

CLS Comments on the Draft Online Dispute Resolution (ODR) Policy

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About CIS

The Centre for Internet and Society (CIS) is a non-profit organisation that undertakes interdisciplinary research on internet and digital technologies from policy and academic perspectives. The areas of focus include digital accessibility for persons with disabilities, access to knowledge, intellectual property rights, openness (including open data, free and open source software, open standards, open access, open educational resources, and open video), internet governance, telecommunication reform, digital privacy, and cyber-security. The academic research at CIS seeks to understand the reconfiguration of social processes and structures through the internet and digital media technologies, and vice versa.

CIS is grateful for the opportunity to submit its inputs on the draft report on Online Dispute Resolution(ODR) policy.

Executive Summary

This submission is a response by the researchers at CIS to the report “Designing the Future of Dispute Resolution: The ODR Policy Plan for India” prepared by the NITI Aayog Expert Committee on ODR.

We have put forward the following comments based on our analysis of the draft report.

1. Structural considerations with ODR itself
 - The report classifies ODR as a singular entity rather than a group of technologies that require different approaches
 - Currently ODR still has a number of functional limitations such as difficulty to account for nuance, limitation of algorithms and vulnerability of the systems.
 - The report also fails to address how the psychological limitations involved with ODR, such as involving communication, perception and preferences of parties, will be solved for when implemented at the national level.
2. Socio-Economic considerations when transitioning to nation wide ODR
 - There is a lack of current access to digital infrastructure that limits ODR's effectiveness.
 - The projections made in the report disproportionately rely on market forces while suggesting a lack of mandated standards
3. Privacy and Security concerns with moving to ODR
 - Need for greater clarity on oversight and regulation of ODR platforms especially in the absence of a personal data protection bill.
 - An independent sectoral regulator is a necessity
4. Other comments
 - The opt out model proposed must be changed to allow for the option of ADR as well.

Structural Considerations with ODR itself

The draft report provides a comprehensive analysis on a number of elements related to ODR's implementation in India including its potential benefits, lessons from other countries and also the societal and economic requirements to implement ODR at the national level. However, we believe that a key element of analysis missing from the paper is an examination of the efficacy of ODR itself. As such, we have outlined below some structural considerations and challenges that ODR faces. These challenges must be overcome prior to any significant attempt at national level adoption.

1. Viewing ODR As A Monolith

The draft report encourages adopting a loose definition of the term ODR in order to foster its innovation and development. It does so by defining it as “ the use of technology to resolve disputes. However, mere integration of technology in the dispute resolution processes (such as virtual scheduling) is not ODR. The use of technology to actually resolve disputes (such as video conferencing and digital circulation of files) can constitute as ODR. ODR is also more than just e-ADR for it can include the resolution of disputes through automated dispute resolution or AI/ML tools.” This notion of ODR however seems to be based on an arbitrary drawing of a line rather than any concrete rationale that delimits the extent to which an action is not ODR. For example, would an email setting up a date for negotiations be considered as ODR if it also included one party's introductory offer? Would discussions over a whatsapp call constitute ODR? And if so how is the whatsapp call functionally different to a regular phone call? While seemingly pedantic, any attempt at creating policies surrounding ODR must clearly articulate where integrating technology in the dispute resolution process ends, and where ODR begins.

While it is understandable why one would want to adopt a wide reaching conception of ODR it is also imperative to understand the degrees of difference that are covered under the umbrella term of ODR. For example, the system of ADR Negotiation and arbitration as a tool are structurally different processes.¹ Translating that onto ODR, arbitration is much more similar in nature to litigation than negotiation and as such the use of ICTs must meet a different standard in such instances. Therefore any attempt at analysing ODR, or recommending its implementation as was the case in the draft report, must make explicit note of these differences and outline the levels to which digital integration is needed for each tool. The draft report fails to do so adequately.

2. Functional Limitations Involved With ODR

The draft report provides a comprehensive analysis of the potential benefits involved with ODR, and also examines the application of such systems around the world.

¹ Jean Sternlight, “Is Binding Arbitration a Form of ADR?: An Argument That the Term ‘ADR’ Has Begun to Outlive Its Usefulness,” *Scholarly Works*, January 1, 2000, <https://scholars.law.unlv.edu/facpub/270>.

However, the draft report fails to make note of a number of functional limitations that have hampered the effectiveness of existing (and potentially future) versions of ODR. These are as follows:

a. Difficulty for text based ODR to account for nuanced and complicated situations

In his critique of ODR, Condlin notes that most text based ODR systems utilise a system of organisation and categorisation he describes as “a little boxes format.”² Under such a system the parties would enter the details of their dispute in the form of predetermined options provided to them through the ODR interface. While this does in fact allow for greater efficiency in terms of time taken to achieve a result, there exist concerns as to whether it can accommodate the intricacies involved in a complex case. It is not always possible that a claim can be easily broken down into a number of distinct sub issues that can be dealt with individually. And so, this form of box ticking results in a loss of detail and nuance that would not be the case of a narrative based ODR system. Furthermore, this could result in parties having to describe their claims using complicated legal terminology and concepts that they may not fully understand. Any system of dispute resolution must be therefore moulded around ensuring the parties understand the issues involved and are comfortable discussing them rather than forcing the parties to adapt to the system’s complexity.

b. Limitations of algorithms

Much of the discussion around implementing ODR centers on the ability of algorithms to provide a more fair and transparent solution as opposed to an individual. The draft report calls for such algorithms and the platforms that they drive, to be developed in accordance with the principle of Free and Open Source Software - however does so only in relation to the public sector. It advocates for a ‘bifurcated structure’ wherein the principles of FOSS are not placed on the private sector. However it does not clearly delineate the extent to which such private actors who are not bound by the principles of FOSS can interact with public ODR systems. In such a situation the algorithms used by private entities would be proprietary and potentially secret. Such a situation wherein proprietary and secretive algorithms are being utilised in order to dispense justice, would go against the very idea of public dispute resolution as being “based on substantive standards and procedural rules that are transparent and known equally to all. The conception of fair outcome underlying public dispute resolution cannot be private.”³ Furthermore, since such technology would be proprietary and secret, there is no way for the

² Robert J. Condlin, “Online Dispute Resolution: Stinky, Repugnant, or Drab,” *Cardozo Journal of Conflict Resolution* 18, no. 3 (2017 2016): 717–58.

³ *Ibid*

parties to know how decisions have been reached and of contesting the means by which the decision was reached.

These algorithms, as currently envisioned, look to resolve cases by examining big data relating to similar cases and identifying patterns or analysing crowdsourced data.⁴ Both of these methods are limited. Big data, while able to recognize large patterns, might be unable to account for the nuances of a unique case. In the case of crowdsourced data, the success of the ODR would be dependent on the quality of data - and by extension would be limited by issues such as incomplete collection of data, pre existing biases when collecting data, etc.

c. Vulnerability of ODR systems

One of the purported benefits of ODR over traditional dispute resolution methods is the notion that the software and algorithms involved in ODR are not susceptible to the corruption that humans are. However, ODR tools are still vulnerable to manipulation in other ways. For example, it is possible to imagine a scenario wherein a party is victim of a phishing scheme, gives up the password to their account on an ODR platform, and later finds out that the details of their claim was issued.

3. Psychological Limitations That Must Be Considered When Implementing ODR

One of the key elements of ODR that has not been discussed within the draft report, is how well the psychological factors affecting ADR would translate to ODR. As such the draft report fails to address a number of the psychological limitations that exist in implementing ODR at a mass scale. Some of these considerations examined below:

a. Limitations with the ability to communicate through ODR

ODR has both positive and negative effects on human communication during the redressal process. On the one hand, technology such as video calling can facilitate conversations and communication between parties while taking away much of the cost that would have otherwise been required. Alternatively, it can also provide the anonymity required for a party to communicate freely and without pressure.⁵ However, for all these benefits, ODR does limit certain key elements of communication. Firstly, as mentioned prior, a tick the box based

⁴ Supra 2

⁵ Lauren A. Newell, "Rebooting Empathy for the Digital Generation Lawyer," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 28, 2019), <https://doi.org/10.2139/ssrn.3012108>, in Jean Sternlight, "Pouring a Little Psychological Cold Water on Online Dispute Resolution," *Scholarly Works*, January 1, 2020, <https://scholars.law.unlv.edu/facpub/1295>.

format may make it difficult to properly communicate all the elements of a dispute in an ODR system. Secondly, a text based ODR mechanism would limit a party's ability to effectively communicate their emotions and state of mind - both of which are necessary in any form of out of court settlement process.⁶ Thirdly, research has found that individuals are more likely to behave in a manner that is competitive, adversarial or in their own self interest when bargaining through a computer as opposed to in person.⁷ This could negatively affect the ability of parties to reach an agreement online.

b. Limitations in terms of parties' memory and perception of facts

Sternlight, in her paper on the subject of ODR, noted that it faces clear challenges when managing the psychological elements associated with a party's memory and perception.⁸ These challenges are twofold:

The first challenge revolves around how the software involved in ODR would be able to distinguish which of the parties' differing versions of the events is true. Issues of fake documents, inaccuracy of verification software, etc, limit the effectiveness of ODR in this case.

The second challenge arises from the role of mediation and negotiation to help parties' understand each other's perspective. One of the fundamental roles of a mediator is that of helping a party understand that their version of events is either limited, incomplete or wrong.⁹ In such situations, simply providing individuals with data that contradicts their views is often not sufficient to get them to alter their perspective.¹⁰ This is where human characteristics such as emotion, tone, empathy, etc from the mediator is necessary and as such this function cannot be fulfilled by an ODR mechanism.

c. Assumption that parties' preferred outcomes are consistent across time and cases

Sternlight also notes that ODR must be designed in such a manner that accounts for flexibility in a party's preference - across time and across

⁶ Jean Sternlight, "Pouring a Little Psychological Cold Water on Online Dispute Resolution," *Scholarly Works*, January 1, 2020, <https://scholars.law.unlv.edu/facpub/1295>.

⁷ Howard Raiffa, *The Art and Science of Negotiation*, Revised ed. edition (Cambridge, Mass.: Belknap Press: An Imprint of Harvard University Press, 1985).
Noam Ebner et al., "You've Got Agreement: Negoti@ting via Email," in *Rethinking Negotiation Teaching: Innovations for Context and Culture*, ed. Christopher Honeyman, James Coben, and Giuseppe De Palo (DRI Press, 2009), <https://dspace2.creighton.edu/xmlui/handle/10504/61449>.

⁸ Supra 6

⁹ Carrie Menkel-Meadow, "The Trouble With the Adversary System in a Postmodern, Multicultural World," *Georgetown Law Faculty Publications and Other Works*, January 1, 1996, <https://scholarship.law.georgetown.edu/facpub/1745>.

¹⁰ Tali Sharot, *The Influential Mind: What the Brain Reveals About Our Power to Change Others* (New York: Henry Holt and Co., 2017).

different cases.¹¹ For example, in cases wherein the software or algorithm must act as an arbitrator, it cannot simply prescribe a singular solution for a type of case. That is to say the ODR mechanism cannot recommend replacement as a solution in all cases wherein one party sells another one a broken commodity. While the general trend of cases may favour replacement as an equitable solution, it is entirely possible that there is a proportion of cases wherein the wronged party would prefer another form of resolution instead of a replacement. Sternlight further argues that an ODR system would find difficulty in handling questions of “comparative fault, causation, defenses, or specific facts” - all of which would ultimately need to be considered to arrive at a just resolution.

Furthermore, as mentioned prior, ODR that relies solely on algorithm or software use would be unlikely to convince participants to alter their preferences in such a way that a just resolution is achieved.

Socio-economic Factors To Consider When Transitioning To ODR

The draft report goes into significant detail on the Socio-economic impact that would arise as a result of a transition to ODR. While we generally agree with much of the analysis within the report our comments pertain to 1) the lack of current access to digital infrastructure and 2) Over reliance on market forces and lack of mandated standards.

1. Lack Of Current Access To Digital Infrastructure

The most significant drawback of moving towards ODR would be the exclusion of non digitally connected individuals from this element of the judiciary. The draft report mentions that the cost of such digital infrastructure is two fold - the cost of government provided services such as affordable broadband, and the cost of devices faced by individuals.

- While the first of the costs are provided through a number of government schemes mentioned in the draft report it is far from universal. A 2019 study has estimated that access to the internet in India stands at around 500 million users (over the age of 5) of which 227 million are rural users.¹² This however represents only 42%¹³ of all people over the age of 5 in India, thereby showing that digital connectivity still remains a fundamental issue in India. The more

¹¹ Supra 6

¹² “Digital in India” (IAMAI, 2019),

<https://cms.iamai.in/Content/ResearchPapers/2286f4d7-424f-4bde-be88-6415fe5021d5.pdf>.

¹³ The estimate of individuals over the age of 5 in India is achieved by first subtracting the percentage of children in the 0-6 range from the 2011 census (13,12%) from the estimates of the Indian population in 2019.

recent 2020 TRAI performance indicators indicate that this number has increased to 55.12% with 285.7 million rural users.¹⁴ There is, therefore, still a hugely significant portion of the population that does not have access to the internet. The population that lacks internet access is predominantly rural as well as lower income - which, as per the DAKSH study cited in the draft report, is the group most likely to opt for out of court mechanisms for dispute redressal.¹⁵ Therefore a move towards ODR could negatively affect their access to such measures.

- On the second of these, smartphone use is estimated to count for around 97% of internet access in the country.¹⁶ It is therefore clear that any success of ODR would be almost singularly dependent on the near universal adoption of smartphones in the country. However, the draft report makes no reference to provisions for increasing smartphone adoption.
- Therefore, we recommend that rather than relying solely on existing programs, the government should look to implement new programs that focus primarily on increasing smartphone penetration among rural and low income sections of the population as well as programs to improve affordability of internet access.

2. Over Reliance On Market Forces And Lack Of mandated Standards

The draft report consistently suggests a combination of public and private efforts to facilitate the widespread adoption of ODR. While privatisation has proven to be useful in certain aspects of governance, the draft report fails to make clear how ODR will handle the profit motive that drives the companies in the space and the following problems that may arise because of it. Furthermore, the draft report consistently makes mention of a self regulatory model of governance for this system of ODR. However, this raises a number of clear issues:

- a. The draft report notes that much of the development of the technology involved in ODR would be a result of the innovation undertaken by the private sector. It, however, fails to outline the necessity of common standards that all

¹⁴ Telecom Regulatory Authority of India, "The Indian Telecom Services Performance Indicators," November 9, 2020, https://www.trai.gov.in/sites/default/files/Report_09112020_0.pdf.

¹⁵ The DAKSH study found that out of court mechanisms are most used by individuals who have a per annum income of Rs. 50,000 - Rs. 1,00,000. Padmini Baruah et al., "Paths to Justice: Surveying Judicial and Non-Judicial Dispute Resolution in India," in Justice in India (DAKSH, 2017), https://dakshindia.org/Daksh_Justice_in_India/12_chapter_02.xhtml.

¹⁶ Telecom Regulatory Authority of India, "The Indian Telecom Services Performance Indicators," November 9, 2020, https://www.trai.gov.in/sites/default/files/Report_09112020_0.pdf. Kantar IMRB and MMA, "Kantar IMRB & MMA Smartphone Usage and Behaviour Report (Overview) – India 2016-17," 2017, in India Cellular & Electronics Association and KPMG, "Contribution of Smartphones to Digital Governance in India," 2020, <https://icea.org.in/wp-content/uploads/2020/07/Contribution-of-Smartphones-to-Digital-Governance-in-India-09072020.pdf>.

ODR technology would be required to meet. This could potentially lead to the danger of different ODR companies providing services that could be used favourably by one party. When coupled with external/societal factors that may cause power imbalances between the parties involved, could lead to the exploitation of the less powerful party. In the study conducted by DAKSH, the number one reason cited for not going to court was that “the other party opted for a non judicial-method.”¹⁷ This could lead to a situation wherein a more powerful party may push the less powerful party towards a form of ODR that would benefit them. For example, it is possible to imagine a situation wherein one party may utilise a ODR service that has a complicated interface in an attempt to confuse the other party. Alternatively, a party may insist on the use of an ODR service that follows the laws of a jurisdiction that would favour them as opposed to the other party.

- b. In order for ODR to become cost effective it must fulfil two criteria: 1) there must be enough actors within the market to ensure that there is sufficient competition to maintain prices lower than the existing systems. 2) there is sufficient regulation to prevent such companies from coming together and operating in such a way that the real cost on the consumer remains the same while the company's margins widen. The report fails to provide quantitative data that the incentives proposed will lead to the former scenario coming true, and fails to outline any regulation that would ensure that the latter one would be prevented.

Privacy And Security Concerns With Moving To ODR

The draft report has stressed the need to ensure citizen’s privacy and security when implementing ODR. To that end, our comments below address the need for additional oversight and regulation in this sector.

1. Oversight and Regulation of ODR Platforms

The draft report defines ODR platforms as the “*technology layer in any ODR process, irrespective of whether the platform provides direct services to resolve disputes or not.*” It highlights the privacy and confidentiality concerns that ODR platforms should be cognizant of- it states that “*ODR service providers should be extremely mindful of building robust data storage and management framework*” and it has also recognised the need to have a robust data security framework (for both personal data and non-personal data), however, it does not go clearly specify the data protection measures that need to be in place by the ODR platforms.

¹⁷ Padmini Baruah et al., “Paths to Justice: Surveying Judicial and Non-Judicial Dispute Resolution in India,” in Justice in India (DAKSH, 2017), https://dakshindia.org/Daksh_Justice_in_India/12_chapter_02.xhtml.

ODR platforms may store sensitive communications and records, such as personally identifying information; opinions and communications made to other disputants and records relating to health, education, and employment¹⁸. Currently, ODR mechanisms such as mediation are being conducted by different institutions/ ODR platforms in an ad-hoc manner. There is no formal regulatory standard regulating ODR platforms (either platforms which provide services to resolve disputes or which provide the necessary technological infrastructure for the parties to resolve the disputes.). Even court-annexed mediation is supervised in a fragmented manner.¹⁹

It is necessary for the ODR platforms to be subject to uniform principles framework /regulation. The principles should should ,amongst other measures, specify the measures to be adopted by the platforms about (i) time period for the retention and deletion of personal data; (ii) anonymisation and encryption of personal data; (iii) limitation on sharing/transfer of personal data; and (iv) security measures to be adopted. These principles are also provided for in the draft Personal Data Protection Bill, 2019 which is currently pending before the Standing Committee.

2. Need for the establishment of an independent sectoral regulator?

There are currently two forms of ODR platforms, namely, (i) court- annexed ODR platforms and (ii) private ODR platforms. However, currently, there is no independent regulator governing private ODR platforms. There are no uniform standards or regulations to be followed across the board by all private ODR platforms which has led to ODR proceedings being conducted in an ad-hoc manner. The increase in the deployment of private ODR platforms in the absence of a sector specific regulator governing the ODR platforms could create new problems, primarily being the exclusion of a substantial part of the population who may be unable to afford the fees of private ODR platforms. It is also necessary that ODR platforms conform to the principles of accountability, lack of bias , natural justice and accessibility.

In the absence of any regulatory control or oversight, the ODR mechanism particularly with private enterprise may risk widening the existing inequality in access to technology. Moreover access to justice is a fundamental right and the ODR mechanism should strive to achieve this objective. We recommend that certain broad parameters should be statutorily prescribed for ODR platform providers to adhere to. These could include:-(a) standards of performance; (b) specify training, qualification and certification for mediators (including their empanelment); and (c) a model code of conduct. The standards should also specify that each ODR platform must have its business rules or by-laws for providing ODR services. These standards would ensure

¹⁸ Suzanne Van Arsdale, 'User Protections in Online Dispute Resolution', Harvard Negotiation Law Review, available at https://www.hnlr.org/wp-content/uploads/sites/22/HNR103_crop-1.pdf, accessed on November 9, 2020.

¹⁹ 'ODR- The Future of Dispute Resolution in India', Vidhi Centre for Legal Policy', available at <https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in-india/>, accessed on November 8, 2020.

uniformity and consistency in the dispute resolution process and bring in effective accountability and transparency. The draft report also observes the need to publish statistics and anonymised data of the outcome of ODR processes to illustrate the lack of bias. However, it does not address the concerns emerging of commercial exploitation of such data and also from the re-identification of anonymised data.

Other Comments

1. Changes To Opt Out Model Required

The draft report makes mention of the opt out model that makes pre litigation mandatory in countries such as Italy, Brazil and Turkey. While the idea of an opt out model is generally positive, complications can arise from requiring mandatory mediation prior to litigation. For example, as mentioned earlier uneven power dynamics can result in a situation wherein one party is coerced to accept a settlement through mediation rather than being able to go straight to litigation.

Furthermore, under the proposed system in the report it is unclear whether individuals will have the option of choosing to use ADR mechanisms instead of ODR for their prior mediation or negotiation. Given the concerns raised due to lack of digital infrastructure, such a provision would allow for individuals who are not digitally connected to still have access to all judicial options.