

# Pathway to Digital Justice and Innovative Mechanisms: An analysis of amicable dispute settlement in Kenya

By Nellys Koyoo\*

## Abstract

*Digital technology continues to transform dispute resolution landscape. In the process however, despite solving numerous problems, it generates new breeds of disputes all together. Since time immemorial, justice has been meted out such that the disputants alongside the adjudicators have to converge at an agreed place and give their part of the story hoping that the adjudicator will facilitate an agreement between them on the issues in contention. By the end of the day, justice will have been done. This article seeks to review the promise of an improved dispute resolution mechanism through technology in Kenya, grounded in less conceptual and physical considerations, and the possibility of justice being achieved digitally.*

## Key words

Digital justice, Alternative Dispute Resolution, Online Dispute Resolution, Technology, Justice

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## **1.0 Introduction to digital justice**

Employment of technology comes with convenience or lack of it. With improved technological investment, one fact that remains to be is that life has been made simpler yet more efficient. This is in almost all the spheres including digital access to justice.<sup>346</sup>

Digital justice has been understood in various contexts. This extends to a mechanism through which justice can be accessed online unlike the previous trend where parties had to be physically present at the courts rooms. This is the essence of online dispute resolution, (ODR). Here, the technology has been understood as effectively transforming the landscape when it comes to dispute resolution.

The concept of digital justice is contextualized to mean the radical technological transformation in the legal process such that there is an advancement in courtroom technology. This is in a bid to ensure that there is fair yet equitable access to justice by the members of the public. Here, a digital space is provided through which problems can be investigated and amicable solutions achieved.

ODR started off as online Alternative Dispute Resolution (ADR), the intention behind it being that it would be an equivalent to ADR mechanisms such as negotiation and mediation, save for the fact that it would be network based. Therefore, the process was intended to mimic the traditional means of settlement of disputes albeit at a distance. Human mediators would be used in the process. However, with the developing technology and robotics inventions, this can be done with the help of robots.

Over time, Judicial systems in Kenya and all over the world are moving swiftly shifting from the bulk paper based judicial procedures and are embracing use of digital technology. In the face of Covid -19, the courts went virtual and justice would be served albeit remotely. Technology made this possible. This article therefore seeks to examine the implications of technology in facilitating access to justice. Conscious that innovations also have a negative side, this article further

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<sup>346</sup>Rabinovich-Einy, Orna, and Ethan Katsh. "Digital justice: Reshaping boundaries in an online dispute resolution environment." *IJODR* 1 (2014): 5.

seeks to propose practical recommendations on the next steps towards digital justice.<sup>347</sup>

## **2.0 Online Dispute Resolution (ODR) in Kenya and Globally**

Online Dispute Resolution (ODR) refers to a wide range of alternative adjudication of disputes without necessarily taking them to court that take advantage of the increased development in Internet and technology. Therefore it culminates in an online resolution of disputes. ODR primarily involves the employment of a range of online technologies ranging from email and video conferencing in facilitating negotiation, arbitration and mediation or a combination of the three. It may be applied to a range of disputes from interpersonal to interstate.<sup>348</sup>

ODR aims at ensuring that disputes are solved at a relatively faster rate as opposed to the long periods that a file can take in court. It also ensures that disputes are resolved at a cheaper price as opposed to litigation which has proven to be very expensive both in terms of money and time. Unlike the sophisticated procedures in litigation, ODR additionally aims at ensuring that justice is meted out in a less technical procedure such that the disputants are able to appreciate the process as well as the result. The speed and convenience of the internet has made these objectives achievable.

An Internet survey was conducted in Malaysia regarding the prospects of using an ODR Platform in the resolution of banking disputes. There were about 109 Respondents. The analyzed data extended to multifarious factors including access to justice and practical understanding of ODR. The findings from the survey pointed out that resolution of disputes as well as access to justice attitudes are among the leading factors that have affected the use of ADR among the bank stakeholders.<sup>349</sup>

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<sup>347</sup> Hensler, Deborah R. "Our courts, ourselves: how the alternative dispute resolution movement is re-shaping our legal system." *Penn St. L. Rev.* 108 (2003): 165.

<sup>348</sup> Mania, Karolina. "Online dispute resolution: The future of justice." *International Comparative Jurisprudence* 1, no. 1 (2015): 76-86.

<sup>349</sup> Oseni, Umar A., and Sodiq O. Omoola. "Prospects of an online dispute resolution framework for Islamic Banks in Malaysia: An empirical legal analysis." *Journal of Financial Regulation and Compliance* (2017).

Does ODR work? It involves the extensive application of technological knowledge to a combination of mediation and negotiation. Therefore, it streamlines traditional means of solving disputes while reducing the formalities as well as complexities of the process. A variety of online tools are used to that effect including “blind bidding”. Here, each party makes a settlement bid that should be unknown to the other disputant after which a software analyzes their suggested offers before providing a binding settlement figure.

Proponents of ODR argue that the mechanism promotes convenience such that parties do not necessarily have to go to an agreed place to have the mediation. This has resulted in scenarios where justice is dispensed even if parties are miles away. Here, geographical distance is no longer a bother. Similarly, by one conducting the proceedings from one’s usual residence, the person gets free and comfortable with the process as opposed to if one would be doing it on strange premises. To add onto that is the fact that a virtual process is cheaper such that the side expense will be less as opposed to if the parties would meet physically in a hotel.<sup>350</sup>

The traditional dispute resolution field continues to view ODR as an area with several gaps and limited relevance. On the other hand, critics argue that technology failures remain to haunt the system. They further argue that human interaction, critical in any adjudication, may be lacking when it comes to virtual processes. They similarly argue that building that cordial relationship with the disputants becomes very difficult when adjudicating virtually. With the skills and tactics of a mediator however, these will be easily achieved.

### **3.0 Key issues in online dispute resolution in Kenya and Globally**

Various issues arise when it comes to online dispute resolution. Some of the issues likely to arise include competence of the online mediator, accountability of the mediator in the process as well as consent and voluntariness of the parties to the process. The fairness of the process as well as the outcome has similarly been a great concern. A discussion of the same is made below:

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<sup>350</sup> Condlin, Robert J. "Online dispute resolution: stinky, repugnant, or drab." *Cardozo J. Conflict Resol.* 18 (2016): 717.

### **3.1 Data security and privacy**

Shared data and personal information is likely to be tampered with in Kenya and globally. People jealously seek to guard their privacy so that not even a single of their personal data should be interfered with. However, in online resolution, one is not sure whether unauthorized parties will have access to the information.

As far as privacy is concerned, there is need to bring to the attention of the parties, the various ways through which their privacy is safeguarded and the means of storing the personal information that they give to mediators and arbitrators. Similarly, the mediating firm should have a privacy policy through which they will be in a position to safeguard their client's privacy. Therefore to this extent, every dispute received in their websites must be treated with due regard to confidentiality.<sup>351</sup>

Encryption has made it possible to enhance confidentiality and data security. This is because it makes it possible for the parties to communicate without the risk of access to the confidential information by third parties. Encryption involves an automated process usually facilitated by algorithms, through which data is made inaccessible to third parties. Therefore in the process, encryption ensures a secure data protection. Decryption on the other hand aims at ensuring such data is not only accessible but also available to third parties.<sup>352</sup>

A method popularly used is asymmetric crypto system. This is a system of guaranteeing confidentiality while using a set of private and public keys for the purposes of encryption and decryption of data. While private keys may be used both in encryption and decryption, public keys on the other hand can only be used when it comes to encryption of sensitive data. Without the key therefore, one cannot read exchanged messages.<sup>353</sup> Similarly, the key that is required to read the

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<sup>351</sup> Ebner, Noam, and John Zeleznikow. "Fairness, trust and security in online dispute resolution." *Hamline J. Pub. L. & Pol'y* 36 (2015): vi.

<sup>352</sup> Rabinovich-Einy, Orna, and Ethan Katsh. "Blockchain and the inevitability of disputes: the role for online dispute resolution." *J. Disp. Resol.* (2019): 47.

<sup>353</sup> Boneh, Dan, Giovanni Di Crescenzo, Rafail Ostrovsky, and Giuseppe Persiano. "Public key encryption with keyword search." In *Advances in Cryptology-EUROCRYPT 2004: International Conference on the Theory and Applications of Cryptographic Techniques, Interlaken, Switzerland, May 2-6, 2004. Proceedings 23*, pp. 506-522. Springer Berlin Heidelberg, 2004.

message is separately sent to the recipient using a different route from that of the message, hence confidentiality of the process.

### **3.2 Automated decision making in Kenya and globally**

Preserving a fair process remains an issue in the face of employment of algorithms in meting out decisions. An issue has always arisen as to who should be held accountable for algorithmic errors. Justice demands fairness in order to be legitimate. Therefore fairness must be preserved at all costs. Despite the jurisdictional variance in civil and criminal procedure, there has always been a legitimate expectation that the outcome will be fair and justiciable.

The more automated decision making in legal systems increases, the more the increase in fair process concerns. An example is in the digital lending industry as well as application for affordable housing plan in Kenya. The immense quantity of digital communication has made fair process difficult if not almost impossible to achieve. Indeed, automated decision making has more often than not failed to satisfy the fair trial requirement. This is because, despite the fact that there might be various situations similar in nature in which if similar rules would be applied given the similar<sup>354</sup> circumstances, a constant automated solution would be reached. However, there exist situations where serious human judgment including empathy will be required if indeed justice is to be done.

Similarly, there should be an expectation that decisions are not only transparent but that they can also be appealed against. When algorithms are used it is almost impossible to challenge their decision. This is partly because they do not offer an explanation as to how they got to that decision. Indeed, some algorithms have gone as far as predicting scores to the effect that charged people are likely to commit similar crimes in the near future, scores that have been relied upon by judges in sentencing.<sup>355</sup>

Provided computers are in a position to accurately predict defendants who are more likely to commit crimes, the criminal justice system should aim towards

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<sup>354</sup> Sela, Ayelet. "Can computers be fair: how automated and human-powered online dispute resolution affect procedural justice in mediation and arbitration." *Ohio St. J. on Disp. Resol.* 33 (2018): 91.

<sup>355</sup> Fortes, Pedro Rubim Borges. "Paths to digital justice: Judicial robots, algorithmic decision-making, and due process." *Asian Journal of Law and Society* 7, no. 3 (2020): 453-469.

conflict prevention as opposed to punishment. One thing however is that the computer must first get it right, otherwise a miscarriage of justice will occur. Better approaches on merging algorithmic efficiency with key tenets of fair trial must be relooked.

### **3.3 Digital signatures and identity in ODR in Kenya and Globally**

Prudence in practice calls for the need of adjudicators having the identity of the parties. This makes it simpler to go about the adjudication process. However, with ODR, especially in cases where it is documents only or email based, it becomes very difficult for the mediator to establish the identity of a party. To this effect there have been cases of parties delegating their duty to facilitate settlement to other individuals not so well conversant with the issues at hand. That results in delayed settlement as a result of the hurdles likely to be encountered in such cases, including delay in production of some relevant documents.

Digital signatures have facilitated the process of online resolution, as one can simply sign digitally as far as the proceedings are concerned. The result is that the digital signature will have a similar legal validity as that of written documents. This plays a key role in ensuring authenticity and integrity of data communication and enhancing trust in the process.

However there arises the urgent need to pass a law that will regulate digital signatures including prescribing the punishments that one will be liable for in case of digital signature forgeries. A perfect example is the Electronic Signatures in Global and National Commerce Act that has been adopted by the European Union (EU).

### **3.4 Trust building in ODR in Kenya and Globally**

Trust is an essential feature of any form of dispute resolution. The trust should not only be among the parties but also between the disputants and the adjudicators, at all times. Therefore a perfect adjudicator must maintain trust with the disputants just as the disputants trust him.

This is unlike the offline settlement of disputes where parties know each other and have a relationship that ought to be restored and maintained. In ODR, the situation

is a bit different as the parties barely know each other. This is because, more often than not, the parties are involved in electronic commercial transactions.

The very fact that communication takes place through exchange of emails and documents therefore makes it very hard on the part of the adjudicator to get the tone of the interaction of the parties. Additionally, it makes it difficult for the mediator to manage the temper of the parties as far as the dispute is concerned. The parties are also not in a position to get to know the tone of the mediator. That may result in them losing faith and trust in him. To this extent, establishment of trust as well as maintenance of the same becomes very difficult. This may in turn make it more difficult and complicated to settle disputes.<sup>356</sup>

### **3.5 Enforcement and Compliance in ODR in Kenya and Globally**

Parties in an online resolution are never certain as to whether the other party will comply with the outcome of the resolution. This is unlike in offline adjudication whereby the agreement that follows such a process can be made to be a contract, legally enforceable and requiring performance, breach of which one will be eligible for damages.

Previous trends point to the fact that more often than not, losers are less likely to comply with the outcome terms. When it comes to a market place arbitration, compliance tends to be attained through threat of exclusion from the marketplace. It is the fear of being excluded and not the outcome, that makes a party comply. There is an urgent need to come up with a legislation on compliance that will stipulate clearly what amounts to compliance as well as a piece of the punishment for any party who fails to comply.

Ideally, outcomes following a resolution should be enforceable. Similarly, parties prefer litigation because the courts are likely to enforce their decisions and ensure compliance with their orders. To this extent the court may be willing to go as far as attaching a person's property and if the person defaults then the property or money will be forfeited. If the court forms an opinion that a person is not

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<sup>356</sup> Schulz, Thomas. "Does Online Dispute Resolution Need Governmental Intervention-The Case for Architectures of Control and Trust." *NCJL & Tech.* 6 (2004): 71.



complying with its orders, it can as well proceed and issue a warrant of arrest against the person.

A parallel enforcement mechanism should be established in the face of online dispute resolution. This will not only add value to the process but also make the process preferable to many people. Futility is a breeding ground for better alternatives. If litigation was successful, ADR would never be exploited. If ADR was sufficient, ODR would be non-existent. There is need to ensure that orders from online dispute resolution are permissible and enforceable. Without enforceability, the process will be futile.<sup>357</sup>

#### **4.0 UNCITRAL, EU and Online Dispute Resolution: Lessons for Kenya and the East Africa Community (EAC)**

Commerce continues to thrive in the face of technological advancement in Kenya, the East African Community (EAC) and globally. E-commerce is a case in point. As a result, online cross border transactions are the order of the day. With the increased use of the Internet in commercial transactions, a dynamic set of disputes relating to such transactions also arise. This leads to the need to develop a parallel mechanism through which such disputes will be amicably solved.

To this effect, the UN Commission on International Trade Law (UNCITRAL) has adopted Technical Notes on online dispute resolution aiming at assisting states solve their disputes on matters e-commerce amicably, while promoting their economies. Right from the preamble clause, the Technical Notes note the fact that there has been a sharp increase in cross border transactions necessitating the review of the situation. It proceeds to exemplify the fact that ODR can assist parties to amicably solve their disputes in a more flexible yet secure manner.

It is also important to note the fact that the Technical Notes are non-binding by the very fact that they are more descriptive than prescriptive of what ought to be done. The Technical Notes are expected to significantly contribute to the development of systems that will facilitate settlement of possible disputes that

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<sup>357</sup> Ortolani, Pietro. "Self-enforcing online dispute resolution: lessons from bitcoin." *Oxford Journal of Legal Studies* 36, no. 3 (2016): 595-629.

may arise as a result of cross border contracts conducted through electronic communications.

The Technical Notes have therefore fostered the development of ODR and greatly assisted ODR administrators and its platforms including the parties to such proceedings. Needless to emphasize is the fact that the Notes reflect newer and better approaches to the resolution of disputes including embracing principles of impartiality, independence, due process and accountability. Similarly, ODR calls for the consent of the parties such that without that consent the process cannot proceed.<sup>358</sup>

Section III of the Technical Notes clearly lists the stages of an ODR process. It provides that ODR may initially comprise the ADR mechanisms including negotiation, facilitated settlement and mediation. The process begins when a person submits a Notice through an ODR platform. The Notice is then picked on by an Administrator who in turn informs the Respondent as to the allegations. Technology enabled negotiation will be the very first step. If that does not result in a settlement, the process advances to a facilitated settlement supervised by a Neutral appointed by the Administrator. The roles of the Neutral are also outlined.

The Notes also provide for the fact that the proceedings are to be conducted in a language of desired by the parties. That just points to the extent of flexibility. It further bolsters the process to be subject to due process and be highly confidential. So far, the notes have been of great assistance in terms of facilitating the process. Therefore there is much to be learnt from UNCITRAL.<sup>359</sup>

The European Union (EU) has an ODR platform through which consumers within the Union as well as the traders are in a position to settle disputes that arise in the course of e-commerce. This extends to both domestic as well as the cross border purchases issue. It provides for a one stop point of contact for traders and buyers alike.

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<sup>358</sup> Bakhramova, Mokhinur. "ODR (Online Dispute Resolution) System as a Modern Conflict Resolution: Necessity and Significance." *European Multidisciplinary Journal of Modern Science* 4 (2022): 443-452.

<sup>359</sup> Brand, Ronald A. "Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project." *Loy. U. Chi. Int'l L. Rev.* 10 (2012): 11.

The lauded platform has managed to efficiently, yet timely resolve most of the consumer complaints. This has been further enhanced by the Guidelines for Consumer Protection in the Context of Electronic Commerce. The Guidelines encourage stakeholders extending to consumer representatives and Governments to work hand in hand in a bid towards availing consumers meaningful, fair and timely redress of their disputes.<sup>360</sup>

Due regard has been placed on cross border transactions, especially on the aspect of innovative use of information technology. To this effect, a directive has been issued as the European Union Directive on Electronic Commerce. The Directive *inter alia* provides that in case of disagreements, member states are to ensure that their legislation do not hamper the use of out of court mechanisms and as far as possible, appropriate electronic means are to be used.

Various workshops have additionally been organized to demystify out of court dispute resolution within the Union. These have resulted in reports that have promptly addressed variants of online dispute settlement that if employed would be very effective in an e-commerce environment. A point of reference is the United States Department of Commerce that has organized various public workshops on Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Market.

Relatedly, the Dutch Justice Minister affirmed that he saw a possibility of coming up with a cross border Consumer Complaint Board.<sup>361</sup> This will further ease settlement of e-commerce disputes between Germany and Netherlands. The Dutch Government has resolved to the fact that a European ADR network can play a leading role in solving e-disputes among other e-Commerce concerns.<sup>362</sup>

Needless to emphasize, ADR has a capability to solve problems of jurisdiction as it is a very swift process. Similarly, it can be provided at a relatively cheaper or

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<sup>360</sup> Hörnle, Julia. "Encouraging Online Dispute Resolution in the EU and Beyond-Keeping Costs Low or Standards High?" *Queen Mary School of Law Legal Studies Research Paper* 122 (2012).

<sup>361</sup> Van den Heuvel, Esther. "Online Dispute Resolution as a solution to cross-border e-disputes." *University of Utrecht* (2000).

<sup>362</sup> Gramatikov, Martin, ed. *Costs and quality of online dispute resolution: a handbook for measuring the costs and quality of ODR*. Maklu, 2012.

no cost to the consumers. There are also guarantees that the process will be of high quality as it is facilitated by experienced adjudicators and mediators. These must be exploited.

However, the biggest obstacle to note is the fact that ODR is a yet to be known phenomenon both in Europe and in Africa. An awareness campaign must hence be launched so that the public is educated on the same.

## **5.0 Regulations on ODR in Kenya and Globally that Have Been put in place?**

### **5.1 Regulations on ODR in Global Perspective**

Regulation is important especially as far as the economy is concerned. Therefore, even as ODR mechanisms are being embraced, there is a need to ensure that proper safeguards as far as its operation is concerned are put into place.<sup>363</sup>

With the launch of ODR, those who engage in e-commerce must ensure that they comply with some minimum set conditions. For example, online traders dealing in tangibles as well as services must ensure that they accordingly comply. This extends to dissemination of knowledge as well as information as to the existence of the ODR platform. They should ensure that at all times they maintain an up to date website and provide functional links to their websites. Similarly, they must provide valid email addresses on their websites at all times.

Needless to point, regulation is necessary as far as cross border online dispute resolution is concerned. The big question is whether co-regulation should be adopted at the expense of detailed regulation and vice versa. While a best interest standard has been favored especially in the context of retail consumers of any security transaction or investment strategy involving securities, a more progressive regulatory mechanism should be adopted when it comes to online dispute resolution.

Self-regulation has been preferred at the expense of other means of regulation. Indeed, in Europe, the Union's Directive provides for a legal framework for

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<sup>363</sup> Morek, Rafal. "The regulatory framework for online dispute resolution: A critical view." *U. Tol. L. Rev.* 38 (2006): 163.

electronic commerce, while at the same time refraining from introduction of new legislation altogether. In the Netherlands however, a model Code of Conduct for Electronic Commerce has been established. This is the very first self-regulation initiative of its kind.

Therefore, there is no urgent need of coming up with legislation specifically tailored to disputes that happen across the borders even in the face of e-commerce. Indeed, we can make good use of the available self-regulatory mechanisms that are highly effective. Borrowing from the effectiveness yet competency of self-regulation therefore, Kenyans and Africans we shall be in a position to advance our cross border practices including dispute resolutions. The East African Community has a lot to borrow.

## **5.2 Harnessing ODR in Kenya and EAC Law Firms**

The Constitution of Kenya 2010 provides for the right to access to justice under Article 48. It further stipulates that justice can be accessed through alternative means including ADR. The Consumer Protection Act in a bid to promote ADR provides for a consistent and accessible system for consensual resolution of disputes that may arise from consumer transactions. To this extent therefore, ODR as a form of ADR can be employed to facilitate the settlement of the consumers' issues. To this extent, justice will be done.

Kenya is among the most advanced countries in Africa as far as technology is concerned.<sup>364</sup> Despite the Kenyan Constitution providing for ADR, it has not explicitly provided for the implementation of ODR. This raises the urgent need to come up with legislation to regulate ODR.

The law has moved at a slower rate as compared to technology. ODR is no exception. There is need for the law to catch up with ODR. As a result, regulation as well as navigation through the process will be made easier. Tanzania is a case in point. Through its "I Resolve" an online dispute resolution system, the process

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<sup>364</sup> Mutula, Stephen M. "Peculiarities of the digital divide in sub-Saharan Africa." *Program* 39, no. 2 (2005): 122-138.

has been facilitated. This is despite Kenya not having a comprehensive ODR statutory regime.

Most lawyers are of the view that deploying technology in adjudicating issues should be done on a case by case basis, only when appropriate. Simply put, they argue against the blanket approach towards the resolution of disputes using technology. To that effect therefore, they argue that ODR will be more useful where the antecedents of the disputes can be traced online as in the case where a consumer buys goods online or a vendor sells their commodities online. To this extent, they continue, it will be only viable to solve the issue online, if there is an appropriate forum to do so.

Theoretically speaking, law firms can implement their own online dispute resolution forums and platforms, as other service providers have done. They can also adopt third party platforms on agreement and utilize the same in promoting the resolution of disputes and justice in the process. Additionally, lawyers should be trained on embracing ODR.<sup>365</sup>

With the expanding cross border practice and e-commerce within the community, there is a need for the Community to develop a regulatory framework on ODR before it is too late<sup>366</sup> and dispute resolution is overtaken by more complex initiatives including block chain arbitrations.<sup>367</sup>

## **6.0 Findings, Conclusion and recommendations on ODR in Kenya and Globally**

What are the findings, conclusions and recommendations on ODR in Kenya and globally?

This article finds that majority of Kenyans are not aware of ODR and among those who are aware of it, many have not yet appreciated it. The article similarly finds

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<sup>365</sup> Aresty, Jeffrey M. "The Internet and ADR: Educating Lawyers about Online Dispute Resolution." *GPSolo* 23, no. 1 (2006): 30–35. <http://www.jstor.org/stable/23673082>.

<sup>366</sup> Duca, Louis Del, Colin Rule, and Zbynek Loebel. "Facilitating expansion of cross-border e-commerce-developing a global online dispute resolution system (Lessons derived from existing ODR systems-work of the United Nations Commission on International trade law)." *Penn St. JL & Int'l Aff.* 1 (2012): iv.

<sup>367</sup> In block chain arbitration, a decentralized system adopts block chain towards the settlement of disputes with the assistance of smart contracts on the appointment of arbitrators, costs and other factors being preconditions to be considered before such matters can be admitted under the dispute resolution clause of such contracts.

that there is need to put in place measures to protect victims from the uncertainties likely to be experienced when it comes to ODR. The article recommends capacity building on ODR both in Kenya and the East African Community.

## **6.1 Awareness creation on ODR in Kenya**

Most legal practitioners despite being aware of ADR are yet to be aware of ODR. It may therefore take decades if ODR is fully fledged as a dispute resolution mechanism. The general public is even more ignorant of ODR. Despite them being aware of mediation and arbitration, they hardly know of online mediation and arbitrations. The public should be made aware of online dispute resolution mechanisms.<sup>368</sup>

Among the key obstacles to accepting ODR is the unfortunate fact that a large group of people either do not have Internet accessibility or are illiterate on Internet use. Regular internet users do not face this challenge as they use the Internet in their transactions anyway. The challenge comes in where attempts towards having ODR as fully fledged alternatives to ADR may fail.

This raises the urgent need to build public trust in ODR not only as a means of having it universally accepted but also as a means of building faith in e-commerce transactions. Through the establishment of a platform of dispute resolution that ensures privacy and data security, the trust of many will be won and that may lead to many people being encouraged to invest in e-commerce.

## **6.2 Creation of feasible steps for victims to navigate the ODR process**

Ideally, a victim whose rights have been violated requires a clearly set means through which the person can get redress. There is a need to develop with an elaborate victim resource guide that will be invaluable even when it comes to navigating through the system. Such guidelines must clearly stipulate the

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<sup>368</sup> Kaufmann-Kohler, Gabrielle, and Thomas Schultz. *Online dispute resolution: challenges for contemporary justice*. Kluwer Law International BV, 2004.

remedies the victim is entitled to as well as the steps and procedures to be followed in the quest for redress.<sup>369</sup>

Similarly, the Guidelines should be clear regarding the time frame within which a person is to get audience and a resolution. The timelines should be reasonable so that they do not in the first place defeat justice. Indeed, delayed justice is a denied justice.

Additionally, the Guidelines should clearly stipulate the adjudication procedure including appeals and how they can be done. Through this, it will be easier for a victim to follow through the process and at the end of the process get content with the outcome. Where need be, the guideline should proceed and outline the requisite fees as far as the whole procedure is concerned. The fees should be highly affordable.

The Guidelines must equally include the common questions that victims may be asked by the investigator including the relevant information that they will always be required to provide. Similarly, the names and contacts of departments that may be of great assistance to such victims must be shared with all customers. Additionally, a list of help hotlines for victims of digital harm should be availed to all customers. With these safeguards in place, the consumers will be better placed.

### **6.3 Capacity building on ODR in Kenya and EAC**

The Government must do the best it can to ensure that it explicitly addresses harms that are data driven. To this extent, the Government should reconsider the available legal and policy measures in place before the Internet vis- a- vis their practicality in the face of the digital world. The Government needs to come up with legislation on this sphere. The Government likewise should ensure that such legislation is compliant with the international standards on digital rights, especially on automated decisions.

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<sup>369</sup> Zlatanska, Elina, and Julio César Betancourt. "Online Dispute Resolution (ODR): What is it, and is it the Way Forward?" *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 79, no. 3 (2013).



Development of new systems results in building new mechanisms to facilitate realization of new rights and in the process solving disputes. To this effect, there has been development of a system that provides due process that is technological in nature. This aims at ensuring that not even a single procedural right intrinsic to the government is violated even as those processes undergo digital transformation.

There exist various approaches to justice. While one school of thought propounds that justice should be corrective as well as restorative, another school of thought holds the view that justice should be punitive. Governments are under an obligation to ensure that they design effective digital justice systems that are in a position to efficiently address these approaches to justice. The harmonization will serve to increase the system's capacity.

## **7.0 Concluding statement**

ODR Reforms may benefit from the words of Barack Obama, former US President that change will not come if we wait for some other person or some other time. "We are the ones we have been waiting for. We are the change that we seek".

Indeed, Kenyans have come far as far as dispensation of justice is concerned, traversing through litigation to ADR and now to ODR. Law and technology have been greatly impactful in the discourse. With the 2020s dispensation amidst the digital world and the Covid-19 Pandemic, there is an urgent need to look into effective ways of employing technology in solving disputes for the obvious benefits highlighted throughout the article. Digital justice is justice.

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