**E-COURT: FAIR OR UNFAIR PROCEDURES?[[1]](#footnote-1)\***

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**Abstract**

*Digital age has brought the application of e-Court more feasible in the form of internet-based court management, online trial and live broadcasting trial, for example. These forms of online court have, paradoxically, facilitate a number of fair trial rights and concurrently limit or even threaten a number of other fair trial rights. Although several internet-based judicial services have been introduced in a number of countries and jurisdictions, legal scholarship has paid little attention to how universal fair trial rights are affected by those services. This paper contributes to evaluating the possibility of expanding several forms of online judicial procedures and ways they affect fair trial rights.*

**Keywords:** e-Court, e-Justice, fair trial rights, due process, fair procedure

# **1. Background of e-Justice and e-Court**

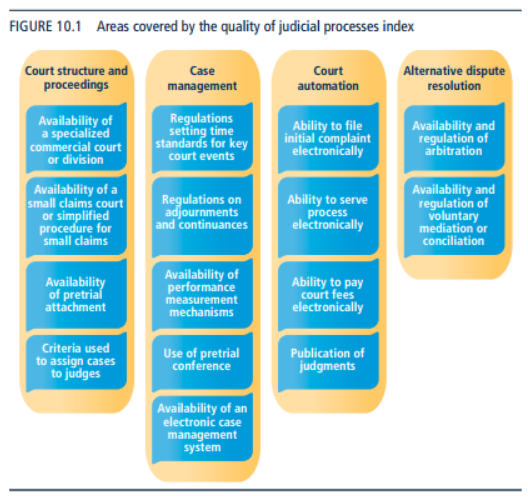
Electronic Court (e-Court) has been generally considered as a component of e-Justice systems, particularly in Europe over the past decade. Across the world, e-Justice and e-Court initiatives are still emerging[[2]](#footnote-2) because judicial procedures paradigm traditionally prefers face-to-face communication. As observed in the US, E-Court may reduce cost and increase but it is still not the norm because of “fear of the unknown, fear of losing jobs and status, fear of start-up costs, and fear that technology will disrupt due process”. This may be true for other countries and legal systems too.

IN Europe, the Council’s 2019-2023 Action Plan and Strategy has confirmed an e-Justice paradigm. Accordingly, the e-Justice paradigm “aims at facilitating access to justice and the functioning of judicial systems, including in cross-border cases, for citizens, legal practitioners and authorities, taking into account judicial independence and separation of powers”. This e-Justice system reflects judicial interconnections, which are characterised by simplified, digitised communications and procedures. E-Justice is based on digital means (ICT components and mechanisms).[[3]](#footnote-3)

***Court Automation***[[4]](#footnote-4)

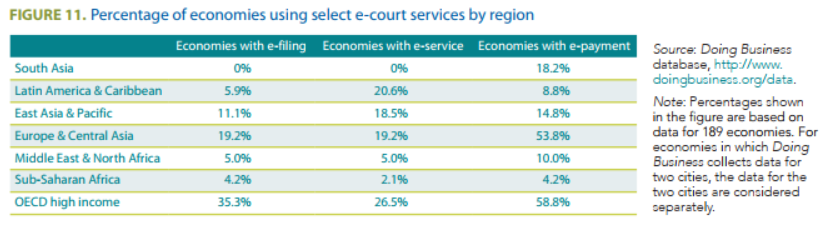
As analysed by the *Doing Business 2016* report, four e-solutions of judicial processes could enhance efficiency, access, transparency, and accountability of courts are ability to file a complaint electronically, the ability to serve process electronically, the ability to pay court fees electronically, and the electronic publication of judgments.[[5]](#footnote-5) The solution of court automation could be considered as the beginning of e-Court. Not only that, recent time has witnessed increasing use of video and audio recording of hearings, video arraignments and testimony, online auctions, etc in courts.[[6]](#footnote-6) At least, e-solutions of judicial processes can be a parallel option for and agreed by all parties of the proceedings.[[7]](#footnote-7)

*Court automation as part of judicial processes index*



**Source:** World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, p. 92.

*E-Court services in regions of the world*



**Source:** Heike Gramckow et. al., *Good Practices For Courts: Helpful Elements for Good Court Performance and the World Bank’s Quality of Judicial Process Indicators,* World Bank, 2016, p. 73.

Vietnamese policy makers have long confirmed the role of IT in the development of Vietnam, such as: “Application of information technology (IT) in state agencies' operations is a correct and urgent requirement nowadays. Without fast and strong implementation of this work, Vietnam will not be able to integrate into the world’s development”.[[8]](#footnote-8) This is such a correct judgment of the State of Vietnam in the current period. Court adjudication is also not an exception to this requirement. Pursuant to the Party and State’s policy, Vietnam’s Court system gradually implements the model of "Electronic Court" under the Resolution No. 52-NQ/TW by the Communist Party of Vietnam’s Politburo dated 27 September 2019 providing several policies on active participation in the Fourth Industrial Revolution. The world has now conducted and successfully applied information technology to operate the court system, for instance, considering European examples (Italian Trial Online; English and Welsh Money Claim Online; the trans-border European Union e-CODEX), and Canadian examples (Ontario’s Integrated Justice Project (IJP), Ontario’s Court Information Management System (CIMS), and British Columbia’s eCourt project) and the Beijing Internet Court.[[9]](#footnote-9) As can be seen from other countries’ experiences, information application in court operations impacts many aspects such as access to justice, procedures and costs, etc.

According to a report by Kanta Worldpanel, Vietnam is one of the countries with the top e-commerce growth in the world. The Vietnam e-commerce White Papers in 2019 also stated that the number of online shoppers in Vietnam in 2018 reached 39.9 million with a growth in e-commerce consumption of about 30% per year.

Meanwhile, the online form has shown outstanding features with exceptional demonstration in many activities, including shopping, working, meeting and resolution of disputes on sale and purchase, etc. Based on the 2016 UNCITRAL's technical notes on ODR (Online Dispute Resolution) in contract verification and identification of managed cloud computing[[10]](#footnote-10) through computer mediated communication (CMC), and the dispute resolution mechanism in e-commerce activities of big e-commerce websites such as eBay, the essence is to resolve disputes. Alibaba retailer uses ODR mechanism to resolve disputes between buyers and sellers. The online dispute resolution system (ODR) of the Hanoi international arbitration center was the first ODR system put into operation in Vietnam. There is no ODR restriction on e-commerce.

Disputes resolved in Court has gradually been shifted from direct to online operation considering the application of technology in the following procedures: the dispatch of court summons, announcement of trial judgments and online mediation. The appearance of the Covid pandemic accelerates the onlineization of court proceedings. Particularly, the following specific services appear:

***Electronic lodgment (eLodgment)***[[11]](#footnote-11)

eLodgement is a service that allows court users to lodge Magistrates Court civil claim, statement of claim, request for default judgment, default judgment, affidavit, application for an enforcement hearing summons forms online through an approved service provider.

eLodgement is understood as the process of transferring documents and information to the court via an electronic means rather than on paper. Permission to submit online dossiers means that attorneys and litigants do not have to go to court to lodge all required documents and the court has all the required authentic documents and legally verified signatures in acceptable forms to make case records easily available for further processing, thus saving time and effort for the courts, court staff and users.

Therefore, litigants or lawyers can lodge the documents directly via the internet from their home, office or anywhere.

***Electronic courtroom (eCourtroom, virtual courthouse)***

The eCourtroom has not appeared nor been recognized in Vietnam. According to Australian experience, “[eCourtroom](about:blank) is an online courtroom used by Judges and Judicial Registrars to assist with the management and hearing of some matters before the Federal Court of Australia or [Federal Circuit Court of Australia](about:blank)”.[[12]](#footnote-12)

eCourtroom is integrated with eLodgment, providing parties with a link between eCourtroom and eLodgment to facilitate the electronic filing of documents. Online (electronic) courtroom means a courtroom arranged in compliance with the provisions of procedural law and equipped with audio and video recording equipment, television screens, computers, internet networks, online television networks and other equipment for activities during trial and sessions.

The entities that are part of a trial will participate in the trial similar to an online video conference. The trial conductors sit in the courtroom at the courthouse (the central bridge point) and the participants in such legal proceedings sit in the courtroom at the local courthouse (local bridge point) can still see and talk directly to each other at the same time through the electronic devices set up, linked by the internet and operated by a software application program, without having to gather in one courtroom as usual. Moreover, with the permission of the central bridge point (the trial panel), numerous people interested in the case can follow its legal proceedings as opposed to conventional trial where the number of viewers is restricted by the room’s space.

***Electronic record management system***

The electronic record management system is a software application connected to the internet, built in order to manage and monitor cases from when they are accepted until they are resolved. This system will record cases, manage the list of cases to be heard, record the Court's orders and the results of each case. Electronic record management system helps officers in charge of case management; assists the secretaries in scheduling and arranging the cases to be heard; assists the Judges in making judgment; and at the same time, it is the source of information and data on the Court’s activities.

The electronic record management system helps the Court to perform repetitive processes and procedures more accurately, faster and at a lower cost than when doing it manually.

***The sign of e-Court in Vietnamese context***

It is a positive sign that there has been recently a proposal to implement some e-court solution in Vietnam. The report ′′Good Practices in Court Procedures to Improve Court Integrity” proposes four groups of judicial e-procedures: (i) Procedures to receive petition, accept case handling (including court-annexed mediation); (ii) Judge assignment in the Court; (iii) Management of the time for case settlement; and (iv) Grant of extracts, delivery of judgments and judgments publication.[[13]](#footnote-13)

# **2. Benefits of e-Court**

Implementing processes in the application of eCourt model in adjudication to minimize human intervention, eliminate unnecessary administrative procedures, use algorithms to improve classification productivity and process papers on electronic system helps simplify compared with the traditional trial model.

***Benefits for participants:***

In the period when time means money, the costs incurred during the preparation include full travel costs, parking fees, paper costs, time off work in addition to costs incurred paid to the Court or the mediator by participants of the proceedings.

eCourt also reduces feelings of shame when entering court, creating equality for participants regardless of profession. This issue is not related to "feelings of guilt" but rather the individual’s emotional feelings due to the influence of the heavily-opined media in Eastern countries.

***Benefits for state agencies:***

Initialization costs are often difficult but will be offset by savings of operation costs. ODR helps to prevent tensions between parties and online mediation can easily result in quick agreement and resolution. This saves courts from burdensome administrative and human resources. The combination of fee payment and automatic notification, integration of information stored in the database system help to create consistency and accelerate the production, storage, servicing, retrieval and internal transfer. eCourt is easily accessible from anywhere and health-related absences are minimized. It avoids interrupting the trial and avoids wasting opportunity costs of those affected when a trial is canceled without their fault.

# **3. Impacts of e-Court on fair trial rights**

In principle, it is understandable that “e-service of an initial summons has to provide the same due process protections as the traditional service of summons”.[[14]](#footnote-14) However, it is reasonable to pay attention to “*Dangers of Digitizing Due Process*” and therefore the need of “guarding due process in the digital age”.[[15]](#footnote-15)

It is necessary to consider the reciprocal relationship between the e-Court model and the principle of human rights, including the right to a fair and public hearing, the correlation between adjudication and the complexity of the case, the right to confront and the right to dialogue of the competent procedural authorities and the participants in legal proceedings.

According to international human rights law, the right to a fair trial is a basic human right highly universal and existent in all criminal and non-criminal cases.[[16]](#footnote-16) National law regulates this right as an indispensable right in a rule by law state. The treatment of an accused person reflects the extent to which human rights are respected by the state. As for fundamental changes in a trial’s format, impacts during the trial on the right to a fair trial will be assessed by the following rights to:

1. be held within a reasonable time
2. be heard by an independent and impartial decision-maker
3. be given all the relevant information
4. be open to the public (although the press and public can be excluded for highly sensitive cases)
5. allow representative and an interpreter where appropriate, and
6. be followed by a public decision.[[17]](#footnote-17)

The differences between traditional and online trial models have clearest impacts on the following rights: right to be tried within a reasonable time and right to be heard by independent and impartial decision-makers and additionally, the right to be open to the public, ensuring the people's right to supervise the adjudication activities.

***The right to be tried within a reasonable time***

***The right to a fair and public hearing***[[18]](#footnote-18)

In addition to the expansion of the poor and other disadvantaged groups’ access to justice, these groups may also be affected by their inability to access and use information technology infrastructure.

***The right to be heard by independent and impartial decision makers***

Issuance of jargon-free guidance offered in multiple languages could better facilitate the dissemination and justly adoption of e-fairness, initiatives as well as the collaboration opportunities between important judicial branches of related parties.

## ***The right to supervise adjudication***

It can be seen that public exposure is an integral part of most proposals. Perhaps, by coincidence, many features of an online social networking website can be tailored to accommodate the variety of information outlined above. With the advent of Web 2.0, which enables user-centered design, interactive information sharing, interoperability and collaboration on website, from anywhere with an internet connection, you can:

* upload case documents, detention photographic evidence and videos of court proceedings;
* ask eminent lawyers to reconsider the case;
* connect to websites that provide case records, legal archives, reports and analysis;
* search for data against polices, prosecutors and judges by using keywords;
* monitor professional responsibility of officials in the legal system;
* post details of online trials; and
* promote public awareness of legal proceedings.

Such websites do not need to be part of the judicial body yet can be an independent judiciary. This kind of exposure can help improve the likelihood of justice and importantly, social media itself has the potential to connect advocating justice communities and nongovernmental organizations network through means such as censored forums, lists, newsletters, online letters/recommendations, advisory columns and comments. Although online data can be at risk, unlike newspapers and as a large data storage platform compared to radio and television, the internet has the advantage of being unrestricted by national boundaries and, therefore, less vulnerable to threats from within areas having weak legal system to maintain the situation.

# **4. Prospects of e-Court**

The expansion possibility of some online trial forms is an inevitable trend in the present period. Despite several shortcomings regarding the application of the right to a fair trial, the existing and outstanding benefits of online trial are undeniable.

The nature of the court is to ensure a unified opinion among parties on the disputes, a “location” empowered by the parties that must ensure its obligation to make a final decision. In the digital age, when all gaps are blurred thanks to the achievement of connected technology on the platform of the virtual world, the “location” will become “where” not necessarily attached to an existing physical location. It can be digitized into an online venue where all involved can be easily receptive.

How they affect the right to a fair trial: Providing more ways and effectively use multiple means to conduct trials for participants. Therefore, they can choose to proceed in a way that suits their own conditions. However, in addition, it is also necessary to gradually improve the shortcomings of the online system to ensure improvement when applying online trial.

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1. \* This research is funded by Vietnam National Foundation for Science and Technology Development (NAFOSTED) under grant number 505.01-2018.300. [↑](#footnote-ref-1)
2. This is also the case for E-Court in the US (see: Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, Buffalo Law Review, Number 1, Volume 67, 2019, p. 92). [↑](#footnote-ref-2)
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16. See: UDHR, ICCPR, ECHR, etc. [↑](#footnote-ref-16)
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