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Technology, Ethics, and Access to Justice: Should an Alogrithm be Deciding Your Case?

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ARTICLES

TECHNOLOGY, ETHICS, AND ACCESS TO JUSTICE: SHOULD AN ALGORITHM BE DECIDING YOUR CASE?

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"We have to think whether, when dealing with disputes, we need to physically converge in courts . . . We should at least be exploring the use of technology in dispute resolution."

—Professor Richard Susskind, the Lord Chief Justice's IT Adviser[1]

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1. *Susskind Attacks CJC for Dismissing Online Dispute Resolution*, SOLICITORS J. (Mar. 19, 2013), http://www.solicitorsjournal.com/news/litigation/adr/susskind-attacks-cjc-dismissing-online-dispute-resolution.

Introduction

At a time of U.S. budget cuts, popularly known as the "sequester,"[2] court systems across the nation are facing financial shortfalls.[3] Small claims courts are no exception.[4] Among the worst hit states is California, which is suffering staffing cutbacks that result in long delays[5] prompting consideration of the old maxim, "justice delayed is justice denied."[6] Similar problems, albeit on a larger scale, are evident in other nations including India where the Law Commission has argued that the millions of pending cases combined with the lagging uptake of technological best practices has impeded judicial productivity, leading to "disappointment and dissatisfaction among . . . justice-seekers."[7] As justice systems continue to struggle with inadequate resources, and individuals are confronted with the reality that pursuing claims, especially low-value claims, are often not worth the effort, justice is being denied to millions of individuals.

One option for improving access to justice is to encourage the wider use of alternative dispute resolution (ADR). As court-annexed mediation is gathering steam, some are arguing that increased usage of online dispute resolution (ODR) is an effective mechanism to further reduce barriers to accessing justice.[8] Yet ODR presents new challenges as technology and platform design, especially those that have no human interaction, as the

2. *The Sequester Explained*, Bipartisan Pol'y Ctr., http://bipartisanpolicy.org/sites/default/files/BCA%20Sequester%20Fact%20Sheet.pdf (last visited July 31, 2014).

3. *See* Emily Green, *Budget Woes Mean Big Delays For Small Claims Courts*, NPR (May 15, 2013, 3:13AM), http://www.npr.org/2013/05/17/182640434/budget-woes-mean-big-delays-for-small-claims-courts.

4. *Id.* For a general description of small claims courts, *see Resolve Consumer Problems in Small Claims Court*, USA.gov, http://www.usa.gov/topics/consumer/complaint/legal/small-claims-court.shtml (last visited July 31, 2014) (defining small claims courts as "courts [that] resolve disputes over small amounts of money. While the maximum amount that can be claimed differs from state to state, court procedures are generally simple, inexpensive, quick and informal. Court fees are minimal, and you often get your filing fee back if you win your case").

5. *See* Cal. Judicial Branch, *In Focus: Judicial Branch Budget Crisis*, http://www.courts.ca.gov/partners/1494.htm (last visited July 31, 2014).

6. Library of Cong., Respectfully Quoted: A Dictionary of Quotations 183 (2010) (citing Laurence J. Peter, Peter's Quotations 276 (1977) (attributing the maxim's origin to William E. Gladstone)).

7. Report on Strategic Plan for Implementation of ICT in Indian Judiciary 1 (2005), *available at* http://indianjudiciary.nic.in/images/main.pdf [hereinafter Strategic Plan].

8. Ruha Devanesan & Jeffrey Aresty, *ODR and Justice – An Evaluation of Online Dispute Resolution's Interplay with Traditional Theories of Justice*, *in* Online Dispute Resolution: Theory And Practice, A Treatise On Technology And Dispute Resolution 251, 293 (Mohamed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

system may unduly preference efficiency at the expense of justice. This balancing act between efficiency and due process is not only playing out in the United States, but in countries and regions around the world. Indeed, the United States, European Union, and India all share a common interest in and, at some level, hesitation to use ODR.[9] This hesitation is likely to grow as the use of algorithms with the ODR platform increases, necessitating the answering of questions prior to the widespread use of this technology.

This Article addresses the automation of ODR through the lens of the access to justice literature. In Part I, we describe the evolution and present state of ODR and discuss its applicability to improving "access to justice." Part II surveys a subset of governments including the United States, Mexico, and the E.U., which were chosen because they represent a spectrum of potential ODR platforms ranging from purely public to private systems. A particular focus of this Part is India, since this is a nation that has widely adopted ADR and is considering ODR but is still grappling with access to justice issues. Part III surveys the current public and private entities offering, or about to offer, ODR. Part IV concludes the Article by discussing lessons learned regarding whether, and under what conditions, ODR improves access to justice, and if new forms of "polycentric"[10] regulation might be needed to help ensure this outcome. Ultimately, we argue that an effective and ethical ODR platform requires the use of algorithms to settle the more common disputes, but that minimalistic regulation must be introduced to ensure due process protections exist within the system.

I. ODR as an Access to Justice Issue

The importance of individuals' need to have access to justice is central to human rights protections. The U.N. Secretary General Ban Ki-moon, for example, has stated that:

> The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the

9. While the hesitation is subtle and at times more the product of negotiations and other pre-drafting meetings, some commentators are beginning to express reservations about the widespread use of ODR. *See e.g., Dispute Resolution in India – An Update*, LawQuest, http://lawquestinternational.com/dispute-resolution-india-%E2%80%93-update (last visited July 31, 2014); Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution*, Duke L. & Tech. Rev., Feb. 18, 2003, at 7–9, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr; David Niven, *EU Alternative Dispute Resolution (ADR) Proposals Criticised Following UK Consultation*, Lexology (May 3, 2012), http://www.lexology.com/library/detail.aspx?g=582722f7-0f94-4814-8c6b-947e11bc2e30; Techno Legal Centre Of Excellence For Online Dispute Resolution (ODR) In India (TLCEODRI), *Online Dispute Resolution in India*, http://www.odrindia.in/tlceodri/?p=14 (last updated Oct. 25, 2012).

10. Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 32-33 (World Bank Policy Research, Working Paper No. 5095, 2009) (discussing the definition of the term "polycentric").

> State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[11]

For purposes of this Article, the systemic definition of the rule of law embodied in the above quotation is narrowed to allow discussion of the rule of law as it relates to civil matters and ADR. The World Justice Project (WJP), an independent, non-profit organization, "develops communities of opportunity and equity by advancing the rule of law worldwide."[12] One of the major initiatives of the WJP is the Rule of Law Index (2012-13), which is a quantitative assessment tool that offers a detailed and "comprehensive picture of the extent to which countries adhere to the rule of law in practice[,]"[13] and is relied on here to provide a framework for discussion.[14]

The WJP asserts that access to civil justice "requires that the system be accessible, affordable, effective, impartial, and culturally competent."[15] The civil justice index measures seven key factors: (1) that "[p]eople can access and afford civil" justice; (2) "[c]ivil justice is free of discrimination; (3) civil justice is free of corruption; (4) [c]ivil justice is free of improper government influence; (5) [c]ivil justice is not subject to unreasonable delays; (6) [c]ivil justice is effectively enforced"; and (7) ADRs are accessible, impartial, and effective.[16] Our focus here is on the indicators that measure accessibility and cost, the absence of unreasonable delays, and ADR because these factors demonstrate a global need to consider a greater use of ODR.

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11. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement.

12. *See* World Justice Project, http://worldjusticeproject.org/ (last visited July 31, 2014).

13. Juan C. Botero & Alejandro Ponce, *Measuring the Rule of Law* 1 (World Justice Project Working Paper Series, Paper No. 001, Nov. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257.

14. *See* Mark David Agrast et al., The World Justice Project, World Justice Project Rule of Law Index 117 (2011), *available at* http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf.

15. *Id.* According to Professor Mauro Cappelletti, there are three main obstacles that make civil and political liberties inaccessible in many parts of the world. First, due to economic reasons, individuals are unable to access information or adequate representation. Second, due to organizational obstacles, the isolated individual lacks sufficient motivation, power, and information to initiate and pursue litigation. Third, sometimes procedural processes are inadequate, that is, "traditional contentious litigation in court might not be the best possible way to provide effective vindication rights[ ]" for many individuals. Mauro Cappelletti, *Alternative Dispute Resolution Processes with the Framework of the Worldwide Access to Justice Movement*, 56 Mod. L. Rev. 282, 283–84 (1993).

16. *See Civil Justice*, World Justice Project, http://worldjusticeproject.org/factors/effective-civil-justice (last visited July 31, 2014).

TABLE 1: WJP'S THE RULE OF LAW INDEX[17]

	OVERALL SCORE	7.1 People can access and afford	7.2 Free of discrimination	7.3 Free of corruption	7.4 Free of improper government influence	7.5 Not subject to unreasonable delays	7.6 Effectively enforced	7.7 ADRs are accessible, impartial, and effective
AUSTRALIA	0.72	0.60	0.56	0.92	0.86	0.51	0.77	0.85
CHINA	0.43	0.58	0.45	0.37	0.10	0.64	0.35	0.52
GERMANY	0.80	0.71	0.87	0.85	0.83	0.68	0.87	0.78
INDIA	0.45	0.46	0.50	0.47	0.68	0.20	0.26	0.55
ITALY	0.56	0.62	0.50	0.73	0.70	0.29	0.33	0.74
JAPAN	0.77	0.64	0.83	0.85	0.79	0.65	0.79	0.83
MEXICO	0.40	0.48	0.29	0.37	0.54	0.30	0.28	0.54
NORWAY	0.82	0.73	0.81	0.93	0.89	0.69	0.74	0.92
RUSSIA	0.50	0.54	0.56	0.43	0.42	0.52	0.40	0.60
SOUTH AFRICA	0.55	0.49	0.47	0.64	0.62	0.41	0.52	0.67
UNITED KINGDOM	0.72	0.66	0.73	0.84	0.78	0.58	0.64	0.82
UNITED STATES	0.65	0.53	0.53	0.86	0.75	0.44	0.63	0.83

17. *See The Rule of Law Index*, WORLD JUSTICE PROJECT, http://worldjusticeproject.org/rule-of-law-index (follow "Download the Dataset" hyperlink) (last visited July 31, 2014).

By way of summary, these data points highlight the extent to which the United States serves as an example of a nation in crisis. As can be seen from Table 1, the United States ranked twenty-first out of sixty-six nations along the dimension of "access to civil justice" in 2011.[18] "Accessibility includes general awareness of available remedies, availability and affordability of legal advice and representation, and absence of excessive or unreasonable fees and . . . hurdles . . . ."[19] As a result of the absence of general awareness and especially the cost, the United States ranked remarkably low within its region: twelfth of sixteen.[20] In fact, within the group of nations having similar incomes, survey respondents ranked the United States an embarrassing twentieth out of twenty—three.[21] These numbers are echoed in numerous jurisdictions around the world, for example, nearly thirty million cases are pending in Indian courts,[22] some of which have been within the justice system for more than twenty years.[23] This places India well within the lower third of the WJP Access to Civil Justice Global Rankings: seventy-eighth of ninety—seven.[24]

The results are unsurprising as the Indian legal system has long been mired by backlog in its outstanding caseload, resulting from among other factors overly elaborate, unenforced procedures, automatic appeals, and systemic vacancies from the bench, and critically misaligned incentive structures, among other factors.[25] The Law Commission of India has maintained that the reason for judicial delay is not a lack of clear procedural laws, but rather the imperfect execution, or even utter non-observance, thereof.[26] Given the huge number of pending cases, the governance and administrative control over judicial institutions through manual processes has become extremely difficult, resulting in systematic failure. The government's *Report on Strategic Plan for Implementation of ICT in Indian*

18. *See* AGRAST, *supra* note 14, at 111.

19. WORLD JUSTICE PROJECT, *supra* note 12.

20. AGRAST, *supra* note 14 at 150.

21. *Id.*

22. *See* Neeta Lal, *Huge Case Backlog Clogs India's Courts*, ASIA TIMES ONLINE (Jun. 28, 2008), http://www.atimes.com/atimes/South_Asia/JF28Df02.html; Amol Sharma & Vibhuti Agarwal, *India Rape Case Tests Fast-Track Courts*, WALL ST. J. (Jan. 25, 2013, 8:26 PM), http://.wsj.com// SB10001424127887323854904578261551780617048.html.

23. *See* Hiram E. Chodosh et al., *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. INT'L L. & POL. 1, 7 (1997-98) (discussing judicial reform efforts in India in general, not specifically, with ADR).

24. *See Civil Justice*, *supra* note 16.

25. *See* Hiram E. Chodosh, *Emergence from the Dilemmas of Justice Reform*, 38 TEX. INT'L L.J. 587, 601 (2003) ("In India . . . backlog and delay derive from a lack of accountability, discipline, versatility, and finality."). A description of available reform options is presented in Appendix 1.

26. The ILC has stated, "The delay results not from the procedure laid down by it but by reason of the non-observance of many of its important provisions particularly those intended to expedite the disposal of proceedings." Law Commission of India, 77th Report, http://lawcommissionofindia.nic.in/51-100/Report77.pdf.

Judiciary argues that this has negatively affects judicial productivity.[27] The Supreme Court of India made it clear that this state of affairs must be addressed: "An independent and efficient judicial system is one of the basic structures of our constitution. . . . [I]t is our constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases."[28]

In many instances, one solution to mitigate backlog and increase efficiency is to create and support an efficient and fair ODR platform. This may be illustrated in the European Union context. Tonio Borg, as European Commissioner for Health and Consumer Policy noted: "The [E.U.] ADR and ODR legislation will strengthen their possibilities to solve their disputes out-of-court in a simple, fast and low-cost way."[29] He was also quick to point out: "This improvement will not only prevent overburdening court proceedings with low value affairs, but it is expected to motivate consumers to seek redress in the first place."[30] The Commissioners comments are reflective of the anticipated increase in the access to justice that will occur with the creation of an effective ADR and ODR European wide system.[31]

Not only is access to justice likely to be increased, economic impacts are anticipated to occur as well. As noted by Dr. Ann Neville Director of European Consumer Centre, Ireland:

> According to recent research, losses experienced by cross-border shoppers are estimated at EUR425 million per annum. The European Commission has estimated that if EU consumers can rely on well-functioning and transparent ADR for their disputes, both national and cross-border, they could save around _22.5 billion a year, corresponding to 0.19% of EU GDP.[32]

And these anticipated impacts are not merely a dream of legislative ODR enthusiasts-private ODR systems currently exist that demonstrate real world impact when an online dispute resolution platform is effectively implemented. For example, on a global level, eBay and PayPal Resolution Centers[33] "resolve more than 60 million disputes per year in more than a

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27. *See* STRATEGIC PLAN, *supra* note 7.

28. Brij Mohan Lal v. Union of India & Others, (2002) 5 S.C.C. 1 (India), *available at* http://www.indiankanoon.org/doc/1017222/.

29. Tonio Borg, European Comm'r for Health & Consumer Policy, Address at the European Consumer Centres Cooperation Day (May 23, 2013) [hereinafter Borg Address], *available at* http://ec.europa.eu/commission_2010-2014/borg/docs/speech_23052013__.pdf.

30. *Id.*

31. *See* Julia Hörnle, *Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?* 25–27 (Queen Mary Sch. of Law Legal Studies Research Paper No. 122/2012, 2012), *available at* http://dx.doi.org/10.2139/ssrn.2154214.

32. *EU Consumers Could Save _22.5 Billion A Year From New Dispute Resolution Mechanisms*, EU2013 (May 23, 2013, 7:18 PM), http://www.eu2013.ie/news/news-items/20130523ecc-netconference/ [hereinafter EU2013].

33. Discussed in detail, *infra* Part III.A.

dozen different languages around the world."[34] As Collin Rule notes: "It is the largest ODR system in the world, resolving disputes in areas as diverse as item payment, item receipt, and item condition."[35] Within the platform eBay users can resolve disputes using the Resolution Center process, with immediate effect and enforcement.[36] In fact, "more than ninety percent of the disputes filed are resolved without requiring the intervention of a third party to render a decision."[37] These systems are clear indication that a well-designed ODR platform can increase individuals' access to justice, but questions remain regarding to what extent efficiency is trumping access to justice, which is a balancing act also playing out in India.

II. A System in Need: Alternative Dispute Resolution in India

The role of law, as argued by Gandhi, is to "unite parties driven asunder."[38] Law, then, has a preeminent role to play in the resolution of disputes, which in turn "is an essential characteristic for societal peace, amity, comity and harmony."[39] The need for fast and equitable dispute resolution is what has lead nations around the world to adopt various manifestations of ADR, including India.[40] Indeed, "ADR has become a global necessity" as judicial backlog proliferates.[41] In fact, the goal of ADR is enshrined in the Indian Constitution's preamble itself, which enjoins the state "to secure to all the citizens of India, justice—social, economic, and political—liberty, equality, and fraternity."[42] The Constitution goes on to elaborate these goals by adding, "[t]he State shall secure that the operation of the legal system promotes justice . . . ; to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or

34. Collin Rule, *eBay Resolution Center Up for Dutch Innovating Justice Awards - Needs Your Vote!*, Mediate.com (June 2011), http://www.mediate.com/articles/vote.cfm.

35. *See id.*

36. *See id.*

37. *See id.*

38. Mahatma Gandhi, The Story of My Experiments with Truth 168 (1962).

39. Jitendra N. Bhatt, *A Round Table Justice Through Lok-Adalat (Peoples' Court) – A Vibrant-ADR-In India*, 1 SCC (Jour) 11, 11 (2002), *available at* http://kelsa.nic.in/lokadalat.htm.

40. Nevertheless, fierce arguments for and against consensual dispute resolution have been sparked. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 Yale. L. J. 1073, 1076 (1984) (arguing against settlement because of the adverse effects of resource disparity); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 Yale. L. J. 1660 (1985) (responding to Fiss); Owen M. Fiss, *Out of Eden*, 94 Yale L. J. 1669 (1985) (responding to McThenia & Schaffer); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485 (1985); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211 (1995).

41. Asia Dev. Bank, The Role of Public Administration in Building a Harmonious Society 591 (2006); *see also* Bhatt, *supra* note 39.

42. India Const., pmbl.

other disabilities."[43] The Supreme Court of India has interpreted this principle to equate "social justice" with 'legal justice,' which means that the system of administration of justice must "provide a cheap, expeditious and effective instrument for realization of justice by all Sections of the people, irrespective of their social or economic position or their financial resources."[44]

Unfortunately, the current manifestation of the Indian judiciary is neither expeditious nor inexpensive. Unlike other nations' courts,[45] Indian courts are not deaf to such pleas. The Supreme Court of India deemed endemic delay unconstitutional, stating: a "speedy trial is of [the] essence to criminal justice and there can be no doubt that the delay in trial by itself constitutes denial of justice."[46] In response, both the Indian Parliament and judiciary, spearheaded by the Supreme Court, instituted massive ADR projects throughout India.[47] One of the primary mechanisms through which the Indian Parliament and courts have sought to deal with this problem is through the creation of Lok Adalats (peoples' courts),[48]

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43. *Id.*, art. 39(A); *see also* CENTRE ON PUB. LAW & JURISPRUDENCE AT JINDAL GLOBAL LAW SCH., JUSTICE WITHOUT DELAY: RECOMMENDATIONS FOR LEGAL AND INSTITUTIONAL REFORM 3 (2012) [hereinafter JUSTICE WITHOUT DELAY], *available at* http://www.scribd.com/doc/37565811/Justice-Without-Delay-1.

44. Babu vs. Raghunathji, A.I.R. 1976 S.C. 1734 (India); *see also* Madabhushi Sridhar, *Miscarriage of Fast Track Justice*, LEGAL SERVICES OF INDIA, *available at* http://www.legalservicesindia.com/articles/misoj.htm (last visited July 31, 2014).

45. This argument bears a remarkable similarity to the travails of a Chancery Court described by Charles Dickens in Bleak House 150 years ago:

> This is the Court of Chancery . . . which gives to monied might, the means abundantly of wearing out the right; which exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honorable man among its practitioners who would not give – who does not often give – the warning 'suffer any wrong that can be done rather than come here!'

CHARLES DICKENS, BLEAK HOUSE 4 (1853).

46. Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1364 (India); JUSTICE WITHOUT DELAY, *supra* note 43, at 7. In yet another case the Court affirmed this principle by adding that "[t]here can, therefore, be no doubt that speedy trial and by speedy trial we mean a reasonably expeditious trial, is an integral and essential part of fundamental right to life and liberty enshrined in Article 21." *Khatoon*, A.I.R. 1979 S.C. 1364.

47. *See* JUSTICE WITHOUT DELAY, *supra* note 43, at 16; Tassaduq Hussain Jillani, *Delayed Justice & the Role of A.D.R.*, SUPREME COURT OF PAKISTAN 5, http://www.supremecourt.gov.pk/ijc/Articles/7/1.pdf (last visited July 31, 2014).

48. India's ADR effort falls under its consensual dispute resolution (CDR) program. CDR encompasses a variety of techniques (e.g., mediation, arbitration, judicial settlement, early neutral evaluation, conciliation, and settlement by Lok Adalat) designed to create a greater variety of options in the resolution of disputes. CDR allows litigants the opportunity to settle disputes in a consensual manner, through more conciliatory, less formal, and more flexible processes than in litigation. *See* HIRAM CHODOSH, GLOBAL JUSTICE REFORM: A COMPARATIVE METHODOLOGY 42 (2005). Of the various manifestations of CDR, arbitration and settlement through Lok Adalat are the ones currently most widely available. Lok Adalats are a blend of all three forms of traditional ADR: arbitration, mediation, and conciliation. *See* Anurag K. Agarwal, *Role of Alternative Dispute Resolution in the Development of Society: 'Lok Adalat' in India* (Indian Inst. of Mgmt., Working Paper No. 2005-11-01, Novem-

which are designed to promote the rapid conciliation and binding resolution of disputes.[49] As will be described in further detail later, these local courts are effectively local ADR mechanisms, and as such serve as an excellent point for starting a larger access to justice and ADR discussion.

The implementation of local courts has produced staggeringly positive improvements. "[M]ore than 200,000 Lok Adalats have been held" throughout India leading to the settlement of millions of cases.[50] So far, more than $1 billion has been distributed to compensate accident victims, and at least 6.7 million people have received legal aid.[51] These efforts have been successful in decreasing backlog in key areas of need.[52] The efficiency of the system is staggering in light of the timeframes for traditional court proceedings in India that frequently take years or even decades.[53] Efficiency is not the only benefit of the introductions of Lok Adalats; however, as these bodies also promote the rapid and equitable resolution of disputes in a manner that is culturally attuned to traditional Indian jurisprudence.

Lok Adalats are not without their critics, including advocates, judges, and certain classes of consumers, each with competing vested interests at play. Now, with the creation of dedicated Permanent Lok Adalats, which are specialized to certain classes of cases, power asymmetries have become more prevalent.[54] This begs the question of whether justice is being compromised in the name of judicial efficiency, in a manner paralleling the debate over ODR.

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ber, 2005), *available at* http://www.iimahd.ernet.in/publications/data/2005-11-01anurag.pdf. They use conciliation, with elements of arbitration given that decisions are typically binding, and are an illustration of legal decentralization as conflicts are returned to communities from whence they originated for local settlement. *See* Robert Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 L. & Soc. Rev. 545, 545-58 (1991).

49. *See* Marc Galanter & Jayanth K. Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789, 789 (2004). *See generally* Marc Galanter & Jayanth Krishnan, *Debased Informalism: Lok Adalats And Legal Rights In Modern India*, *in* Beyond Common Knowledge: Empirical Approaches To The Rule Of Law 96 (Erik Jensen & Tom Heller eds., 2003).

50. Agarwal, *supra* note 48. *See Lok Adalat for Speedy Justice*, Hindu (Dec. 18, 2001), http://www.hindu.com/thehindu/op/2001/12/18/stories/2001121800060100.htm; Jillani, *supra* note 47, at 5 ("Lok Adalats have so far settled over ninety-seven lakh legal matters throughout the country.").

51. Manzoor Elahi, *Lok Adalat System in India*, Academia.edu 2, http://www.academia.edu/3296008/Lok_Adalat_System_in_India (last visited July 31, 2014).

52. *See* H.R. Bhardwaj, *Legal and Judicial Reforms in India*, Int'l Center for Alternative Dispute Resolution, http://icadr.ap.nic.in/articles/articles.html (last visited July 31, 2014); Elahi, *supra* note 51, at 4.

53. *See* Janet Martinez et al., *Dispute System Design: A Comparative Study of India, Israel, and California*, 14 Cardozo J. Conflict Resol. 807, 808-10 (2013).

54. *See* Elahi, *supra* note 51, at 7–8.

A. *In the Name of Efficiency: Analyzing ADR Efforts in India*

India, the most populous and diverse democracy in the world, has a legal system to match.[55] The system, a composition of ancient Hindi panchayats (village assemblies), Islamic law, and a formal British judiciary, has long been under immense strain, stifling economic competiveness and the pursuit of justice alike. As Lord Delvin famously said, "If our business methods were as antiquated as our legal methods we should be a bankrupt country."[56] As was illustrated in Table 1, backlog and delay stemming from myriad factors including misaligned incentive structure among the key players exist in a wide array of legal systems around the world. Arguably, these problems are most accentuated in modern-day India. Thus, India has become a test bed for rule of law reform generally, and ADR specifically. This case study examines India's efforts with regard to ADR critiquing the role and evolution of Lok Adalats, before turning to an analysis of stakeholders and the potential of ODR to improve access to justice in the subcontinent.

The "Lok Adalat originated from the failure of the . . . [Indian] legal . . . system to provide effective, fast, and" affordable justice.[57] The first modern Lok Adalat was held in Junagadh in 1981, though some argue that they originated in the northwestern Indian state of Gujarat by Manharlal P. Thakkar, the late Chief Justice of the Gujarat High Court.[58] Others contend that they began in the central-western Indian state of Maharashtra well before 1982.[59] What is not in doubt is Justice Thakkar's significant influence in directing the contemporary evolution of Lok Adalats. The guiding principle of Justice Thakkar, when he was considering creating a system of Lok Adalats, was to form a system that was "less expensive, less speculative, less glamorized, more participatory, and more resolution oriented that would work to serve the purpose of justice with humanity in mind."[60]

The 1987 Legal Services Authorities Act provided free and competent legal service to disadvantaged groups "to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of

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55. *See India Profile*, BBC, http://www.bbc.co.uk/news/world-south-asia-12557384 (last updated Dec. 13, 2013); *Constitution*, Supreme Court of India, http://supremecourtofindia.nic.in/constitution.htm (last visited July 31, 2014).

56. Deepka Kr. Azad, *Plea Bargaining: A Unique Remedy To Reduce Backlog In Indian Court*, Campus Law Centre Legal Awareness (Mar. 15, 2009, 2:01 AM), http://clclegalawareness.blogspot.com/2009/03/plea-bargaining.html.

57. *See* Girish Patel, *Crippling Lok Adalats*, India Together (Dec. 1, 2007), http://www.indiatogether.org/2007/dec/hrt-adalat.htm.

58. *See id.*

59. *See* P.N. Bhagwati et al., Report on National Judicare: Equal Justice, Social Justice (1977) (the "Bhagwati Report").

60. Patel, *supra* note 57.

the legal system promotes justice on the basis of equal opportunity."[61] This statute also gave gives statutory authority to Lok Adalats, based on the practice of panchayats.[62] Under this system, Lok Adalats are available at both the pre-litigation and litigation stages of dispute resolution thanks to amendments to the Code of Civil Procedure circa 1908.[63]

In traditional Lok Adalats, at least one party gives consent for the matter to be heard by conciliators. The conciliators are comprised of "[a] sitting or retired judicial officer and other persons of repute as may be prescribed by the state government in consultation with the chief justice of the High Court."[64] If no compromise is "arrived at through conciliation, the matter shall be returned to the concerned court for disposal . . . ."[65] Professor Robert Moog has argued that this system gave the Indian people, for the first time in centuries, a choice of forum for the resolution of their disputes so they may make better-informed, rational decisions.[66]

Initially, there was great enthusiasm for Lok Adalats, at least among consumers. For example, in one early Lok Adalat "in north Gujarat, when the judges . . . asked an ordinary litigant, 'What is your problem?' The man, with fears [sic] in his eyes, said, 'For the first time in five years, somebody has asked me about my case.' "[67] But the benefits of Lok Adalats are not limited to reducing the time to bring a claim. In fact, the imposition of Lok Adalats has many of the hallmarks of the WJP markers that are cited to increase access to justice, such as: filing without a fee, direct consultation with a neutral without procedural hurdles, an abbreviated hearing schedule, and the final decision that is binding upon the parties and enforceable in the local courts as a civil court decree.[68]

Moreover, within the Lok Adalat system, individuals "have greater scope for participation in the satisfactory resolution of their disputes."[69] The wider scope of participation arises from Lok Adalats' ability to per-

61. Legal Services Authorities Act, No. 39 of 1987, pmbl.,INDIA CODE (1994), *available at* http://nalsa.gov.in/actrules.html; *see also* Martinez et al., *supra* note 53, at 808-09 (exploring the evolution of Lok Adalats).

62. For deeper historical assessments of the Lok Adalats, see generally UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM 338-42 (1982); Upendra Baxi, *From* Takrar *to* Karar*: The Lok Adalat at Rangpur - A Preliminary Study*, 10 J. CONST. & PARLIAMENTARY STUD. 52, 93–95 (1976).

63. *See* The Code of Civil Procedure, No. 5 of 1908, Sec. 89, CODE CIV. PROC. (India). The Code of Civil Procedure is itself a derivation of the British Judicature Acts. *See generally*, Hillary Heilbron, *Courts Caught in a Time Warp*, THE TIMES (London), July 6, 1993, at 35 (noting that 1873 was "the time of the last reforms in civil procedure . . . [t]he technological revolution has largely bypassed civil litigation," and that "costs have escalated, delays have increased, trials have become more complex and they take longer").

64. Agarwal, *supra* note 48. *See* Elahi, *supra* note 51, at 4–5, 8.

65. Agarwal, *supra* note 48; Elahi, *supra* note 51 at 5.

66. *See* Moog, *supra* note 48, at 547, 552.

67. Agarwal, *supra* note 48; Patel, *supra* note 57.

68. *See* Martinez et al., *supra* note 53, at 809.

69. Agarwal, *supra* note 48.

form different functions,[70] meaning that they may "act simultaneously as conciliators, mediators, arbitrators or adjudicators as the" situation demands.[71] As such, Lok Adalats enjoy myriad different roles—preventing conflicts from festering, negotiating, bargaining, compromising, and resolving disputes efficiently. When considered as a means to improve access to justice, it is important to note that the use of Lok Adalats removes one of the most common drawbacks in traditional litigation, i.e., the potential to lose everything. Within India, the use of ADR often allows a compromise position to be reached, thereby reducing the likelihood of a decimating final judgment. The inclusion of the ability to compromise within the system is often heralded as one of the greatest benefits of the ADR system within India.[72] Thus, proponents argue that the pace and dispensation of justice is back in the hands of the people.

Newspapers across India, including *The Hindu*, have applauded the widespread adoption of Lok Adalats as a way to expedite justice.[73] The headlines are full of the resounding success of Lok Adalats in equitably settling hundreds or thousands of cases, sometimes in a single afternoon.[74] Taking a few examples, bankers in Coimbatore were keen to settle hundreds of pending debt actions "amicably."[75] Eighteen banks settled 200 cases in a few hours.[76] Many headlines are even more straightforward, such as "846 Cases Settled."[77] These exhortations underscore the public need and pride in resolving the greatest number of disputes as quickly as possible.

These headline quotes raise an interesting implicit question: what protections are being given up in the name of efficiency? As case backlogs began to slowly decline, and individuals began to become comfortable with the system, the costs in sacrificing procedural protections seemed mi-

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70. *See* Patel, *supra* note 57.

71. Agarwal, *supra* note 48.

72. *See* Chodosh, *supra* note 23, at 3 n. 4. This has led courts to become competitive arenas for social status. *See* Moog, *supra* note 48, at 551-52 ("Attorneys, judges, and litigants often cited deference of *izzat* (honor), harassment, and speculation as reasons for filing with the courts[,]" confusing the role of courts of law with traditional village panchayats).

73. *See, e.g.*, *Nod to 20 Fast Track Courts, 4 Lok Adalats*, Tribune India (Mar. 13, 2005), http://www.tribuneindia.com/2005/20050314/delhi.htm#1.

74. *See, e.g.*, *Lok Adalat*, Hindu (Mar. 18, 2004), http://www.hindu.com/2004/03/18/stories/2004031803250300.htm; *59 Cases of Land Acquisition Settled at Mega Lok Adalat in Adilabad*, Hindu (Mar. 17, 2006), http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/59-cases-of-land-acquisition-settled-at-mega-lok-adalat-in-adilabad/article3134362.ece.

75. *Lok Adalat for Debts Recovery*, Hindu Bus. Line (Mar. 8, 2005), http://www.thehindubusinessline.com/todays-paper/tp-money-banking/debt-tribunals-lok-adalat-in-coimbatore/article2170881.ece.

76. *See id.*

77. *846 Cases Settled*, Chandigarh Trib. (Nov. 9, 2003), http://www.tribuneindia.com/2003/20031110/cth1.htm. *See also, Lok Adalat Settles 390 Bank Cases in TN*, Hindu Bus. Line (Jun. 23, 2003), http://www.thehindubusinessline.in/2003/06/24/stories/2003062400941700.htm.

nor in comparison to the absence of justice. After all, chronic judicial stagnation calls for simplifying procedures and increasing flexibility.[78] However, during the adoption of Lok Adalats, little attention was made to undelaying issues that demanded attention. Instead, the judicial system now seems to place efficiency as the goal, rather than as a means to achieve justice.

B. *Lessons to be Learned from India's Implementation of ADR*

The promise of Lok Adalats was to overcome both the traditional limitations of panchayats as well as the failings of the formal Indian judicial system with a people-centric approach to jurisprudence with roots in ancient India.[79] The goal was to reposition humanity in the system, to put person over procedure in a way that echoes the evolution of the U.S. notice pleading system and its evolution from British civil procedure.[80] As Girish Patel, a senior advocate at the Gujarat High Court stated, "Lawyers and judges cannot be mere black-letter men looking upon law as only an exercise in logic and not in life."[81] Unfortunately, this transformation of the Indian justice system has not yet fully taken hold. But that does not mean that the dream is dead.

Although Lok Adalats reduces court backlog, the theory behind Lok Adalats "was never fully examined and was allowed to grow haphazardly on an ad hoc basis. Nobody tried seriously to put it in a larger and proper historical and socio-political context."[82] Backlog is not the only reason to create Lok Adalats. Indeed, Lok Adalats alone will not solve backlog, nor any of the other myriad problems facing the Indian legal system. Hard questions must be asked and answered. For example, are Lok Adalats (like ODR) merely a by-product of a failed and overburdened judicial system, or an alternative, bottom-up justice-delivery system? Additionally, the political context within which the Lok Adalats and courts exists also exerts pressures and, consequently, guides the directions in which these bodies can move.[83] These pressures should be recognized and accounted

78. Juan Carlos Botero et al., *Judicial Reform*, 18 World Bank Res. Observer 66, 80-83 (2003); *see* Moog, *supra* note 48, at 545 n.1.

79. Lok Adalats may be considered a recent expression of this trend in judicial populism and the benefits of traditional dispute resolution, which has continued in India since independence and may trace its roots back to British attempts to establish local panchayats that would handle petty disputes. *See* Hugh Tinker, The Foundations of Local Self Government In India, Pakistan And Burma 117 (1954). Its primary characteristic is "an overriding concern with the delivery of affordable legal services to the ordinary person." Moog, *supra* note 48, at 552. This underscores the need to make proceedings as affordable as possible. As such, the 1970s saw a series of government reports culminating in the Bhagwati Report, a manifesto for judicial populism, urging decentralized, informal, and affordable justice for the common man. *Id*. at 552–53.

80. *See, e.g.*, Lawrence M. Friedman, A History of American Law 95-101 (3d ed. 2005).

81. Patel, *supra* note 57.

82. *Id.*

83. *See* Moog, *supra* note 48, at 564.

for in planning the composition and procedures of Lok Adalats, as well as the expansion of the Lok Adalat system online through ODR, as should the larger rule of law reforms necessary to improve access to justice in India.

However, some problems are beyond the pale of legal or judicial reform, such as the continued explosive growth of the Indian population and the resultant strains that this will place on court infrastructure.[84] Still, much can be done to ensure that India enjoys a world-class legal system to match the goals enshrined in its Constitution. Even relatively simple reforms have the potential to result in vast improvements over the status quo. For instance, the internal monitoring and tracking of the key procedural events in the life of a civil case (i.e., more transparent court administration) would increase the accountability of courts.[85] Greater judicial involvement in preparing and pacing a civil litigation ("case management") could also impose greater discipline on the civil process, and thereby reduce the time required to adjudicate a civil claim.[86] Other institutional mechanisms besides ADR could also easily be expanded, such as the Supreme Court of India's relaxed *locus standi* for public interest litigation.[87] At the heart of these reforms though, is the need to make people aware of their rights. "[T]he people's right to information has become a very important instrument for the people in the affairs of the nation."[88] Increased publicity is required to ensure that Indian citizens are educated on their rights in courts of law, and Lok Adalats alike.

In order to preserve the adversarial model of civil justice, India must enact greater administrative accountability and judicial control over the preparation of claims and defenses, and less formal, more conciliatory, and calibrated consensual resolutions.[89] Great strides have been taken in the name of judicial efficiency. What is left is to ensure that Lok Adalats live up to their namesake as true peoples' courts through targeted reforms, including ODR discussed in Part III. When that day comes, ADR will have the capacity to not only reunite parties riven asunder, but also unify

84. *See, e.g.*, Amrutha Gayathri, *India's Population Will Grow While China's Will Begin To Decline By 2028, Making India World's Most Populous Country In About 15 Years, UN Report Says*, Int'l Bus. Times (June 17, 2013, 12:48AM), http://www.ibtimes.com/indias-population-will-grow-while-chinas-will-begin-decline-2028-making-india-worlds-most-populous.

85. *See* Randall T. Shepard, Chief Justice, Indiana Supreme Court, State of the Judiciary Address to a Joint Session of the Indiana General Assembly: Burdened but Unbowed (Jan. 12, 2011), *available at* http://indianacourts.us/times/2011/02/burdened-but-unbowed/.

86. Chodosh, *supra* note 23, at 62.

87. *See* Bharat Desai, *Enforcement of the Right to Environment Protection Through Public Interest Litigation in India*, 33 Indian J. Int'l L. 27, 28-29 (1993); B.K. Sharma, Introduction to the Constitution of India 117 (2007) (noting that the National Human Rights Commission of India is another venue for resolving fundamental disputes in a timely manner, especially through direct petition to the Supreme Court of India under Article 2(6) or through general public interest litigation provisions).

88. Patel, *supra* note 57.

89. *See id.*

the Indian nation behind a fully functional, equitable, and efficient justice system. Over time, this could serve both as a precedent for other countries to emulate through India acting as a norm entrepreneur,[90] and as one component of creating a system of polycentric governance to enhance access to justice as is discussed in Part IV.[91]

III. ADR Moves into Cyberspace

According to noted ADR author Jacqueline Nolan-Haley, "Arbitration's fading popularity over the last two decades has energized mediation's growth and has helped it to displace arbitration as the ADR process of choice."[92] Indeed, Professor Nolan-Haley asserts, "mediation is the new arbitration."[93] In many ways, the growth of mediation has spurred renewed attention to ODR, as mediation is a cooperative process fostered through communication—something that can be facilitated within the online world. The extension of mediation into cyberspace could drastically improve individuals' access to justice.

Before surveying some of the newest approaches to ODR, it is important to note that ODR suffers from a lack of definition. As a result, some commentators use ODR as a term that means nothing more than the use of technology in an already existing judicial system.[94] Technology as an annex or facilitator of document receipt, search, and storage is an important advance in the judicial system; it is, however, not ODR. In fact, online communications as a means to allow parties to voice complaints, when not coupled with a dispute resolution mechanism, should also not be thought of as ODR. Mechanisms that allow customers to complain to a business are nothing more than online customer service facilities; and are not per se, ODR. We argue that a true ODR system is one that allows the parties to do more than merely complain—the platform must involve the resolution of a dispute and use a neutral facilitator (mediation) or a neutral decision maker (arbitration).

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90. *See* Tim Maurer, Cyber Norm Emergence at the United Nations: An Analysis of the Activities at the UN Regarding Cyber-Security 47 (2011), *available at* http://belfercenter.ksg.harvard.edu/files/maurer-cyber-norm-dp-2011-11-final.pdf (discussing the theory of norm entrepreneurs in the cybersecurity context).

91. *See* Michael D. McGinnis, *Costs and Challenges of Polycentric Governance: An Equilibrium Concept and Examples from U.S. Health Care* 1–2 (Vincent & Elinor Ostrom Workshop in Political Theory & Policy Analysis, Indiana University, Bloomington, Working Paper W11-3, 2011), *available at* http://php.indiana.edu/~mcginnis/Beijing_core.pdf (noting "[t]he basic idea [of polycentric governance] is that any group . . . facing some collective problem should be able to address that problem in whatever way they best see fit").

92. Jacqueline M. Nolan-Haley, *Mediation: The 'New Arbitration'*, 17 Harv. Negot. L. Rev. 61, 66 (2012) (citing Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 Penn St. L. Rev. 165, 183 (2003) (noting that court created "rigid" policies deterred parties from engaging in arbitration)).

93. *Id.* at 61.

94. *See, e.g.*, Goodman, *supra* note 9 at 1–16.

With these parameters in mind, we can narrow the discussion of particular ODR platforms as few systems truly involve the resolution of a dispute. In general, two types of platform providers exist—private and public—and both deserve consideration. In terms of private providers, it is important to note two categorizations at the outset. Private ODR providers come in two types: self-contained and full service. A self-contained provider resolves disputes within a community, and as such the members to that community are controlled by, and agree to, the terms of service and associated agreements that regulate the community and the use of the platform. In contrast, a private full service platform provides any and all parties access to an ODR mechanism.[95] The differences between these various types are fundamental and highly important to the discussion as private providers are creatures of contract, and are—at least for the time being—largely unregulated. The distinctive importance will become evident in the discussion within this Part, after which it will be possible to apply lessons learned from our India, United States, and European Union case studies.

A. *Private ODR Platforms*

When considering private based platforms, it is important to start by examining the eBay marketplace members' platform.[96] When eBay launched in 1995 as "AuctionWeb," it was rather small and known to relatively few users, so buyers and sellers mostly interacted like friends in a community.[97] The creator, Pierre Omidyar, established a "Feedback Forum," telling readers to "[g]ive praise where it is due; make complaints where appropriate . . . ."[98] Since then, eBay has hosted an eBay Resolution Center that facilitates communication between the buyer and the seller in the event that something goes wrong with an eBay marketplace transaction.[99] Buyers and sellers can open a case within the eBay marketplace platform, which allows the parties to communicate and attempt to resolve the issue amongst themselves.[100] After three days, should the parties not reach a resolution, a party can escalate the claim to an eBay repre-

95. *See, e.g.*, *supra* text accompanying notes 112–123.

96. Of course, others also offer compliant services. For example, Amazon.com allows customers of third party sellers to file an A-to-z Guarantee claim if you purchased physical goods or eligible services on the Amazon.com website. *See File an A-to-Z Guarantee Claim*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=200783750 (last visited July 31, 2014). A similar service is offered by Etsy. *See How Do I Report a Problem with My Order?*, ETSY, http://www.etsy.com/help/article/35 (last visited July 31, 2013).

97. *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 130 (2006).

98. *Id.* at 131.

99. *See How Does eBay Buyer Protection Work?*, EBAY, http://pages.ebay.com/coverage/BuyerProtectionForBuyers.html (last visited July 31, 2014).

100. *See id.*

sentative.[101] eBay will then resolve the issue within forty-eight hours.[102] In some limited circumstances, eBay Buyer Protection may cover the purchase price plus original shipping.[103]

Of course, the customer can also post negative feedback on the seller and can contact the eBay Trust and Safety team to investigate issues within the marketplace. For example, eBay India has used online negotiation and mediation to resolve reputational disputes.[104] Known as the eBay Community Court, the Court uses trusted eBay community members to resolve reputation-reporting disputes among the buyers and sellers within the eBay platform.[105] As platform designer and noted ODR authority Collin Rule highlights "once each side has made their case [uploading material, etc.], the matter is put in front of a jury of twenty-one randomly selected eBay community members."[106] While the jury members do have to meet stringent eligibility criteria, the jury is made up of uncompensated volunteers.[107] The decisions are reviewed, when needed, for patterns and problems with outcomes and (in very rare cases) issues with the decisions of a particular member.[108] Although some tinkering was initially needed,[109] the feedback on the Community Court has been very strong among all of the users.[110]

Self-contained dispute resolution platforms have advantages over other private systems in that the marketplace can respond to parties that fail to comply with dispute outcomes. For example, within the eBay platform, eBay can take action against parties' failing to comply by suspending accounts or allowing the winning party to post negative feedback about the non-compliant party.[111] Moreover, in many of these settings, the payment mechanism is internal to the marketplace. In these situations the

101. *See id.*

102. *See id.*

103. *Id.* The sellers redress options are different, mainly that the seller may both file a claim and seek to sell the original item still in its possession. See *What to Do When a Buyer Doesn't Pay (Unpaid Item Process)*, EBAY, http://pages.ebay.com/help/sell/questions/no-payment.html (last visited July 31, 2014).

104. Colin Rule & Harpreet Singh, *ODR and Online Reputational Systems – Maintaining Trust and Accuracy Through Effective Redress*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, *supra note 8, at* 163, 180-81.

105. Zhao Yun, Timothy Sze, Tommy Li & Chittu Nagarajan, *Online Dispute Resolution in Asia*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, *supra* note 8, at 499, 510.

106. Rule & Singh, *supra* note 104, at 181.

107. *Id.*

108. *See id.*

109. This included changing the words used to describe the online adjudicative process. Instead of discussing 'juries' and 'courts,' eBay now uses the term "community review 'panels'". *Id.*

110. *See id.*

111. *Why Was My Account Suspended?*, EBAY, http://pages.ebay.com/help/account/questions/account-suspended.html (last visited July 31, 2014).

payment portion of the marketplace can institute a delay in payment or can even reverse charges in the event that issues arise relating to the transaction. Systems that allow for delayed payments or that incorporate a savings account portion of the payment system allow for funds to be returned to the customer, without the need for merchant compliance with the mediated outcome.[112] The use of payment mechanisms, especially one that incorporates a chargeback facility, is an important means of compliance and is often heralded as one of the essential features of a successful private ODR platform.[113] These systems, coupled with the internal "trust mark,"[114] allow for a fully internal system of dispute resolution.

In contrast to the self-contained platforms of dispute resolution, private full-service platforms are just beginning to emerge as a possible addition to a judicial system. One of the newest players in the full service private ODR platform marketplace is Modria.[115] The creator of the Modria platform, Collin Rule, was also the creator of the original eBay and PayPal dispute resolution systems.[116] Modria is designed to be a full-service private provider of dispute resolution services in that it allows parties to bring any dispute to the online platform.[117] When someone reports a problem, the Modria software helps diagnose it by collecting and organizing information about the issue and suggesting solutions.[118] The software also enables the parties to discuss the matter online.[119] If the parties fail to communicate online, the software guides them to mediation and arbitration, where the Modria team can assist in resolving the dispute through the use of either mediation or arbitration.[120]

Despite its recent entry into the market, the Modria platform has gained traction by securing several large businesses as clients.[121] In fact, Modria's CEO stated that his company's goal is to be "the small-claims

112. See for example, eBay. *See supra* text accompanying notes 106–111. In fact, eBay and other online providers, such as PayPal, use a facility known as a chargeback. For more information, see PayPal website, Chargeback guide, at https://www.paypal.com/us/webapps/mpp/security/chargeback-guide

113. *See* Vikki Rogers, *Knitting the Security Blanket For New Market Opportunities*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, *supra* note 8, at 95.

114. A trustmark is, for example, a top rated seller designation based on customer feedback. *What is E-commerce Trustmark?*, WEBOPEDIA, http://www.webopedia.com/Term/E/e_commerce_trustmark.html (last visited July 31, 2014). *See also* Pablo Cortés, *Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers*, 19 INT'L J. L. & INFO. TECH. 1 (2010)(describing the potential use of trustmarks in the E.U.).

115. *See* MODRIA, https://www.modria.com/ (last visited July 31, 2014).

116. *See Our Team*, MODRIA, https://www.modria.com/team/ (last visited July 31, 2014).

117. *See* MODRIA, https://www.modria.com/ (last visited July 31, 2014).

118. *Fast and Fair Resolutions*, MODRIA, http://www.modria.com/resolution-center/ (last visited July 31, 2014).

119. *Id.*

120. *Id*.

121. *See* MODRIA, http://www.modria.com (last visited July 31, 2014).

court for the 21st century."[122] The Modria platform replicates a process well known to all, small claims court, but it does so even in a cross border situation.[123] Consequently, if its claims are accurate, the Modria platform will become the first to accomplish the development of a private full-service dispute resolution platform. Even more encouraging to the users of e-commerce, Modria will be the first-public entity to put in place a cross-border online dispute resolution platform.

B. *Public ODR Platforms*

Many of the benefits of private self-contained member-based complaint platforms can be replicated in the online public justice ODR environment. One of the primary differences between private and public ODR platforms, though, exists in the mechanism of enforcement of outcomes. For the public-based and/or judicially-supported ODR platforms, enforcement can be done through several different mechanisms—the easiest of which is to have the local courts assist in enforcement should the losing party fail to comply. In this type of mechanism, no feedback, accreditation or account restrictions are necessary to encourage compliance. Instead, merchants agree to abide by particular rules and laws and allow a public supported ODR system to resolve issues.[124] One such example exists in Mexico. The platform known as Concilianet is both hosted and supported by the government via the Federal Attorney's Office of Consumer (PROFECO).[125] The Concilianet platform was created to resolve disputes between registered merchants,[126] and their customers.[127] The process is remarkable as it: (1) is straight forward; (2) has no direct filing costs; (3) allows online and in-person filing; (4) uses verified forms of personal identification for registration of a claim; (5) complies with local law on data retention and protection; (6) has trained assistants to assist the consumer through the process; (7) uses a secured electronic data capture and virtual courtroom throughout the process, and; (8) is able to resolve the majority of claims within a short, consumer driven timeline.[128] In fact,

122. Deborah Gage, *VC Dispatch, Modria An Online 'Small-Claims Court for 21st Century'*, WALL ST. J., (Nov. 20, 2012, 12:18 AM), http://online.wsj.com/article/SB10001424127887324307204578129443877501274.html.

123. *See Our Technology*, MODRIA, http://www.modria.com/technology (last visited July 31, 2014).

124. Such as what exists in the Concilianet system. *See, e.g.*, *¿Qué es?*, CONCILIANET, http://concilianet.profeco.gob.mx/concilianet/faces/que_es.jsp (last visited July 31, 2014).

125. *Id. See generally*, CONCILIANET, http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp (last visited July 31, 2014).

126. Eighty-seven merchants and their sub-merchants have registered. *Proveedores Participantes*, CONCILIANET, http://concilianet.profeco.gob.mx/concilianet/faces/de_quien.jsp (last visited July 31, 2014) (follow "Concilianet Descargar Documento" hyperlink).

127. *See ¿Qué es?*, *supra* note 124.

128. *See Paso a Paso*, CONCILIANET, http://concilianet.profeco.gob.mx/concilianet/faces/como_funciona.jsp (last visited Feb. 23, 2014); *Preguntas Frecuentes*, CONCILIANET, *http://concilianet.profeco.gob.mx/concilianet/faces/preguntas_frecuentes.jsp#preg8* (last visited July 31, 2014).

even merchants not registered with the service can have a claim filed against them, but the filing must be done in person (as use of the online platform requires consent via registration) at a local satellite office.[129] It is also worth noting that the entire system is both voluntary and allows the consumer to retain his right to his day in court,[130] unlike, for example, the binding decisions of Lok Adalats.

One of the better examples of a full service public-supported ODR platform is currently in the testing stage within the province of British Columbia, Canada.[131] Unlike previously described systems, the British Columbia ODR platform engages the business once the complaint is filed.[132] At this initial stage the parties to the dispute agree to proceed with the resolution process and also agree to have the outcome be final and binding (i.e., arbitration). Although the platform does not assist in the recovery, should the losing party fail to comply, the final award can be taken to the judicial system for enforcement. This system is one of the better systems that exist at this time because it allows the party to consent to participate after the dispute has arisen and ends with a binding, court enforceable outcome.[133]

As demonstrated through these examples, arbitration and mediation are becoming more advanced and widely used within the justice system. These ADR systems are slowly beginning to benefit from technology with the next likely extension being the introduction of a true ODR platform, such as the system described in British Columbia or the private system Modria. Some commentators argue that the emergence of ODR as a means to relieve the pressure that exists in the backlogged justice system should be a welcomed advance that will increase individuals' access to justice,[134] similar to how proponents discuss the benefits of Lok Adalats.[135] While none of the previously discussed systems are perfect, they represent the cutting edge in the ODR world. However, some tough questions must be asked before these platforms are fully embraced, especially in the area of the use of automation. The next section will consider some of the newest systems being designed to move ODR beyond domestic platforms through an increased use of technology.

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129. *See Id.*

130. *See Preguntas Frecuentes*, CONCILIANET, http://concilianet.profeco.gob.mx/concilianet/faces/preguntas_frecuentes.jsp (last visited July 31, 2014).

131. *Resolve Your Dispute*, CONSUMER PROTECTION BC, http://www.consumerprotectionbc.ca/odr (last visited July 31, 2014).

132. *See Frequently Asked Questions*, CONSUMER PROTECTION BC, http://www.consumerprotectionbc.ca/faqs (last visited July 31, 2014).

133. *See* Anjanette H. Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an 'Informed' Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV., (forthcoming Spring 2014) [hereinafter Raymond, *Gorilla*].

134. *See e.g.*, Devanesan & Aresty, *supra* note 8, at 293.

135. *See, e.g.*, Patel, *supra* note 57.

C. *Cross Border Platforms: European Union ODR*

In a similar manner as previously-discussed India, individuals within the European Union suffer time delays and lack effective means to access to justice, especially in the cross-border ecommerce environment. According to the 2013 European Union (E.U.) Justice Scoreboard, the majority of European Union Member State courts take over 200 days to resolve a litigious civil and commercial case,[136] and many States have a high number of such cases pending.[137] However, a large majority of member states have a well-developed system for the registration and management of cases,[138] including filing in small claims courts.[139] And nearly all member states report the availability of ADR methods,[140] yet few have a full online dispute resolution platform available, and none of which reach cross-border trade.

It is important to note the cross border nature and importance of e-commerce within the European Union. While numerous commentators, economic institutions, and governmental authorities recognize the importance and value of growing cross border e-commerce, consumers seem hesitant to risk the difficulties involved in cross border transactions. Consumers report four main areas of concern when shopping online in a cross border transaction: (1) delivery timeframes and delays; (2) the ease of replacing or repairing a faulty product; (3) payment and reimbursement issues; and (4) the misuse of payment card details and personal data.[141] Consumers' hesitation is reflected in their behavior, as European Commissioner for Health and Consumer Policy Tonio Borg noted, "about one in five EU consumers encounters a problem when buying goods or services in the internal market. Only a small fraction of these consumers currently seek and secure effective redress."[142] In other words, access to justice is thus being denied at an alarming rate across the European Union.

The denial of justice has been recognized as one reason that consumers fail to shop within the cross-border internal market, especially when the merchant is located in a legal system or culture that lacks effective means of redress and consumer protections.[143] For a region working hard

136. European Comm'n, The EU Justice Scoreboard (2013), *available at* http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf.

137. *Id.*

138. *Id.*

139. *See id.*

140. *Id.*

141. *See* Civic Consulting, Consumer Market Study On The Functioning Of E-Commerce And Internet Marketing And Selling Techniques In The Retail Of Goods 173 (2011), *available at* http://ec.europa.eu/consumers/consumer_research/market_studies/docs/study_ecommerce_goods_en.pdf (reporting and evaluating a wide breadth of information concerning online behavior and attitudes of consumers within Europe).

142. Borg Address, *supra* note 29.

143. *See* Accenture, European Cross-Border E-commerce: The Challenge of Achieving Profitable Growth, Impact of Laws and Regulation 11, *available at* http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture-ERRT-Brochure.pdf.

to remove boundaries in terms of trade, the absence of a cross-border dispute resolution mechanism is a serious issue, as it greatly limits individuals' willingness to shop outside their home country.[144] As a result of these findings and others, the European Union passed a first-of-its-kind ADR Directive and corresponding ODR Regulation to facilitate the widespread use of ODR across the European Union.[145]

The ADR Directive creates a procedure covering "all contractual disputes in every market sector (e.g., travel, banking, dry cleaning), and in every member state."[146] Similar to other systems,[147] the ADR Directive will require traders to "inform consumers about the availability of ADR,[148] will require traders to include and inform consumers about ADR on their websites and in their general terms and conditions[,]"[149] and will require ADR entities "to meet quality criteria which guarantee that they operate in an effective, fair, independent and transparent way."[150]

In addition to the ADR Directive, the European Union has created an ODR Regulation that will allow regionally located buyers and sellers to resolve disputes within an online environment through the use of an online platform.[151] Interestingly, the online platform[152] will have a commu-

144. In 2013, online retailing in Europe grew to £111.2 billion *See* Ctr. for Retail Res.: http://www.retailresearch.org/onlineretailing.php. While in the U.S., in 2009, 154 million people bought something online, or sixty-seven percent of the online population (four percent more than in 2008). *See* Forrester Research, *Forrester Research Web Influenced Retail Sales Forecast*, 3, (Dec. 2009), *available at* http://www.forrester.com.

145. "Member states will have twenty-four months after the entry into force of the Directive to transpose it into their national legislation. That takes us to mid-2015. The ODR platform will become operational six months after the end of the transposition period." *Alternative Dispute Resolution and Online Dispute Resolution*, EUBUSINESS (Mar. 12, 2013), *http://www.eubusiness.com/topics/consumer/dispute-adr-odr/*. The ADR Directive will not cover the sectors of health and education as these areas are already heavily regulated and disputes arise are often of a more complex nature. Press Release, European Comm'n, A Step Forward For EU Consumers: Questions & Answers On Alternative Dispute Resolution And Online Dispute Resolution (Mar. 12 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-193_en.htm [hereinafter EUROPA, Press Release]. For the original website for the platform, see *Solving Your Consumer Disputes Out of Court (Alternative Dispute Resolution)*, EUROPA, http://ec.europa.eu/consumers/redress_cons/adr_en.htm (last visited July 31, 2014).

146. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145; EUROPA, Press Release, *supra* note 145.

147. Raymond, *Gorilla*, *supra* note 133.

148. Directive 2013/11/EU of The European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution For Consumer Disputes, art. 7, 2013 O.J. (L 165) [hereinafter ADR Directive].

149. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145. *See* EUROPA, Press Release, *supra* note 145.

150. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145; *see* ADR Directive, *supra* note 148 arts. 15-16; EUROPA, Press Release, *supra* note 145.

151. EUROPA, Press Release, *supra* note 145.

152. Regulation No. 524/2013 of the European Parliament and of the Council of 21 May 2013 On Online Dispute Resolution For Consumer Disputes, arts. 1–7, 2013 O.J. (L 165) [hereinafter ODR Reg.].

nication facility between the platform and the national ADR entities.[153] As a result, the European Union will have successfully created a single point of entry for resolving online disputes, regardless of domestic or cross-border transactions. The platform will overcome prior barriers and will be free of charge for all to use.[154] In practice, consumers encountering a problem with an online purchase will be able to submit a complaint online, in the language of their choice, through the ODR platform.[155] As would be expected, the ODR platform will serve as the sole communication device, allowing the parties to receive notices via the system[156] and to agree upon the ADR entity to resolve their dispute.[157] Importantly, as will be discussed later, it is arguable at this point that the ADR submission agreement is created between the parties.[158] "When they agree, the chosen ADR entity will receive the details of the dispute via the ODR platform."[159] Because "[t]he ODR platform will be connected to the *national* ADR entities[,][160] the platform will allow national ODR advisors tasked to "provide general information on consumer rights and redress in relation to online purchases,"[161] and "assist with the submission of complaints and facilitate communication between the parties."[162] Most importantly, "the new rules will provide for ADR entities to settle a dispute within 90 days[,]"[163] a significantly quicker process than many existing small claims courts throughout Europe.[164]

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153. EUROPA, Press Release, *supra* note 145.

154. *See* ADR Directive, *supra* note 148, art. 9; EUROPA, Press Release, *supra* note 145.

155. *See* ODR Reg., *supra* note 152, art. 7; ADR Directive, *supra* note 148, art. 17; EUROPA, Press Release, *supra* note 145.

156. EUROPA, Press Release, *supra* note 145.

157. *See* ODR Reg., *supra* note 152, arts. 5, 8; EUROPA, Press Release, *supra* note 145. *See also*, Raymond, *Gorilla*, *supra* note 133,

158. Pre-dispute arbitration clauses are generally thought of as unfair contract terms when E.U. consumers and their corresponding consumer protection laws are implicated in the transaction. This is *not* the US position. *See* Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 Loy. U. Chi. Int'l L. Rev. 11, 27 (2012); Raymond, *Gorilla*, *supra* note 133.

159. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145. *See* ODR Reg., *supra* note 152, art. 8; EUROPA, Press Release, *supra* note 145.

160. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145. *See* ADR Directive, *supra* note 148, art. 27; ODR Reg., *supra* note 152 art. 6.

161. Including a high level of transparency about the process and prior outcomes, statistics, etc. *See* ADR Directive, *supra* note 148, art. 7; *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145.

162. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145. *See* ADR Directive, *supra* note 148, art. 11; EUROPA, Press Release, *supra* note 145.

163. *Alternative Dispute Resolution and Online Dispute Resolution*, *supra* note 145. *See* ADR Directive, *supra* note 148, art. 8; EUROPA, Press Release, *supra* note 145.

164. For example, the Regulation on European small claims the gives the defendant thirty days to respond to the complaint. Regulation 861/2007 of the European Parliament and of the Council of 11 July 2007 on Establishing a European Small Claims Procedure, art. 5, 2007 O.J. (L 199).

It is important to note that the European Union legislation will affect individuals' access to justice in a substantial and real manner. As noted by Commissioner Borg. "This improvement will not only prevent overburdening court proceedings with low value affairs, but it is expected to motivate consumers to seek redress in the first place."[165] The Commissioner's comments are reflective of the improvement of consumer protection through the use of ADR and ODR.[166] As noted by Dr. Ann Neville, Director of European Consumer Centre Ireland:

> The ADR Directive and ODR Regulation when implemented will allow business to consumer disputes to be settled fast, effectively and cheaply without going to court. Effective ADR offers both business and consumers a win-win situation encouraging consumers to spend secure in the knowledge that if something goes wrong it is easy for them to access redress while business will avoid the costs of going to court.[167]

Although some commentators doubt the veracity of these estimates,[168] few can argue against the numerous comprehensive research studies that all point to the need to improve access to justice in the European Union, especially in cross-border situations. The creation of a nationally supported ADR system as well as the support and monitoring of an ODR platform will undoubtedly lead the way for future discussion both in terms of access to justice and the widespread use of a public full service platform.

D. *United Nations Document on Cross-Border ODR*

Despite the growing success of ODR in both public and private domestic markets in many countries, the harmonized international cross border business to consumer (B2C) e-commerce alternative dispute resolutions market is surprisingly non-existent.[169] In fact, until recently, no international legal body had even attempted to craft a cross border legal instrument. Currently, the United Nations Commission on International Trade Law is facilitating the most prominent work in the area. Drawing its mandate from the U.N. General Assembly's forty-third ses-

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165. *Id.*

166. *See generally* Hörnle, *supra* note 311.

167. EU2013, *supra* note 32.

168. *See* DEP'T FOR BUS., INNOVATION & SKILL, GOVERNMENT RESPONSE TO THE CALL FOR EVIDENCE: EU PROPOSALS ON ALTERNATIVE DISPUTE RESOLUTION 9 (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190192/12-674-government-response-eu-proposals-alternative-dispute-resolution_1_.pdf.

169. Rep. of the Comm'n on Int'l Trade Law, Working Group III (Online Dispute Resolution), 44th Sess., June 27–July 15, 2011, ¶ 31, U.N. Doc. A/CN.9/716 [hereinafter Working Group III Rep.]. That is not to say that several regional and domestic systems do not exist, many of which have served as an influence to the UN ODR text. *See id.* ¶¶ 32–34.

sion,[170] the United Nations Online Dispute Resolution (ODR) Working Group has worked for four years to create a series of instruments to facilitate platform development in a three-phase dispute resolution process.[171] The working Group is to create several instruments: (1) procedural rules; (2) accreditation standards, and minimum requirements for ODR providers and platforms; (3) guidelines and minimum requirements for ODR neutrals; (4) principles for resolving ODR disputes; and (5) a cross-border enforcement mechanism.[172] The ODR system is designed to create a quick, simple, and inexpensive means of resolving disputes involving "low-value, high-volume, cross-border, electronic commerce transactions."[173]

To date, the UNCITRAL Working Group has decided to divide the text into two tracks, one covering the business-to-business (B2B) platform, and one covering the business-to-consumer (B2C) platform.[174] In effect, B2C disputes will be handled under a slightly different set of rules,[175] primarily because national laws differ in terms of consumer protections.[176] One of the main sticking points is the differing laws in terms of pre-dispute arbitration clauses and the final and binding nature of an arbitration award.[177] As a result of these substantial and important differences, the current process envisions the parties making a declaration and the applicable national law being applied via the neutral or the platform.[178] The ability to make this declaration, within the platform itself, is a perfect example of the increasing use and importance of technology within the dispute resolution world. As consumers are able to select more options, the system will send the individual down a different path of choices.

However, the drafting of the cross border text is a textbook example of the problems associated with creating any cross-border instrument, especially when substantive law and enforcement is included within the instrument. The sticking points of the group highlight major issues that will need to be addressed by drafters within cross-border instruments, including: (1) the need to coordinate any dispute resolution mechanism with national rules of private international law (conflict of laws); (2) the need to ensure the enforcement of national law, such as consumer protection laws; and (3) the need to coordinate with already existing international law, such as the international arbitration law framework.[179] Specifically in re-

170. Rep. of the Comm'n on Int'l Trade Law, 55th Sess., June 12–July 7, 2000, ¶ 385 U.N. Doc. A/55/17.

171. *See generally* Working Group III Rep., *supra* note 169.

172. *See id.*, ¶ 115.

173. Working Group III Rep., *supra* note 169.

174. U.N. Comm'n on Int'l Trade Law, Working Group III (Online Dispute Resolution), *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules*, ¶¶ 6–7, U.N. Doc. A/CN.9/WG.III/WP.119 (Mar. 11, 2013).

175. This will require a declaration by the party to establish their status. *See id.* ¶¶ 8, 15.

176. *Id.*

177. *See id.*

178. *Id.*

179. *See* Brand, *supra* note 158, at 11.

lation to the design of an ODR mechanism, the difficulties within the drafting of this text highlight the complexities and the importance of implementing a mechanism for the rapid and simple enforcement of outcomes.[180]

The process and the difficulties associated with creating a cross-border ODR instrument should not be overlooked.[181] Cross-border issues relating to the access to justice—be they consumer protection, privacy rights, or even right of expression—will continue to be sticking points for legislative drafting. Technology can help overcome many of the boundary based-issues, but some commentators are quietly asking if technology will be able to adequately apply applicable local law in an appropriate manner.[182]

IV. Toward a Technology-Based ODR Platform

The absence of simple, cost-effective, fair, and transparent third-party administered online dispute resolution platforms denies access to justice to many individuals seeking redress of grievances. Even with the success of Lok Adalats in India, for example, millions of cases remain pending. Technology can be used to greatly improve individuals' access to justice. As more stakeholders begin to use online platforms as small claims courts, one must ask what the future of dispute resolution will look like. In many ways, the regions of the world surveyed are far apart in determining the best manner in which to use technology within the justice system. This section will consider next steps, gaze into the crystal ball to predict problems arising within ODR systems, and make a modest suggestion for resolving some of these issues.

A. *What is Coming Next in ODR*

While many justice systems are beginning to embrace ADR, some sectors, particularly those that dislike mandatory arbitration clauses within contracts of adhesion, are beginning to question the widespread use of ADR.[183] The growing hesitations toward widespread use of ADR will

180. *See* Raymond, *Gorilla*, *supra* note 133.

181. This raises the issue of to what extent the Internet should be considered a "borderless" environment. Two schools of thought play out, one depicting cyberspace as a commons largely free from governmental interference, while the other considers cyberspace to be an extension of national territory. *See, e.g.*, Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 Calif. L. Rev. 439, 519 (2003) (depicting cyberspace as a traditional commons and warning that inaction will lead to an intractable digital anticommons); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1367 (1996) (arguing that "[g]lobal computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility—and legitimacy—of laws based on geographic boundaries").

182. This is based on the authors' own first-hand knowledge of discussions.

183. *See generally*, Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses within Contracts of Adhesion*, 91 Neb. L. Rev. 666 (2013) (discussing the use of contracts of adhesion in light of the recent Supreme Court case AT&T Mobility LLC v. Concepcion)) [hereinafter Raymond, *Protecting Consumers*].

likely extend to ODR. Founded in distrust of an unknown system, individuals' hesitation may be well placed as the ODR system lacks legal protections and is created by a business community that may not always have the best interest of the consumer as its priority.[184] As can be seen above, this distrust by consumers of ADR is starting a groundswell of legislative response in India and the European Union. A similar movement is also underway in the United States, as is discussed next.

The regulation of ODR, though, is taking a drastically different form in various jurisdictions, which in the long run may lead to fundamentally different forms of ODR. For example, within the next ten years it is likely that many disputes within the European Union will be resolved online in a virtual small claims court.[185] Individuals will have the ability, should they choose, to file a claim online, submit the information, seek assistance from local authorities, and resolve the dispute via the use of a multilingual (potentially mobile) online platform. As a matter of importance, one must appreciate these platforms will be monitored and will be subject to governmental intervention. These are public justice systems that are merely delivered in an online environment.

In contrast to the European Union, the United States has long recognized parties' ability to contract as they see fit, with few exceptions or limitations, even in the field of dispute resolution clauses.[186] The wide support for parties' ability to contract for dispute resolution has led to the growth of the dispute resolution industry. These entities provide dispute resolution services within the context of a business endeavor with no regulation, or oversight and few restrictions. In the United States,, dispute resolution is a creature of contract, which allows for wide deference to be given to the parties' agreement to resolve the dispute as the parties see fit. Of course, the issue is that these clauses are often not a product of negotiations, leaving the business to craft the clause. The agreement will undoubtedly contain consent to participate in the platform and will likely include consent for a high level of automation and technology, without necessitating any due process protections. Of course, platform designers may elect to respect due process and consumer protections, but there is no requirement to do so within the United States. Unlike the public systems of the European Union, Mexico, and to a lesser extent India,[187] these private platforms will have no oversight and no judicial connection. Also, unlike the European Union,[188] the U.S. judicial system, especially the U.S. Supreme Court,[189] will support the decisions generated from these plat-

184. *See, e.g.,* William Black, *How Trust is Abused in Free Markets: Enron's 'Crooked 'E'*, SSRN (Jan. 16, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536532 (last visited July 31, 2014).

185. *See* EU2013, *supra* note 32 (comments of Dr. Ann Neville).

186. *See* Raymond, *Gorilla*, *supra* note 133.

187. *See* discussion *supra* Part III.C.

188. *See* discussion *supra* Parts II.A, III.B, III.C.

189. *See* Raymond, *Gorilla*, *supra* note 133; Raymond, *Protecting Consumers*, *supra* note 183.

forms as the parties agreed to resolve their dispute in arbitration and the Federal Arbitration Act strongly favors arbitration.[190] There is nothing to suggest that challenges to the use of technology, including automated platforms, will cause any issues as these platforms will be used with the consent of the parties.[191] As a result, these private ODR platforms will likely include arbitration as a final stage of resolution and the award may be easily enforceable in a local court system, irrespective of the use of an algorithm.

As the ODR community looks ahead, many within the community are going to the extremes and arguing that ODR can become a fully automated process.[192] In fact, platforms such as Cybersettle[193] and Clicknsettle[194] allow parties to settle their dispute with no human intervention whatsoever. This new breed of ODR is an algorithmic process, not merely an online communications device used to facilitate discussions between the parties. For example, there are now more than one platform that exist that are designed as "completely automated web based communications tool[s]"[195] allowing parties to communicate via the platform and attempt to reach a settlement amongst themselves.[196] The newest platforms, however, use automation for the majority—and in some cases all—of the process.[197] In fact, in 2006 prominent dispute resolution author Professor Dr. Morek argued, "[S]oftware is designed to support, and in certain instances replace 'live' neutrals. Thus, the role of technology in ODR must not be underestimated."[198] The next generation of ADR will likely be partially or fully automated online dispute resolution, a logical extension of the same drive for efficiency that has fueled India's quest to enhance judicial efficiency through implementing ADR reform generally and Lok Adalats specifically. As a result, it is no longer merely enough for us to "think whether, when dealing with disputes, we need to physically converge in courts."[199] It is now time for us to begin asking how much technology should be used in dispute resolution, in what circumstances, and at what cost?

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190. *See* Raymond, *Gorilla*, *supra* note 133.

191. *See id.*

192. *See* Gage, *supra* note 122.

193. *See* CYBERSETTLE, http://www.cybersettle.com (last visited July 31, 2014). The website is now less descriptive about the Cybersettle platform and more about the new initiative in payment. For a full discussion, see Dusty Bates Farned, *A New Automated Class Of Online Dispute Resolution: Changing The Meaning Of Computer-Mediated Communication*, 2 FAULK. L. R 335, 338–46 (2011); Goodman, *supra* note 9.

194. Richard Michael Victorio, *Internet Dispute Resolution (IDR): Bringing ADR Into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279, 287–88 (2001).

195. Goodman, *supra* note 9.

196. *Id.*

197. *Id.* at 12.

198. Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 U. TOL. L. REV. 163, 178 (2006).

199. *Susskind Attacks CJC for Dismissing Online Dispute Resolution*, *supra* note 1.

B. *ODR Platforms Need Automation to Survive*

As was previously stated, the private full service platforms, such as Modria, are touted as the "small-claims court for the 21st century."[200] In fact, Modria may end up being the first cross-border small claims court. The survival of the Modria platform is not guaranteed as the majority of private ODR platforms have failed. In fact, a review of "ten Years of ADR" completed in 2006 by Ethan Katsh[201] sheds light on the sheer number of platforms that no longer exist as ODR entities. Many creators of these platforms cite one primary reason for failure: cost.[202] In fact, public dispute resolution platforms have also suffered and failed due to the costs associated with the platform and the administration of justice, even in a publicly supported platform. Even in the private context, these costs are difficult to pass on to the user as the dispute in question often involves a small value dispute around $5.00. Few people will pay $5.00 to resolve a $5.00 dispute. Consequently, platform designers are left with a serious question of how to fund the project. And if the projects can find funding, how will the providers maintain the platform over time when the costs are high?

For technology enthusiasts the answer to this question is almost obvious—reduce costs by automating as much of the system as possible and then further reduce costs by removing the most costly element of the platform, i.e., the human neutral decision maker. This approach is already being reflected by platform designers, as enumerated by the Modria team in the *Wall Street Journal*. "Modria's goal is to resolve about 90% of cases through software, without humans."[203] Indeed, automation of a large part of the ODR system is already being used in both private and public alternative justice systems. As has been discussed, numerous systems allow online decision support systems that permit everything from electronic filing of claims to the filing of forms and similar submissions of information.[204] In fact, some negotiation support systems, such as DEUS, allowed the parties to communicate within the platform, to exchange offers, and to view graphs and other interactive tools used to compare the current offer to initial offers and the expectations that lead to the offer.[205] Moreover, a

200. Gage, *supra* note 122.

201. *See generally* Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. Tol. L. Rev. 101 (2006) (discussing the progression of ODR and the various platforms that have succeeded and failed).

202. *See* Nicholas W. Vermeys & Karim Benyekhlef, *ODR and the Courts*, *in* Online Dispute Resolution: Theory and Practice, a Treatise on Technology and Dispute Resolution, *supra* note 8, at 295, 298–99 (discussing Michigan's Cyber Court and the loss of funding as one looming reason behind the projects abandonment).

203. Gage, *supra* note 122.

204. *See supra* Part 3.2.

205. *See* Arno R. Lodder & John Zeleznikow, *Artifical Intellegence and Online Dispute Resolution*, *in* Online Dispute Resolution: Theory and Practice, a Treatise on Technology and Dispute Resolution, *supra* note 8, at 61, 63–64.

few private systems exist that allow for logarithms and other types of technology based metrics to be employed in online mediation as intelligent negotiation support.[206] In these systems, parties rank and value each issue within the dispute by allocating a sum amongst all issues.[207] The platform then uses the numbers to optimize each other's desires and to make suggestions of a fair outcome.[208] These platforms, such as the well-known Smartsettle, assist the parties in clarifying interests, identifying trade-offs, and generate optimal solutions.[209]

However, artificial intelligence and algorithms, such as intelligent negotiated support systems, are newer to ODR—but that should not be read to assume this technology is not established. For example, case-based reasoning systems,[210] such as PERSUADER, integrate "case based reasoning and game theory to provide decision support."[211] Within the now expired platform, the application of case-based reasoning lead to the parties being able to explore suggested "solutions, to debug proposed solutions, and to persuade a disputant of the utility of a solution."[212] The most important aspect of case-based reasoning is to be "able to utilize the *specific* knowledge of previously experienced, concrete problem situations (cases). A new problem is solved by finding a similar past case, and reusing it in the new problem situation."[213] But even though the system was widely regarded as groundbreaking and received much attention, case-based reasoning was only the first stage in artificial intelligent design. Today, the use of algorithms and case-based learning is essential to any modern platform. For example, noted eNegotiation authors Ernest Thiessen, Paul Miniato, and Bruce Hiebert, suggest:

> When a negotiation problem is modeled, a computer can act as an intelligent agent using optimization algorithms [sic] that seek the best solution. Such algorithms create a representation of party preferences that can be used to generate packages (bundled positions on issues) that are helpful in the process. Such suggestions for resolution can be based on private information that remains private to the parties but is visible to the neutral eNegotiation system. A computer generated package can encourage the process,

206. *Id.*

207. *Id.* at 65.

208. *Id.*

209. *Id.* at 64–65.

210. *See generally*, Agnar Aamodt & Enric Plaza, *Case-Based Reasoning: Foundational Issues, Methodological Variations, and System Approaches*, 7 ARIFICIAL INTELLIGENCE COMM. 39 (1994), *available at* http://www.iiia.csic.es/People/enric/AICom.html.

211. Emilia Bellucci & John Zeleznikow, *AI Techniques for Modeling Legal Negotiation*, 1999 PROC. OF THE 7TH INT'L CONF. ON ARTIFICIAL INTELLIGENCE & THE L. 108; Aamodt & Plaza, *supra* note 210 at 40–45.

212. Janet Kolodner, *Case-Based Reasoners*, GATECH.EDU, http://home.cc.gatech.edu/jlk/10.print (last visited July 31, 2014).

213. Aamodt & Plaza, supra note 210 at 39.

> resolve impasses, and improve negotiated agreements—all without reducing the control of the process by the negotiating parties. 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.[214]

eNegotiation, like so many aspects of our lives benefits from technology, especially the gathering and use of information to identify patterns and predict responses. As these systems continue to become more advanced—and contain more information—there will be little argument against the continuing increased use of these platforms. The cost savings per individual dispute, the ability to quickly and fairly resolve individual disputes, and the ability to resolve massive numbers of disputes—all while learning from each outcome—will likely lead to an increased use in automation technology and algorithms in ODR.

C. *A Balance Must be Struck between Efficiency and Justice*

Despite the growing chorus of arguments supporting the wider use of technology in dispute resolution, one must ask how much technology individuals will allow before doubting the legitimacy of the online justice system. According to Professor Amy Gangl, three factors affect the assessment of the legitimacy of a judicial decision.[215] First, individuals must believe that the decision-making process takes their views into account.[216] Second, decision making should be neutral and all opinions must be granted equal consideration without favoritism.[217] Third, citizens must trust the judicial system and its representatives.[218] Of course, each of these issues is ever present in current ODR platform design debate. All of these assessment points demand that we first examine one essential question—is the increasing use of technology a challenge to the legitimacy of the alternative justice system?

As a case in point, in 2002, Michigan enacted legislation creating a court-annexed ODR project colloquially titled 'Cyber Court.'[219] For the

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214. Ernest Thiessen, Paul Miniato & Bruce Hiebert, *ODR and eNegotiation*, *in* Online Dispute Resolution: Theory and Practice, a Treatise on Technology and Dispute Resolution, *supra* note 8, at 329, 333.

215. Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 Pol. Behav. 119, 121 (2003).

216. *Id.*

217. *Id.*

218. *Id.*

219. The once promising domain of http://www.michigancybercourt.net is now a traffic-forwarding page for a California law firm. *See* H.B 4104 (Mich. 2002). *See also*, Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J. L. & Tech. 51, 55 (2002) (discussing the court in detail).

purposes of this Article, the full explanation of the system is best left to other researchers; suffice it to say, it was a full-service online cyber court.[220] For our purposes, it is important to note that the project was ultimately abandoned. Some authorities argue it was the loss of funding that was the major issue in this case;[221] however, others note a groundswell of criticism ranging from "reluctance of parties and lawyers to gamble on an untested system,"[222] to a general distrust of technology,[223] misunderstanding or failing to understand the system,[224] and a concern from witnesses and parties that the information they shared would not be appropriately protected from wider release.[225] Mistrust of the system, even if the mistrust is based in wrong assumptions, is a fundamental issue within ODR, just as it can be with ADR, generally.

To overcome this mistrust, platform designers and policymakers must consider three issues. First, despite what ODR enthusiasts may suggest, automation should not be used for every dispute. Legitimacy is in the eye of the beholder, and a balance must be struck between promoting efficiency and ensuring the procedural protections inherent to improving access to justice. As demonstrated by consumer behavior in the European Union and the resulting legislation as well as the failure of the Michigan online platform,[226] to name but a few examples, individuals are still not ready to be engaged in an automated process relying on an algorithm in every instance. Updating basic information, handling minor disputes and similar actions is probably within the realm of acceptability as is communicating through an online platform. However, full automation including the use of algorithms to decide child custody, discrimination cases, and other highly regulated and important issues, is probably still a step too far for many individuals. Rooting such processes, to the extent possible, in history and cultural norms, such as the Lok Adalats have attempted,[227] might help ameliorate some of these concerns. However, one must still recognize and appreciate when the process has lost legitimacy because of the overuse of technology.

Second, the ODR system must also meet standards of legitimacy.[228] Noted authors Ruha Devanesan and Jeffrey Aresty emphasize a familiar set of legitimacy criteria for the ODR system: transparency, ("readily-ac-

220. *See* Marc Shulman, *Cyber Court in Michigan*, 80 MICH. B.J. 45, 45 (2001), *cited in* Vermeys & Benyekhlef, *supra* note 202, at 298–99.

221. *See* Vermeys & Benyekhlef, *supra* note 202, at 298–99, 310.

222. *See* Brian A. Pappas, *Online Court*, 12 UCLA J.L. & TECH. 1, 10 (2008) *cited and commented on in* Vermeys & Benyekhlef, *supra* note 202, at 299–300.

223. *Id.*

224. *Id.*

225. *Id.*

226. *See supra*, text accompanying note 141.

227. *See* Martinez et al., *supra* note 53, at 809.

228. *See infra* discussion accompanying Part V.2. (regarding the legitimacy of polycentric regulation).

cessible information about all aspects of their [ODR] services"),[229] independence and impartiality (operating independently from business and government interest and without bias favoring those interests), effectiveness (means to ensure compliance), accessibility (ease of use), flexibility (ability to adapt to circumstances of the dispute), fairness and integrity (observe due process standards), and affordability ("particularly in light of the amount of compensation sought").[230] When considering these criteria, India serves as a reminder of the problems associated with a questionable public ADR system.

India has implemented a fast track court in an effort to improve the time it takes for the court to resolve disputes. However, the system has been created with inadequate procedural protections and absent larger rule of law reforms, as was discussed in Part II. For example, in the "Best Bakery" case, fourteen Muslims were murdered in Vadadara on March 1, 2002. All twenty-one of the accused were acquitted by the Fast Track Court of H.U. Mahida despite questionable decisions regarding witness testimony and a lack of effective cross-examination.[231] The National Human Rights Commission (NHRC), in its Special Leave Petition to the Supreme Court of India, argued against the verdict. The NHRC petition stated, "instead of making efforts to strengthen the prosecution case, it appears that the steps to the contrary were being taken."[232] At the time, the judges themselves who first decided the case recognized the ludicrousness of the situation. "The court of justice is not a court of justice in the real sense, but it is a court of evidence," Judge Mahida remarked in his judgment.[233] Regardless, the fast track court enjoys powers, including holding the investigation en camera, but chose to abrogate them resulting in a gross miscarriage of justice.[234]

This episode underscores the true cost of the lack of procedural protections in Lok Adalats and other fast track courts, with potential lessons for ODR as well. As the ODR system matures and becomes even more widely utilized, it could eventually result in the creation of a parallel system of rapid "cheap" justice lacking the procedural protections inherent in courts of law. Policymakers should avoid a similar outcome in which the proscribed cure was more detrimental than the original disease.

Third, and finally, of equal importance when considering legitimacy is the trend in the U.S. justice system to allow unregulated, private ODR systems to administer justice.[235] When private actors are allowed to ad-

229. Anita Ramasastry, *Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 WASH. L. REV. 159, 173 (2004).

230. *Id. See also* Devanesan & Aresty, *supra* note 8, at 265.

231. *See, e.g.*, Sonia Sarkar, *Need for Speed*, TELEGRAPH (Jan. 30, 2013), http://www.telegraphindia.com/1130130/jsp/opinion/story_16499488.jsp#.UemvhVOoXF8.

232. Sridhar, *Miscarriage of Fast Track Justice*, supra note 44.

233. *Id.*

234. The Supreme Court ultimately agreed with the NHRC and ordered a new trial in a court of law. *See id.*

235. *See supra* text accompanying notes 198–203.

minister justice we must demand a higher level of scrutiny. This is especially true when the ODR system gathers its authority from the consent of the parties via a contract of adhesion and provides no alternative other than the ODR platform to resolve the dispute. Within the domestic U.S. context, the Supreme Court has ruled that ADR, especially arbitration, is a creature of contract and subject to traditional contract interpretation and enforcement.[236] Within U.S. law, without legislative guidance or regulation, the use of automation will presumptively be determined as a matter of contract law as the use of automation will be just one term within the larger ADR contract clause. As such, the unregulated nature of the emerging private automated justice system should give us more than a moment pause as the absence of regulation fails to ensure a balance between justice and efficiency, thereby eroding the legitimacy of the system.

D. *Ethical Dilemmas Should Not be Overlooked*

It is important to recognize that an increased recognition of the need to improve access to justice may lead to some unfortunate ethical dilemmas. For example, the ADR movement in India is having real effects, and has become so successful in some ways that it has, perhaps paradoxically, led to questions regarding the pressure placed on individuals for a quick resolution. This passage raises the ugly possibility of coercion behind at least some percentage of India's ADR success. Of course, this passage takes on additional significance as the arbitration award is binding under the Indian Arbitration Act.[237] With systems such as this, potential ethical issues abound as the arbitrator is empowered to resolve the dispute between the parties without many procedural protections but with all of the powers inherent in courts of law.

As private businesses begin to become justice providers one must also consider conflicts of interest. For example, in as recently as 2000 an entity known as "Insurance Services Office, Inc., which provided consulting and technical services to insurance brokers and companies, purchased sixteen percent, or $4 million, of the NAM Corporation through shares, which operates clickNsettle.com and provides mediation and arbitration ser-

236. *See, e.g.,* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (holding an arbitration agreement enforceable despite State laws of unconscionability); Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (explaining basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-220 (1985) (holding Congress intended courts to "enforce [arbitration] agreements into which parties had entered," and to "place such agreements 'upon the same footing as other contracts'"); *see also* Stephen L. Hayford, *Commercial Arbitration and the U.S. Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996); Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343 (1995); Stephen L. Hayford, *Law In Disarray: Judicial Standards For Vacatur Of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

237. Martinez et al., *supra* note 53, at 809.

vices."[238] One can expect purchases of this type to raise concerns about the objectivity and impartiality of a business to handle certain types of disputes.[239] As business entities allow justice to be provided by fellow business entities, we must begin to ask how to handle conflicts that will inevitably exist when close business associates decide cases or run businesses that dispense justice.

Private justice raises important issues of ethical considerations in ADR and ODR design. Although such an important and complex topic deserves deep examination, for now we simply note that the rush to ADR, which has as its ultimate form fully-automated ODR, raises profound ethical issues about the nature of justice and what role constitutionally-guaranteed due process protections will play in the everyday resolution of disputes in the twenty-first century. Further research is required to explore the implications prior to widespread adoption of ODR as a true mechanism of justice.[240] As noted by the Madras High Court, "justice has to be imparted: [sic] justice cannot be hurried to be buried. We have to 'decide' the cases and not just 'dispose them of (sic).'"[241]

V. The Need for Regulation and a New Approach

This Article has explored comparative ADR and ODR efforts as an access to justice issue, focusing on India, the European Union, and the United States relying on India as an illustrative example. The importance of regulation to increase accountability in ADR and ODR system design has been mentioned throughout. This Part begins the process of unraveling what such regulation might look like and how it could strike the deli-

238. Thomas Schultz, *An Essay on the Role of Government for ODR: Theoretical Considerations About the Future of ODR*, 2003 Proc. of the UNECE Forum on ODR 1, 6 n. 11; *see also* Press Release, ISO, Nam Corporation, Parent Company Of Clicknsettle. Com, Announces That Insurance Services Office, Inc., Acquires 16 Percent Stake In Nam (May 11, 2000), *available at* http://www.iso.com/Press-Releases/2000/NAM-CORPORATION-PARENT-COMPANY-OF-CLICKNSETTLE.COM-ANNOUNCES-THATINSURANCE-SERVICES-OFFICE-INC.html; *see also*, Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 Tul. J. Tech. & Intell. Prop. 55, 87 (2001) (discussing the issues associated with such a conflict of interest).

239. *See, e.g.*, Allen Scott Rau, *On Integrity in Private Judging*, 14 Arb. Int'l 115, 115 (1998). "There are those among us who view arbitration primarily as a business. They are likely to concentrate more on self-interest than the interest of the profession . . . We recognize that arbitrators are no less ambitious than other professionals; we recognize that many of us are dependent on arbitration fees for a livelihood. But self-serving instincts must always be subordinated to the need to uphold the integrity and honor of the profession." *Id.* (quoting *Report of Special Committee on Professionalism of National Academy of Arbitrators (1987)*, Daily Lab. Rep. (BNA) 106, E1, E4).

240. For further information on this topic, *see* Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 Wis. L. Rev. (forthcoming 2014).

241. Chief Justice R.C. Lahoti, Keynote Address Delivered at the Conference of the Chief Ministers of States and the Chief Justices of High Courts: Envisioning Justice in the 21st Century (Sept. 18, 2004).

cate balance between promoting accountability without unduly affecting innovation in a rapidly changing legal environment.

A. *Access to Justice Must be Regulated*

Regulatory theorists have identified an array of modalities that may be used to control patterns of behavior within complex systems.[242] These include strategies ranging from command and control to self-regulation including relying on markets to reach a desired outcome,[243] such as enhancing access to justice. Professor Lawrence Lessig identified four modalities of cyber regulation, which are architecture. law, the market, and norms that may be used individually or collectively by policymakers.[244] These modalities are mentioned here since it is important to recognize that policymakers are far from the only regulators of ADR and ODR systems. For ODR in particular, the code giving rise to the architecture of the system itself is a critical determinant, which is in turn shaped by other considerations including the market and consumer preferences. Thus, consumer education to establish norms and expectations about necessary procedural protections in rapidly expanding ADR is vital to its ultimate success.

Most systems that are treated as a means to improve access to justice must be regulated, especially in situations where the outcome is to be enforced by the court with minimalist review. However, as can be seen from the above ODR platforms, many providers are currently within the private sector and are given authority via contract. Currently, little regulation exists to prevent providers from focusing on cost and efficiency over due process. One should be hesitant, however, to respond with hostility to potential issues with a private ODR platform as none are currently in widespread use. As such, minimalistic intervention prior to the maturity of the ODR industry seems preferable, though it is also true that the system will be difficult to change once it is fully implemented. Moreover, the creation of an international standard of due process minimum standards within alternative dispute resolution already exists. The New York Convention has long provided due process protections in arbitration involving cross-border international business to business commercial disputes.[245] One can

242. *See* ANDREW D. MURRAY, THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT 29 (2007).

243. *See id.* at 28 (comparing how the regulatory strategies modeled by professors Baldwin and Cave, Thatcher, and Lessig might be applied to cyberspace); ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION 34 (1999) (categorizing regulatory strategies based on whether governments use resources to command, to deploy wealth, to harness markets, to inform, to act directly, or to confer protected rights).

244. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–63 (1998) (describing four constraints or modalities of regulation—law, norms, the market, and architecture—that "constitute a sum of forces that guide an individual to behave, or act, in a given way").

245. For example, Article V provides for basic due process protections such as the right to receive notice, the right to present the case. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3.

imagine a day when these commercial business protections are afforded to all consumers entering into all ADR agreements. That day is far from here as the UN Working Group III has discovered that few nations can agree on the best means to protect online consumers.[246] Consequently, international regulation on improving access to justice will not likely be forthcoming for the foreseeable future as consumer protections often stand in the way.

The increasing use of algorithms is an issue anticipated by the European Union ADR Directive, which requires natural persons to be in charge of ADR and to possess the necessary expertise and demonstrate impartiality from both parties. Unfortunately, as drafted, there is no clarity in the provision,[247] which leaves the definition of 'be in charge'openended. One has to consider the real possibility that a natural person will have review oversight and will not actually participate fully in the decision-making process. While this is a step in the right direction, it misses at least three key issues that must be addressed.

Requiring a natural person to be in charge of *all* ADR and ODR is likely a step too far. Many disputes can be resolved without a natural person. Automation, artificial intelligence, and algorithms are not presumptively bad—especially in the low-value online sales context. The system must ensure due process, including transparency and neutral decision making algorithms, but a natural person is often not needed to accomplish that feat. In fact, 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. Regulation, though, may well be needed to ensure any artificial intelligence uses a decision matrix that is bias free. But any regulation, be it at an international level or a regional or domestic level, must start from a position of increasing trust in the system, with the focus placed on protecting due process entitlements. The usual, throw the baby out with the bathwater approach, so often embraced by anti-ADR advocates,[248] must be rejected as a well-designed, ODR platform can protect individuals' due process entitlements. However, as the India case study demonstrates, some minimalist regulation may be required to promote access to justice.

B. *Polycentric Regulation*

Given the slow progress of U.N. efforts to increase access to justice, policymakers at the national and regional levels are undertaking regulatory interventions described in the U.S., European Union, and Indian case studies above. Such initiatives may be conceptualized as a polycentric approach to enhancing access to justice, a fact that has been underap-

246. *See supra*, discussion and footnotes accompanying Part III.D.

247. *See* ADR Directive, *supra* note 148, arts. 15–16.

248. Such as those that continue to introduce Congressional Act designed to eliminate the use of ADR. *See, e.g.*, Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (1st Sess. 2013).

preciated in the literature.[249] Polycentrism has arisen across an array of disciplines, from law to urban studies, and involves the study of multiple power centers in a given environment.[250] Professor Vincent Ostrom defined a "polycentric" order as "one where many elements are capable of making mutual adjustments for ordering their relationships with one another within a general system of rules where each element acts with independence of other elements."[251] This approach recognizes that the state is only one of many actors in a polycentric system.[252] It is the desire to address some common concern that ties together the various state and nonstate actors in a polycentric system, which can then enjoy "mutual monitoring, learning, and adaptation of better strategies over time."[253]

Polycentric regulation may provide a path forward to enhance procedural protections and improve access to justice in the ADR and ODR context. Indeed, Professor Elinor Ostrom created an informative framework of eight design principles for the development of polycentric systems.[254] Not all of Professor Ostrom's design principles are applicable in the ADR context, but several have some salience. For example, the importance of monitoring, the need to establish enforceable norms of behavior, and, above all, the requirement of graduated sanctions and low-cost, legitimate conflict resolution systems are critical for the continued uptake of ADR and ODR. Indian, U.S., and European Union policymakers should take this into account, as should international negotiators at the U.N. Indeed, another insight of polycentric regulation is that an inflexible comprehensive international regime could actually stifle innovation by crowding out smaller-scale efforts that might be more effective at enhancing access to justice.[255] The vital role of the private sector and nations

249. *But see* Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1013 (2011) (discussing polycentric regulation in the human rights NGO context); S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29, 69–71 (2001) (calling for "a more participatory, polycentric, and result oriented judicial process" in the Indian context).

250. *See, e.g.*, SURYA PRAKASH SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW 1-17 (1996); Robert C. Kloosterman & Sako Musterd, *The Polycentric Urban Region: Toward a Research Agenda*, 38 URBAN STUD. 623, 623 (2001).

251. Vincent Ostrom, *Polycentricity (Part 1)*, *in* POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS 52, 57 (Michael Dean McGinnis ed., 1999).

252. *See* Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 137–40 (2008).

253. Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550, 552 (2010) [hereinafter E. Ostrom, *Polycentric Systems*] ("Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric unit").

254. *See* Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, *in* GLOBAL ENVIRONMENTAL COMMONS: ANALYTICAL AND POLITICAL CHALLENGES INVOLVING A DIVERSITY OF ORGANIZATIONS 105, 117-18 (Eric Brousseau et al. eds., 2012).

255. *See, e.g.*, Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 656 (2010) (citing Andrew F. Reeson

acting as laboratories to identify best practices is also part and parcel of polycentric regulation, which recognizes the importance of such bottom-up efforts. Thus, small like-minded, public-private groupings of key stakeholders should be created to continue the debate about how to improve access to justice across regions, if nothing else as a starting point until further multilateral progress is made.

Polycentric regulation has its faults, but so does waiting for a consensual approach that could come too late to improve access to justice, if at all. Effective polycentric governance is predicated on the difficult task of getting diverse stakeholders to work well together across sectors and borders, while the absence of hierarchical control threatens gridlock. But this conceptual framework has the potential to move the debate about improving access to justice through ADR and ODR in a more productive direction.[256] However, the digital equivalent of field studies needs to be undertaken using innovative methodologies to explore the benefits and drawbacks of applying polycentric governance to these novel contexts.

Conclusion

This Article has considered ADR and ODR in India, the U.S., and European Union through the lens of access to justice. It demonstrated that while public and private ADR and ODR systems have the potential, and indeed in many cases already are, improving efficiency sorely lacking at times in the formal public justice system, the widespread adoption of these systems also risks sacrificing due process protections critical to the functioning of a healthy democracy. This is especially apparent in the case of fully automated ODR, which, in its worst manifestation, could lack due process protections yet be automatically enforceable in courts without the possibility of judicial review. The ongoing debates in New Delhi, Washington D.C., Brussels, and indeed in capitols around the world should be informed by the triumphs and tribulations of past ADR and ODR efforts to ensure that justice is not sacrificed in the name of efficiency.

& John G. Tisdell, *Institutions, Motivations and Public Goods: An Experimental Test of Motivational Crowding*, 68 J. Econ. Behavior & Org. 273 (2008)) (finding "externally imposed regulation that would theoretically lead to higher joint returns 'crowded out' voluntary behavior to cooperate.").

256. See Shackelford & Raymond, *supra* note 240, for further discussion of these principles and their applicability to designing ethical ODR systems.