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Book Review Essay
Richard Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019)

David Cowan[*]

There are times when the essential nature of something is simply viewed as 'nice to have' until a paradigmatic shift turns the essential into a necessity, and necessity in technological change is not so much the mother of invention as the parent of behavioural change. This point is made clear by the Covid-19 pandemic, which has forced courts to put online and remote working at centre stage. There is a natural yearning to go back to 'normal,' but questions arise as to whether online courts are a good idea and whether attempts to work online and remotely will survive the crisis to become a 'new normal' (to use a term that is over-worked these days). It is thus opportune that Richard Susskind's latest, and arguably most important, offering on law and technology should look at online courts and the future of justice. This book will be a useful guide in assessing how successfully - or not - online and remote courts have been in playing an essential role in keeping the justice system, at least in part, moving during the pandemic.

Susskind says he often jokes that he writes the same book every four years, and admits there is "truth in this jest, in that my message has been consistent for almost 40 years — that we can and should find ways of using technology to improve the practice of law and the administration of justice."[1] This book is a natural progression in his work as he tackles the attitudes and practicalities of how the legal profession and administrators of justice utilize technology and the attitudes that can hinder and prevent adoption. He offers a preamble for the sceptics, noting:

> . . .the concept of online courts is stirring some emotion in legal circles, largely amongst lawyers and judges, many of whom - there is no escaping the truth - have not actually learned what is envisaged nor observed any kind of system in action. Their instinctive responses to the term itself range from scepticism to outrage. No matter the emotion, the premise is frequently the same - that online courts are misconceived and their deployment should be resisted.[2]

Given recent experience, can this resistance or 'irrational rejectionism'[3] continue? With the pandemic, their deployment has become more of a reality and

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[1] See Richard Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019) at 9 [*Susskind*].

[2] *Ibid* at 3.

[3] *Ibid* at 3, 44, 181, 186, 256.

there is more evidence to assess how online and remote courts work in practice. The question will be twofold: is there enough evidence to convince, and will there be a reversion to pre-pandemic ways of operating or a hastening deployment?

We are in a situation whereby, unlike a modern-day doctor stepping back in time into a Victorian hospital, a lawyer today could happily step into the courts hearing of Dickens' fictional case of *Jarndyce and Jarndyce* and feel everything is at it should be. Over 100 years ago, Dickens' *Bleak House* illustrated the need to look at what the courts are for. The impression still appears to those outside of the system that courts are for the lawyers rather than a means to an end for society. While Susskind dismisses notions that courts are part of a protectionist instinct amongst the profession as cynical, he accepts there are conventional reasons and traditions that lawyers hold dear.

The courts operate for the good of society and to provide access for justice for those who want and need it, and today society operates in a digital age. As Susskind provocatively but perhaps unkindly, puts the problem:

> We should be driven by the needs of society and of citizens rather than by the prejudices (even if well-intentioned) of the current cohort of providers, the influencers amongst whom are in their 50s and 60s and not always on top of digital developments.[4]

However, we should not be fooled into thinking that younger demographics understand technology any better. They may be handy with a smartphone but are equally clueless as to what lies behind the technology.

This book is set out in four parts. Susskind starts by exploring the foundations for his argument, which includes: the rule of law and the role of the courts in developing legal doctrine; why disputes arise; and the nature of the law. Susskind then turns to ask whether courts are a service or a place, in a world where more people have access to the Internet than they do to justice—a system that, in the words of one of his British interviewees, is in a "sorry state".[5] Whether one views technology as a type of solution, there is certainly still widespread recognition of the problems Susskind highlights in this section of his book. He outlines two broad ways to effect change. The first is "evolutionary and incremental, and involves improving the current system"[6]; the second is "radical, and requires the current set-up or great parts of it to be superseded swiftly rather than improved over time."[7] Susskind confesses, "[t]o put my cards on the table, I am much nearer the radical end. I expect the transformation to be incremental and ongoing but I fall short of being a full-on, fully bearded revolutionary."[8]

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4 *Ibid* at 4.

5 *Ibid* at 28.

6 *Ibid* at 30.

7 *Ibid* at 32.

8 *Ibid*.

He addresses criticism of online courts, though dismisses low-level concerns like technology jargon and focuses on bigger concerns: technology advancing at an exponential rate, systems becoming increasingly capable and pervasive, and human beings becoming increasingly connected through social media, crowdsourcing, and other means. Given these factors though, what "excites and unsettles" him is that "there is no apparent finishing line."[9] In keeping with his jest, Susskind rehearses many of the themes and objections discussed in his other works, but notes that in respect to online courts, his main objective in this book is "to apply and encourage" what he calls outcome-thinking[10] "in planning court services of the future."[11] What is it that people want from a court system?

In exploring the notions of 'access to justice' and 'justice according to the law,' Susskind does not believe "that optimizing our current methods of dispute resolution of itself will secure a fully satisfactory system of justice."[12] Law , he says, means enabling and improving access to justice "much more than providing access to quicker, cheaper, and less combative mechanisms for resolving disputes."[13] He warns the future of the courts is too important to be left exclusively in the hands of those who currently work on and in the system and he urges "new perspectives on our most important social institutions."[14] There is an extended discussion about how the layers of justice, which he outlines as legal health promotion, dispute avoidance, dispute containment, and dispute resolution. These can be mapped onto court design in three or four of these layers. He then takes a deeper dive into this architecture, largely from the point of view of someone pursuing rather than defending a claim.

Susskind notes that one of the crucial distinctions between traditional and online courts is that the former has largely been developed by lawyers for lawyers, while the latter are conceived as a service for use directly by non-lawyers. This perhaps goes to the heart of change in the legal space: can we maintain the distinction between 'lawyers' and 'non-lawyers'? This is where design thinking comes to the fore, citing two pioneers of the discipline Tim Brown and Roger Martin, who suggest that design thinking extends both to the design of the 'artifact' (the online court) and to the design of its 'intervention' and how it fits with the status quo. This approach focusses on building user acceptance.[15]

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9 *Ibid* at 41.

10 *Ibid*, Chapter 4 focuses on outcome-thinking

11 *Ibid* at 48.

12 *Ibid* at 66.

13 *Ibid* at 70.

14 *Ibid* 4.

15 Tim Brown and Roger Martin, *Design for Action* (September 2015) Harvard Business Review 56.

Wherever there is big data and clear rules, there is much scope for commodification. This takes us into looking at coding in the courts. Susskind looks at the nature of rules underlying online courts and concludes:

> . . .code is law but it is law whose creation has been formally sanctioned through some kind of delegated authority. This may seem heavy-handed but I do not think we can simply leave the rule-making and code-cutting to a group of developers and judges, no matter how senior and well-motivated. We cannot allow coding to become law-making.[16]

He bats away immediately objections based on the idea that online courts are largely motivated by attempts to save money. He also bats away objections that not all cases are suitable for online courts by acknowledging that while this is true it does not necessarily defeat the idea of more online courts. The challenge is to identify the limits of technology and make the most of it, and he says "we should not make assumptions about the world yet to come. There is no evidence from the future."[17]

Others worry about economy-style justice and a two-tier system whereby "real" law happens in the physical courts, and then there is this other law being exercised in virtual courts that is not taken as seriously. There are certainly questions to answer about the absence of a physical courtroom including transparency issues and accounting for small things—like, for example, the expressions on a judge's face. There are many versions of these arguments between the physical and digital world, but they face us in all areas of our life and society, such as those who worry about books versus e-books. Susskind suggests it is "strongly arguable that online courts are, in practice, more conducive to open justice than traditional, physical courtrooms."[18] The same holds in his discussion of the notion of a fair trial, where he rebuts lawyer worries about "distortion or dehumanization" in an online world of justice.

Fears that access to justice may be impeded by lack of access to the technology is batted away by suggesting that while on the face of it this is "a robust and important challenge. . . it is often overstated."[19] A more intriguing argument he assesses reminds me of the notion that when you add new lanes to a highway you end up with lots more cars on the road. This version is that if you have online courts offering cheaper and more accessible access to justice you will end up with a more litigious society. This seems to be one of the bigger arguments to tackle, and the solution Susskind offers is to have "appropriate incentives and disincentives in place that nudge citizens towards a proportionate use of online court services."[20]

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16 Susskind, *supra* note 1 at 163.

17 *Ibid* at 186.

18 *Ibid* at 200.

19 *Ibid* at 215.

20 *Ibid* at 225.

In Chapter 23 entitled "jurisprudential miscellany", by which he means theoretical and philosophical questions, Susskind takes a romp through the separation of powers, adversarial versus inquisitorial systems, lawyerless courts, and the diminishing of the raw material of the common law system. He concludes that many "challenging issues that arise are philosophical in nature and call for the expertise of legal theorists, specialists in jurisprudence."[21] He notes a bigger concern is that education curricula in jurisprudence courses reveal "scarcely a mention of the impact of digital technology on the judicial process."[22] Lastly, he looks at public policy issues and concerns that the state needs to put systems in place, and governments do not tend to excel in such endeavours. His answer to these concerns involves having better project management and effective pilot projects. While admitting it is a smaller jurisdiction, he praises Singapore where "they have an action-oriented, pragmatic, confident, pioneering, entrepreneurial, and energetic attitude. This is the spirit that will be needed, across the world, to kick-start online courts in the future."[23]

Susskind predicts that "[b]y 2030, and possibly much sooner, our courts around the world will have been transformed by technologies that have not yet been invented."[24] This ambitious statement contrasts with his stated objective of advocating for the use of online courts for low-value civil disputes. However, this "modest opening gambit"[25] is a realistic starting point, and he goes on to look into the future, specifically: the impact of telepresence, augmented reality, virtual reality, advanced ODR, and of course Artificial Intelligence, and machine learning. He also takes a look into machine or robo-judges, and sees some possibility for success despite some valid concerns over bias and other moral issues. Though he warns that "we need to keep an open mind, remembering too that the moral high ground is not necessarily held by those who prefer the status quo. In its conservatism, my generation runs the risk of being guilty of sins of omission, of failure to make changes."[26]

Concluding with an invitation to readers looking at online courts, Susskind advises "not to focus on their current shortcomings but instead to consider whether their introduction would represent an improvement over our traditional court systems."[27] He says to answer this and advance the cause, "we now need a global effort, dedicated to introducing online courts to countries that have great backlogs in their traditional court systems or severe access-to-justice problems.

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21 *Ibid* at 240.

22 *Ibid* at 241. At Maynooth we are launching in 2020-21 compulsory LLB modules on Law and Technology for years one through three and will address this very problem, which is now a matter of urgency, in my view, for all law schools.

23 *Ibid* at 250.

24 *Ibid* at 41.

25 *Ibid* at 253.

26 *Ibid* at 292.

27 *Ibid* at 293.

These countries could be invited to commit (by accord, protocol, memorandum of understanding, or the like) to the introduction and provision of online courts."[28] Like other services in this society, online courts have the potential to increase access to justice and also bring courts closer to communities, especially in rural and impoverished areas, rather than as part of an urban and sophisticated infrastructure. He concludes optimistically "if the platform came to be used even in a small number of countries, it might change the lives of many," and such a platform pushed by today's online court innovators "could well be our legacy."[29]

Susskind's focus is online courts for civil and mainly low-value disputes. He does not address specifically family, administrative, or criminal law. Instead he suggests what he says is also applicable there, though the criminal area "does raise some additional and difficult questions."[30] This suggests we have an awfully long way yet to go in addressing online courts since we cannot underestimate the level of difficulty in these other areas he leaves out, not just the criminal law. For instance, online delivery of divorce has been rolled out in the UK.[31] This certainly addresses the contractual side of marriage, but does it do so at the cost of the relational side? Divorce was originally made "harder" in law for specific reasons, and online courts may certainly be a digital step in making it easier, but one might ponder whether it also trivialises the marriage state or fails to address the emotional dynamics of the divorce process. Technology should not be a reason for sidestepping the human issues, and it is in these areas where the conflict between the evolutionary nature of change in the law and the radical disruptive influence of technology in society raises the concerns of the sceptics.

The timing of this book is coincidental; otherwise, some academics and practitioners might look at this as a book rushed out to meet a present need. This would be unfortunate, as Susskind's excellent and very readable book is a useful guide for thinking through the wisdom we need in the wake of the pandemic. This is especially the case if we are to figure out the future of court automation for a system that is groaning under its own weight, which will not be lessened by what is expected in some quarters to be an ironically looming outbreak of pandemic-related litigation.[32]

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[28] *Ibid* at 299.

[29] *Ibid* at 301.

[30] *Ibid* at 12.

[31] HM Courts & Tribunal Service, Ministry of Justice, and Lucy Frazer, "Fully digital divorce application launch to the public" (6 May 2018), online: *GOV*.UK < https://www.gov.uk/government/news/fully-digital-divorce-application-launched-to-the-public > .

[32] See also Hunton Andrews Kurth, "COVID-19 Complaint Tracker" (last visited 23 July 2020), online: *Hunton Andrews Kurth* < https://www.huntonak.com/en/covid-19-tracker.html > , according to a litigation tracker run by U.S. law firm Hunton Andrews Kurth as of July 23rd, 2020 there have been 3727 complaints registered in the U.S. since March 2020.