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Online Courts in China: A New Hybrid Model for Access to Justice

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Abstract

Amidst the global movement for online courts and digitization of justice, many jurisdictions have to overcome concerns over new technological barriers that negatively impact on the access to justice by all. China's implementation of the online courts since 2020 introduces a distinctive approach, setting itself apart by providing litigants with a unique freedom of choice between online and offline mechanisms for every aspect of civil and administrative litigation in any Chinese court. Several inherent characteristics or even perceived weaknesses of the Chinese political and judicial system contributed to this move that had not be tested before in China or elsewhere. This innovative model creates a new hybrid judicial framework for the digital era, potentially reshaping traditional paradigms and offering solutions to the emerging challenges faced by contemporary legal systems, as part of China's notable efforts to influence global discussions and understanding of important topics such as law and governance

Keywords: access to justice, online courts, Internet court, smart court, digitization of justice, legal systems, online dispute resolution, Chinese law

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Online Courts in China: A New Hybrid Model for Access to Justice

1. Introduction

In December 2018, Lord Burnett, Lord Chief Justice of England and Wales, judiciously observed that ‘[t]he world over, legal systems have been developing online courts and digitisation.’¹ Online courts and digitization present both challenges to the existing legal systems as well as opportunities for change. While the wide adoption of technology undoubtedly contribute to the alleviation of some of the difficulties in the traditional justice system, such as the cost and obstacles in terms of the physical access to the court,² digitization of such a crucial component of the modern state and governance could also exacerbate existing problems and create new concerns, such as understanding of and access to technology, which in turn impacts on inclusivity, equality and many other fundamental values of the legal and political infrastructure. Many more established jurisdictions have encountered significant difficulties or delays in the implementation of digitization that are often independent of any legal and technological constraints, over concerns such as safeguarding access to justice in the digital age.³

Such a global trend and challenges put China at the forefront of the movement. Alongside the size of its population and the economy, China also has the world’s largest online population and the greatest number of courts and judges. In terms of the use of technology in the legal system, China Judgements Online, the public access database run by the Supreme People’s Court,⁴ housing over 140 million judgments and other court documents, has been the world’s largest database of judicial decisions for some time.⁵ China Court Trial Online has broadcasted over 20 million trials live, with over 17 million recorded sessions available online. Artificial

¹ Lord Burnett, speech at the First International Forum on Online Courts (London, 3 Dec. 2018), <https://www.judiciary.uk/wp-content/uploads/2018/12/speech-lcj-online-court-2.pdf> (accessed 15 Oct. 2022).

² Orna Robinovich-Einy & Ethan Katsh, ‘The New New Courts’ (2017) 67 *American University Law Review* 165, 186.

³ Catrina Denvir and Amanda Darshini Selvarajah, ‘Safeguarding Access to Justice in the Age of Online Courts’ (2022) *Modern Law Review* 25.

⁴ Bjorn Ahl and Daniel Sprick, ‘Towards judicial transparency in China: The new public access database for court decisions’ (2018) 32 *China Information* 3.

⁵ Lu Xu, ‘The Changing Perspective of Chinese Law: Socialist Rule of Law, Emerging Case Law and the Belt and Road Initiative’ (2019) 5 *Chinese Journal of Global Governance* 153, 169.

intelligence is beginning to assist the judiciary on multiple fronts, from measuring sentencing to drafting judgments.⁶ Meanwhile, the court system has also been under enormous pressure due to the constant increase in the number of cases, which formalistic digitization of the judicial process could only alleviate to certain extent. More systemic reforms are needed in response to the challenges posed by the fast-changing landscape of litigation and demand for justice in the Internet era. The Supreme People's Court responded by implementing the widest initiative of online courts (*zaixian fayuan*) that included all 3,502 courts in China and encapsulated all civil and administrative litigation. While there has been some examination of the technological details of initiatives such as the Internet Courts (*hulianwang fayuan*), smart court (*zhihui fayuan*) and artificial intelligence in the court, the fundamentally different approach of the Chinese online courts has largely gone unnoticed, especially with regard to its potential impact beyond Chinese law on issues such as access to justice.

This article delineates and analyses the digitization of the Chinese court system as a three-stage process for a structured understanding of the ongoing and multi-fronted developments. The most important and distinctive feature of the Chinese digitization of justice is its hybrid approach of combining the presence and functions of the court both online and offline, while leaving the selection between the two media as a matter of free choice for individual litigants in every case. In ensuring that the increasing reliance on technology will not create new barriers or obstacles in terms of access to justice, this new Chinese approach potentially broadens the understanding of the content and options for maintaining and enhancing access to justice in the global movement of online courts and digitization of justice. Moreover, the scale and extent of such an innovative approach is a sign that China is beginning to develop viable alternatives to other, mostly Western, countries, even in areas such as law and justice, which have typically been perceived as weaknesses in China's development over the past decades.

The rest of this article is structured as follows. Section 2 provides an account of the context of digitization and its effect on access to justice from studies based on several jurisdictions. Section 3 traces through the digitization developments in the Chinese court and break them

⁶ Chen Su and Tian He (eds) *Development Report of Informationaization of Chinese Courts No.5 (2021)* (Social Sciences Academy Press 2021).

down into a three-stage process. Section 4 contrasts the new approach of the Chinese online courts with the existing model, highlighting its essence as a hybrid combining both online and offline presence of the court. Section 5 analyses the important contributing factors and characteristics to such a new approach. Section 6 concludes with a summary of the significance and implications of the Chinese approach.

2. Access to Justice and Digitization of the Court

The concept of ‘access to justice’ could be conceived very differently, depending on the context and field of any discussion. For international lawyers and human rights lawyers, the essence of access to justice as a basic right is enshrined in key documents such as the United Nations’ Universal Declaration of Human Rights and the European Union’s Charter of Fundamental Rights, encapsulating components such as the right to an effective remedy, the right to a fair trial and equality before the law.⁷ It has been observed that particulars of some of these notions may indicate influence of ‘the Western legal tradition’ or typical ‘liberal democracies’,⁸ while work on access of justice often takes a more domestically focused approach in examining particular domestic legal systems and problems of domestic governance.⁹ In a narrower conception, access to justice could simply mean effective access to the courts to resolve legal disputes.¹⁰ While the more developed analysis identifies multiple layers to the concept including access to courts as the entry barriers, access to law as the process barriers and access to justice as the outcome barriers.¹¹ Lord Woolf in his seminal report in 1996 listed a number of principles that the civil justice system should meet in order to ensure access to justice, including just results, fair treatment of litigants, appropriate procedures at reasonable cost, reasonable speed for dealing with cases, being understandable to users, being responsive to the

⁷ Universal Declaration of Human Rights, Articles 8 & 10; EU Charter on Fundamental Rights, Articles 20 & 47.

⁸ Francesco Francioni, ‘The Right of Access to Justice under Customary International Law’ in Francesco Francioni (ed) *Access to Justice as a Human Right* (Oxford University Press, 2007) 3.

⁹ Christopher A Whytock, ‘Transnational Access to Justice’ (2020) 38 *Berkeley Journal of International Law* 154, 156.

¹⁰ Jack Simson Caird, Jacqueline Beard and Grahame Allen, ‘Access to Justice’ (House of Commons Library, 9 January 2017), <https://researchbriefings.files.parliament.uk/documents/CDP-2017-0001/CDP-2017-0001.pdf> (accessed 30 June 2023).

¹¹ Sagit Mor, ‘With Access and Justice for All’ (2017) 39 *Cardozo Law Review* 611, 614.

needs of users, providing certainty and being effective in terms of resources and organization.¹² Despite the obvious importance of access to justice, however, there has been a sense of crisis where concerns over the lack of access to justice have called into question the basis of civil justice system in well-established jurisdictions including the United States, the United Kingdom, Canada, and so on.¹³ The traditional court system and practice are described as presenting ‘insurmountable barriers for large sections of the population’.¹⁴ The engraving of ‘equal justice under law’ on the front of the United States Supreme Court is seen as a failed promise, especially for the poor.¹⁵ OECD estimated in 2016 that only half of the world’s population lived under adequate protection and entitlements of the law.¹⁶

The rise of online courts and digitization are bestowed with great hope as a paradigm shift in tackling many of the barriers and difficulties of the traditional court. There have been a number of analyses on the potential and impact of online courts on access to justice.¹⁷ Courts in England and Wales made the most unequivocal statement in that ‘the introduction of digital services will help strip away the complexity and confusion that can get in the way of accessing our courts and tribunals system and will, through the provision of better designed services, increase access to justice’.¹⁸

Nevertheless, while online courts and digitization unquestionably improve the efficiency of the legal system, the perception of trade-offs between efficiency and fairness that first emerged with ‘alternative dispute resolution’ in the late 20th century still lingers in the contemporary

¹² Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July 1996).

¹³ Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2009) 27.

¹⁴ Robinovich-Einy and Katsh (n 2) 212.

¹⁵ Martha Minow, ‘Access to Justice’ (2022) 2 *American Journal of Law and Equality* 293, 296.

¹⁶ Ignacio Oltra Gras, ‘Online Courts: Bridging the Gap between Access and Justice’ (2021) 10 *Journal of Law and Jurisprudence* 24, 24.

¹⁷ Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) ch 6; Denvir and Selvarajah (n 3); Gras (n 16); Armin Amirsolimani, ‘Let Justice be Done Though the Overheads Fall: How Online Courts Promote Access to Justice’ (2020) 20 *Legal Information Management* 101.

¹⁸ HM Courts and Tribunals Service, ‘Written Evidence from HM Courts and Tribunals Service (CTS0064)’ (House of Commons, 2019), <https://committees.parliament.uk/writtenevidence/100242/html/> (accessed 30 June 2023).

development of ‘online dispute resolution’.¹⁹ Simply put, while technology facilitates more efficient or more affordable means of access to many people, it could create new barriers for those with less access to such technology in the first place. In the context of access to justice, the concern is not only over the availability of Internet access, the so-called first digital divide, but also the willingness and ability of people to use the Internet, the so-called second digital divide.²⁰ It is particularly concerning where people with vulnerable characteristics are often the least comfortable with the switch to new technology such as remote hearing.²¹ This then becomes a difficult decision for the policymakers as to whether the digitization of justice movement should guarantee ‘channel plurality’, i.e. the simultaneous availability of both online and traditional mechanisms.²² Equally challenging will be the design of any system to provide assistance to litigants for navigating a digitized justice system, with difficult questions such as distinguishing between advice about using digital systems and ‘legal advice’.²³

Although it is clear that online courts and digitization are being developed by legal systems across the world and the process would not be halted, such difficulties and concerns over access to justice are important reasons why most jurisdictions have yet to establish any comprehensive structure of online courts, even though the COVID pandemic forced adaptations and adjustments on many legal practices. There are numerous pilots in many jurisdictions, often constrained to specific branches or practice areas of the court or specific types of cases such as money only claims below certain threshold.²⁴ Nevertheless, as things stand, the prospect that almost any case could be dealt by an online court remains a remote possibility or vision that very few has committed to, let alone with a plan to deliver it. Against such background, the ambition of and steps taken by the Chinese system, to be examined next, are of great importance

¹⁹ Robinovich-Einy and Katsh (n 2) 168; Gras (n 16) 25.

²⁰ Denvir and Selvarajah (n 3) 29.

²¹ Janet Clark, *Evaluation of remote hearings during the COVID 19 pandemic* (HM Courts and Tribunals Service, December 2021) 82.

²² Denvir and Selvarajah (n 3) 30.

²³ Denvir and Selvarajah (n 3) 39.

²⁴ Money Claim (MCOL) in England and Wales: <https://www.moneyclaim.gov.uk/>. Other examples frequently examined in literature include ODR systems in British Columbia, Utah, the Netherlands and so on, see Denvir and Selvarajah (n 3) 27.

to the continuing development of the understanding and practice of online courts.

3. Overview of Digitization of Chinese Courts: Internet Courts, Smart Court and Online Courts

The development of online courts in Chinese judicial practice so far can be seen as a three-staged process, which has been around for more than fifteen years but witnessed considerable acceleration of pace twice in 2017 and 2020 respectively. It is worth noting from the outset that these stages are not mutually exclusive, as there is often overlap between them, especially given the divergence of the Chinese court system over a massive span of geography and economic differences. It is expected that some courts and some parts of the country will be more advanced in online courts and digitization than others. Though by and large, centrally driven initiatives from the Supreme People's Court are quickly alleviating such differences.

3.1 Early online hearing and online judging (2006-2017)

The first reported instances of using online communication in formal court proceedings came as early as in 2006. A basic People's Court in Fujian simply started using online video conferencing when parties could not make it to the court for scheduled hearing, including in divorce proceedings where one of the parties was living abroad.²⁵ Some courts in Shanghai used online video hearing more systemically in criminal proceedings subject to consent by defendants for relatively minor and uncontested charges, saving the trouble of logistical arrangements for the defendant to be transported between custody and the physical court room.²⁶ Later on, audio and video calls on social media have been used by various courts as substitutes for in person court hearing.²⁷

An important aspect of these early initiatives was that the lack of legal basis for such practice. Policies from the Supreme People's Court in 2014 only envisaged the use of online technology

²⁵ Shen Cong, '<“QQ court” resolved a transnational divorce case>' *Shanghai Morning Post* (10 Jan. 2007), <http://news.sina.com.cn/o/2007-01-10/023010959952s.shtml> (accessed 15 Oct. 2022).

²⁶ '<Minor crime cases take “online express” in Shanghai Pudong>' *People's Court Daily* (31 Mar. 2014) 5, http://rmfyb.chinacourt.org/wap/html/2014-03/31/content_79167.htm (accessed 15 Oct. 2022).

²⁷ '<Inception of “WeChat court hearing”>' *China News Service* (19 Dec. 2015), <http://www.chinanews.com/m/sh/2015/12-19/7678435.shtml> (accessed 15 Oct. 2022).

and platforms for procedures such as case filing and communication with judges, rather than actual court hearings.²⁸ Judicial interpretations in 2015 only authorized the serving of court documents and the notification of parties in cases following ‘simplified procedures’ via means such as emails and mobile communication.²⁹ Although those online hearings proceeded and concluded without any reported incident of difficulty, there could have been tricky questions for the court had there been objections by any litigant during or even after the hearing. There are further questions in terms of the proper procedures of the court, such as the right for the public to attend open trials,³⁰ which would be more difficult to give effect to with hearings over video calls only.³¹ Though of course in the practice the general public would not be interested in listening to some matrimonial disputes or minor crimes, and online hearings do not undermine access to justice more than traditional, physical courtroom.³²

Despite the absence of apparent authorization by the Supreme People’s Court or any other law or regulations, these early efforts of online hearing and online judging were received very positively by the court, judges, lawyers, litigants, the media and so on. The years between 2006 and 2017 also saw many revolutionary growths in technological capabilities such as broadband and smart phones. There was little doubt of the trend of general acceptance of technology by the court system and the public even then.

3.2 The Internet Courts and Smart Court (since 2017)

3.2.1 The Internet Courts in Hangzhou, Beijing and Guangzhou

The formal, institutional endorsement of the digitization of courts arrived with the establishment of the three Internet Courts in Hangzhou, Beijing and Guangzhou in 2017 and 2018. The decision was made by the Central Leading Group for Comprehensively Deepening

²⁸ Supreme People’s Court, ‘Guiding Opinions on Comprehensively Promoting the Establishment of Litigation Service Centre at People’s Courts’ (15 Dec. 2014).

²⁹ Supreme People’s Court, ‘Interpretations on the Application of Civil Procedure Law of the People’s Republic of China’, Judicial Interpretations 2015/No.5 (30 Jan. 2015), Articles 135 and 261.

³⁰ Supreme People’s Court, ‘Opinions on Strengthening the Work on Judicial Openness in the People’s Courts’, Supreme People’s Court Issue 2007/No.20 (4 June 2007), para.15.

³¹ ‘<Debate over the first “WeChat court hearing”>’ *China National Radio* (1 Feb. 2016), http://china.cnr.cn/yaowen/20160201/t20160201_521292870.shtml (accessed 15 Oct. 2022).

³² Susskind (n 17) 200.

Reforms of the Central Committee of the Chinese Communist Party, chaired by Xi Jinping. The Supreme People's Court duly promulgated detailed Internet Courts Rules.³³ The pattern of such reforms conforms to the Chinese model of 'decentralized experimentation', where pilot schemes are run often without clear legislative authority, before the successful parts of these pilots are codified into laws for wider implementation.³⁴

Unlike the earlier, sporadic, ad hoc measures by various courts to supplement or replace some aspects of the judicial process with online technology, the Internet Courts are inherently fully online by design. In other words, these courts are fully digitized both for 'online judging' and as 'extended courts'.³⁵ The entire litigation process of a case is typically conducted online, encompassing both core components, such as online hearing and the exchange of evidence electronically, as well as logistical elements such as the verification of the identities of the litigants digitally, and the serving of all court documents including judgment.³⁶ By making extensive use of blockchain technology,³⁷ the three Internet Courts have also developed their own systems for the preservation of digital evidence. Online systems for litigation risk analysis are made available to potential litigants, while any mediation effort is also expected to be online.³⁸

In many regards the experiment with the Internet Courts has demonstrated the potential and efficiency of digitization. By the end of August 2020, the three Internet Courts had accepted 222,473 cases, resolved 194,697 cases,³⁹ far exceeding the average case load for typical basic courts.⁴⁰ The average hearing time for a case was 29 minutes, which is about a quarter of the

³³ Supreme People's Court, 'Rules on several issues in the trial of cases by Internet Courts', Judicial Interpretations 2018/No.16 (6 Sept. 2018), 'Internet Courts Rules' hereinafter.

³⁴ Sebastian Heilmann, *Red Swan: How Unorthodox Policy Making Facilitated China's Rise* (The Chinese University Press, 2018) 45.

³⁵ Susskind (n 17) 6.

³⁶ The serving of court judgment electronically was only authorized by amendments to the Civil Procedure Law in 2021, Article 90 (cf Article 87 prior to the amendments).

³⁷ Huang-Chih Sung, 'Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China' (2020) 39 *Computer Law and Security Review* 1, 4-6.

³⁸ Internet Courts Rules, Article 1.

³⁹ Luo Sha, '<Much bigger roles for the Internet Courts beyond "online judging">' *Xinhua News* (23 Sept. 2020), <http://www.court.gov.cn/zixun-xiangqing-258511.html> (accessed 15 Oct. 2021).

⁴⁰ The average number of resolved case in a basic court nationally is below 400 per month over 2018 and 2019. For

time it takes for the average session in a brick-and-mortar court room, greatly improving the efficiency of the court. The average time for resolving a case was 42 days in the Internet Courts, less than half of the time in the traditional courts.⁴¹ 99.7% of the case were filed and accepted online in the Internet Courts, while 98.9% of the court hearings were completed online.

In addition to these quantitative data on efficiency and performance, the Internet Courts have contributed several notable judgments on important and novel disputes arising in the Internet era. These decisions range from the commercial use and ownership of big data analyses from the Hangzhou Internet Court,⁴² the illegality of contract for the manipulation of network traffic and visits from Beijing,⁴³ to the continuing upload of gameplay video by numerous unspecified users that led to the grant of interim injunction by the Guangzhou Internet Court while the litigation was ongoing.⁴⁴ The expertise of the Internet Courts when dealing with these disputes unfamiliar to the traditional legal system is fully appreciated by the court hierarchy, with all these ground-breaking decisions being upheld on appeal, often with added recognition of their value for future disputes of similar nature.

Despite such successes, however, the three Internet Courts are notably limited in their jurisdiction both in terms of geography and subject matters of litigation. The essence of the Internet Courts is encapsulated in ‘online adjudication for online disputes’, in that they can only hear specified categories of Internet related cases within their respective cities.⁴⁵ While the ‘Internet only’ jurisdictional limit helps to cultivate the expertise of the Internet Courts, it also means a much narrower scope of application for what the Internet Courts can do in comparison with other general-jurisdiction courts in China. Moreover, due to their status as basic courts with no appellate jurisdiction, the Internet Courts are inundated with low-value, routine cases

the Internet Courts, they each resolved over 2,000 cases per month over the same period.

⁴¹ Annual Report of the Supreme People’s Court for 2019, National People’s Congress (25 May 2020), <http://www.court.gov.cn/zixun-xiangqing-231301.html> (accessed 15 Oct. 2022).

⁴² 淘宝(中国)网络有限公司 v 安徽美景信息科技有限公司, (2017)浙 8601 民初 4034 号, 杭州铁路运输法院 (16 Aug. 2018).

⁴³ 常某某 v 许某, (2019)京 0491 民初 2547 号, 北京互联网法院 (23 May 2019).

⁴⁴ 深圳市腾讯计算机系统有限公司 v 运城市阳光文化传媒有限公司, (2019)粤 0192 民初 1092-1102, 1121-1125 号, 广州互联网法院.

⁴⁵ Internet Courts Rules, Article 2.

such as straightforward contract disputes over online purchase. Although the Internet Courts have been highly efficient in dealing with the high volume of cases, the sheer workload hinders their task to develop the law in new realms involving the Internet and other technologies.⁴⁶

3.2.2 Smart Court

While the three Internet Courts represented the more focused forms of digitization, all other courts have been experiencing different levels of technological and procedural transformations. The Supreme People's Court first mentioned the phrase 'smart court' as early as in 2015, but it was not until 2017 that the first formal policy document materialised to promote the initiative in earnest.⁴⁷

Unlike the ad hoc efforts by individual courts before 2017, which was largely supplementing or replacing specific elements of the traditional litigation process with telecommunication technology, the smart court experiments in different parts of China often created new mechanisms and systems with the help of technology that was not available a decade ago.⁴⁸ Big data analysis made it possible for some courts to offer statistics on success rate and range of award for any given type of cases to potential litigants as a highly informative and useful tool at pre-litigation stage and court-directed mediation. Artificial intelligence and cloud computing greatly expands the knowledge base and case-handling capacity of the judiciary by identifying similar cases, patterns of likely disputes and difficulties, typically used sources of law, and so on. Voice recognition and automated script-writing free up much of the time of court clerk in court hearings and enable them to offer more substantive assistance to judges.

In many regards, the groundwork was being laid in thousands of Chinese courts for the digital switch-over, though not necessarily with a centralized structure or vision as to what or when this would eventually take place.⁴⁹ What also lacking was the legal basis for the use of

⁴⁶ Gao Wei, *Institutional Analysis of Dispute Resolution in the Cyberspace* (Peking University Press 2021) 194-5; Liu Zhewei and Li Xiaoxuan, '<Commentary on the Jurisdiction Rules of the Internet Court>' [2019/5] *Business and Economic Law Review* 130.

⁴⁷ 'Opinions of the Supreme People's Court on Accelerating the Construction of Smart Court' (*Fafa* 2017 No.12, 12 April 2017).

⁴⁸ Benjamin Minhao Chen and Zhiyu Li, 'How Will Technology Change the Face of Chinese Justice?' (2020) 34 *Columbia Journal of Asian Law* 1; Elinor Greenhouse, 'Balancing the scales in China's smart courts: driving case standardisation through AI' (2021) 9 *Peking University Law Review* 233.

⁴⁹ For a critical, doctrinal examination of the impact of smart courts beyond the actual technologies, see Straton

technology to replace traditional mechanisms that carried legal effect, such as court hearings, and exchange and cross-examination of evidence. Although the court have been getting ‘smarter’ in terms of their digitization, the core adjudication activities were largely still to take place in physical courtrooms as a matter of legal principle.

3.3 Online Courts (since 2020)

The COVID pandemic in some sense was the catalyst needed to institutionalize the transition and transformation. With all courts forced to operate for a period of time in the new environment of ‘contactless litigation’, the mode was proven capable and widely accepted by both the judiciary and litigants. The Supreme People’s Court was quick to act in making online courts a formal part of the operation of every court in China, providing for the first time the legal basis for the use of technology in the judicial process. The current foundation of the new stage are the rules promulgated by the Supreme People’s Court, namely the Rules for Online Litigation, which commenced in August 2021,⁵⁰ the Rules for Online Mediation, which commenced in January 2022,⁵¹ and the Rules for Online Operation, which commenced in March 2022.⁵² The 2021 amendments to the Civil Procedure Law then confirm the legislative basis for online litigation, by specifying that civil litigation can be conducted online and stipulating that online litigation activities have the same legal effect as the offline counterparts.⁵³ These Rules institutionalized much of the experience and good practice of the court over the previous years. The Chinese approach to online courts will transform all aspects of the practice of the traditional court through the integration of technology and procedures, rather than merely creating a technologically enabled and focused component of the court to deal with specialized matters,

Papagiannas, ‘Automating Intervention in Chinese Justice: Smart Courts and Supervision Reform’ (2023) 10 *Asian Journal of Law and Society* 463.

⁵⁰ Supreme People’s Court, ‘Rules of People’s Courts for Online Litigation’ Judicial Interpretation 2021/No.12 (16 June 2021), ‘Online Litigation Rules’ hereinafter.

⁵¹ Supreme People’s Court, ‘Rules of the People’s Courts for Online Mediation’ Judicial Interpretation 2021/No.23 (30 Dec. 2021), ‘Online Mediation Rules’ hereinafter.

⁵² Supreme People’s Court, ‘Rules of the People’s Courts for Online Operation’ Supreme People’s Court Issue 2022/No.8 (26 Jan 2022). Unlike the other two sets of Rules, these rules do not have the status of judicial interpretation.

⁵³ Civil Procedure Law of the PRC, Article 16.

which was the remit of the Internet Courts. The latest statement of ambition from senior members of the judiciary is for the establishment of some ‘universal digital court’ (*quanyu shuzi fayuan*), which encapsulates the digitization of all elements at all stages of all court procedures in every court.⁵⁴ As such, the scope of online court is much wider, both in terms of the courts involved as well as the categories and procedures of litigation. Every court in China is now a part of the ‘online court’ system. Except most criminal cases, any court can now consider using online litigation and online mediation for the entirety or any parts of civil, administrative and enforcement cases.⁵⁵ Experiments by the Internet Courts such as blockchain evidence are now formalized and made available to all courts.⁵⁶ Rules are now more fully developed in different aspects of online courts, such as new procedures recognizing both synchronous and asynchronous exchange and challenge of evidence.⁵⁷ International impact is also an inherent part of the vision and ambition of the current measures. The online dispute resolution platform developed by the Supreme People’s Court was formally launched in July 2021 for the China International Commercial Court, where the involvement of foreign mediators is envisaged in disputes that involve foreign entities.⁵⁸

The online courts reform quickly become an integral part of Chinese legal practice. In 2021, 11.439 million cases were accepted online by the court; 2.601 million cases had exchange of evidence conducted online; 1.275 million court hearings were held online.⁵⁹ The more developed regions expectedly lead the expansion of online courts, with for example 67.4% of the court hearings in Beijing being held online for 2021.⁶⁰ Yet other places are not far behind, where 37.3% of all court hearings in China were conducted online in 2022, compared to only

⁵⁴ Li Zhanguo, <Constructing and implementing ‘comprehensive digital court’> [2022/1] *Peking University Law Journal* 5, 9.

⁵⁵ Online Litigation Rules, Article 3; Online Mediation Rules, Article 3.

⁵⁶ Online Litigation Rules, Articles 16-19.

⁵⁷ Online Litigation Rules, Article 14.

⁵⁸ Online Mediation Rules, Article 6.

⁵⁹ Chen Guoping & Tian He (eds), *Annual Report of Informationization of Chinese Courts No.6 (2022)* (Social Science Academic Press China, 2022) 5.

⁶⁰ Chen & Tian (n 55) 96.

1.1% in 2018.⁶¹ In less than five years, the Chinese court system has gone from taking tentative, unregulated steps in online hearing and judging, to the establishment of three dedicated Internet Courts, to the current full-scale authorization for online litigation and mediation at all courts.

4. Two contrasting models of online courts

The most notable distinction and innovation of the Chinese online courts approach is the simultaneous presentation of online and offline options as a free choice for litigants, creating a hybrid model of online and physical courts not previously envisaged in China or elsewhere. This is in sharp contrast to the former model where a decision is made as to whether any case should be dealt with online or in person.

4.1 Former model: decision over either online or offline litigation

A common, defining characteristic of almost all other models of online courts, remote hearings, online dispute resolution and so on is that there is an important decision about whether a case is to be dealt with online or offline.

In the main, that decision is made systemically based on the nature of the dispute, the jurisdiction of the court and carefully construed eligibility rules authorizing the use of online mechanisms under given circumstances. In England and Wales, for example, this could be a maximum sum cap for money claims submitted through the online system,⁶² while in British Columbia this could be a condominium dispute within the jurisdiction of the Civil Resolution Tribunal, heralded as the first online tribunal of its type in the world.⁶³ In many regards, this model is followed by the Chinese Internet Courts as explained above. When and only when a case is filed with the Internet Court, the default decision is that it will be processed and heard online.

Otherwise, the decision could be made on individual cases by a judge or the adjudicating body,

⁶¹ Chen Guoping & Tian He (eds), *Annual Report of Informationization of Chinese Courts No.7 (2023)* (Social Science Academic Press China, 2023) 23.

⁶² Civil Procedure Rules, Practice Direction 7C.

⁶³ Shannon Salter and Darin Thompson, 'Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal' (2017) *McGill Journal of Dispute Resolution* 113, 114.

if that is within the power conferred by law. This happened a lot during the pandemic years, where the judiciary either had new powers specifically created by statutes to allow the use of technology in replacement of in person activities, for example in England and Wales,⁶⁴ or discovered the use of existing provisions that served the purpose, for example in Germany.⁶⁵ Those ad hoc decisions by Chinese judges in the past to use video calls for court hearings mentioned above could fall under this category, even though there was no legal basis for such decisions at the time.

Most systems or pilots typically allow a withdrawal route from this decision of going online in the face of difficulties or the likelihood of causing injustice. The Internet Courts for example allow certain procedures of the litigation to be conducted offline if requested by the litigants.⁶⁶ Nevertheless, the decision of going online, unless revoked, is significant and that decision is usually made by the system or the judge. Arguably, most of the concerns regarding the negative impact of online courts on access to justice are rooted in such a model.

Whenever a decision has been made to go online with any case, litigants and other interested parties have to abide by that decision and use the online mechanisms provided by the legal system. Questions are legitimately asked as to whether these people can comply with such requirements as well as the implications for doing so. Some of these questions could be rather superficial, if not frivolous, such as whether parties will have Internet access to respond to litigation in the Chinese Internet Courts.⁶⁷ Obviously parties with no Internet access are unlikely to be involved in the first place, given that the Internet Courts only deal with disputes that arise online or in the cyberspace! Yet the challenge becomes far more problematic when the scope of online courts is expanded to other realms so that people with no prior knowledge or skills of using technology are in a sense forced into this in order to defend their interest and rights. As mentioned above, these concerns are over the availability of technology as well as individuals' willingness and skills to use them.⁶⁸ Any divide or barriers for access to justice

⁶⁴ Coronavirus Act 2020, s.55.

⁶⁵ *Zivilprozessordnung*, s.128a.

⁶⁶ Internet Courts Rules, Article 1.

⁶⁷ Sung (n 37) 12.

⁶⁸ Denvir and Selvarajah (n 3) 30.

here may not only be socio-economic, but also generational, with particularly negative impact on the elderly.⁶⁹

There are of course considerable efforts by legal systems to address such concerns, given the unquestionable importance of safeguarding access to justice for all. In the United Kingdom, for example, the Ministry of Justice works as part of the ‘Assisted Digital’ schemes and collaborate with various organizations to provide help in many locations such as libraries and other community hubs for individuals that lacked the skills, facilities or confidence to use the digital service.⁷⁰ In other words, such help is provided for those parties who want to participate in online court processes, rather than those who do not want to be online for any reason. For the latter group, currently the official policy is that digital services are additional to existing routes rather than as any substitution and there is no plan to mandate the use of digital channels for public users.⁷¹ However, for any ‘offline users’ in online courts processes, the understanding is that online procedure rules will still apply, with the court likely charged with the responsibilities of providing such users with an alternative that did not involve the technology, such as a scan and print service when the party cannot access documents digitally.⁷²

In essence, these envisaged measures for accommodating offline litigants in online courts are to emulate the online environment as much as possible for the benefit of those offline users. The case itself is still processed primarily online. Although the judge retains the discretion to withdraw a case from the online process, often this requires one of the parties to make a compelling case justifying such a change of procedure. A rather paradoxically, even comical, procedural requirement during the COVID pandemic was that parties who did not want to have remote hearings needed to request a postponement via email or the e-filing system.⁷³

More importantly, it has always been clear since the landmark report by Lord Briggs that the online court ‘cannot be designed as a permanently voluntary alternative to the traditional civil

⁶⁹ Robinovich-Einy & Katsh (n 2) 208.

⁷⁰ Ministry of Justice, ‘Evaluating our reforms: Response to PAC recommendation 4’ (January 2019) para.27.

⁷¹ Denvir and Selvarajah (n 3) 34.

⁷² Denvir and Selvarajah (n 3) 35.

⁷³ Denvir and Selvarajah (n 3) 36-7.

court'.⁷⁴ Sooner or later, online courts will be mandated to cover more grounds in any given legal system. Once a case, a type of cases, a court or tribunal is designated to be 'online', the expectation and norm is for all parties to work online, with technical assistance if needed, unless there are very good reasons why the case should not be dealt with online at all. Under this former model, there are few truly appealing options for parties to an 'online' court case to persistently remain offline, even though the online elements may create obstacles hindering access to justice.

4.2 New hybrid model of Chinese online courts

The new model of Chinese online courts comprises two underlying principles, each of them potentially paradigm-shifting on its own. The combined effect is an approach never envisaged before for the expansion and adoption of online courts.

On the one hand, unlike all previous Chinese or foreign measures that contain the digitization of judicial processes to specific courts and jurisdiction, specific branches of the law or specific types of cases, the Chinese online courts encapsulate all courts in all civil and administrative litigation, as well as some criminal cases under summary procedures.⁷⁵ Online mechanisms are used not only for court hearings, but also all court processes including the acceptance of cases, mediation, exchange of evidence, court inquiry and service of documents.⁷⁶ With one categorical provision, all online litigation activities are given the same legal effect as their offline counterparts.⁷⁷

On the other hand, every litigant has the right to choose to undertake any process offline, regardless of the preference of other parties and any decision or procedure of the court. Crucially, the decision by one party to undertake any process offline does not affect the choice of other parties to undertake the same process online,⁷⁸ giving rise to the hybrid model that is

⁷⁴ Lord Justice Briggs, *Civil Court Structure Review: Final Report* (Judiciary of England and Wales, July 2016) 6.16.

⁷⁵ Online Litigation Rules, Article 3.

⁷⁶ Online Litigation Rules, Article 1(1).

⁷⁷ Online Litigation Rules, Article 1(2).

⁷⁸ Online Litigation Rules, Article 4.

at the heart of the Chinese online courts. To give a simple example, if the claimant of a case prefers to have an online court hearing but the defendant wants to appear in person, the outcome will be a hybrid court hearing where the claimant connects to the hearing via online video link, while the defendant appears in person in the physical courtroom where the judge is. Choosing to do something online in the litigation does not prevent the party from doing other things offline, and vice versa.

The combination of these two principles makes the Chinese online courts the most widely available option for litigants with the least compulsion for using it. Unlike in the former model, where the legal system, the court or the judge in individual cases ultimately decides on which case should be dealt with online, there is notably little decision-making power in the Chinese online courts framework. The judge may only decide that any case or any process within a case should be taken offline,⁷⁹ but it is never up to the judge to demand that any party shall take part in any process online. If anything, the Rules are explicit in prohibiting any sort of requirement or requirement in disguise by the court for any process to be online.⁸⁰ Only the litigants can decide that they will undertake any process online. Consent of the litigants is necessary for their participation in each component of the litigation process to be online, and any consent given for one component does not imply consent for other components.⁸¹ The default position where a litigant does not express any preference for a particular stage of the litigation is that it will be conducted offline for that litigant, although this does not affect the choice by other parties to take part online.⁸² Where some parties participate online while others attend in person at any stage, for example the exchange of evidence or court hearing, the process naturally becomes a hybrid of online and offline mechanisms.

In short, the Chinese online courts avoid creating any new obstacles or barriers for access to justice. No party is ever mandated to do anything online. No party is ever expected to submit any request to NOT have a remote hearing. Any online mechanism is always an option that

⁷⁹ Online Litigation Rules, Article 5.

⁸⁰ Online Litigation Rules, Article 2.

⁸¹ Online Litigation Rules, Article 4.

⁸² Online Litigation Rules, Articles 10 & 4.

those who prefer it may choose to use. It cannot be forced on any other litigant, not even by the court. For anyone who feels uncomfortable with or disadvantaged by the digital and online mechanisms, such as the elderly, the less well-off or less educated, the brick-and-mortar courthouse is always there to receive in-person visits.

4.3 Best of both worlds: combining the advantages of online and offline operations

Such a hybrid model is arguably necessary in view of the scale and pace of the implementation of the online courts reform and the significant variety in both the court system of different parts of China and the population. Although over one billion people in China uses the Internet regularly, that still leaves hundreds of millions without such access. Contrary to some speculations earlier, the Chinese reforms do not restrict the rights of some people along the online/offline divide. Much criticism and hypothetical questions have been voiced before regarding the protection of parties' rights on 'what ifs', such as where 'the defendant is not able to access the Internet at all, or if the local network where he lives is not in acceptable condition'.⁸³ The answer or solution offered by the current Chinese reforms is rather simple: go to the physical courthouse and the court will make sure any litigant can do any part offline instead.⁸⁴ To that end, more than 700 courts have now started to offer "24-hour litigation service",⁸⁵ where litigants can use dedicated, physical facilities located at the court for document submission and retrieval and other litigation activities out of working hours.

More importantly, even people familiar with technology may not want to deal with serious and often complicated matter such as litigation on a computer or a smart phone. The presence of the court in the physical offline world is crucial in the current design and operation of the Chinese legal system and this would likely remain unchanged in the foreseeable future. All 3,502 courts in China, including the three Internet Courts, are 'brick-and-mortar' courts. Each of these courts, including the Supreme People's Court, still receive inquiries and visits by members of the public in large numbers on a daily basis. It is not permissible for any court to

⁸³ Sung (n 37) 12.

⁸⁴ Online Mediation Rules, Article 16(2).

⁸⁵ Annual Report of the Supreme People's Court for 2021, National People's Congress (8 Mar. 2022), <https://www.court.gov.cn/zixun-xiangqing-349601.html> (accessed 15 Oct. 2022).

simply direct these visits to some websites or online systems of case management and refuse to assist them at the physical site of the court. Most courts now have public access terminals at their ‘litigation service hall’ so that parties without smartphones can access any online services mentioned above, with the help and guidance of court personnel if they experience difficulty or have little understanding of technology. This concurrent availability of both offline and online mechanisms is essential to the current design of Chinese online courts. Subject to minor exceptions such as certain procedures of the three Internet Courts or specific ‘online’ matters such as blockchain evidence, the greatly enhanced online capacity of the court is an alternative to the offline mechanisms, but never a substitute or replacement.

Moreover, although litigants who choose to stay offline may not notice much difference to their experience of the court, substantive digitization of the infrastructure and operations of the court still have significant impact on what the system can offer. This is best illustrated with an example, such as the system for filing a court case.

In many jurisdictions, online digital filing of cases is now used as a centralized alternative to posting or submitting the necessary documents in person at a court. In England and Wales, for instance, straightforward small claims for money can be submitted online to a central platform, as an alternative to physically posting the paper forms to the national processing centre for small claims. The system undoubtedly saves cost and improve efficiency, as all county courts can avoid having to directly deal with the queries and submission of case filing from claimants. However, this also means that claimants, even those who have difficulty using technology or filling in legal forms without help, would not be able to simply walk into any county court and file the case in person. For the 170 county courts, there is limited presence and therefore limited scope to influence the parties’ choices and decisions until much later in the litigation, for example by suggesting alternative dispute resolution to the parties before a court case is actually filed. While this conception is consistent with the mode of traditional court with its focus on ‘dispute resolution’, the wide-spread digitization of the court should, in theory at least, offer greater involvement in terms of ‘dispute avoidance’ and ‘dispute containment’.⁸⁶ A purely online system therefore reduces not only the access to justice and options of those who prefer

⁸⁶ Susskind (n 17) 113-4.

in person interaction but also the opportunity for the court to engage early on with these people to potentially avoid the need for litigation where appropriate.

The recently implemented system of ‘cross-jurisdiction case acceptance’ (*kuayu li’an*) embodies a very different approach in China.⁸⁷ As a general principle, Chinese law confers jurisdiction over any civil dispute on the local court where the defendant resides.⁸⁸ If a claimant living in Shanghai, say, wants to sue a Shenzhen-based company for breach of contract, the case needs to be filed with a court in Shenzhen. In the pre-Internet era, this entails getting the physical documents to the Shenzhen court, either in person, through a delegate such as a lawyer, or by post. Online case filing and acceptance was expectedly introduced as an alternative to in person visits or physical posting of documents, saving enormous amount of time and resources. The Supreme People’s Court reported about 54% of the first instance cases in China being filed and accepted online in 2020.⁸⁹ Still, that means 46% of the cases were filed offline. What if this hypothetical claimant in Shanghai, with limited access to technology and little understanding of the law, wants to file the case with some help in person at a court, but does not want to travel to Shenzhen? This is where the ‘cross-jurisdiction case acceptance’ system comes into play. As things stand, any claimant can visit any of the 3,400 basic or intermediate courts and more than 10,000 of the subsidiary tribunals (*fating*) in China in person with the necessary case documents. Case officers at the ‘reception court’, likely to be a court in Shanghai in this scenario, will handle the submission, give any advice or help face-to-face as needed, recommend alternative dispute resolution if appropriate, before uploading all documents submitted onto the internal online platform of the court system for cross-jurisdiction case acceptance. The assessment and decision to accept the case will still be made by the ‘jurisdiction court’ in Shenzhen in this scenario. This decision is expected within 30 minutes on a normal working day,⁹⁰ while the claimant is still waiting in the service hall of the reception

⁸⁷ People’s Court Press, ‘<Cross-jurisdiction case acceptance service now comprehensively covers all four tiers of courts>’ (1 Feb 2021) <https://www.court.gov.cn/zixun-xiangqing-286101.html> (accessed 30 June 2023).

⁸⁸ Civil Procedure Law of PRC, Article 22.

⁸⁹ ‘<Supreme People’s Court: more than half of the cases were accepted online in 2020>’, *China News Service* (4 Mar. 2021), <https://www.chinanews.com/gn/2021/03-04/9424334.shtml> (accessed 15 Oct. 2022).

⁹⁰ 88.7% of cases are reported to be dealt with in 30 minutes in 2020 according to the Supreme People’s Court, <http://www.court.gov.cn/zixun-xiangqing-286101.html> (accessed 15 Oct. 2022).

court in Shanghai. Case officers at the reception court will then communicate the decision to the claimant in person, ask for any additional documents if required by the jurisdiction court, or explain the reasons for rejection of the case by the court.

Such hybrid operation conveys a glimpse of the admirable ambition of the Chinese system to potentially combine the best of both online and offline worlds. While the internal case acceptance platform is a massive, sophisticated and technologically advanced system, underpinning court decisions with immediate legal effect in real time being made in another part of the country, its interface with the general public does not have to appear technical or ‘online’ at all. The average layperson walking into the court in Shanghai probably would not appreciate the technology and infrastructure in place to enable a legal decision to be made by the court in Shenzhen in the next 30 minutes, or that this would be near impossible to achieve ten or fifteen years ago without changing the foundational rules of the Chinese legal system.

5. Analysis of the Chinese Approach

5.1 Chinese Court as the Provider of Non-Adversarial Litigation Service

It should be noted that jurists from other jurisdictions, especially those following the adversarial approach to judicial procedures, may find it inherently difficult to accept such a notion of ‘free choice for all’. In an adversarial setting, one party’s loss is the opponent’s gain. Online or in-person hearing presents very different challenges and opportunities to litigants, therefore each side understandably would prefer to have the opponent having to comply with the less favourable option. Online hearing may offer advantages to certain litigants, such as those who want to hide certain traits such as mobility impairment or poverty, those who tend to feel more pressure when speaking in person, perhaps even those who simply find it easier to lie more convincingly when not in the same room. In the new Chinese model, the court has the discretion to direct any litigation stage to be conducted in person on grounds such as the complexity of litigation or where in person examination of evidence or witness is needed.⁹¹ Still, the notion that in most cases any litigant or any witness could simply choose to video call into court hearing without needing the agreement of the opposing party nor the judges is understandably

⁹¹ Online Litigation Rules, Article 5.

difficult for many to accept as the future direction of online courts.

The Chinese system takes a very different approach not only in terms of the non-adversarial nature of judicial procedure, but also the objectives and values of the legal system as a whole. The strong attitude of litigation-aversion in the traditional Chinese culture has been well documented in scholarship.⁹² The mostly inevitable outcome of having winners and losers at the end of litigation was often frowned upon, even when legal rules are correctly applied by competent officials. Although modern Chinese law has advanced considerably beyond such cultural mindset, especially given the contemporary emphasis on rule-based governance, the desire of the court system is to find an outcome acceptable to all parties, colloquially referred to as ‘case concluded and matter resolved’ (*anjie shiliao*), rather than to determine the more legally meritorious claim that leaves the other party deeply discontent over the practical consequences. Such form of Chinese ‘mediatory justice’ has been observed before to mitigate to some extent the ‘adversarial excesses’ in Western legal systems.⁹³ In this regard, catering for the different preferences of litigants as to whether to appear in person or online not only enhances the court’s capacity in reaching parties and witnesses under different circumstances, but also alleviates possible tension between the parties, in order to facilitate a more amicable resolution.

Moreover, for the Supreme People’s Court, such a fundamental change in the basic construct of the system fits with its favoured narrative that the court provides a range of *services* to the litigants who may pick and choose from, as ‘one-stop litigation service centres’ in its official policies.⁹⁴ The important thing is not whether the court prefers litigation to be conducted online or offline, but what the litigants want. Unlike the traditional court where the litigants must find their ways around the working mechanisms of the court, the mechanisms of the online courts are expected to evolve to cater for the demands of the litigants. To Susskind’s question ‘Is court

⁹² Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press 1999), 24.

⁹³ Philip C.C. Huang, ‘Court Mediation in China, Past and Present’ (2006) *Modern China* 275, 306.

⁹⁴ Supreme People’s Court, ‘Opinions on Building One-stop, Diversified Dispute Resolution Mechanism and One-stop Litigation Service Centres’ (31 July 2019).

a service or a place?',⁹⁵ the answer from China would emphatically be that it is a service.⁹⁶

5.2 Challenges and opportunities for the 'weaker' traditional court

Changes on the scale such as the Chinese online courts understandably encountered considerable obstacles in practice. Measures such as 'asynchronized litigation', where each litigant and the judge deal with different components of the litigation, such as exchange and challenge of evidence, at their own time can cause much unease.⁹⁷ These include protracted litigation time or the possibility of interference by others, which in turn leads to unfavourable opinions among the more experienced judges more accustomed to the former mechanisms.⁹⁸

It is also worth noting that many of these reforms in the Chinese court do not evidently make the job of the judiciary any easier or less demanding. Take for instance the cross-jurisdiction case acceptance mechanism above. There has already been online case acceptance system in place for several years. Why would the court cater for litigants who desire the convenience of not having to travel far yet at the same time prefer to have face-to-face interaction with the court? In essence, the system turns every court in the country into a service branch of the jurisdiction court, to be selected at will by the litigants to suit their needs and preferences, rather than according to the organizational structuring of the court. A comparison with modern banks and their branches has frequently been raised in this context.

Despite such an obvious and sensible question, there is notably little hesitation, let alone resistance, shown by the court system institutionally towards these significant changes and new measures being experimented and implemented. The willingness, even enthusiasm that the judiciary collectively has shown in embracing the online court and digitization may be better explained and understood when examined against the traditionally 'weaker' position of the court in the Chinese political system and society.

⁹⁵ Susskind (n 17) 95.

⁹⁶ Gao (n 46) 220-1.

⁹⁷ Online Litigation Rules, Articles 14 & 20; Zuo Weimin, 'Online Litigation in the Post-Epidemic Era: Where to Go' [2021/6] *Modern Law Science* 35, 45.

⁹⁸ Xu Danyang and Yang Qinyun, '<Examination of the current status and future prospect of asynchronized litigation>' [2022/18] *Shanghai Legal Studies* 8.

A major force behind the current reform is the fact that the digitization of the court system comes with strong political endorsement from both the Communist Party and the central government.⁹⁹ The centralization of decision-making powers in an authoritarian system involves less institutional frictions, so that policy change is often radical and forceful.¹⁰⁰ China has firmly and repeatedly rejected any notion of ‘judicial independence’ in its official narratives. With explicit expectation to follow closely the leadership of the Communist Party, there are powerful institutional drives for the Supreme People’s Court to propel its centralized reforms through the massive court structure.

It is notable that many of the perceived shortcomings of the Chinese court make such a top-down approach of universal digitization more effective. The local courts have always been seen by critics as weak, lacked independence, poorly resourced and occupied much less influential positions than other institutions such as the Communist Party, the government, the procuratorate and so on.¹⁰¹ Armed with both centrally driven policy imperatives and technological capabilities, the Supreme Peoples’ Court finds itself in a very strong position to convince the lower courts to accept its digitization initiatives and methods. Large arrays of performance indicators are set up by the Supreme People’s Court that continually update and inform all courts of their progress in digitization as compared to their peers in the region and nationally. There is a dedicated, massive flatscreen monitor inside the Supreme People’s Court that shows up-to-date data and statistics of how local courts are performing. By analysing the enormous amount of data generated, both the Supreme People’s Court and the local court leadership such as the provincial high people’s courts can readily identify those institutions and processes that are having difficulty implementing digitization and take measures accordingly. The Supreme People’s Court have sent out multiple work groups to local courts that are seen as encountering difficulties as reflected in the data. The universal digitization of the court system is conducive to achieving an unprecedented level of efficiency and control, which both the Party leadership

⁹⁹ Opinions of the General Office of the CPC Central Committee and the General Office of the State Council on Improving the Diversified Resolution Mechanism of Conflicts and Disputes (2015).

¹⁰⁰ Yipin Wu, ‘Dynamics of policy change in authoritarian countries: a multiple case-study on China’ (2020) 40 *Journal of Public Policy* 236, 237.

¹⁰¹ Lubman (n 92), 292-5; Randall Peerenboom, ‘Judicial Independence in China’ in Randall Peerenboom (ed) *Judicial Independence in China* (Cambridge University Press 2010) 78-84.

and the court leadership are keen to pursue.

Meanwhile, in the context of the centrally driven top-down reforms, there is also notable support for digitization from the lower courts and many judges. When there are observed difficulties with particular aspects of online courts or among particular groups within the judiciary, such as the more experienced judges, the suggested solution is often more comprehensive digitization, rather than less!¹⁰² Here, somewhat uncannily, the underprivileged and uncelebrated heritage of the Chinese court potentially renders it more amenable to accept and adapt to the challenges and opportunities of online courts and digitization.

In a system with more established and more privileged court, it is understandable that online courts and digitization presents more of a challenge due to the switch to a virtual presence.¹⁰³ In establishing the online courts, there is the need to preserve ‘the majesty of the court’ according to Lord Briggs.¹⁰⁴ It seems rather unimaginable that the judge would allow the claimant and the lawyer for the defendant to join on separate video calls from their dining rooms, while the lawyer for the claimant and the defendant are sitting in the courtroom. This is arguably much less of a concern for the Chinese court, which traditionally has a very different understanding of the status of the court and the relationship between judges and litigants. Long before the Internet era, Chinese courts, especially those in rural inland areas covering larger landmass, have been sending out itinerant tribunals to towns and villages without majestic courthouses. Judges travel on horseback to reach remote sites and hold court hearings on fishing boats,¹⁰⁵ without any concern for ‘majesty’. ‘Online judging’ would be an obvious and less physically taxing upgrade for these judges.

In terms of ‘extended courts’, a common objection by judges and lawyers from some countries is that it is not for the courts to provide legal advice.¹⁰⁶ Yet Chinese courts and judges have

¹⁰² Xu and Yang (n 98) 14.

¹⁰³ Susskind (n 17) 208.

¹⁰⁴ Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, December 2015), 4.

¹⁰⁵ Xiao Jinbo and others, ‘<Why does China have “tribunals on horseback”?>’ *People’s Daily* (20 Sept. 2019), <http://politics.people.com.cn/n1/2019/0920/c429373-31363528.html> (accessed 15 Oct. 2022); ‘<Tribunal on fishing boat trials 250 cases per year on average>’ *Beijing Youth Daily* (24 Dec. 2019), http://www.xinhuanet.com/legal/2019-12/24/c_1125380204.htm (accessed 15 Oct. 2022).

¹⁰⁶ Susskind (n 17) 127-8.

always been providing legal and other advice to various members of the public. It has been observed, for example, that Chinese judges do not usually have fixed working hours nor formal separation between personal and professional life; many court visitors insist on seeing judges in person to talk about their cases, while referring to the judges as ‘comrade’, ‘cadre’, even ‘uncle’ or ‘elder sister’.¹⁰⁷ Digitization of such roles and tasks of Chinese judges is again likely to be welcomed by the judiciary. Chinese courts have been seen to strive for ‘legitimacy’ from their traditionally weaker position.¹⁰⁸ It is submitted that being technologically up-to-date and having increasing presence both online and offline greatly enhance such legitimacy in the Chinese society and the political system. Consistent with the ‘self-interest institutional pragmatism’ observed before of the Chinese court,¹⁰⁹ the Supreme People’s Court and many of the thousands of courts below have certainly been notably proactive in the pursuit of online courts and digitization of justice. It remains to be seen whether the Chinese court could take advantage of such opportunities to fundamentally alter its traditionally weaker position in the political and social context of China.

5.3 Potential Impact on Chinese Law and Beyond

Technology and the move towards online courts have the potential to break down physical barriers as well as the traditional hierarchy where the judge sits above the parties as the omniscient and just adjudicator to decide disputes according to the law, while staying aloof of matters largely of parties’ autonomy such as dispute containment or dispute avoidance. Online courts and digitization may create a ‘flat’ structure of justice, where courts and judges are very much involved with the parties throughout the litigation process.¹¹⁰ Considering the past and present work patterns of Chinese courts and judges, they are well-positioned to make the necessary adjustments more quickly. It is envisaged that developing nations may ‘leapfrog’ the

¹⁰⁷ Stephanie Balme, ‘Local Courts in Western China: The Quest for Independence and Dignity’, in Randall Peerenboom (ed) *Judicial Independence in China* (Cambridge University Press 2010) 168.

¹⁰⁸ Peter CH Chan, ‘Do the “Haves” Come Out Ahead in Chinese Grassroots Courts? Rural Land Disputes Between Married-Out Women and Village Collectives’ (2019) 71 *Hastings Law Journal* 1, 72.

¹⁰⁹ Taisu Zhang, ‘The Pragmatic Court: Reinterpreting the Supreme People’s Court of China’ (2012) 25 *Columbia Journal of Asian Law* 1.

¹¹⁰ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017) 20, 162-3; Susskind (n 17) 67, 70, 113-9; Gao (n 46) 219.

more ‘advanced jurisdictions’ in the global movement of online courts, through bypassing many of the traditional challenges of legal reforms.¹¹¹ There is unequivocal statement in Chinese scholarship that, despite the fact that many foreign jurisdictions started the discussion of online courts much earlier than China did, the practical implementation is far behind the theories.¹¹² In this regard, the Chinese hybrid model in presenting a choice for litigants is a genuine innovation to the wider debates about online courts and digitization of justice worldwide. It may or may not work well in practice, but the important thing is that it is already underway and being implemented by thousands of courts.

Moreover, the development of Chinese law and the legal system has been widely seen as lagging behind its conspicuous economic development in the past decades.¹¹³ Western scholarship often needs to deal with the ‘China problem’, specifically that a Western conception of the rule of law or rights protection did not seem to form the prerequisite of economic growth and prosperity as formerly envisaged.¹¹⁴ Different aspects of Chinese law are often seen as either ‘transplantation’ of more advanced foreign concepts or ‘hybridisation’ with ‘Chinese characteristics’, and therefore inferior to its more established foreign counterparts.¹¹⁵ It has rarely been contemplated in international scholarship that China could have anything to contribute to the global development in areas such as law, justice or governance.

Yet there are important signs that China may no longer be content for its success to be narrowly depicted with economic terms. It is making substantial efforts to expand the scope of international understanding of basic human rights by including the right to subsistence and development.¹¹⁶ It is constructing more institutionalized theories about concepts such as

¹¹¹ Susskind (n 17) 300.

¹¹² Zuo (n 97) 43.

¹¹³ Yang Yao and Linda Yueh, ‘Law, Finance and Economic Growth in China: An Introduction’ (2009) 37 *World Development* 756.

¹¹⁴ Donald Clarke, ‘Economic Development and the Rights Hypothesis: The China Problem’, (2003) 51 *American Journal of Comparative Law* 89; Frank Upham, ‘Lessons from Chinese Growth: Rethinking the Role of Property Rights in Development’, in Weitseng Chen (ed), *The Beijing Consensus: How China has Changed Western Ideas of Law and Economic Development* (Cambridge University Press 2017).

¹¹⁵ Joshua Fund Sze Kiun, ‘Beyond transplantation and hybridisation: the distinctiveness of the System of Case Guiding’ (2022) 10 *Peking University Law Journal* 75.

¹¹⁶ Qin Gang, ‘Following a Chinese Path of Human Rights Development and Contributing China’s Strength to Global Human Rights Governance’, speech at the United Nations Human Rights Council (27 Feb 2023).

democracy,¹¹⁷ the substantive discussion on which it sometimes meekly shunned away from in the past. Law and justice are logically high on the same agenda to promote a Chinese viewpoint that is different from the dominant Western narratives. While commenting on how the concept of 'foreign-related rule of law' (*shewai fazhi*) has become an important element of China's promotion of 'Chinese-style modernization', Erie urged the United States in particular to improve its record of access to justice at home to avoid charges of hypocrisy as a response to China's outward-facing initiatives.¹¹⁸

It is submitted that, in this emerging realm of digitization and online courts, China has indeed started its journey down an alternative pathway, which can potentially influence and shape the understanding and practice of justice both in China and possibly beyond. Its vision of access to justice for all and more importantly the measures for implementation are admirable. There will likely be many successes and failures. But it will simply be untenable to ignore the experiments and experience of China henceforth.

6. Conclusion

The global movement for online courts and the digitization of justice is undoubtedly transforming how legal systems operate, where many existing, physical barriers are overcome with the ever more prevalent use of technology. For most jurisdictions, the question is not whether online courts should be implemented, but how quickly and to what extent should they become a part of the contemporary legal practice. Despite the numerous advantages and enormous potential of online courts, however, the perception of some form of trade-offs lingers, especially in relation to the critical issue of access to justice for all. While online courts and technology enable quicker, cheaper and more convenient access to the court for most people, the fear or side-effect is that they could also create new barriers and obstacles, with the potential to disadvantage or exclude some groups, especially those with vulnerable characteristics. A lot of care and efforts have poured into the design of online courts in various jurisdictions, such as

¹¹⁷ Information Office of the State Council of the PRC, *China: Democracy That Works* (Foreign Languages Press 2021).

¹¹⁸ Matthew S Erie, 'Foreign Policy Implications for China's "Foreign-Related "Rule of Law""' (2023) 67 *Orbis* 565, 576.

providing assistance and guidance for operating online to those people who had poor access or little relevant skills before. Nevertheless, the essence of such an approach is still a decision over whether any court case is to be dealt with online or in person, which is largely made by a legal system, a court, or a judge. Litigants and parties in each individual case have to abide by such a decision.

In China's three-staged development of the digitization of the court, the small number of Internet Courts followed such a traditional model. But rather than building on it, the Chinese online courts implementation since 2020 has undertaken a novel and potentially paradigm-shifting approach. Instead of any gradual expansion, online courts now comprehensively encapsulate all civil and administrative litigation in all 3,502 courts of China. At the same time, each party is given the right to decide whether the participation for each component or stage of the litigation process is to be online or offline, without affecting other parties' choice over the same issue. When one party decides to engage online while the other party prefers in person attendance, the process naturally becomes a hybrid of online and offline mechanisms. The court cannot require anyone to use online courts under any circumstances and it must be a decision by each party. The Chinese approach thus offers an effective and innovative solution to concerns over the negative impact on access to justice by the ever-increasing reliance on technology across many legal systems. Meanwhile, the practical effect of offering such a free choice to litigants is highly encouraging so far, with for example up to 64% of court hearings being completed online in Beijing in 2021 and 37% nationally in 2022.

There are a number of important, contributing factors to this novel approach, which may well limit its wider implication beyond the Chinese system. On top of the non-adversarial construct of the legal system that facilitates mediation and settlement, the Chinese court firmly positions itself as a provider of services, to be used and selected by litigants to suit their needs and preferences. The traditionally weaker position of the court in the political and social structure of China means there is very little resistance by the judiciary to move towards a new model of judicial practice. Online courts and the digitization of justice present opportunities for the Chinese courts and judges to enhance their position in the Chinese society and political structure by embracing the changes in technologies and methods of justice.

Moreover, these substantive developments, albeit in the context of China that is very different

from many other jurisdictions, have the potential to challenge the existing conception of online courts and their impact on access to justice. China has been cultivating a different narrative of its development across topics such as human rights and democracy. Innovations and different conceptions about law and justice will very likely follow suit. Given the scale of its implementation as well as the numbers and wide varieties of cases already handled by online courts, the Chinese experience should provide much food for thought to many discussions surrounding online courts with solutions and answers that would be surprising. Although it is far too early to assess whether the Chinese reforms will ultimately be successful, the commitment to and implementation of full-scale online courts by a major jurisdiction shall certainly be followed closely in the coming years.