospects for courts in the post-pandemic and new technology era.

[Table of contents]

1. Amendment of the Japanese Code of Civil Procedure	3
(1) Calls for Digital Reformation.....	3
A) Historical Background	3
B) The Path to Amendment	4
C) The 3 phases	7
(2) How it was Prior to Amendment.....	8
A) Overview of Japanese courts (civil division)	8
B) Implementing Microsoft Teams under the Pre-Amended CCP (Phase 1).....	9
C) The Impact of Implementation	11
(3) How the civil procedure system will work in the near future.....	13
A) Now Developing.....	13
B) Remaining Tasks	15
2. Digitalization in US courts	19
(1) Before and After the Pandemic	19
(2) Coping with Technology Expansion	21
3. Future tasks.....	23
(1) Data collection and Analysis to Improve the System	23
A) Roles that Courts are Expected to Play After Digitalization.....	23
B) Necessity to Collect and Analyze Data.....	24
(2) The Gap Caused by Digitalization	27
(3) Use of AI.....	30
A) Accountability, Neutrality, and Transparency.....	31
B) Fairness and Impartiality	32
C) Informed Participation.....	33
(4) Expanding Use of ODR.....	34
(5) Loss of Majesty.....	38
4. Conclusion	40

1. Amendment of the Japanese Code of Civil Procedure

(1) Calls for Digital Reformation

A) Historical Background¹

Before trades and treaties with the United States and the European countries were made and Western systems were introduced during the Meiji Restoration of 1868, civil disputes were traditionally resolved by local lords, particularly by encouraging settlement.

The new central government established after the Restoration steered the country to change most of the legal institutions and its procedural systems. In 1880, the legislatures completed a draft for the Code of Civil Procedure based mainly on French Civil Code of 1806, but it was not adopted. Another draft mainly made by Emile Gustave Boissonade; a French advisor to the Ministry of Justice, was completed around 1883, but was not adopted as well. Following the 2 failures, the government decided to refer to the German Code of Civil Procedure of 1877, which was the newest procedural law in Europe at that time. A Prussian state councillor Hermann Techow completed the draft in 1886, and this law was promulgated in 1890.

In 1926, in order to simplify the procedures to prevent delay in litigation, rules regarding the compulsory execution (enforcement), public peremptory notice, and arbitration were amended, in a way that strengthened the court's directive power.

After the World War II, since Japan was occupied and administered by the

¹ YASUHEI TANIGUCHI ET AL., CIVIL PROCEDURE IN JAPAN (Juris Publishing 3d ed. 2018), at 29-42.

victorious allies of the War, the Code of Civil Procedure was amended under the influence of American procedural philosophy. The autonomy of the litigants was strengthened, and new rule for examination were made.

Later on, as number of novel and complicated cases (such as environmental and consumer cases) increased in the mid-1980s and Germany amended its procedural law in the 1970s, Japan too amended its Code of Civil Procedure in 1996. The goal of the amendment was to decrease backlogs, resulting in the creation of small claims procedure in the Summary Court, limiting appeals to the Supreme Court to focus on important constitutional issues, and to set a schedule to organize the issues at an early stage and manage concentrated examination of witness, rather than having parties freely present new issues and/or evidences at any time during the lawsuit. From 2001 onwards, further amendments were made, such as implementing production order for a document held by the public office (adopted in 2001), and implementing rules to allow collection of evidence from another party before the commencement of a lawsuit (adopted in 2003).

B) The Path to Amendment²

In the World Bank Group's Doing Business 2017, lags in case management and digitalization of litigation procedures in Japanese courts were noted, drawing attention to the slow adoption of IT in the Japanese judicial system.³ This was one of the triggers

² Shinji Wakimura et al., *Minjisoshouhoutou No Ichibu Wo Kaiseisuru Houritsu No Gaiyou [Overview of the Amendment of the Code of Civil Procedure (Related to Digitalization)]*, HOURITSU NO HIROBA, Sep 2022, at 4, 4-5.

³ Tsuyoshi Momosaki, *Minjisaibantetsuduki No Dejitaruka No Genjyou Nitsuite [The Status Quo of the Digitalization of Civil Procedures]*, HOURITSU NO HIROBA, Apr 2023, at 21, 21.

for Japan's digital reformation, and on May 18, 2022, the Amendment of the Code of Civil Procedure ("Amended CCP") was enacted.⁴ This amendment sets its main goal to establish provisions to enable digitalization of civil litigation system, in order to make civil trials more accessible to the public by further increasing its speed and efficiency regarding the remarkable progress in information technology.⁵ The path to the amendment was as follows.

In the "Strategy for Future Investments, 2017" approved by the Cabinet in June 2017, the Japanese government set a goal to promptly consider measures to promote the use of IT in court proceedings. In October, the IT for Court Proceedings Study Group was established in the Cabinet Secretariat. In March 2018, the Study Group compiled a report which proposed "3e" (which stands for e-Filing, e-Case Management, and e-Court) as the main contents of the digitalization project.⁶

On February 21, 2020, the Minister of Justice consulted the Legislative Council to review the civil litigation system. In response, the Legislative Council established the Civil Procedure Code (IT-related) Subcommittee, which held a series of deliberations.

On February 14, 2022, the decision on the outline was made, and on May 18, the bill was passed by the Diet, and promulgated on May 25.

The enforcement period varies depending on how much preparation is anticipated,

⁴ MINISTRY OF JUSTICE THE CIVIL AFFAIRS BUREAU, Amendment of the Code of Civil Procedure (related to digitalization) (Jun 2022), <https://www.japaneselawtranslation.go.jp/outline/61/905R411.pdf>.

⁵ *Id.*

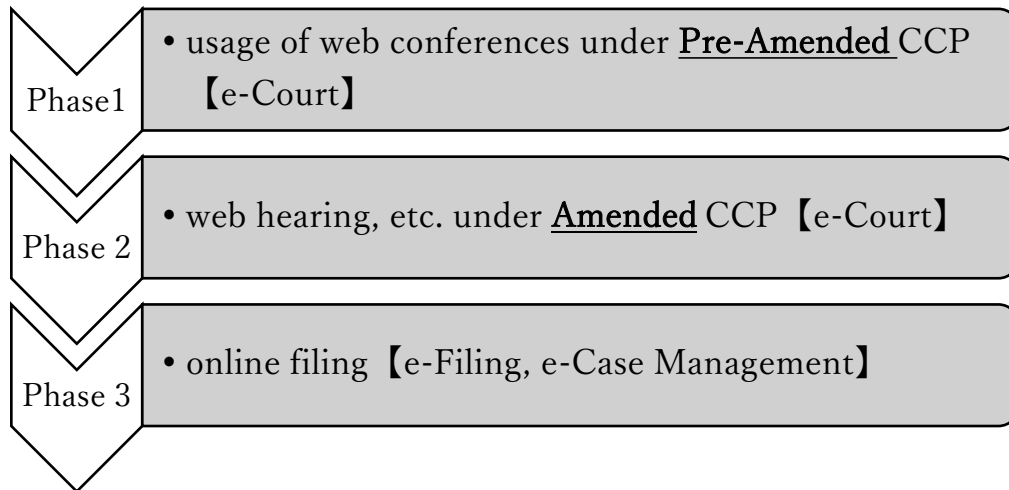
⁶ Shusuke Kakiuchi, *Minjisaibantetsuduki No ITka -Online Moushitate • Soshoukiroku No Denshika [Digitalization of Civil Procedures -Online Filing and Digitization of Case Records]*, HOURITSU NO HIROBA, Sep 2022, at 13, 13.

and a date to be specified by a Cabinet Order varies from “within 9 months” to “within 4 years” from May 25, 2022; the date of promulgation.⁷ The following are the enforcement schedules of major systems.

- By March 1, 2023: System that enables both parties to participate in preparatory proceedings by audio transmission (teleconference, web conference, etc.), without actually appearing in court.
- By March 2024: System that enables parties to participate in the dates for oral argument by web conference in Civil Litigation.
- Within 1.5 years after the system above is implemented: System that enables parties to participate in the dates for oral argument by web conference in Personal Status Litigation.
- By May 2025: System that enables the divorce mediation and settlement through web conference.
- By March 2026: System that enables digitalization as a whole, including e-filing and digitalization of litigation records.

⁷ Wakimura et al., *supra* note 2, at 12. As for the effective dates, MINSITRY OF JUSTICE, <https://www.moj.go.jp/content/001386867.pdf>.

C) The 3 phases⁸



The process of the digitalization project is organized in 3 phases.

Phase 1 regards to procedures that can be done by the Pre-amended CCP, such as usage of web conferences, and usage of chat function of Microsoft Teams to efficiently organize the issue and keep track of settlement negotiations. Microsoft Teams was gradually implemented (earliest ones starting from February 2020), and by July 2024, it was implemented in all of the District Courts (including branches⁹) in Japan (By November 2022, it was also implemented in all of the High Courts in Japan).¹⁰

Phase 2 regards to procedures that will be feasible once the CCP is amended, such as dates for oral arguments and preparatory proceedings by audio transmission

⁸ SAIBAN TETSUDUKITOU NO ITKA KENTOUKAI (IT for Court Proceedings Study Group, Cabinet Secretariat), ITTetsudukitou No ITka Ni Muketa Torimatome [IT Study Group Report for Digitalizing Court Procedures] (Mar 30, 2018), <https://www.kantei.go.jp/jp/singi/keizaisaisei/saiban/pdf/report.pdf>, at 20.

⁹ District Courts are located in 50 cities (one in every prefecture except for Hokkaido, which is divided into four districts considering its land size), and there are 203 branches throughout the country.

¹⁰ COURTS IN JAPAN, https://www.courts.go.jp/about/topics/webmeeting_2022_1121/index.html (last visited Aug 9, 2023).

(teleconference, web conference), etc., without any parties actually appearing in court.

Finally, Phase 3 regards to procedures that not only requires amendment of CCP, but also technical environment arrangement, such as development and implementation of brand new, civil litigation system. E-filing and e-case management (digitalizing all litigation records) is to be feasible during this phase.

(2) How it was Prior to Amendment

A) Overview of Japanese Courts (Civil Departments)

Japan is geographically about 4% the size of the United States, and slightly smaller than the State of California.¹¹ Other than the Summary Courts and Family Courts, Japanese operates on three-tiered judicial system; it has 253 District Courts (including 203 branches), 14 High Courts (including 6 branches), and 1 Supreme Court.¹² As of March 2023, there about 3800 judges.¹³

In District Courts, there are over 130,000 cases filed every year, number of cases terminated ranging from about 123,000 cases to 139,000 cases for the year of 2019 to 2021.¹⁴ Average time intervals from commencement to disposition is 9.5 months to 10.5 months for the same term, and limiting it to time needed to terminate cases that ended in verdict (excluding default judgement) is 13.3 months to 14.6 months.¹⁵

¹¹ WorldData.info, <https://www.worlddata.info/country-comparison.php?country1=JPN&country2=USA>

¹² SAIKOU SAIBANSHO JIMUSOUKYOKU (The General Secretariat of the Supreme Court of Japan), Saibansho De-tabukku 2022 [Courts Databook 2022], https://www.courts.go.jp/vc-files/courts/2022/databook2022/db2022_1-21.pdf, at 1.

¹³ *Id.*, at 22. https://www.courts.go.jp/vc-files/courts/2022/databook2022/db2022_22-24.pdf.

¹⁴ *Id.*, at 35. https://www.courts.go.jp/vc-files/courts/2022/databook2022/db2022_35-54.pdf.

¹⁵ *Id.*, at 73. https://www.courts.go.jp/vc-files/courts/2022/databook2022/db2022_73-82.pdf.

B) Implementing Microsoft Teams under the Pre-Amended CCP (Phase 1)

Since Microsoft Teams started to be implemented in civil departments since February 2020, each judge came up with creative ways to use the software under the restriction of Pre-Amended CCP, and the Supreme Court organized monthly online meetings to share ideas within all the District Courts in Japan (each department sent at least 1 judge to participate in the meeting, and to bring back information to the department).

As of August 2022, in Tokyo district court, one of the established usages for judges was to use the chat function to directly communicate with the litigators outside the dates for oral arguments. By “@mentioning” the litigators in the team, the litigators will receive a message to their email address that they have registered, whenever a new document is uploaded (it can be judge’s memo on organized issues, agenda for the preparatory proceedings, ideas for settlement, etc.). Sharing the organized issues and agenda are considered especially meaningful, since the parties can make sure that there are on an equal footing. Other than that, this usage saved time for judges and litigators to make a phone call, have the law clerk/secretary connect to the judge/litigator, and call back when he/she was not available at that time. Also, it helps remind the submitting dates for certain documents, and the other party can easily see how the court is keeping track of the to-be-submitted documents, and the preparation status of the litigator (For example, when the litigator inevitably has to submit the promised document later than the scheduled date, he/she can let the court and the other party’s litigator know by posting it on the chat group. This way, without making extra phone calls, both the judge and the adversary litigator can know when to expect the document). In addition, litigators may use the data of whatever

memorandum uploaded by the judges to write reports to its clients, saving time and avoiding misunderstanding among the parties. Prior to the implementation of Microsoft Teams, litigators were only able to send documents by physical mail or facsimile, resulting time gap between the time documents were sent and actually put in front of whoever it was sent to.

Another well used usage is sharing the screens or allowing both parties to edit the same document during the web conference. For example, this can be useful to consolidate the parties' assertions in one paper; listing up the damage and coloring it according to whether the adversary party admits or denies, making timeline of the major events and inserting assertions within the timeline to point out the negligence disputed in that case, and etc.

When the courts first started the usage introduced above, especially for the usage of chat function, there were concerns regarding confidentiality and formality. As for confidentiality, the court started small by allowing the usage of Microsoft Teams for cases which have represented litigators on both sides. As for formality, judges often explain to litigators that whatever they share on the platform or whatever they write on the group chat will be informal, and that they would not be formally used to limit the submittal of assertions and evidences. As a result, the usage is widely shared among judges, gaining generally positive comments from the users.

C) The Impact of Implementation

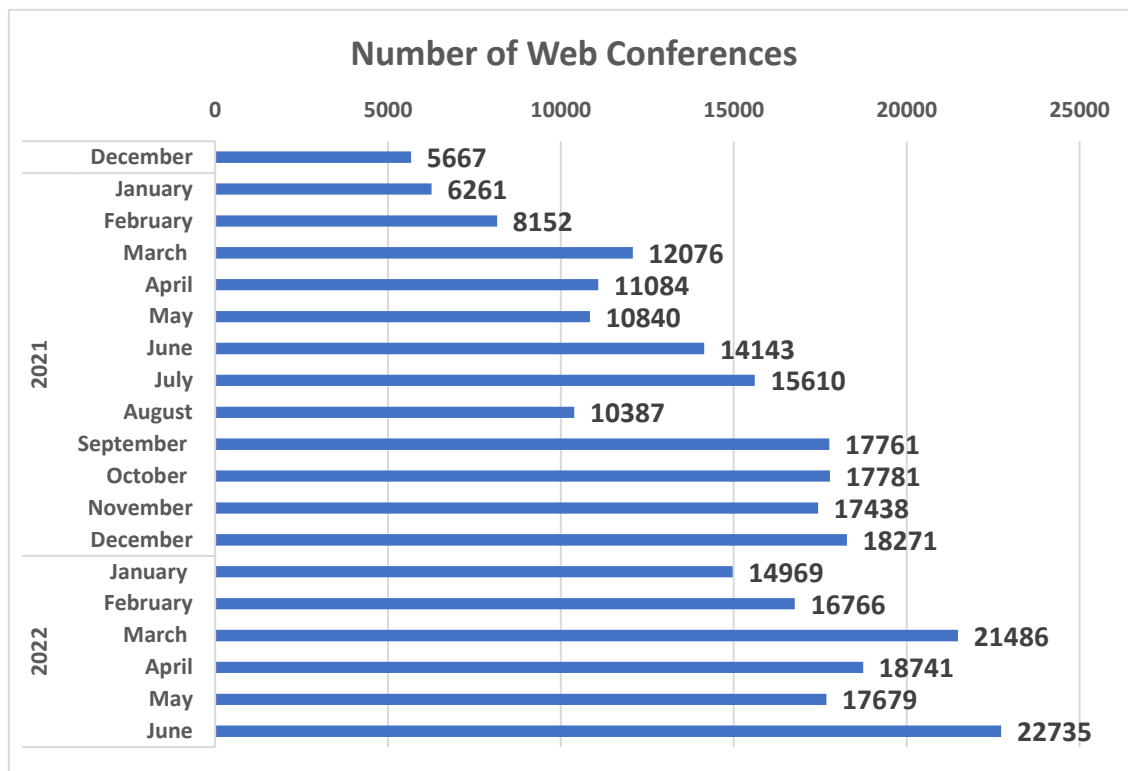
The use of Microsoft Teams especially drew attention among judges and litigators during the COVID-19 pandemic. On April 7th 2020, the Japanese government announced a State of Emergency (An official request for people to stay in their houses to avoid further spread of COVID. Although it was not a coercive order, it created huge pressure among the society, and most of the citizens followed the government's request.) for cities of large populations such as Tokyo and Osaka, soon expanding its scope to all the 47 prefectures on the 16th. Tokyo was among the few prefectures that was in the scope of the State of Emergency all the way to May 25, and during that time, nearly all of the original dates for oral hearings were cancelled.¹⁶ After May 26, Tokyo district court suffered severe backlog of cases, and since the pandemic was still ongoing, unable to schedule hearings in such cramped environment as it was before.

Since the earliest implementation of Microsoft Teams started from February 2020, departments which already had the network environment ready started to use the platform, enabling to process cases without opening the actual court room. Throughout the fight with the backlog, and with concerns of the pandemic to last for a long period of time, the necessity of digitalizing the procedure was highly recognized among judges and litigators.

The following is the data on number of web conferences, starting from December 2020, when Microsoft Teams was implemented in all the District Courts (excluding branches).¹⁷

¹⁶ COURTS IN JAPAN, Shingata Koronaurirusukansenshou No Eikyou To Saibansho No Taiou [The effects of COVID-19 pandemic and How Courts Dealt with it], https://www.courts.go.jp/vc-files/courts/2021/09_houkoku_2_corona.pdf.

¹⁷ Data provided by: Makoto Hashizume & Ryuta Gotou, *Minjisaibantetsuduki No ITka -Saibansho*



Considering the fact that the total ongoing civil cases in District Courts was 114,732 in 2020, and 106,581 in 2021, and that web conference was not applicable to cases which include self-represented litigants (as of the statistics of fiscal year of 2020, 55.5% were non-applicable cases.¹⁸), it can be said that number of cases using web conference rapidly grew to a significant number.¹⁹ As of June 2022, it is evaluated that this new method to use web conferences in civil procedures has obtained foothold in Japan.²⁰

Niokeru Genkouhoujouyou No Torikumi To Unyou [Digitalization of Civil Procedures -Court Operation Under the Pre-Amended Code of Civil Procedure], HOURITSU NO HIROBA, Sep 2022, at 24, 25.

¹⁸ Yoshinori Ozawa, *Minjisaibantetsuduki No ITka -Shihoushoshi No Tachibakara ~Honnin Soshou No Sapo-toyaku Toshite [Digitalization of Civil Procedures –From the Perspective of Judicial Scrivener ~as a Supporting Role for Self-Represented Litigants]*, HOURITSU NO HIROBA, Sep 2022, at 37, 37.

¹⁹ The General Secretariat of the Supreme Court of Japan, *supra* note 12, at 35. https://www.courts.go.jp/vc-files/courts/2022/databook2022/db2022_35-54.pdf.

²⁰ Hashizume & Gotou, *supra* note 17, at 25.

By examining the overview of Phase 1 (Pre-Amendment), it can be said that system development under the Amended CCP will further boost the usage of web conferences in Japan, saving time for litigators to travel to different District Courts, enabling more flexible schedule and availability, and utilizing the time of intervals of procedure dates for efficient negotiation or preparation.

(3) How the civil procedure system will work in the near future

A) Now Developing

The following are the major differences of how procedures were done under the Pre-amended CCP, and how it is/will soon be under amended CCP, especially after the developing systems for Phase 2 and 3 are complete.²¹

Under Pre-Amended CCP	Under Amended CCP
[filing]	[e-filing]
-Only filing of petitions to the court specified by the Supreme Court was allowed online. ²² (Article 132-10)	-Filing of all complaints, briefs, etc. can be done online. (Article 132-10)
-Service was to be made by physical mail or by a court execution officer, by delivering physical document to	-Service from court can be performed online (parties are to pay the fee by Pay-easy. Recipient can view and download the

²¹ Wakimura et al., *supra* note 2, at 4-8, MINISTRY OF JUSTICE THE CIVIL AFFAIRS BUREAU, *supra* note 4.

²² However, e-filing under this article was rarely used, since the Supreme Court allowed very limited types of documents.

the person who is to receive the service. No online service was allowed. (Article 99, 101)	documents filed by the plaintiff. In case the recipient does not take any of the following actions, the service will take effect after 1 week has passed from the dispatch of notice to the recipient.). However, this method can be done only when the recipient consents in advance. (Article 109 to 109-4)
[hearing]	[e-hearing]
-Parties were not allowed to participate online for dates for oral argument. Also, for preparatory proceedings, it was mandatory for one party to appear in the actual court if another party was participating via web/teleconference. (Article 170)	-Dates (for oral argument, preparatory proceedings, etc.) for which online participation is allowed were expanded. Also, even under the circumstance when both of the parties cannot come to the actual court, it is possible for parties to participate online. (Article 87-2, 89, 170, 187)
-Online disposition was allowed only when the witness lived in remote place. (Article 204)	-Online disposition is possible, even when the witness does not live in a remote place. (Article 204)
[case management]	[e-case management]
-All the case records were paper based.	-In general, case records will be digitalized. (Article 132-12, 132-13, 160, 252, 253)

-Parties had to visit the court that handled the case (during working hours), and inspect the physical record.	-Parties can access the court's server via internet and inspect the case records from anywhere. (Article 91-2, 91-3)
--	--

B) Remaining Tasks

i) Dealing with Digital Divide

To avoid hindering citizens who are not accustomed to digital technology from having access to justice, in general, the use of the online proceedings is optional. On the contrary, since litigators are considered professionals of law which should help promote efficient court procedure, they are obliged to use the e-filing system (Article 132-11).

As for the self-represented litigants, in Summary Courts²³, 93.35% of the cases had at least one self-represented party (as of the statistics of fiscal year of 2020). In District Courts, the ratio was 55.5%.²⁴ Further careful discussion regarding personnel aids to assist access to the system will be essential, but quick spread of users will be the key to avoid expanding the digital divide. In addition, considering the high number of self-represented litigants, collaborating with the bar association and establishing a system to make e-forms will also be a practical method to enhance access to justice. For example, in the United States, there are websites such as solosuit.com (for debt

²³ Summary Courts have jurisdiction over civil cases in which the disputed sum does not exceed 1,400,000 yen (as of the rate of August 4, 2023, it is approximately \$9876).

²⁴ Ozawa, *supra* note 18, at 37.

collection) or divorce.com (for divorce and related issues), which are designed to help self-represented litigants generate an automatic legal answer to a debt lawsuit, or generate forms just by responding to a series of questions.²⁵ Both Solosuit.com and divorce.com have functions that have attorneys review the document. Also, in California; “Tenant Power Toolkit” was organized by more than 50 tenant advocates and attorneys, and functions as an automatic document filing system for eviction and debt collection cases.²⁶ Tenants go through a long series of questions in relatively plain English or Spanish, and the website will create a legal document they can print and submit in court. If they choose, tenants can connect to legal aid organizations through the website.²⁷

Regarding the digital divide, “access to justice” is a topic frequently debated in the United States, not only because of its geographic size and hardship to physically travel, but also in the way how certain population cannot or do not seek help to the court resource. As of the data of 2021, although 74% of American low-income households (household income at or below 125% of Federal Poverty Level or below 125% of the poverty threshold) experienced at least 1 civil legal problem over the past year, only 19% of them sought legal help, and even limiting to problems that impacted them substantially, the percentage was merely 25%.²⁸ In addition, “some 14 percent of all

²⁵ <https://www.solosuit.com/>, <https://divorce.com/>

²⁶ Manuela Tobias, *Got an Eviction Notice? This California Website Will Help You File a Response.*, CALMATTERS (Jul 19, 2022), <http://calmatters.org/housing/2022/07/california-eviction-tenants-tool/> (last visited Jul 25, 2023) ; <https://tenantpowertoolkit.org/>.

²⁷ Tobias, *Id.*

²⁸ LEGAL SERVICES CORPORATION, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* (Apr 2022), <https://lsc-live.app.box.com/s/xl2v2uraiothbbzrhwtjlgioemp3myz1> (last visited Aug 8, 2023), at 8, 18, 44.

adults living in the United States are functionally illiterate. Another 30 percent can only read and understand common phrases. Altogether, this means that close to half of the adult U.S. population struggles as readers. And this segment of the population is disproportionately poor, meaning an even higher percentage of the people who need civil legal services are illiterate or barely literate”.²⁹ On the contrary, the literacy rate in Japan in 1950 was estimated to be below 2.1%, including those who are barely literate (however, Japan measured its literacy based on whether one can read kanji or can just read kana letters, so it cannot be evaluated equally with the statistics of the United States).³⁰ Therefore, although Japan too needs to keep an eye on how the digital divide affects access to justice, the situation is not as severe as that of in the United States.

ii) Utilizing Data as Complete Database³¹

In parallel with the digitalization of the civil litigation system, a system to allow all civil judgments to be accessible on a database is being considered. After Phase 3, basically all litigation records will be digitized, judgments will be rendered based on electronic judgment documents, and electronic record (of oral argument, etc.) will be made. Currently, the Study Group for Creating a Database of Civil Judgment

²⁹ Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DAEDALUS 93 (2019), at 94.

³⁰ Yasuo Saitou, *Shikijinouryoku · Shikijiritsu No Rekishiteki Suii -Nihon No Keiken* [Historical Transition of Literacy Rates -Japan’s Experience], 15 KOKUSAI KYOUIKU KYOURYOKU RONSHUU 51 (2012), at 61. <https://cice.hiroshima-u.ac.jp/wp-content/uploads/publications/15-1/15-1-04.pdf>. As of August 2023, no recent surveys were found.

³¹ Kazutoshi Otsubo, *Minjihanketsu No O-punde-taka To Kongo No Tenbou* [Allowing Civil Case Judgements as Open Data and its Future Prospects], HOURITSU NO HIROBA, Apr 2023, at 43.

Information is set up by the Ministry of Justice, and is discussing the legalization of this system.

Under the status quo, some civil case judgements are available on court's website (the criteria for publication are those that have been published in 2 or more newspapers, those that have a significant social impact, and are particularly considered appropriate to widely provide the information to the public, etc.). are posted on the court's website, after deleting real names in consideration of privacy and other factors. Although there are many more judgements available on fee-charging database operated by private enterprises, the overwhelming majority of judgments are buried. For example, the number of judgments issued by District Court for civil cases in 2021 was about 60,000 (excluding default judgement, orders, settlements, and family cases).³² Even not limiting to judgements issued by District Courts, as of March 20, 2023, in 'Hanrei Hisho' database (the database which is implemented in courts), there were only 4,445 judgments in civil and family cases, and 6,278 judgments in cases other than criminal cases listed in Westlaw Japan database (judgements issued in the year of 2021). As these numbers show, the vast majority of judgements are not available online.

In Japan's neighbor South Korea, a special desk has been set up in the court library, where citizens can use the court's internal judgment search system. This gives them access to the same information resources as judges. Furthermore, for unappealable

³² SAIKOU SAIBANSHO JIMUSOUKYOKU (The General Secretariat of the Supreme Court of Japan), REIWA3NEN SIHOUTOUKEINENPOUGAIYUBAN 1 MINJI • GYOUESIHEN [Annual Report of Judiciary Statistics Overview Version for 2021 Volume 1 Civil Cases](August 2022), <https://www.courts.go.jp/app/files/toukei/594/012594.pdf>, at 3, 4.

judgments, citizens can access them on the website of the Court of the Republic of Korea via internet. This allows anyone to inspect unappealable judgments (excluding those of criminal and family cases). All of these judgments are de-identified by outsourced contractors, the cost of which is covered by the national budget of the court (and the citizens also pays a certain fee).

The system that Japan is currently considering for civil judgments database is not free of charge, as the cost of maintaining and administering the system is planned to be covered by charging fees from users. In the future, the need for open data that can basically be used free of charge is expected to increase, but for now, the system development in Phase 3 and the discussion on complete database can be evaluated as a significant step forward from the status quo.

2. Digitalization in US courts

(1) Before and After the Pandemic

Before spring of 2020, when the COVID-19 pandemic struck worldwide, many courts in the United States had to cancel and stop their proceedings, and as backlogs swelled, courts were forced to move online at a rapid speed.³³

e-Filing for self-represented litigants was already available in 37 States and Washington D.C., even before the pandemic.³⁴ And since March 2020, when the first

³³ Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, THE ATLANTIC (May 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> (last visited Aug 9, 2023).

³⁴ The Pew Charitable Trusts, *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations* (Dec 2021), <https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf>, at 1; STATE OF INDIANA SUPREME COURT, Technology Working

wave of pandemic attacked the country, 10 more states allowed similar processes. Self-help centers were organized in court or court-annexed organization such as law library, to assist self-represented litigants to use the software.³⁵ In addition, looking at Online Dispute Resolution (ODR)³⁶ programs' launch dates in US state courts, many courts have already implemented digitalized proceedings for small claims, traffic, and civil debt cases before the pandemic.³⁷

On the contrary, unlike e-filing system and various ODR programs, courts had almost no history of e-hearing before March 2020.³⁸ “For example, the Texas court system, which had never held a civil hearing via video before the pandemic, conducted 1.1 million remote proceedings across its civil and criminal divisions between March 2020 and February 2021. Similarly, Michigan courts held more than 35,000 video hearings totaling nearly 200,000 hours between April 1 and June 1, 2020, compared with no such hearings during the same two months in 2019”.³⁹

Group Recommendations (Mar 2021), <https://www.in.gov/courts/admin/files/innovation-twg-report.pdf>, at 51.

³⁵ Ozawa, *supra* note 18, at 40; https://www.sanmateocourt.org/self_help/

³⁶ Online Dispute Resolution (ODR) is the use of technology to settle disputes between parties. It broadly includes any online platform or technology that deal with settling disputes between more than 2 parties. Recently, it has been adopted by many courts to help processing cases outside the courtroom (court-related ODR). Court-related ODR is a public facing digital space in which parties can convene to resolve their dispute or case. *See* https://www.americanbar.org/groups/centers_commissions/center-for-innovation/online-dispute-resolution-in-us/; <https://www.ncsc.org/odr/guidance-and-tools>.

³⁷ STATE JUSTICE INSTITUTE & NATIONAL CENTER FOR STATE COURTS, An Evaluation and Performance Measurement Framework for Online Dispute Resolution Programs: ASSESSING IMPROVEMENTS IN ACCESS TO JUSTICE (May 2021), https://www.ncsc.org/__data/assets/pdf_file/0022/65641/ODR-Evaluation-Performance-Measure-Framework.pdf, at 6-8.

³⁸ The Pew Charitable Trusts, *supra* note 34.

³⁹ *Id.*, at 1.

(2) Coping with Technology Expansion⁴⁰

The courts were aware that even after the COVID-19 pandemic, the use of technology in courts will not diminish but will probably continue and rather expand. The rapid spread of use of technology in courts resulted in necessity for guidelines and to deal with the risks and adverse effects of this technology expansion. The California Commission on Access to Justice issued a report on remote hearings, which was adopted by the National Center for State Courts.⁴¹ Although each court differs by its use of budget, capability of IT staffs, etc., this report suggests how to consider access to justice in making arrangements for remotely conducted proceedings. Among the points that the guide suggests is (1) to secure the court's control over the proceedings and (2) to secure security (to avoid issues like "zoom-bombing"; where a third person intrudes in the video conference and hijack its control, sharing inappropriate screens and messages).⁴²

In addition, courts should consider on what the users can do on the new technology platform. For example, live-stream hearings can be recorded by user's personal devices, and screenshots can be taken and saved in personal devices as well, which the current system has no way to prevent. In Oregon, the hearings are live-streamed through WebEx events, and viewers are warned not to record the hearings, and are asked to

⁴⁰ Recently, regulations regarding data privacy, such as the European Union Data Act and General Data Protection Regulation are proposed and took into effect. There are debates how these will affect the dispute resolution systems, but since it is out of scope of this paper, it will not be further mentioned.

⁴¹ NATIONAL CENTER FOR STATE COURTS, Remote Hearings and Access to Justice During Covid-19 and Beyond, https://www.ncsc.org/__data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf.

⁴² *Id.*, at 6, 14.

register their legal name (however, the latter is optional).⁴³ This method is apparently not efficient to structurally prevent private recordings, since in virtual court, courts cannot always keep track of who was auditing the hearings, for they can use a false name and go in and out of the e-hearing anytime.⁴⁴ Currently, the only method courts can do is to give warnings to not to take unauthorized recordings or take screenshot in the form of order, and to hold the violators in contempt of court if these acts are discovered.⁴⁵ In Calcutta High Court of India, such a situation occurred when a lawyer took a screenshot of the e-hearing and later posted on his social media. Following this incident, the High Court initiated a contempt action against the lawyer, but it was later dropped after the lawyer tendered an unconditional apology and with accepting that his actions were incorrect.⁴⁶

However, in reality, it would take time and effort to track down the individual who uploaded unauthorized recordings or screenshots, and by the time the first one is tracked down, chances are, it has already been spread and shared to other platforms on the internet, causing severe damage to whoever was taking part in the e-hearing. Thus, the current method is not an effective way to deter the potential violators, and at least for taking screenshots, the court systems (or any platform they are using for e-hearing) should be improved to prevent remote users from being able to take any screenshots (for instance, blacking out the screen when one sends command to take a screenshot).

⁴³ Gabrielle Scarlett, *Virtual Court: Privacy and Security of the Vulnerable* (May 19, 2021), <https://papers.ssrn.com/abstract=3845761> (last visited Aug 9, 2023) , at 14.

⁴⁴ *Id.*, at 20.

⁴⁵ *Id.*, at 21.

⁴⁶ Rahela Khorakiwala, *The Majesty and Dignity of Courts: Changes in Court Dynamics with the Onset of the COVID-19 Pandemic in India*, 18 SOCIO-LEG. REV. 51 (2022) , at 67.

Unfortunately, as for recording, methods to technically prevent still seems to be unavailable.

3. Future tasks

(1) Data collection and Analysis to Improve the System

A) Roles that Courts are Expected to Play After Digitalization

After the court proceedings get digitalized, it is analyzed that courts will play at least 3 distinct data governance roles; the *users* of data, the *dispensers* of data, and the *regulators* of data.⁴⁷ Engstrom and Vogt explains as follows:

1. The role as the *users* of data is expected when courts design and oversee new databased tools, including court-linked legal help chatbots and ODR systems.
2. The role as the *dispensers* of data is expected when courts collect the mountains of data generated by the legal system and set the terms on which that data is made available to outside actors who wish to use it toward various ends.
3. The role as *regulators* of data is expected as courts determine which software providers can, or cannot, provide legal services consistent with existing lawyer regulation and the rules of professional responsibility.

Besides Japan, England and Wales are also undergoing a rapid digital transformation using 1 billion pounds (approximately 1.26 billion dollars) budget, including automation of case management, widespread use of video conferencing, and new

⁴⁷ David Freeman Engstrom & R.J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DePaul L. Rev. 171 (2023), at 179.

facilities for parties to file electronically.⁴⁸ His Majesty's Courts and Tribunals Service (HMCTS. An executive agency, sponsored by the Ministry of Justice, and is responsible for the administration of Criminal, Civil and Family Courts and tribunals in England and Wales) have committed to evaluate the impact of reform on access to justice, to evaluate the use of data gathered by the users, and etc. Their report issued in October 2019 focuses on the second role to enhance the system design (first role), and suggests what kinds of data are required to measure the impact of reform.⁴⁹

B) Necessity to Collect and Analyze Data

Among the 3 roles introduced in the previous chapter (3.(1) A), this chapter would be focusing on the second role; the role as dispensers of data.

Although Japan is making its effort to digitalize court proceedings, mere digitization of the current procedure will not be enough in a long-term view, since systems always need to be revised for long term usage. Designing systems to collect and provide data to third parties to analyze and continuously improve the system will be essential.

By analyzing the data, it will be possible to categorize what types of cases require more involvement of judges, and to what extent. This enables in what exact type of cases and procedures we can be more dependent on technology (such as AI), and what type of cases and procedures that courts need to more focus its human resource,

⁴⁸ Natalie Byrom, The Legal Education Foundation, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice* (Oct 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF, at 2-3.

⁴⁹ *Id.*, at 26.

furthermore, enabling more efficient resolution of disputes. For example, the analysis of the types of cases with a high probability of ending in settlement, and the types of cases with a high probability of ending without holding oral argument or hearing dates, can be considered for more technology dependent. The field of data strategy in e-filing should be more focused upon establishing the new digitalized system in Japan, and data such as (i) Characteristics of the parties (whether it is an individual or a company), (ii) Whether an attorney has been appointed or is self-represented, (iii) Amount of the lawsuit, (iv) Main issues (complexity of the case), (v) How the negotiation was done before the case was filed, (vi) Number of people needed to testimony, (vii) Time required before settlement or closing, (viii) Timing of termination (settlement before examining testimony, after examining testimony, or cases ended by judgment) should be gathered for further analysis of maximizing the efficiency of the new dispute resolution system.

By “efficiency”, the major metrics to evaluate it will be (1) How many cases were terminated (either by settlement or by verdict), (2) How long it took for termination, and (3) Quality of service. (1) and (2) are easy to calculate through court systems, but (3) requires parties to answer questionnaires, and not all courts are conducting surveys on this point. For example, in San Mateo County, California, the court assembled a new family law ADR program with the help (both financially wise and human resource wise) of the bar association.⁵⁰ These programs were evaluated through questionnaires

⁵⁰ JANET MARTINEZ ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (Stanford University Press 2020), at 116-118.

answered by the attorneys, mediators, arbitrators, and parties. A court conducted study revealed that for cases from July 2007 to July 2008, 81% of cases were resolved through the ADR program, and the parties estimated that the program reduced the court time for all cases and reduced costs for 97%. As a result, both parties and attorneys showed high levels of satisfaction with the process.⁵¹ On the other hand, as of August 2023, within the databases currently available to the author, no official surveys regarding user interviews done by Japanese courts (not limited to cases that used Microsoft Teams) were found for (3).

According to a study based on Israeli civil cases, in terms of correlation between the outcome of dispute resolution and judge's involvement, in cases in which judges were procedurally involved, 40% of the cases terminated without judges having an opportunity to influence litigants' mode of disposition, meaning that the judges were not affecting the parties' decision-making process in these cases.⁵² Thus, it can be said that this 40% worth of workload can be more dependent on technology, rather than having judges involve as they have always been. However, since the study "draws on coding done by the Israeli Supreme Court Research Division, which lacks information about litigants' demographics or settlement results (whether the plaintiff or the defendant prevailed)"⁵³, further analysis on what exactly constitutes the 40% was not possible. Like how it was in this case, collecting sufficient data for third parties to be able to analyze is crucial when designing the system, and when determining to have

⁵¹ *Id.*, at 118.

⁵² Ayelet Sela & Limor Gabay-Egozi, *Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice*, 47 J.L. & Soc'y 468 (2020), at 492.

⁵³ *Id.*, at 498.

these data available to public (or to certain organizations).

As new systems always need improvement for higher efficiency, and since judges are not experts of data analysis, having a third-party organization analyze the collected data will be necessary. In Canada and in the United States, analyzing the data collected by court and making feedbacks are done by universities or NPO. For example, in Canada, the Cyberjustice Laboratory (University of Montreal) collaborate with courts in Canada to analyze data to provide better conflict resolution systems.⁵⁴ In the United States, a NPO called the National Center for State Courts (NCSC) functions as the analyst for ODR programs.⁵⁵

(2) The Gap Caused by Digitalization

Digitalization helps boost access to justice.⁵⁶ But at the same time, deepens the gap in some context such as eviction and debt collection.

The number of cases that has at least one party without representation is significant. In the United States, “a 2019 California Justice Gap Study found that 55% Californians at all income levels experienced at least one civil legal problem in their household in the prior year, but nearly 70% of them received no legal assistance.”⁵⁷ Nation-wide, out of

⁵⁴ <https://www.cyberjustice.ca/en/laboratoire/presentation/>

⁵⁵ For example, the data elements for the evaluation are listed at STATE JUSTICE INSTITUTE & NATIONAL CENTER FOR STATE COURTS, *supra* note 37, at 21.

⁵⁶ Penn Carey Law, *The Factors that Lead to Eviction by Default*, PENN TODAY (Jun 14, 2022), <https://penntoday.upenn.edu/news/penn-carey-law-factors-lead-eviction-default> (last visited Aug 9, 2023).

⁵⁷ Lyle Moran, *LAWYERS AND JUDGES OPTIONAL? Online dispute resolution promises to increase access to justice, but challenges remain*, 107-NOV A.B.A. J.58 (Oct 1, 2021), <https://www.abajournal.com/magazine/article/online-dispute-resolution-promises-to-increase-access-to-justice-but-challenges-remain> (last visited Aug 9, 2023).

approximately 330 million population, “roughly 30 million Americans each year to navigate potentially life-altering legal problems, such as eviction, debt collection, and child support cases on their own”⁵⁸, and it is estimated that about 3 in 4 civil cases involve at least one party without an attorney.⁵⁹ In Japan, approximately 93% in Summary Courts and 56% in District Courts are cases which had at least one self-represented party.⁶⁰

Digitalization of court proceedings significantly increased participation in civil courts, since self-represented litigants can save their travel expenses and lost wages. For example, for debt collection cases which typically has many self-represented litigators involved, from 2010 to 2019, more than 70% of respondents in debt collections cases failed to appear in court or respond to summons, resulting in a default judgement.⁶¹ After courts allowed hearings online, the rate of participation soared, and in some States, more people showed up than who did not show up in physical courtrooms.⁶² For example, in Arizona’s largest county, Maricopa, default judgement for eviction cases decreased from nearly 40% to 13% for the 2 years of 2019 to 2021.⁶³ Similarly, for debt collection cases in Michigan, there was a slight decline of default judgements from what was around 70%,

⁵⁸ The Pew Charitable Trusts, *supra* note 34, at 1.

⁵⁹ NATIONAL CENTER FOR STATE COURTS & STATE JUSTICE INSTITUTE, Civil Justice Initiative the Landscape of Civil Litigation in State Courts, https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf, at iv.

⁶⁰ Summary Courts have jurisdiction over civil cases in which the disputed sum does not exceed 1,400,000 yen (as of the rate of Aug 7, 2023, it is approximately \$9825); Ozawa, *supra* note 18, at 37.

⁶¹ The Pew Charitable Trusts, How Debt Collectors Are Transforming the Business of State Courts (May, 2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf>, at 2.

⁶² The Pew Charitable Trusts, *supra* note 34, at 8.

⁶³ The Pew Charitable Trusts, *supra* note 34, at 9; ARIZONA SUPREME COURT THE COVID-19 CONTINUITY OF COURT OPERATIONS DURING A PUBLIC HEALTH EMERGENCY WORKGROUP, Post-Pandemic Recommendations (Jun 2, 2021), <https://www.americanbar.org/content/dam/aba/administrative/judicial/2021-az-post-pandemic-rec.pdf>.

to 59% between 2019 and 2020.⁶⁴ The cause of this decline is yet to be analyzed, but it is suggested that one reason can be virtual court options that was available in Michigan District Courts from 2020, since defendants are more likely to respond to a complaint when they know they could participate in the hearing.⁶⁵

On the other hand, for litigants with lawyers, technological improvements made it easier for them to file cases in bulk, such as debt collection and eviction cases.⁶⁶ Also, since lawyers are repeat players, they have the full videoconferencing capabilities, while low-income self-represented defendants are often limited to audio-only capabilities of their cell phones. This results self-represented defendants not being able to see the facial expression of other parties and judges, nor can the judge see these defendants, creating a gap in the amount of non-verbal information one can receive during the same proceeding.

To deal with this digital divide, providing more funds to enable these vulnerable defendants to lawyers are essential, and at the same time, developing e-filing tools to assist the self-represented litigators in typical cases such as debt collection, eviction, and family cases are essential as well. As for the need to increase access to lawyers, for example, in debt collection cases, studies show that when a consumer is represented by a lawyer, it is 10 times more likely to be dismissed with prejudice and twice as likely to reach a settlement.⁶⁷ As for e-filing tools, for example, Suffolk Law School in Massachusetts

⁶⁴ MICHIGAN JUSTICE FOR ALL COMMISSION, Report & Recommendations Advancing Justice for All in Debt Collection Lawsuits (Mar 2022), https://www.courts.michigan.gov/4ac33d/siteassets/reports/special-initiatives/justice-for-all/jfa_advancing_justice_for_all_in_debt_collection_lawsuits.pdf, at 26.

⁶⁵ *Id.*, at 26-27.

⁶⁶ The Pew Charitable Trusts, *supra* note 34, at 2.

⁶⁷ MICHIGAN JUSTICE FOR ALL COMMISSION, *supra* note 64, at 2.

collaborated with courts in 3 States to develop a website that provide user-friendly e-filing tools that guide litigants through various cases including debt collection, eviction and family cases.⁶⁸ In addition, considering the fact that low-income defendants often do not have high speed internet environment and personal gadgets to easily access the website, setting computer booths in public facilities (such as libraries, courts, and even places where people can visit after working hours) may also be one idea to fill in the gap.

(3) Use of AI

Recently, the use of AI in court proceedings are being discussed and partially implemented in some countries. In Japan, the Cabinet approved the “Growth Strategy” in June 2019, establishing a Study Group for promoting usage of ODR. Since then, a total of 7 meetings were held, and the Study Group compiled a report titled "Summary for ODR Activation" at the end of March 2020.⁶⁹ The report not only emphasizes use of AI in courts, but also suggests collaborating with private enterprises already working on implementing AI technology for conflict resolutions.⁷⁰ In the United States, in 2016, the Superior Court of Los Angeles County implemented Gina; the online assistant that helps people at the Los Angeles Superior Court handle their traffic citations online, providing its service in 6 languages (English, Armenian, Chinese, Korean, Spanish, and

⁶⁸ <https://courtformsonline.org/>

⁶⁹ Mayu Watanabe, Japan Association for Online Dispute Resolution (JODR), ODR Kasseika Kentoukai “ODR Kasseika Ni Muketa Torimatome” [Study Group for Promoting Usage of ODR announces “Summary for ODR Activation”] (Apr 2, 2020), https://japanodr.org/2020/04/02/odrkasseika_report/ (last visited Aug 7, 2023).

⁷⁰ ODR KASSEIKA KENTOUKAI (Promoting Usage of ODR Study Group, Cabinet Secretariat), ODR Kasseika Ni Muketa Torimatome [Summary for ODR Activation] (Mar 2020), <https://www.kantei.go.jp/jp/singi/keizaisaisei/odrkasseika/pdf/report.pdf>, at 16-22.

Vietnamese).⁷¹ Prior to the introduction of Gina, in 2014, people waited 2.5 hours to see a clerk for their traffic matter, but with the help of Gina which handles 200,000 interactions a year (and other ODR measures in the court), the average wait time has been cut to 8 to 12 minutes. The program to operate Gina costs \$2,500 per year, and considering its contribution, it can be evaluated as a very successful investment.⁷²

However, whenever there are merits, there are demerits or risks that needs to be taken care of. To enhance the quality, effectiveness, and scope of using technology in the traditional process, The National Center for Technology & Dispute Resolution (NCTDR) introduces ethical principles for ODR initiative.⁷³

A) Accountability, Neutrality, and Transparency

NCTDR explains the principle of accountability as “the development and implementation of ODR systems, processes, and practices are accountable to the institutions, legal frameworks, and community that they serve”.⁷⁴

In the use of AI in court proceedings, there will be questions as to who will specify the scope of the data to be input in the system, and who will be accountable for its accuracy. In addition, since there will be constant needs to update the system with new judgements, changes in law, and etc., there will always be the question of how will the

⁷¹ Cristina Llop, Self-Represented Litigation Network (SRLN), News: Gina - LA's Online Traffic Avatar Radically Changes Customer Experience (Los Angeles 2016) (Feb 17, 2023), <https://www.srln.org/node/1186/gina-las-online-traffic-avatar-radically-changes-customer-experience-news-2016> (last visited Aug 9, 2023).

⁷² *Id.*

⁷³ The National Center for Technology & Dispute Resolution, Ethical Principles for ODR Initiative, <https://odr.info/ethics-and-odr/> (last visited Aug 9, 2023).

⁷⁴ *Id.*

system be kept updated.

These issues also relate to how to keep the system transparent and neutral, and avoid chilling effects for users. The feature of AI itself causes accountability concerns; as for AI, especially the machine learning models, makes it hard for even a system's engineer to assess how it reached a certain result that the AI produced.⁷⁵ This creates a problem of what AI related service providers should be accountable for, and up to what extent (i.e. should the providers be only responsible of controlling and assessing accuracy of data put into the AI, or are they also responsible to remove every bias in the original data [and whether that is even possible, as discussed in the next subchapter], or to check and assess the result?).

B) Fairness and Impartiality

NCTDR explains the principle of fairness as “to facilitate and uphold due process, without bias or benefits for or against individual groups, including those based on algorithms”, and impartiality as systems to be “designed and implemented and practitioners function with commitment to reducing bias in the delivery of process”.⁷⁶

However, how can we check that the input data itself is not biased? For example, “after controlling the offense level, criminal history, district, and offense type, blacks, Hispanics, and others received sentences 5.5, 4.5, and 2.3 months longer than whites,

⁷⁵ David Freeman Engstrom et al., *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Feb 2020), <https://law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>, at 28, 75; Jenna Burrell, *How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms*, 3 BIG DATA & SOC'Y 1 (2016), at 1, 9.

⁷⁶ The National Center for Technology & Dispute Resolution, *supra* note 73.

respectively, and females received 5.5 fewer months than males. [...] so evaluated at the mean, blacks receive about 12 percent longer terms than whites, and males receive 12 percent longer terms than females”.⁷⁷ Other researches also prove that racial bias clearly appear on risk assessment-based sentencing policy, where predictions on defendant’s safety or flight risk is being used by judges to decide whether to grant bail, etc.⁷⁸ As a result, especially for machine learning AI, whatever the result the AI gives will reflect the bias of the original data.

Studies are conducted regarding how to deal with this already baked in bias in the current data, including blinding the algorithm to race or other biased variables, but other studies point out that this cannot be done simply by omitting the race data, since it can be reconstructed from other features such as income, education, and etc.⁷⁹

As for debates about how to control the algorithm to not reflect the bias of the original data, or to give up on pursuing neutrality from the current data and come up with a way for the new set of data be unbiased, more studies are still on its way.⁸⁰

C) Informed Participation

NCTDR explains the principle of informed participation as, “in the development and implementation of ODR systems and processes active effort is made to ensure (1)

⁷⁷ David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. LAW ECON. 285 (2001), at 300.

⁷⁸ Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments*, 5 BIG DATA 153 (2017), at 154, 155; Jon Kleinberg et al., *Algorithmic Fairness*, 108 AEA PAP. PROC. 22 (2018) at 22; Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218 (2019), at 2271, 2296.

⁷⁹ Kleinberg et al., *supra* note 78; Mustard, *supra* note 77.

⁸⁰ Chouldechova, *supra* note 78, at 162; Mayson, *supra* note 78, at 2296-2297.

explicit disclosure to participants of all information about risks and benefits of the process, (2) the competency of participants to evaluate the information about participation in the process, (3) understanding by participants of the information, (4) whenever possible, the voluntary acceptance by the participants of the risks of participating; and whenever voluntary consent is not possible due to the mandatory nature of participation than that is made transparent”.⁸¹

The second point especially links with transparency of the system, and furthermore, how users will feel comfortable enough to use it. However, as for machine learning AI oriented ODR, as discussed in the previous subchapter A, how will it be even possible to explain to the public when the system’s engineer cannot even assess how the AI reaches a certain result? Like any other field, usage of AI is highly collecting attention in the legal field, but it seems it would need more time and system assessment before average citizens can confidently utilize it with full understanding of its consequence.

(4) Expanding Use of ODR

In this chapter, “ODR” particularly refers to court-related ODR, which is a public facing digital space in which parties can convene to resolve their dispute or case.

Since before the pandemic, many ODR programs were launched in State courts of the United States, many of them dealing with case types such as traffic, civil debt, small claims, and domestic relations.⁸² These areas of conflicts were prioritized for ODR due to

⁸¹ The National Center for Technology & Dispute Resolution, *supra* note 73.

⁸² STATE JUSTICE INSTITUTE & NATIONAL CENTER FOR STATE COURTS, *supra* note 37; FLORIDA STATE COURT ONLINE DISPUTE RESOLUTION WORKGROUP, Online Dispute Resolution Pilot Program Report (Jan 2021), <https://www.flcourts.gov/content/download/725954/file/>

the ubiquity of cases where one of more parties are unrepresented by a lawyer.⁸³ It is evaluated that ODR is attracting attention and more users, since it results in less time and higher user satisfaction compared to traditional litigation.⁸⁴ According to a survey published by the National Center for State Courts in 2018, 66% of participants with a traditional court experience would try ODR, and for traffic disputes, 74% of participants below the age of 50 (59% for over 50) would like to use ODR over traditional court. In consumer debt cases, the ratio was 58% for below 50 and 45% for over 50, and in small claims cases, it was 53% for below 50 and 38% for over 50.⁸⁵ High percentage of user satisfaction is also seen in Canada, in relation to whether the online process have been easy to understand and also whether the online service has been easy to use.⁸⁶ It is also a merit for courts as well, since ODR enables the court to focus on cases that needs the judges to intervene. The implementation of ODR is resulting in significant outcome; for example, in Los Angeles Superior Court, nearly 1,000 cases has been registered for ODR within the program's first 2 weeks, and as of August 2021, nearly 300 small claim cases were resolved through ODR platform without having to show up in court at all.⁸⁷ Although the number just consists approximately 0.5% of the total small cases filed in one fiscal year, it is expected that as users of this platform rise, more cases are expected to

Online%20Dispute%20Resolution%20Pilot%20Program%20Report%20-%20Final%20with%20Appendices.pdf.

⁸³ STATE OF INDIANA SUPREME COURT, *supra* note 34, at 54.

⁸⁴ *Id.*; U.S. SECURITIES AND EXCHANGE COMMISSION, Online Resolution Outcomes Putting Court Access Technology to Work (Dec 2016), <https://www.sec.gov/Archives/edgar/data/1691881/000166919116000080/WhitePaper1.pdf>.

⁸⁵ ZBYNEK LOEBL, DESIGNING ONLINE COURTS (Kluwer Law International 2019), at 26-27.

⁸⁶ *Id.*, at 27.

⁸⁷ Lyle Moran, *supra* note 57.

resolved similarly.⁸⁸

In the United States, since the first court-annexed ODR system was launched in 2014, courts are expanding its use, and the pandemic boosted its number where another 23 court-sponsored ODR were launched in 2020 and the first four months of 2021.⁸⁹ For example, in Michigan courts, a system called MI-resolve is provided online, where individuals can enter mediation using the chat function.⁹⁰ The mediators here are members who took the court-hosted training, sometimes litigators who do mediation as pro bono. Users can use it as long as they know their adversary party's e-mail address, and is free of charge.⁹¹ In California, Los Angeles Superior Court has been ahead of implementing ODR, starting with small claims and broadening to use for child custody and violation cases during the pandemic (from May 2020).⁹² New court-annexed ODR following its pilot experiments are being developed, such as the landlord tenant HUB court in Erie County, New York (from June 2022, followed by operation on pilot basis since December 2021).⁹³ This is the first court in New York State to operate virtually, assuring effective deployment of legal services by centralizing in one location. Under the HUB court, tenants who are considered eligibility based on income can receive legal representation, and since the pilot program started in December 2021, it has handled more than 900 cases until June 2022.⁹⁴

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ <https://www.courts.michigan.gov/miresolve>

⁹¹ <https://cii2.courtinnovations.com/MITRC#:~:text=There%20is%20no%20service%20fee.>

⁹² Lyle Moran, *supra* note 57.

⁹³ Bar Association of Erie County, Dedication of the Erie County Landlord Tenant HUB Court (Jun 1, 2022), <https://eriebar.org/dedication-of-the-erie-county-landlord-tenant-hub-court/> (last visited Aug 9, 2023).

⁹⁴ *Id.*

The implementation of ODR is generally evaluated as success, but some pilot projects suggest that merely digitalizing traditional courts will not be enough to enhance the use of ODR platforms. In Utah, an ODR pilot program was launched in September 2018.⁹⁵ The report on this program issued in December 2020 finds that “the ODR pilot project showed little impact on the manner of disposition and did not show significant changes in default judgement rates or settlement rates”.⁹⁶ The major cause of this result can be the fact that this platform was not user-friendly designed; one-third of study participants did not understand the summons and affidavit information sent to them to register on the platform, and also, these participants experienced technical difficulty entering the URL for the platform on their phones, registering their account, and logging in.⁹⁷ In addition, first time users experienced difficulty uploading the documents (7 out of 8 study participants failed to do this task) and signing settlement agreements (5 out of 7 participants failed) on the platform.⁹⁸ As courts promote the use of ODR for more efficiency, they should always be aware of managing the platform user-friendly, to remove technology barriers for users mainly expected to participate in the lawsuit as self-represented defendants.

⁹⁵ Paula Hannaford-Agor et al., NATIONAL CENTER FOR STATE COURTS & STATE JUSTICE INSTITUTE, Impact of the Utah Online Dispute Resolution (ODR) Pilot Program: Final Report (Dec 10, 2020), https://www.ncsc.org/__data/assets/pdf_file/0027/57636/Impact-of-the-Utah-ODR-Pilot-Program-Final-Report.pdf, at ii.

⁹⁶ *Id.*, at iii.

⁹⁷ *Id.*, at 10, 19.

⁹⁸ *Id.*, at 15.

(5) Loss of Majesty

Judges and lawyers often point out that digitalizing all traditional procedures and maximizing access to justice will result in “loss of majesty” of the courts, and citizens will think less of court and its judgements.⁹⁹ How to define this “majesty” is tricky, but it can be considered as the ritual pressure the participants feel when they have to wear appropriate dress code, head out from their comfort zone and enter the court building, enter the courtroom, and see the judge sitting on an elevated pedestal. The architecture of the court and courtrooms, and the structure of judges being on an elevated pedestal gives a symbolic recognition of the authority of the courts.¹⁰⁰ On the contrary, for e-hearings, nobody will notice what you are wearing underneath the scope of the video, you can be in any comfortable personal environment, and you will appear on the screen as the same size as judges. As a result, some people suggests that the parties and witnesses will no longer feel the ritual pressure, and might not tell the truth the same way they used to do in the traditional, in-person courtrooms.

In India, there are numerous reports on incidents where judges made remarks to the lawyers, regarding their location to attend the hearing and clothing. The court found it problematic when some lawyers were found chewing tobacco and spitting it while appearing in a case, some appearing in moving cars, and some seen wearing only boxers and formal shirt when the smart device he was using accidentally fell.¹⁰¹

However, there are assertions that point out this “loss of majesty” is all about mere

⁹⁹ Chen Xi, *Asynchronous Online Courts: The Future of Courts?*, 24 OR. REV. INT. LAW 39 (2023) , at 84.

¹⁰⁰ Khorakiwala, *supra* note 46, at 55-58.

¹⁰¹ *Id.*, at 61-66.

imagination, and the impact of ritual pressure in traditional, in-court proceedings are overestimated.¹⁰² To start with, judicial majesty must not be dependent on rituals, and should be fully based on fact-discovery and correctly evaluating the fact to lead to one conclusion. And to deal with the problematic cases reported in India, it can be easily solved by creating rules for the locations and dress codes of e-hearing, and have the judge or the court clerk check it in the very beginning of the procedure. Although many professionals instinctively understand this issue of majesty, the exact impact is yet to be determined; lacking studies that statistically analyze the “loss of majesty”. How much of bad effects it bring to the court procedures, and whether it is possible to design a system that would mitigate such effect, is still not thoroughly debated (for example, it may be dealt with adjusting the designs of the online platform). In general, the special experience people feel in the actual courtroom should be considered important, but even that might differ by the age and background of users. For example, for young people who are very used to using digital devices at an early age, having judges on digital devices might not make them feel having a special experience, when population that are not accustomed to digital devices might still feel special experience with judges on their screen. Or, it might even matter with the judge assigned to that case control the court proceedings or his/her age.

Overall, the cause and result of this “loss of majesty” problem is yet to be defined in an objective way. Therefore, finding a way to conduct some detailed and long-term

¹⁰² Xi, *supra* note 99, at 85, 93; RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (Oxford University Press 2019), at 208-210.

research, and to quantify the actual effect of moving procedures online should be debated first.

4. Conclusion

The COVID-19 pandemic exposed the weakness of the court infrastructure. As courts in both Japan and the United States, and likely many other countries had to make a rapid change to provide services during the irregular situation, judicial professionals realized the merits in usage of technology, as well as the demerits. In the future, inevitably, the trend toward digitalization will be further promoted, and in doing so, it is necessary to design a system based on continuous updates, such as compiling and analyzing precise data.

Not only organizing digital platform for courts, but also possibility to go further and increase the use of ODR in a broader sense should be debated; ODR which is not limited to court procedures and court-annexed procedures. At the same time, more support for self-represented litigants will be needed, to amend the digital divide.

It should not be that humans are to be driven by new digital technologies, but that humans make good use of these new technologies, in order to provide more convenient and accessible conflict resolution system to the public.