

‘Firewalls’ to Justice

Can Barriers in Censorship Practices Lead to Advancements in Online Dispute Resolution?

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Abstract

This article will discuss how we can learn from barriers of internet censorship to create opportunities for better access to the justice system through newer and more reliable Online Dispute Resolution technology. These advancements in technology can help in the application of security measures for materials disclosed in the use of online dispute resolution (ODR) platforms and reduce people’s fears of privacy concerns. This in turn will promote the use of ODR and provide greater access to the justice system, especially for those people who cannot afford more traditional forms of legal services by making more convenient platforms that are less costly, less time consuming, and more readily available to people via their laptops. Technology is advancing and it is advancing fast, we choose whether we advance with it or stay behind. The COVID-19 pandemic has shown us the vulnerabilities of our society and how technologically far behind we are, perhaps it was just the push that we needed.

Keywords: online dispute resolution, system design, access to justice, artificial intelligence, intellectual property, blockchain, information communication technology, COVID-19.

This discussion will address a barrier and an opportunity to integrating information and communications technology (ICT) into the justice system. The predominant theme will be access to justice and the ways this has been augmented with the use of online dispute resolution (ODR) technology. As of 2015, The Community Justice and Tribunals System in China has allowed parties to resolve their disputes online in a forum that is less costly, less complicated and less intimidating.¹ A primary advantage of this new system is convenience – if an alternate dispute resolution session is online, it is much more likely for parties to fit it into their schedules as it is more readily available to them by ‘commuting’ via their laptops. An important disadvantage of the ODR system is, however, the potential lack of privacy. If this is an issue, people might feel afraid to pursue

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1 O.Y. Tuck Leong, ‘Access to Justice and Innovative Court Solutions for Litigants-in-Person’, *International Journal on Online Dispute Resolution*, Vol. 5, No. 1, 2018, pp. 9-10.

their rights out of fear of exposing their confidential information and having it backfire against them. This, in turn, limits their fair access to the justice system.

Privacy will be discussed in greater depth by referring to Internet censorship practices worldwide as a barrier to technology. Moreover, the inevitable advancements in technology will be addressed as an opportunity to integrating ICT – greater exposure and development in technology means a greater need for adaptability in society and the law to accommodate ODR practices.

1. Censorship practices in different countries have created a significant barrier to integrating ICT into the justice system due to their manipulation of online information and as a result diverted people from using ODR as a medium to justice

This idea of censorship is engraved in different governments worldwide with the primary intent being the control of the population by determining what the public is allowed to access and what should be kept from their eyes. North Korea, Saudi Arabia and China are among the top ten countries that have the strictest censorship practices.² It might be surprising that China, being a country involved in implementing ODR technology, has such strict censorship practices. Was China's intent of implementing ODR really to create equal access to justice? Or was it just another avenue for them to control the population through censorship practices by getting access into people's privacy through ODR modalities? That is the gist of this discussion: can we really find a balance between access to justice and censorship? Can there be safe access to justice without censorship practices?

China has "the largest recorded number of imprisoned journalists and cyber-dissidents in the world".³ This could show a number of things, but one thing is for sure, there is a high level of control of the Internet in China, so much that this surveillance programme has attached its own cultural name, 'The Great Firewall of China'.⁴ Their censorship has become an industry, consisting of a web of spies, or better known as, 'web police', who are assigned to different neighbourhoods.⁵ In Beijing alone there are over 40,000 Web Police on a daily routine of creating a list of banned search words and implementing it into algorithms for their firewall.⁶

Web police caught Dr. Li Wenglian, a COVID-19 whistle-blower, who made a post on 'Weibo' (a Chinese social media platform) and was reprimanded by the

2 '10 Most Censored Countries', *Committee To Protect Journalists*, available at: <https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist.php> (last accessed 22 March 2020).

3 Leong, 2018, pp. 9-10.

4 'Firewall of Shame', *Global Internet Freedom Consortium*, 2008, available at: www.internetfreedom.org/Background.html#Firewall_of_Shame (last accessed 15 March 2020).

5 *Ibid.*

6 *Ibid.*

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Chinese police for spreading ‘false rumours’.⁷ Dr. Li also had to sign a statement indicating that he was aware of this ‘illegal activity’ he had engaged in and would be ‘brought to justice’ if he continued to spread ‘false rumours’. This is where one asks, where does access to justice and censorship collide? How does a country that is so censored technologically advance so rapidly from implementing ODR to implementing the world’s first full hearing Internet court?⁸

Records from state media in China reported in 2013 that China had over two million ‘web police’.⁹ These workers are employed not only by the government but also by private leading technology companies, some of which are owned by entrepreneurs who hold significant roles in the government.¹⁰ It is no wonder that China’s censorship technology is so comprehensive that no country comes even close.¹¹ Maybe this is why China has been able to advance in the realm of ODR because it has politically influenced investors who have the technological background and resources to make such innovations happen, and given their public office position, the government can be sure that their motives are aligned with China’s political ideals, a major one being censorship.¹²

Can the dark side of censorship practices lead us to a brighter side by creating opportunities in access to justice through ODR? Apart from cases like Dr. Li, censorship is a barrier to justice in many other ways: fear of making a claim for losing face in the community if word gets out, fear of having one’s job on the line if the other party is their employer, fear of being threatened in other ways like the safety of your family, etc. But if China was able to bring about this development in technology for censorship – which ties into our next section on opportunity – can it not also show prospects for future development in systems that enhance privacy and possibly create private ‘Great Firewalls’ for ODR platforms to address people’s fears from censorship practices or breach of confidential material in their online dispute resolution sessions?

What do you do when someone tells you not to do something? Or they tell you not to look? You do it! For those who will admit it, you look! It is human nature. The saying, “curiosity killed the cat”, is not unfounded. The same curiosity brought about the detention of three Chinese activists with their whereabouts unknown for crowdsourcing COVID-19 information on a site called Github, fol-

7 S. Hegarty, ‘The Chinese Doctor Who Tried to Warn Others About the Coronavirus’, *BBC News*, 6 February 2020, available at: www.bbc.com/news/world-asia-china-51364382 (last accessed 1 May 2020).

8 A. Mingay, ‘Size Matters: Alibaba Shapes China’s First “Court of the Internet”’, *Merics*, 17 October 2019, available at: www.merics.org/en/blog/size-matters-alibaba-shapes-chinas-first-court-internet (last accessed 22 March 2020).

9 E. Economy, ‘The Great Firewall of China: Xi Jinping’s Internet Shutdown’, *The Guardian*, 29 June 2018, available at: www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings-internet-shutdown (last accessed 22 March 2020).

10 “For example, Robin Li of Baidu is a member of the Chinese People’s Political Consultative Conference, an advisory legislature, while Lei Jun, founder and CEO of mobile phone giant Xiaomi, is a representative of the National People’s Congress.” *See ibid.*

11 ‘Firewall of Shame’, 2008.

12 Economy, 2018.

lowing Dr. Li's death and his revelation of the COVID-19 outbreak.¹³ Curious or not, it was partially these censorship practices that have been attributed to China's containment of COVID-19.¹⁴

As a result of the COVID-19 outbreak, the Chinese government tightened its censorship and online regulation practices to try to stop the spread. They have been checking phone data to monitor people coming into contact with an infected patient, and making people download a software application that uses data from their 'Alibaba' accounts in order to give them a colour-coded risk of contagion which is shared with law enforcement.¹⁵ One can only imagine what a risk this may pose for someone hoping to engage in ODR. Similar to the earlier discussed censorship barriers to access to justice, this mass data collection of people's location, buying habits and health conditions could really affect someone's chances in ODR or more likely even prevent someone from filing a claim in the first place if there are things they did not want disclosed, especially when the law enforcement has access to it. But is there a silver lining? Though these measures actually have shown to be effective in containing the spread of the virus, could they also be effective in implementing new ways to access justice like ODR?

The Ministry of Justice in China has already issued guidelines to accelerate the development of their ODR measures in order to reopen their economy while controlling the spread of COVID-19. All these efforts are being made to encourage the use of arbitration and mediation to resolve disputes.¹⁶ Where in the past ODR was used in China to resolve Internet-related disputes like e-commerce and domain name disputes, the new guidelines are addressing work disputes, debt issues, labour disputes and work injury compensation.¹⁷ However, these are mainly domestic disputes, international arbitrators are still hesitant to use ODR because of concerns with censorships practices in China.¹⁸

China is not the only country that has tightened its grip on censorship and expanded its use of ICT to fight COVID-19. South Korea has been releasing information about diagnosed patients like their location history. In other countries like Turkey, people have been arrested for 'unfounded and provocative' social

13 P. Zhang, 'Chinese Activists Detained after Sharing Censored Coronavirus Material on Crowdsourcing Site Github', *South China Morning Post*, 25 April 2020, available at: www.scmp.com/news/china/politics/article/3081569/chinese-activists-detained-after-sharing-censored-coronavirus (last accessed 5 May 2020).

14 K. Kupferschmidt & J. Cohen, 'China's Aggressive Measures Have Slowed the Coronavirus. They May Not Work in Other Countries', *Science*, 2 March 2020, available at: www.sciencemag.org/news/2020/03/china-s-aggressive-measures-have-slowed-coronavirus-they-may-not-work-other-countries# (last accessed 5 May 2020).

15 A. Ma, 'How the Coronavirus Outbreak Could Help Fuel China's Dystopian Surveillance System', *Business Insider*, 7 March 2020, available at: www.businessinsider.com/coronavirus-china-surveillance-police-state-xinjiang-2020-2 (last accessed 6 May 2020).

16 V. Chow, 'China Pushes for Increase in Online Dispute Resolution as It Reboots Economy', *Law.com International*, 19 March 2020, available at: www.law.com/international-edition/2020/03/19/china-pushes-for-increase-in-online-dispute-resolution-as-it-reboots-economy/?slreturn=20200411232238# (last accessed 6 May 2020).

17 *Ibid.*

18 *Ibid.*

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media posts about COVID-19.¹⁹ In even more democratic countries like South Africa, the government warned that people spreading fake news about COVID-19 would be liable for prosecution.²⁰ This shows that censorship cannot really be stopped, but there is a lot we can learn from it.

What one may view as a barrier (censorship and not being able to access the Internet freely) another can view as an opportunity (providing a secure network) if that same technology used in censorship is used in private ODR sessions to keep information from leaking out. This leads us into our next discussion of opportunity and the potential for a barrier, such as censorship to be turned around into an opportunity for ICT integration.

2. An opportunity in integrating ICT into the justice system is the inevitable enhancement of technology. In regard to the barrier of censorship, an opportunity for ICT integration can be making advancements in technology to make networks more secure so that people are not afraid of using them due to privacy concerns

Looking at the advancements in technology, China has already implemented Internet courts with artificial intelligence (AI), cloud computing, big data and virtual reality technology.²¹ The Beijing Internet Court has a robot called 'Hubao' that acts as an intelligent litigation guide and has the ability to help parties find the right attorney for their case and informs them on ways to best resolve their disputes.²² For some people this might be a scary phenomenon, while for others it can truly bring about a difference between actually filing or not filing a case due to accessibility to the justice system.

Now you might ask, what things may stop someone from filing a case? Apart from censorship, there are several other barriers such as geographic location (war torn or dangerous areas), economic class (not being able to afford an attorney), education (not knowing what to do and just giving in to the injustice) and, most recently, COVID-19 that has become a worldwide, life-changing pandemic.

These barriers to justice can vary from country to country, but the general premise stands that relief or solutions for justice can be achieved with newer accommodations through ICT. Since the Great Recession in 2008, the United States has experienced a rapid decline in state court caseloads, supporting the greater need for access to justice.²³ Not to mention the recent COVID-19 induced economic downfall, which has strongly shown signs of an upcoming full-blown

19 J. Mchangama & S. McLaughlin, 'Coronavirus has Started a Censorship Pandemic', *Foreign Policy*, 1 April 2020, available at: <https://foreignpolicy.com/2020/04/01/coronavirus-censorship-pandemic-disinformation-fake-news-speech-freedom/> (last accessed 6 May 2020).

20 *Ibid.*

21 F. Xuhui, 'Recent Development of Internet Courts in China', *International Journal on Online Dispute Resolution*, Vol. 5, No. 1, 2018, pp. 52-53.

22 *Ibid.*

23 R. Schauffler, 'The Rise and Fall of State Court Caseloads', *National Center for State Courts*, April 2017, available at: <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2184/> (last accessed 23 March 2020).

recession.²⁴ Looking into economic class – the most important barrier to justice – just within the United States, there is a great class division, but this is quickly being matched by other countries. According to the 2019 Global Wealth Report, “China has surpassed America in having the highest number of residents in the top 10% of the world’s wealth”, showing “the rising inequality around the world, particularly in China, the world’s second largest economy”.²⁵

Furthermore, the Chinese account that “nearly half of its people are in the middle class, raising 840 million people out of poverty in the span of 40 years”.²⁶ This means more educated people, greater incomes, greater access to technology, a higher susceptibility to learning to use technology and different platforms, and as a result a greater opportunity for the integration of new ICT into the justice system. It is no wonder that the Chinese have already developed three major Internet courts where they use blockchain evidence gathering, AI, cloud computing, big data and virtual reality technology.²⁷ And this all took place in only a couple of months.²⁸ “Technology is coming, and it’s coming fast”.²⁹ How can a country that is technologically developing so fast like China have such a huge barrier of censorship?

In recognizing China’s strict censorship yet developing ODR technology, it is important to take advantage of these findings and turn them around by studying and expanding them to address barriers to ICT with even newer technology. As a number of ‘hacktivists’ have addressed, “the key to breaking through the censorship in repressive regimes is developing Internet anti-censorship tools”.³⁰ This is already in the making, Dynaweb and UltraReach are both US organizations dedicated to anti-jamming technology and Internet development.³¹ Their focus has been primarily China but they have spread their efforts to other censored countries as well. A more interesting innovation is the ‘Psiphon’ project by the University of Toronto, Canada, which studies methods to circumventing censorship practices.³² It works by calling for “people in uncensored countries to host proxy servers for people in censored ones”.³³

24 D. Rodeck, ‘Alphabet Soup: Understanding the Shape of a COVID-19 Recession’, *Forbes*, 19 April 2020, available at: www.forbes.com/advisor/investing/covid-19-coronavirus-recession-shape/ (last accessed 6 May 2020).

25 S. Radu, ‘China Surpasses the U.S in Wealth of Top 10%’, *U.S News*, 2019, available at: www.usnews.com/news/best-countries/articles/2019-12-24/china-surpasses-the-us-in-wealth-of-top-10 (last accessed 15 March 2020).

26 Xuhui, 2018, pp. 49, 51.

27 *Ibid.*

28 *Ibid.*

29 D. Rainey, ‘Online Dispute Resolution’, *Class Lecture*, 2 January 2020.

30 ‘Developing Internet Anti-censorship Systems is the Key’, *Global Internet Freedom Consortium*, 2008, available at: www.internetfreedom.org/Background.html#Firewall_of_Shame (last accessed 15 March 2020).

31 *Ibid.*

32 E. Naone, ‘Circumventing Censorship’, *MIT Technology Review*, 19 December 2007, available at: www.technologyreview.com/2007/12/19/222504/circumventing-censorship/ (last accessed 6 May 2020).

33 *Ibid.*

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On top of the already mentioned innovations, people have become more resilient to these censorship practices by changing platforms of communication and using newer and different applications or social media to circumvent censorship laws.³⁴ In China, platform owners have censorship guidelines they need to meet or else they risk being shut down by the government, but by strategically delaying compliance with these guidelines they attract more users that are trying to avoid censorship.³⁵ Charles Darwin said, "...it is those that adapt to change that are able to survive". And just how people are adaptable to change, so is technology to meet the needs of people. The UN Conference of Trade and Commerce has stated, "Since all technologies build on previous scientific discoveries and technological developments, the rate of development of new technologies increases as more are developed", and in their study it showed an exponential increase in this trend since the 1990s.³⁶

This demonstrates the many ways improvements in technology could circumvent the barriers set up by censorship. If you cannot climb a wall, you can always dig, or find a way around it – this is how technology functions as it creates more and more avenues to access. Yes, it is true that China's censorship systems do not come close to any other country's, but there have also been other implemented technological advancements that have come along with it, such as Baoquan.com – blockchain technology used as a third-party form of evidence preservation so as to maintain its integrity. As a result of this innovation, in a copyright case, Baoquan.com was able to show that the plaintiff's evidence had maintained its integrity and as a result the defendant was found liable for infringement.³⁷

Considering the new direction in which society is heading, especially since the COVID-19 pandemic and the world-wide translation to making everything remotely accessible, it is only a matter of time that ICT will be a necessity in administering ODR avenues. Expanding with it is the ever-increasing realm of intellectual property by, for instance, emerging new ways to store intangible evidence, such as Baoquan.com; in contrast with physical evidence that can be merely put in a safety deposit box, intangible evidence has a higher risk of being altered. In a way, Baoquan.com's technology may give a sense of security to parties by feeling more confident of their privacy. Looking back at the many fears discussed in the previous barrier section, dissemination of personal information is a big one, and if there can be ways of preserving this more people may feel inclined, maybe even more convinced to use ODR methods of resolving a dispute rather than in-person methods.

There are a lot of people who are afraid of technology. But just how there is good and evil in the world there is good and evil in technology. Making the argu-

34 Z.J. Liu, 'China is Controlling Social Media – By Allowing a Bit of Dissent', *The Print*, February 2020, available at: <https://theprint.in/opinion/chinas-safety-valve-to-control-social-media-allowing-a-wee-bit-of-dissent/359216/> (last accessed 8 May 2020).

35 *Ibid.*

36 UNCTAD, 'Technological Advances Build on Previous Technological Advances', *Twitter*, 2018, available at: <https://twitter.com/unctad/status/996450139261857792> (last accessed 15 March 2020).

37 Xuhui, 2018, p. 53.

ment that technology is scary does not defeat the fact that we could use it for good. It is just like saying that stem cell research is scary, but on the other hand, it has the potential to help sick people turn their lives around, such as replacing someone's defective organ by creating a new one with stem cells. "Technology is coming, and it's coming fast".³⁸ It was only 15 years ago that people had to use floppy disks to carry around data, now everything works off a cloud server and people can access things on their cell phones at incredible speed compared to the older Motorola razor phones. Why not step further and make the justice system accessible at the tip of your finger? We have already entered a realm where time is a commodity for everyone: longer work hours, greater urbanization and dealing with traffic, having both spouses working and now a newer concern being exposure to COVID-19, especially for at-risk groups. Making things accessible at people's own time and at their own comfort given the current pandemic could really be a matter of filing or not filing a case.

Less filing of legal claims could mean less justice. If people know they will be sued or reprimanded for doing something that is illegal, not keeping promises in contracts, or committing other injustices, there is a higher chance they will not do it again. This affects our whole legal system because when people do not file a claim for an injustice done to them, it just gets overlooked; the perpetrator or liable party thinks it is okay and continues committing the wrongful act, and the party that could not seek justice would continue being displeased and cheated by the law.

Although there are barriers to ODR, newer developments in ICT can help mitigate them and create opportunities to establish a modernized and remote legal system, especially in an era affected by social distancing protocols of COVID-19. In creating measures that may effectively protect people's privacy from being invaded when using ODR platforms, advancements in ODR systems can be the solution to provide greater accessibility for people to the justice system.

38 Rainey, 2020.