

Increasing Access to Justice through Online Dispute Resolution

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Abstract

Online dispute resolution has been posed as a way to further increase access to justice. This article explores the concept of using ODR to increase both 'access' and 'justice' within the dispute resolution system. The concept of increasing access to the dispute resolution system includes a wide variety of ideas: providing dynamic avenues into the legal process to better serve more people, particularly those with physical disabilities, increasing accessibility to low-income communities and ensuring the platform can be used by non-native English speakers. ODR provides the potential to greatly impact the court system by making the court process more efficient and accurate. While there is great value in integrating ODR into the dispute resolution system, the ODR system itself creates a variety of barriers. In order to effectively increase access to justice through ODR, the ODR system must be developed to maximize 'accessibility'. The second prong to this discussion explores the concept of 'justice' within the context of ODR. Critics of ODR purport that the system values efficiency over justice. This article analyses the legitimacy of ODR as a judicial system through three key factors: representation of individual views, neutrality in decision-making, and trust.

Keywords: ODR, fairness, disability, accommodation, accessibility.

Online dispute resolution (ODR) has been posed as a way to increase access to justice. This article explores the concept of using ODR to increase both access and justice within the dispute resolution system. The concept of increasing access to the dispute resolution system includes a wide variety of ideas: providing dynamic avenues into the legal process to better serve more people, particularly those with physical disabilities, increasing accessibility to low-income communities and ensuring the platform can be used by non-native English speakers. ODR provides the potential to greatly impact the court system by making the court process more efficient and accurate. While there is great value in integrating ODR into the dispute resolution system, the ODR system itself comes with a variety of barriers. In order to effectively increase access to justice through ODR, the ODR system must be developed to maximize 'accessibility'.

The second prong to this discussion explores the concept of 'justice' within the context of ODR. Critics of ODR purport that the system values efficiency over justice. This article analyses the legitimacy of ODR as a judicial system through

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three key factors: individual views are represented, neutrality in decision-making and trust.

1 The Legal Landscape of Access to Justice in the United States

Many efforts have been made to provide avenues into the legal process to better serve more people. It has been widely recognized that low-income parties are particularly disadvantaged when it comes to litigating disputes in court. Economic limitations – such as hiring a lawyer, paying filing fees and missing work to meet with a lawyer or attend court – provide the most obvious barriers to resolving disputes through the court system.¹ In addition to economic limitations, more subtle barriers also impact an individual's ability to pursue litigation. Some examples of these barriers include geographic restrictions due to the unavailability of legal services, psychological barriers associated with the mental stress of pursuing a claim, and linguistic or cultural barriers that can lead to miscommunication and misunderstanding.²

As a variety of reform efforts were made to decrease these barriers to justice, alternative dispute resolution (ADR) was eventually identified and expanded through the lens of increasing access to justice.³ ADR processes were created as a response to the demand for faster, easier, more accessible and readily available methods for resolving disputes.⁴ The adoption of ADR into the legal system reflected a greater understanding of the ways in which disputes arose, the variety of dispute types and the various interests of disputants that called for alternative methods of resolving disputes.⁵ As such, ADR is intrinsically linked to the access to justice movement.

The emergence of ODR follows as a direct progression of this trend for meeting the needs of disputants in a way that is more accessible, readily available, faster and greater reflects the ways in which the disputes arose.⁶ ODR began in the private sector, primarily as a way of resolving disputes that originated online. The integration of ODR into the legal system has created an opportunity for the legal process in a purely virtual space.

It follows that ODR will be used as a way to greatly increase access to justice. ODR comes as the next natural step in providing greater access to low-income parties attempting to resolve disputes. ODR systems are cheaper, allow for faster resolution of claims and do not require missing work or driving to a courthouse to participate. However, it is essential that as ODR systems are developed and inte-

1 O. Rabinovich-Einy & E. Katsh, 'A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution', *Ohio State Journal on Dispute Resolution*, Vol. 32, 2017, p. 695, at 705.

2 *Ibid.*, pp. 706-707.

3 *Ibid.*

4 A. Sela, 'The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions', *Lewis & Clark Law Review*, Vol. 21, 2017, p. 635, at 641-642.

5 *Ibid.*, p. 642.

6 *Ibid.*, pp. 641-642.

grated within the court system, the platforms must be designed in a way that is intended to serve the specific needs of those groups for which the barriers to access are the highest. In order to identify the needs of these groups, it is important to look at the overall state of access to justice and determine which needs are not currently being met.

1.1 *Current Access to Civil Justice: World Justice Project*

The World Justice Project (WJP) is an independent, non-profit organization that

develops communities of opportunity in equity by advancing the rule of law worldwide ... The WJP asserts that access to civil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent.⁷

The WJP measures seven key factors to compare the civil justice index within a society:

(1) people can access and afford civil justice; (2) civil justice is free of discrimination; (3) civil justice is free of corruption; (4) civil justice is free of improper government influence; (5) civil justice is not subject to unreasonable delays; (6) civil justice is effectively enforced; and (7) ADRs are accessible, impartial, and effective.⁸

An article published by Raymond and Shackelford explores the data from the 2011 WJP index in the context of exploring access to justice. What they found is that the United States serves as “an example of a nation in crisis” when it comes to access to civil justice.⁹ The United States was given an overall score of 0.65.¹⁰

Accessibility includes general awareness of available remedies, availability and affordability of legal advice and representation, and absence of excessive or unreasonable fees and ... hurdles As a result of the absence of general awareness and especially the cost, the United States ranked remarkably low within its region.¹¹

The United States ranked twenty-first out of sixty-six nations along the dimension of ‘access to civil justice’ in 2011 [and] [...] within the group of nations having similar incomes, survey respondents ranked the United States an embarrassing twentieth out of twenty-three.¹²

7 A.H. Raymond & S.J. Shackelford, “Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?”, *Michigan Journal of International Law*, Vol. 35, 2014, p. 485, at 488.

8 *Ibid.*

9 *Ibid.*, p. 490.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

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Raymond and Shackelford suggested creating an efficient and fair ODR platform as a solution to mitigate backlog and increase efficiency within the civil justice context.

Unfortunately, civil justice in the United States has changed for the worse since Raymond and Shackelford's article was published. According to the 2019 WJP index, the United States has an overall score of 0.71 and a global rank of 20/126.¹³ Based on income, the United States is ranked twenty out of thirty-eight, and within the region, the United States is ranked fourteen out of twenty-four in terms of providing access to justice.¹⁴ While the overall score increased from 0.65 in 2011 to 0.71 in 2019, within the civil justice context the data is telling of a larger problem. Within the civil justice category, 'accessibility and affordability' index has dropped from 0.53 to 0.46 since 2011 and the 'free of discrimination' index has dropped from 0.53 in 2011 to 0.42.

The data from WJP demonstrates that there is still quite a lot of work to be done to increase civil access to justice within the United States. Accessibility and affordability are still one of the largest barriers citizens face when it comes to civil justice. Additionally, discrimination is the largest barrier to justice within the civil context. While the other five categories within the civil justice context are at or above the EU and high-income averages, accessibility, affordability and discrimination are far below EU, North America and other high-income country averages.

1.2 Case Study: FCMC Data Project

It is a well-known and widely accepted fact that social aspects like gender, race and ethnicity, culture and religion impact court decisions.¹⁵ Human perceptions based on these social aspects have influenced dispute resolution outcomes. As evidenced by the WJP index, civil justice outcomes in the United States is still plagued by discrimination. A study by the Franklin County Municipal Court system in Ohio demonstrates how ODR can be used to eliminate or greatly decrease discrimination with the disputes that are litigated using ODR.

In October 2016, the Franklin County Municipal Court (FCMC) located in Franklin County, Ohio, began the FCMC Data Project to demonstrate the value of court-connected ADR, promote transparency and provide a resource for anyone interested in court-connected mediation and ODR as an access to justice initiative. The results of the study demonstrate ODR has a positive impact on case outcomes relating to race and income status among ODR participants.¹⁶

Income and race have historically served as predictors for case dispositions. Positive dispositions are associated with high income and low minority rates

13 2019 World Justice Project Index.

14 *Ibid.*

15 S.N. Exon, 'The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution', *Cardozo Journal of Conflict Resolution*, Vol. 12, 2010, p. 19, at 23.

16 FCMC Data Project, available at: <https://sites.google.com/view/fcmcdataproject/about>.

while low income and high minority rates are associated with negative case dispositions.¹⁷

The FCMC Data Project began as a response to the public desire for courts to develop technology-based solutions to address the impact of income and race on case dispositions.

The FCMC Data Project was designed with public opinions of justice in mind. In a 2015 public opinion survey, the National Center for State Courts (NCSC) found that nearly 70% of respondents felt that the wealthy were treated more favourably by the court/justice system.¹⁸ Among African American respondents, 79% felt the wealthy were treated better and 76% felt large corporations were treated better than others within the court/justice system. When asked to identify who was treated worse by the court/justice system, 49% of all respondents claimed African Americans were treated worse. Conversely, 79% of the African American respondents felt African Americans were treated worse. Fifty-nine per cent of respondents felt that “The Poor” were treated worse, while 80% of African American respondents claimed that “The Poor” were treated worse.

These findings demonstrate that there is a widespread belief, particularly among African Americans, that justice is unequal within the current system. Accordingly, 64% of poll respondents expressed a preference to use ADR over the court system. Lastly, 60% of respondents agreed that state courts should explore new technologies to improve current conditions within the court system.

The FCMC Data Project considered the findings from the NCSC survey into account when developing the project. Three key concepts shaped the development of the FCMC platform: (1) Reduce default judgments by improving access to court services; (2) eliminate barriers to access with a free, user-friendly online portal; and (3) provide dispute resolution services for cases that would not otherwise be resolved through negotiation or mediation.¹⁹ A 1-year pilot focused on City of Columbus Division of Income Tax (CDIT) was launched. “CDIT was selected because it represented the largest small claims plaintiff with the highest percentage of default judgments”.

The FCMC Data Project findings on the ability of ODR to increase access to justice among racial minorities and low-income individuals was significant. The project used two data sets for comparison of ODR to non-ODR cases. The first was a random sample of non-ODR CDIT cases from 2017 and the second was the total ODR participants to date at the time the data was collected. Defendant demographic profiles were created using income level, household income and minority percentage based on US Census data.

The study found that, among the non-ODR tax sample, low-to-middle-income defendants experienced a lower percentage of dismissals than upper-income defendants. Additionally, minority tax defendants experienced a lower percentage of dismissals than non-minorities among the non-ODR data set. Con-

17 *Ibid.*

18 2015 NCSC Public Opinion Survey, The State of State Courts (2015).

19 FCMC Data Project, available at: <https://sites.google.com/view/fcmcdataport/about>.

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versely, among the ODR tax participants, there were nearly identical dismissal percentages among low-, middle- and upper-income defendants.

The results of the FCMC study reveal a number of ways ODR can be used to increase accessibility to the court system. Not only does it produce less disparate results among income levels it also allows for a higher minority percentage without negative case dispositions. The study demonstrates the potential impact of integrating ODR throughout the nation's court systems. ODR offers a level of objectivity that traditional court systems cannot provide.

Another significant finding made by the FCMC study was that 36% of participants first accessed the ODR platform outside of business hours. While there is no way to tell whether these individuals would have been able to arrange their schedules to pursue their claims had ODR not been available, it is significant that over one-third of claimants accessed the ODR platform outside of regular business hours. Regardless of whether schedules and other time constraints would have allowed for those claims to still be pursued, over one-third of participants found it more convenient to access the dispute resolution system outside of business hours.

It is worth noting, however, that accessing ODR outside of business hours does not necessarily help all individuals. For those without a home Internet connection or a device that connects to the Internet, they need to rely on public Internet use, such as a computer at the public library. Public libraries offer a space to allow for the ODR system to be accessed by those without Internet, but libraries tend to have similar hours to courthouses. For an individual living in poverty and working three jobs, accessibility is still an issue. While implementing an ODR system, the court should consider how many public computers are available within their communities and work to find solutions to fill the time and location gaps. Though access to 24-hour ODR will serve to reduce accessibility barriers for some, it will not reduce barriers for all.

2 Maximizing Accessibility within the ODR System

The success of any ODR system is contingent upon accessibility. Users must have access to digital devices that have the technological capacity to interact with an ODR platform.²⁰ ODR is particularly well-suited to provide greater access to dispute resolution for low-value, e-commerce, or cross-border disputes; or the needs of physically or time-constrained disputants.²¹ In order for ODR to reach its full potential of providing greater access to the legal system for a greater number of people, we must examine the limitations presented by the ODR platform and work to account for these limitations in the design of the system.

The limitations of ODR can be categorized into a few key areas. The first is the inability of ODR to be accessed by unrepresented and low-income communities. The second is the inability of ODR platforms to accommodate people with

20 D. Larson, 'Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone', *Ohio State Journal on Dispute Resolution*, Vol 34, 2019, p. 431 at 433.

21 Sela, 2017, p. 643.

physical disabilities. Lastly, ODR will be limited if users have an inability to understand the language or the process.

2.1 Access to ODR by Low-Income Communities

One of the areas ODR is set to expand access to justice is by creating a forum for unrepresented individual litigants. For those who cannot afford an attorney, the ODR platform offers an opportunity to effectively participate in the legal process without representation.

While mitigating the cost of hiring an attorney opens up opportunities for a greater number of individuals to pursue claims, it is not a solution that works for everyone.

There are still significant barriers within this expansion of access to a greater number of people. Individuals within the low-income community are more likely to have limited access to computers and reliable Internet connections, and are not necessarily technologically savvy. In order for ODR to increase access to justice for these populations, the ODR platform must be designed with these constraints in mind.

In order to ensure use of the ODR system is accessible to these communities, an inventory of current technology offerings needs to be addressed. Counties should take into consideration how many devices are available to the public and where the devices are located throughout the district. By identifying where these gaps in technology are and supplementing them with more devices, counties will be able to provide greater access to low-income communities.

2.2 Access for People with Disabilities

Another area of great potential for ODR to increase access to the legal system is use by people with disabilities. The ODR platform must be designed so individuals are not excluded because of a disability.²² The ODR forum will only be as accessible as the creators make it so it is essential that all of the accommodations necessitated within a courtroom are translated to the virtual court process. While the technology can be accessed by a greater number of people, it does not necessarily follow that the forum will be easier to access. The online forum is less regulated than a brick-and-mortar courthouse which is subject to regulations imposed by the Americans with Disabilities Act.

David A. Larson offers a variety of accommodations to include as ODR systems develop to meet 'generally accepted disability standards'. One example of this includes captions for all video content to accommodate people with hearing impairments. Another accommodation involves including alternate text on all images and videos for those with vision impairments. While the previous accommodations are more commonplace, it is important ODR systems use symbols rather than colours to indicate required fields or distinguish between information for colour-blind individuals. Another accommodation includes integrating voice-recognition software into the ODR platform for those individuals who are limited in their ability to use a mouse or keyboard. Lastly, in order to avoid triggering

22 Larson, 2019.

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someone with epilepsy or a cognitive disability, the ODR platform should not include any blinking or flashing content. A courthouse is expected to provide all of the accommodations suggested by Larson and more. The ODR platform should also be held to this standard of accommodation as the court system must serve everyone.

2.3 Access for All Litigants

Another accommodation the ODR platform should consider offering is comprehensive translation services through the platform. Relying upon Internet translation services is not enough to ensure users are able to gain a complete understanding of the legal issues presented. In order to accomplish the goal of making the dispute resolution process easier to understand, it is necessary that interpreters versed in legal language and concepts are used to translate the ODR platform language.

3 Ability of ODR to Provide Greater Justice to Disputants

The second pillar of this discussion rests on ensuring a sense of justice through ODR. ODR carries the potential to have a positive impact on the overall justice system. Moving standardized, low-value disputes online will permit judges to devote more time and effort to, and thus provide more justice in, complex, high-value cases.²³ It is well-known that court systems are overpopulated and under resourced. By eliminating the use of judges and court staff, including law clerks, court reporters, security and administrative staff, to solve low-value disputes, which increases the capacity of court employees to serve litigants pursuing claims that still require a courtroom.

Critics of ODR surmise that the algorithmic system favours efficiency over accountability, quality and fairness, resulting in injustice.²⁴ In order to determine whether ODR can effectively balance efficiency and justice, ODR systems must be assessed using the same legitimacy criteria that is used to assess other judicial systems.

According to Professor Amy Gangl, three procedural characteristics impact legitimacy assessments of judicial decisions.²⁵ Professor Gangl's assessment rests on three factors:

- (1) individuals must believe that the decision-making process takes their views into account,
- (2) decision making should be neutral and all opinions

23 M.A. Bulinski & J.J. Prescott, 'Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency', *Michigan Journal of Race and Law*, Vol. 21, 2016, p. 205, at 214-240.

24 A. Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation', *Cornell Journal of Law & Public Policy*, Vol. 26, 2016, p. 331, at 344-346; *see also* Sela, 2017, p. 669.

25 A. Gangl, 'Procedural Justice Theory and Evaluations of the Lawmaking Process', *Political Behaviour*, Vol. 25, 2003, p. 119, at 121.

must be granted equal consideration without favoritism, and (3) citizens must trust the judicial system and its representatives.²⁶

3.1 Individual Views Are Represented

In order for an individual to believe that their views are adequately represented, the individual needs the opportunity to speak on behalf of their own interests or, at a minimum, have an opportunity to appoint a representative that will stand up for their preferences.²⁷ The current justice system is based on this need to air one's grievances. The opportunity of each citizen to 'have their day in court' serves as a function of perceived fairness and justice.

In order to feel heard through the ODR process, individual claimants need to feel that the ODR platform allows an equal, if not greater, opportunity than a 'day in court' to speak on their own behalf.

The benefit of ODR in this context is that each dispute is able to be individually tailored based on the needs of the parties within that dispute.²⁸ The ODR process can be tailored to the specific dispute, as well as to the individual preferences and capabilities of the disputants.²⁹ The process of tailoring the dispute to one's specific needs may increase the feelings of being heard because of the system's ability to meet individual needs.

Data from the FCMC Data Project demonstrates the potential of the ODR platform to allow people to be heard. ODR participants were given the opportunity to take a survey after resolving their dispute.³⁰ One question measured perceived respect and opportunity to be heard by asking the following: "Whether you reached an agreement or not, do you feel that you were treated with respect and had an opportunity to be heard?" Ninety per cent of participants (85 respondents) answered "yes" to the question posed. This demonstrates a very high rate of satisfaction of participants in feeling their interests were heard. Further, participants were asked: "Given the choice between online dispute resolution and going to court, which would you prefer?" Ninety-four per cent of participants chose ODR after having gone through the process. With such a high rate of satisfaction with the overall process, it appears that citizens felt the decision-making process adequately took their views into account.

The question posed by the FCMC Data Project survey includes both 'respect' and 'opportunity to be heard'. Though both are important, these are separate concepts. The ability of the ODR platform to satisfy an individual's need to be heard would be more accurately assessed if the concepts were separated.

In terms of the ability of ODR to take one's views into account, the FCMC Data Project survey responses demonstrate that the system is effective at providing justice. With 90% of the respondents feeling respected and heard, it can be

26 Raymond & Shackelford, 2014, p. 516.

27 Gangl, 2003, p. 121.

28 Sela, 2017, p. 644.

29 *Ibid.*, pp. 667-668.

30 FCMC Data Project, available at: <https://sites.google.com/view/fcmcdataproject/about>.

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deduced that the ODR process has the adequate ability to take individual views into account.

3.2 *Decision-making Is Neutral*

The second factor in assessing judicial legitimacy is whether the decision-making is neutral and takes all opinions into account without bias or favouritism. Perceived procedural fairness rests on the perception that neither party feels one point of view is disproportionately advantaged.³¹ One can argue that ODR has the potential to be superior to an in-person dispute resolution in this regard because of the ability to design neutral technological systems. Additionally, results from existing ODR judgments can be assessed to demonstrate neutrality. However, the key to ensuring legitimate feelings of justice relies upon perceptions of neutrality so transparency throughout the process is necessary.

Dr. Ayelet Sela, an industry expert on the relationship between law and technology and ODR systems, describes the inherent lack of neutrality in the system's design.

Online technology is not neutral: the way that a software tool is designed and programmed to operate reflects – and promotes – particular values and behaviors. Thus, variations in technological features can greatly impact both process and outcome.³²

In order to account for this lack of inherent neutrality, some level of supervision of the various ODR systems may be necessary.

Scholars Raymond and Shackelford suggest regulation of ODR systems to ensure access to justice.³³

A well-designed artificial intelligence algorithm could be bias free (at least to the extent that the programmers are also bias free), which is an advantage that cannot truly be guaranteed with human actors.³⁴

It is certainly within the realm of possibility to design a truly neutral system. Raymond and Shackelford suggest that regulation may be necessary to ensure this neutrality by requiring a decision matrix that is free from bias.³⁵ As mentioned, the system will only be neutral to the extent that the humans programming it are neutral. A regulation imposing a minimum standard of neutrality would likely increase levels of trust in the system's neutrality among participants.

ODR systems already in place have demonstrated a certain level of neutrality. As previously discussed, the FCMC Data Project resulted in an increased level of neutral decision-making among income groups, as well as among race groups. As

31 Gangl, 2003, p. 121.

32 Sela, 2017, p. 645.

33 Raymond & Shackelford, 2014, pp. 521-522.

34 *Ibid.*, p. 522.

35 *Ibid.*

income level and race have historically been the biggest indicators of court decisions, the FCMC platform demonstrates how ODR systems can be neutral.

While the implications of ODR's potential to improve neutrality for income level and race in a way that in-person court participation cannot, this demonstrates only two areas of increased neutrality. There are countless areas of bias that could be implemented into ODR algorithms, especially as ODR expands to more areas of law. As explained by Dr. Sela,

choosing to communicate via email rather than chat can significantly affect a mediation process; and online judicial proceedings conducted via video-conferencing are markedly different from ones executed via structured web-forms.³⁶

Therefore, it is necessary that standards of neutrality are continually examined and strictly enforced to ensure the legitimacy of the ODR system.

Lastly, it is necessary that the system is designed with transparency in mind in order to effectively promote neutrality. It is important that users of the system understand the legal rules embedded in the system's code. The system's "embedded legal code" can be used to automatically apply rules of civil procedure such as identifying proper venue, applying statutes of limitation, submitting motions, service of documents and much more.³⁷ In order for participants to feel that decision-making is neutral, they need a certain level of transparency into the system's legal code. While the system's design and coding do not necessarily need to be explained to every participant, the information should be readily available and easily accessible to promote feelings of equal consideration.

In order to ensure neutral decision-making in ODR systems, the system's algorithms need to meet certain minimum neutrality requirements. If the system is properly designed, ODR has the potential to be more neutral than an in-person dispute process. In order for participants to avoid feeling that the system is inherently biased, transparency in the system's coding and design must be easily accessible and understandable. With these parameters properly enforced, ODR systems meet the second criteria of a legitimate judicial system.

3.3 *Trust in the ODR System*

The final legitimacy assessment criteria requires that citizens trust the ODR system and its representatives. There are multiple layers of trust that must be evaluated in order to ensure the system is able to provide the level of trust needed for an effective judicial system. ODR systems should be assessed using four key areas of trust: (1) trust in the system's security, (2) individual user's trust in the system to effectively manage their dispute, (3) interpersonal trust between parties using the system, and (4) trust in the system's content.³⁸

36 Sela, 2017, pp. 645-646.

37 *Ibid.*, p. 659.

38 See N. Ebner & J. Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution', *Hamline University's School of Law's Journal of Public Law and Policy*, Vol. 36, 2015, p. 143 at 154-156.

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Legal proceedings require high levels of confidentiality and security. It is essential that ODR systems can be trusted by users to keep their information secure. The challenges surrounding trust in the online system's ability to keep information safe is not unique to ODR. As the technological age rapidly advances and more information is stored online, Internet security is of the utmost importance for all online systems, including ODR.

Scholars Bulinski and Prescott compare the use of technological innovations in banking to the potential use of technology within the court system.³⁹ While banking was historically a face-to-face, time-intensive process within a brick-and-mortar setting, the adoption of online banking has drastically changed the industry's landscape.⁴⁰ Much like court proceedings, banking deals with highly sensitive, confidential information for which mistakes lead to incredibly high consequences.⁴¹ Just as with online banking, trust in the system to provide adequate security may take time. Pioneer systems are usually met with a certain level of scepticism and mistrust, but as ODR is implemented in a growing number of judicial systems, use of ODR will become commonplace.

In addition to security, individuals must trust that the ODR platform can effectively manage their disputes. The most recent NCSC Public Opinion Survey shows the public already prefers ODR to court in certain case types.⁴² When asked whether survey participants would rather resolve certain case types online or in court, the majority of respondents said they would rather resolve traffic tickets and consumer debt issues online. While respondents determined they would rather resolve child custody, divorce and landlord/tenant issues in court, some areas remained more popular for online resolution.

The 2018 NCSC Public Opinion Survey showed an interesting disparity between responses from participants over 50 years of age and those under 50. While 66% of all respondents claimed they would rather resolve traffic tickets online, 74% of respondents under 50 preferred online resolution of these claims. Similarly, 51% of all respondents preferred online resolution of consumer debt, the rate for online preference was 58% among those under 50. Finally, in the category of small claims, 53% of all respondents preferred in-court resolution compared to 45% of total respondents who chose online. However, among younger participants, there was a greater preference for online resolution with 53% of respondents choosing online.

The results of the 2018 NCSC Public Survey demonstrate levels of trust in the ODR system to effectively resolve disputes. Public opinion is that an online system can be trusted to resolve traffic tickets and consumer debt, but there is not enough trust in the system for child custody, divorce or landlord/tenant disputes. Only about half of the public would prefer to resolve small claims online, though a slightly greater percentage of younger respondents preferred online to in-court resolution of these claims. Overall, younger respondents tended to prefer

39 Bulinski & Prescott, 2016, pp. 207-208.

40 *Ibid.*, p. 207.

41 *Ibid.*

42 2018 NCSC Public Opinion Survey, available at: www.ncsc.org/2018survey.

online resolution at a higher percentage than respondents over 50 years of age. This demonstrates that the younger population has a greater level of trust in an online system to resolve disputes.

The third area of trust is found within the interpersonal trust that must be established between the parties. Critics claim electronic communication is no substitute for the ability of face-to-face conversations that have a greater ability to foster the values of mediation.⁴³ In fact, critics claim that ODR may have the opposite effect of ADR by further dividing parties' willingness for social cooperation.⁴⁴ "People behave more competitively, adversarially, and self-interestedly when bargaining through the medium of a computer (online, in effect), than in person", and electronic messages between parties may suspend social cooperation.⁴⁵ While examples of this concept can be easily found in the ways people communicate through social media, proponents of ODR are more optimistic about parties' ability to be civil.

The use of ODR does not necessarily prevent face-to-face meetings between parties. It is quite possible for online technology, such as simple computer cameras and microphones, to be used to hold a session in which the parties interact.⁴⁶ While not all disputes would require a face-to-face session to be effectively resolved, as ODR expands to more areas of law, including family law, this concept may become more necessary.

One way ODR helps to build interpersonal trust between parties is through the maximization of win-win solutions. ODR systems are designed using algorithms that seek the best solution through an objective standard.⁴⁷ Proponents of ODR contend,

optimization algorithms utilize detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not entrust to a human mediator. With anything other than the very simplest of cases, this optimization is beyond the capabilities of any unassisted human.⁴⁸

If participants are able to understand that providing more detailed and accurate information has a greater potential to result in a more favourable outcome for them, trust in the other party's willingness to do the same may increase. This is likely the most challenging area to build trust within ODR.

43 J.F. Eisen, 'Are We Ready for Mediation in Cyberspace?', *BYU Law Review*, 1998, p. 1305, at 1308.

44 R.J. Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab', *Cardozo Journal of Conflict Resolution*, Vol. 18, 2017, p. 717, at 751.

45 *Ibid.*, pp. 751-752.

46 D. Lavi, 'No More Click? Click In Here: E-Mediation in Divorce Disputes--The Reality and The Desirable', *Cardozo Journal of Conflict Resolution*, Vol. 16, 2015, p. 479, at 508.

47 Sela, 2017, p. 643.

48 E. Thiessen, B. Hiebert, & P. Miniato, 'ODR and eNegotiation', in M. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, The Hague, p. 341, at 345.

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The final area of trust relies on the user's trust in the content of the ODR system. This concept relates back to the discussion regarding increased transparency, particularly when it comes to the embedded legal rules in coding. Users must trust the system's algorithm to effectively determine an outcome.

Trust in the system's content can be increased by building safeguards into the system. By using web templates to collect detailed information, users will gain confidence that they sufficiently included all of the necessary information.⁴⁹ By integrating enforceable timelines and providing reminders to users about deadlines, legitimacy in the content of the system will increase.⁵⁰ By providing explanations and greater levels of support, individuals will develop a sense of trust in the system's content.

In order for the third judicial legitimacy requirement to be met, users must trust the ODR system. Trust can be built by maintaining a high level of cyber security. Another area to build trust is by introducing ODR in areas with relatively low-stakes claims, including traffic tickets and consumer debt. By designing the platform to allow for face-to-face sessions should it be needed by the parties, it allows for greater interpersonal trust between the parties. Lastly, by maximizing transparency and providing a simple, streamlined process, it will build levels of trust in the system's content.

3.4 *Legitimacy Assessment of ODR*

To reiterate, three procedural characteristics can be used to assess the legitimacy of judicial decisions: (1) users must believe that the decision-making process takes their individual views into account; (2) decision-making should be neutral and the system must not be improperly biased; and (3) citizens must trust the ODR platform itself and its creators.⁵¹ Survey results from the FCMC Data Project show that individuals reported high rates of satisfaction with feeling like they had the opportunity to feel heard through the ODR process. A critical assessment of ODR algorithms and increased regulation regarding minimum neutrality standards will ensure ODR systems are neutral and not unduly biased. Finally, trust can be built through high cyber security, fostering interpersonal relationships and high levels of transparency.

Based on Professor Gangl's assessment criteria, ODR effectively balances efficiency and justice. Providing justice through ODR takes more than simply increasing an individual's ability to access the platform. In order to effectively provide "justice" within the access to justice conversation, all three assessment characteristics must be taken into account when developing ODR platforms.

In conclusion, ODR has great potential to increase access to justice. The FCMC Data Project examines how ODR is already providing greater access to justice in practice. In terms of providing greater accessibility, all claimants must be considered, including those with disabilities, non-native English speakers and those

49 See Sela, 2016.

50 *Ibid.*

51 See Raymond & Shackelford, 2014, p. 516.

with limited access to technology. In order to effectively increase access to justice through ODR, the ODR system must be developed to maximize 'accessibility'.

In order to effectively provide justice within ODR, views of individuals must be effectively represented. An increase in regulation regarding minimum neutrality standards on ODR platforms will ensure ODR systems are neutral and not unduly biased. Finally, trust can be built through high cyber security, fostering interpersonal relationships and high levels of transparency.

ODR has vast potential to change the legal landscape as it is practiced today. By examining ways to increase both access and justice through ODR, it has the potential to reach a greater number of individuals than has ever been possible. In order to reach this potential, developers of these platforms must take all these aspects into account when designing ODR systems for the court.