ONLINE COURTS AND
THE FUTURE OF JUSTICE. SUSSKIND, R. E.

by

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Susskind, R. E. (2019) Online Courts and the Future of Justice. Oxford: Oxford University Press, 368 p.

1. INTRODUCTION

> *"More people in the world now have access to the internet than access to justice. According to OECD, only 46 per cent of human beings live under the protection of the law."*[1, 2]

This statement could be seen as the main reason, why the treatise such as *Online Courts and the Future of Justice* is more than actual. *Richard E. Susskind* dedicated almost four decades to the work and research on the utilization of technology within the courts, which is also proven by his plentiful publication activity.[3]

In the introduction of the book, the author is pointing out that the topic of online courts is stirring some emotions especially in legal circles because of its conservative environment. Since it is thorny issue, it is crucial to keep

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[1]   According to *Statista.com*, 59 % of the global population has access to the Internet. Clement, J. (2020) *Worldwide digital population as of July 2020.* [online] Available from: https://www.statista.com/statistics/617136/digital-population-worldwide/ [Accessed 1 August 2020].

[2]   Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, p. 27.

[3]   For example, Susskind, R. (1996) *The Future of Law*. Oxford: Oxford University Press; Susskind, R. (2000) *Transforming the Law*. Oxford: Oxford University Press; Susskind, R. (2017) *Tomorrow's Lawyers.* Second Edition. Oxford: Oxford University Press.

an open mind about approach to the topic.[4] *Susskind's* book is in fact not about replacing human judges by the computer ones but about exploring the potential of the online courts – online decision-making process,[5] extension of the courts and digital transformation of the court system to better serve the public. The improvement of the access to the courts should be seen as the main philosophy of the online courts. According to *Susskind's* idea of online courts, he recommends firstly to focus on the minor conflicts (especially low-value civil disputes). Subsequently the knowledge would be transferred to more challenging tasks (criminal law disputes or "hard cases"[6]).

The book is divided into four parts. The first part is called *Court and Justice*, and it explains what is the purpose and value of court systems, the access to justice, if it is time to make a change and how to use technology to reach these goals. The second part of the book is called *Is Court Service or a Place?* and it is developing the central vision of the book – the idea of the architecture of online courts. The third part is focusing on obstacles when building online courts and it is called *The Case Against*. The most innovative part is the last one which is called *The Future*. In this review, we are respecting the order of the book and our comments and observations follow the same structure.

2. COURT AND JUSTICE

The importance of the courts is significant and the author of the book is emphasising it by the explanation of the jurisprudential function and constitutional significance.[7] The motivation for innovating the court system is however not only because of the fact that in some jurisdictions it is under staggering backlogs, but also because the justice should be available to everyone.[8] *Susskind* is stating that the ways how to change rooted system

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4   Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, p. 3.

5   According to *Susskind's* opinion, understanding online judging involves determination of cases by human judges but not in physical courtrooms. He is also mostly trying to exclude a videoconferencing, or any other synchronous communication and he is favouring written submissions. Moreover, online judging shall be (by his opinion) conducted via online platform where all the evidences and arguments will be submitted and subsequently the decision will be delivered. Op. cit., pp. 116–117.

6   To see more on that: Dworkin, R. (1975) Hard Cases. *Harvard Law Review*, 88 (6), p. 1060 *et seq.*

7   Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, pp. 19–25.

8   Op. cit., pp. 27–29.

are two – automatization of known operations and transformation of processes.[9] The first mentioned method is about changing the repetitive, routine tasks in the way that humans will be able to focus on more challenging aspects and they will not be overloaded by routine. The transformation of processes is then targeting revolutionary scenarios like creating an online court. *Susskind's* idea of online court(s) consists of the virtual instrument which would be based on textual description of the dispute only.[10] The decisions then would be (still) made by the human judge, however in cooperation with predictive systems. Even though this technology will be able to save time, money and human resources, it is also important to mention its drawbacks.

The author of the book is aware of some of them, but he is not paying enough attention, in our opinion, for example to biases[11] in more complex way, technological aspect of the issue, partly open texture of the law or the level of quality of written submissions.[12] We would thus stress out (not only in connection with online courts) that especially the connection and cooperation between the lawyers and computer scientists will be crucial in the future (and it is crucial already in the moment).

If, according to *Susskind's* model, online courts will be developed, it will mean that algorithm will help with the preparing the case, predicting the possible outcome, evaluating inserted data. Human beings, judges included, are biased. The architecture of prediction algorithms is by default unbiased since it is just code without feelings, memories, cultural background or knowledge of history (if the algorithm is biased it is not the fault of the system but of its creator).[13] Similar applies also to the processed datasets. The de-biasing of the dataset is theoretically possible and, in our opinion, if the system will be free of such defects, it will

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9   Op. cit., p. 34.

10   Op. cit., p. 60.

11   Završnik, A. (2019) Algorithmic justice: Algorithms and big data in criminal justice setting. *European Journal of Criminology*, 20 (1). [online] Available from: https://journals.sagepub.com /doi/pdf/10.1177/1477370819876762 [Accessed 1 August 2020].

12   To see more on these issues e.g.: Scherer, M. (2019) Artificial Intelligence and Legal Decision-Making: The Wide Open? *Journal of International Arbitration*, 36 (5), p. 554 *et seq.*; Surden, H. (2018) Machine Learning and Law. *Washington Law Review*, 89 (1), p. 105; or historically D'Amato, A. (1977) Can/Should Computers Replace Judges? *Georgia Law Review*, 11, p. 1300 *et seq.*

13   Završnik, A. (2019) Algorithmic justice: Algorithms and big data in criminal justice setting. *European Journal of Criminology*, 20 (1), p. 11. [online] Available from: https://journals.sage pub.com/doi/pdf/10.1177/1477370819876762 [Accessed 1 August 2020].

be potentially able (and will be prepared) to offer more transparent and objective outputs.

According to *Caliskan, Bryson and Narayanan* also the language itself is naturally biased.[14] This means that since one of the inputs (the language) is by its nature biased it is almost impossible to have an unbiased product at the end. Moreover, there is a dilemma concerns whether de-biasing is desirable. One aspect is the architecture of the de-biasing procedure ("cleaning algorithm"), the second aspect to decide what is exactly a bias (or which part of algorithm / dataset is biased). This entails a series of inherent "political" decisions which will answer the questions as to what should be "cleaned", what is sexist, which word is unacceptable.[15] These questions and problems are unfortunately resonating in the book just under the lines and *Susskind* is not focusing on them. Nevertheless, in our opinion these are very important because of the previously mentioned fact that the law (and generally the language even more) has open texture and character.

Susskind is mentioning the prejudice of the legal practitioners who are against the transformation of the system.[16] These people are, in our eyes, not open-minded enough to the concept of online courts. Nevertheless, more interesting point is the bias of the machine involved, which is not sufficiently mentioned in the book.

As further mentioned in the book, the online courts are built on the written submissions – this could however collide with the idea of access to justice. The author understands access to justice as much more than providing faster, cheaper and less combative mechanism for resolving disputes. *Susskind* claims that the system of online courts could help to avoid disputes and could have a greater insight into the benefits that the law can confer. Citizens in the future will be able to own and manage their legal disputes at online courts (write submissions, manage the dispute without the intervention of somebody else). The access to justice will thus

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[14] Caliskan, A., Bryson, J. J., Narayanan, A. (2017) Semantics derived automatically from language corpora contain human-like biases. *Science*, 356 (6334), p. 185. [online] Available from: https://science.sciencemag.org/content/sci/356/6334/183.full.pdf [Accessed 1 August 2020].

[15] Završnik, A. (2019) Algorithmic justice: Algorithms and big data in criminal justice setting. *European Journal of Criminology*, 20 (1), p. 11. [online] Available from: https://journals.sage pub.com/doi/pdf/10.1177/1477370819876762 [Accessed 1 August 2020].

[16] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, p. 44.

increase,[17] also because such submissions and using online courts is only a possibility not obligation.[18] Nevertheless, we think that this idea could be met only if the laypeople would be able to write and manage their submissions effectively. But that could be a difficult task. The main issues are the use of accurate language and "evaluating" or "presenting" the evidence. Laypeople are not trained to identify which information could be relevant and which is not. The solution to that problem could be some assistance offered by the online court (guide, documentation or personal assistance).

3. IS COURT A SERVICE OR A PLACE?

One of the important questions of the book is *If the Court is a Service or a Place?* The answer to this question is a crucial element for digitalisation and *Susskind* sees it as a service.

The architecture of the innovative court system by *Susskind* is, without a doubt, unique. He is describing a four-layer model which includes three tiers.[19] Firstly, there is a layer of "dispute resolution". In this layer, it is possible to find traditional courts, virtual hearings. The second layer is "dispute containment", which contains mainly alternative ways to settle the dispute and tools connected with classical understanding of online dispute resolution (ODR). The other two layers are "dispute avoidance" and "legal health promotion", and they have no plausible equivalent in current legal systems.[20]

The tiers are divided by *Susskind* into the *Tier 1*, the *Tier 2* and the *Tier 3*. The aim of the *Tier 1* is to organise and classify the problems of the people. Some of the goals of this tier are to help laypeople to fully understand their problem, rights and duties and also to guide them through possible remedies available to them.[21] This aim could be fulfilled via the system of decision trees. It is important to mention that we already have a tool that could help the courts with such a task – *Susskind* is using a concrete

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[17] Op. cit., p. 70.

[18] This has been already proven in out-of-court online dispute resolution. To see more on that: Loutocký, P. (2016) Online Dispute Resolution to Resolve Consumer Disputes from the perspective of European Union Law: Is the Potential of ODR Fully Used? *Masaryk University Journal of Law and Technology*, 10 (1), pp. 113–127.

[19] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, pp. 113–119.

[20] Op. cit., pp. 113–116.

[21] Op. cit., pp. 117–118.

example of Resolver.[22, 23] *Tier 1* is more about giving a legal advice, which is not compatible with the typical agenda of courts. There is an objective reason to assume that the private sector would be involved in *Tier 1* as well.[24]

Tier 2 is containing a dispute resolution but necessarily not only with the involvement of a judge. The central figure of this tier is a "case officer". This person will be trying to settle the dispute (to help achieving the agreement). Case officer would act as a mediator and their main goal would be to prevent the litigation and settle and manage the dispute. *Susskind* is emphasising that they should not act as "lite" judges,[25] however, it is questionable if it is possible to fulfil this condition. The case officers will probably need a legal education at least on some level. The principle of *Tier 2* has been already used in the court system of England and Wales for online civil money claims and also by *Canadian Civil Resolution Tribunal*.[26]

Suggested tools and principles in *Tier 1* and *Tier 2* are exceeding the scope of the current court system and also their time and human sources in the moment. Prevention should be however better than *ex post* reaction, and well-set system of *Tier 1* and *Tier 2* will be able to reduce the involvement of judges in many cases, thus transformation of the court capacities is important.[27] Conversely, the easy access and affordability of justice through *Tier 1* and *Tier 2* could trigger an enormous interest in litigations. Moreover, if the tiers would not be appropriately set, the system will collapse.[28] This is however not primarily a disadvantage and we see the great potential in ODR tools, where it is proven, that rising number of disputes does not lead to limiting the resolution but helps the users not to be afraid of dealing with their problems.[29] Also already working scenarios (e.g. *Civil Resolution Tribunal* in Canada) prove that *Tier 1*

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[22] Op. cit., p. 126.

[23] For example, Resolver. [online] Available from: https://www.resolver.co.uk [Accessed 1 August 2020].

[24] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, pp. 127–128.

[25] Op. cit., p. 137.

[26] For example Civil Resolution Tribunal. [online] Available from: https://civilresolutionbc.ca/ [Accessed 1 August 2020].

[27] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, p. 141.

[28] The author of the book is opposing this argument in chapter 22. Op. cit. pp. 224–226.

[29] Rule, C. (2012) Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing In Dispute Resolution. *University of Arkansas at Little Rock Law Review*, 24 (4), p. 772 *et seq.*

and *Tier 2* can eliminate (even by involving the negotiation phase between the parties) many simple cases and the court (and especially the judges themselves) is only dealing with fraction of the initiated cases.[30]

Last tier is described as the online litigation, which involves a human judge. Nevertheless, the dispute should be still completely led online and based on written submissions.[31]

There are concerns that judging online is not possible. This argument is supported by the cases like *The Queen v. Dudley and Stephens*.[32] "Hard cases" containing moral dilemmas or difficult ethical questions require special attention. Online courts are according to *Susskind* primarily focused on quick settlement of "easy" cases. This approach will let human judges to focus just on hard cases. The question is if the system will be able to distinguish in *Tier 1* between the "hard" and "easy" cases.[33]

In the last chapter of this part, *Susskind* introduces the successful projects similar to online courts. He is mentioning examples like systems in China, Australia, Canada or England and Wales.[34] On the other hand, the author is surprisingly ignoring situation within the European Union, for example approaches in Denmark or Estonia.[35]

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[30] Almost 85 % of the cases were resolved in *Tier 1* and *Tier 2* by *Civil Resolution Tribunal*. Rozenberg, J. *The Civil Resolution Tribunal. The Online Court: will IT work?* The Legal Education Foundation. [online] Available from: https://long-reads.thelegaleducation foundation.org/ [Accessed 1 August 2020].

[31] For the first generation of online courts, there would be no involvement of "AI" judges or predictive systems in the *Tier 3*. However, the *Tier 3* has potential space for it in the next generations of online courts.

[32] *Dudley and Stephenson* is an English criminal law case, which is challenging the justification of cannibalism. The main idea of the case is if it is murder of fellow crew member justifiable under specific circumstances or not. *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884). [online] Available from: https://cyber.harvard.edu/eon/ei/elabs/majesty/stephens.html [Accessed 1 August 2020].

[33] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, pp. 146–147.

[34] Op. cit., pp. 165–176.

[35] See CEPEJ European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment. [online] Available from: https://www.coe.int/en/web/cepej/ cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment [Accessed 1 August 2020]; or Justice of the future: predictive justice and artificial intelligence. [online] Available from: https://www.coe.int/en/web/cepej/justice-of-the-future-predictive-justice-and-artificial-intelligence [Accessed 1 August 2020]; Vasdani, T. (2019) *From Estonian AI judges to robot mediators in Canada, U.K.* LexisNexis. [online] Available from: https://www.lexisnexis.ca/en-ca/ihc/2019-06/from-estonian-ai-judges-to-robot-mediators-in-canada-uk.page [Accessed 1 August 2020]; Numa, A. (2020) *Artificial intelligence as the new reality of e-justice*. [online] Available from: https://e-estonia. com/artificial-intelligence-as-the-new-reality-of-e-justice/ [Accessed 1 August 2020]; Danmarks Domstole. [online] Available from: https://www.minretssag.dk/frontpage [Accessed 1 August 2020].

The main criticism to this part of the book is the lack of the technological aspect. The author is introducing his vision of the online court system, but he is not focusing on the technologies he suggests to involve.

4. THE CASE AGAINST

Since online courts are quite a sensitive topic, *Susskind* is pre-empting the possible opposing arguments by dedicating a whole part III of the book to this topic. This part of the book is in our view very important as it is trying to break traditional stereotypes connected with use of the online technologies in the justice. The author of the book is discussing issues as economy-class justice, transparency, human face of justice, fair trial, digital exclusion, public sector technology and jurisprudential miscellany. However, especially this part of the book is just scratching the surface. Susskind is not dealing with each problem in depth.

Another topic is the human face of justice. Question is if we need a contact with human being judge from flesh and bones, or it would be possible to accept a decision through the computer. This is more a psychology question than legal one, but still, it should be at least partly considered. The human element in justice in online courts is in the book compared to the online psychotherapy sessions. *Susskind* is arguing through psychotherapist *Yalom* that when text psychotherapy could be such a success, online courts would be the same.[36, 37] Understandably, patients of psychotherapy are preferring texting over videoconferencing or calling. The texting is giving them a time to think about their message and they can hide behind their phones or computer. The comparison to psychotherapy is however in our opinion unfortunate. Psychotherapy is not litigation. The main purpose of the court system is finding the justice and it is crucial that the judge will be able to find it. According to acquisition of information, the human judge or psychotherapist could reach some information via body language or immediate responses. In the online court system, this would not be possible anymore.

On the other hand, the potential dispute settlement online has been already discovered by some private providers of ODR (it seems more

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[36]   Yalom, I. (2017) *Becoming Myself: A Psychiatrist's Memoir*. Basic Books, p. 306.
[37]   Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, pp. 210–214.

important to offer the solution than to meet face to face)[38]; these aspects are however not mentioned in the book.[39]

The last topic we would like to mention is the digital exclusion. According to *Susskind*, objection to online courts is that many people do not have access to the Internet, or they do not have a necessary level of computer literacy.[40] Nevertheless, he is emptying this argument by the fact that even non-users of the Internet are indirect beneficiaries of the internet.[41] He suggests that less confident users should be assisted by online guidance, which will solve the problem with the lack of computer literacy. To support his conclusion, *Susskind* mentions several statistics.[42] Even though *Susskind's* argumentation seems convincing we are critical about it. Firstly, *Susskind* relies on statistics and data relevant only to the United Kingdom. Secondly, he overlooks the digital skills gap in Europe.[43] Lastly, *Susskind* is not making any difference between consuming the social media and using an online court.

5. THE FUTURE

The last part of the book is dedicated to the emerging technologies, AI, computer judges and the global challenge. As the author mentions this final part is about his predictions.[44] This approach caused the fact that some of his ideas are not supported by any relevant source. The author of the book is firstly exploring the emerging technologies as telepresence, augmented reality or advanced ODR. He believes that these technologies could be used in the current courtrooms.[45]

Another chapter is dedicated to the artificial intelligence (AI) and its impact to future of online courts. Even though *Susskind* is highlighting that

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[38] Rule, C. (2012) Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution. *University of Arkansas at Little Rock Law Review*, 24 (4), pp. 767–777, p. 772 *et seq.*

[39] To see more on that: Loutocký, P. (2019) Online Dispute Resolution as an Inspiration for Contemporary Justice. *Jusletter IT. Die Zeitschrift für IT und Recht*, pp. 1–8, p. 2 *et seq.*

[40] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, p. 215.

[41] Op. cit., p. 216.

[42] Op. cit., pp. 216–218.

[43] According to data from 2017 "[…] *169 million Europeans between 16 and 74 years – 44 % – do not have basic digital skills.*" DG Connect, "The Digital skills Gap in Europe", Digital Single Market. [online] Available from: https://ec.europa.eu/digital-single-market/en/news/digital-skills-gap-europe [Accessed 1 August 2020].

[44] Susskind, R. (2019) *Online Courts and the Future of Justice*. Oxford: Oxford University Press, p. 253.

[45] *Cisco's* telepresence, op. cit., pp. 255–258.

he has been focusing his research to AI and law, he is not consistent and specific about the "AI" systems he is proposing to use for example in the *Tier 3*. He is briefly describing the different concepts of AI, its history and breakthroughs, but he is not explaining how the AI works.[46] We consider this lack of explanation of technological aspect and clear definition of AI as shortcoming of the book.

Subsequently, the author points out the "AI fallacy"; the view that only way to get machines to outperform the best human lawyers is to copy the way that human lawyers work. He claims that this is not a good approach to AI in this context.[47] We think that such author's idea is exciting, but since the programmers of AI will be humans, it is challenging to imagine how AI could overcome this problem. Humans will program the machine in the way how humans understand the law and legal procedures. If we are then talking about different view (using neuron networks or quantum computing), this should be introduced in the book (and not ignored).

Penultimate chapter of the book is about the computer judge. *Susskind* is examining the question *Can machines replace human judges?*, but he is not giving a clear answer to it.[48] Nevertheless, he is more focusing on prediction machines. Even though, *Susskind* is dealing with moral boundaries of AI replacing judges he is not mentioning the moral boundaries of predictive systems. He also barely writes about bias problems of these systems[49] and he is ignoring their deficiencies, for example racial profiling[50], privacy threads[51] or misunderstanding of causal relationships[52].

6. CONCLUSION
The *Online Court and the Future of Justice* is a great and complex introduction and a guide to the topic. *Susskind* is mentioning many of his bright ideas

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[46] Op. cit., pp. 263–272.

[47] Op. cit., pp. 272–273.

[48] Op. cit., pp. 278–281.

[49] Op. cit., p. 289.

[50] Crawford, K., Schultz, J. (2013) Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms. *Boston College Law Review*, 55 (93). [online] Available from: https://ssrn.com/abstract=2325784 [Accessed 1 August 2020].

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[52] Sgaier, S., Huang, V., Charles, G. (2020) The Case for Causal AI. *Stanford Social Innovation review*, 18 (3). [online] Available from: https://ssir.org/articles/entry/the_case_for_causal_ai# [Accessed 1 August 2020].

and experiences and the language of the book is accessible for general public. The book is easy to read and easy to understand which is hard to achieve in such a complex topic.

Despite that, some of the issues just scratch the surface and the author is not developing his ideas in a depth. This is however understandable for the sake of consistency and length of the book. The significant shortcoming of the book is the lack of the technological aspect of suggested online court tools and systems. The author of the book is not explaining how the system will work. Moreover, we believe that since the online courts would be closely associated with technology, as predictive systems or AI in the future, it is crucial to dedicate some part of the book to understand the systems and suggested technologies. In the best scenario this part of the book should have been a cooperation with computer scientists.

On the other hand, we are convinced that the suggested automatization and autonomous systems are a step in the right direction. Despite the criticism, the book is the only complex work on online courts. In conclusion, if there is any desire to understand the future of justice, we have to recommend this book as one of the important foundations.

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