

IN THE SHADOW OF THE PANDEMIC:  
UNEARTHING UNEQUAL ACCESS TO JUSTICE  
VIS-À-VIS DISPUTE RESOLUTION

Sukhsimranjit Singh\*

INTRODUCTION

How has the pandemic crisis unearthed deep structural imbalances in access to privilege due to economic inequalities? The imbalances can be broken down into two categories: external challenges and challenges that are internal to the justice system itself. The pandemic caused many external issues—such as health concerns, business bankruptcy, and other transactional issues—and other inhibitions on physically pursuing justice. These barriers show how access to justice is unequal, or, more specifically, that there are some individuals able to utilize the justice system to its full extent while a vast number of other individuals are unable to receive the same treatment. Indirectly, the pandemic brought to light internal issues in the form of mediator biases and cultural tensions. Through an analysis of the variety of challenges and the impact of the pandemic, it is clear that we are at a crossroads of change. One way to achieve this change is to rely on the system of checks and balances by crafting legislation to clearly outline the rights individuals have while pursuing justice.

I. EXTERNAL CHALLENGES

If we look deeper, the external challenges seem more alarming. Unemployment is rampant, many businesses claimed bankruptcy, and some businesses attempted to claim force majeure. All of these issues resulted in increased court cases, causing scheduling inefficiencies which themselves acted as an obstacle to the general population.<sup>1</sup> Amidst the backlog of cases,

---

\* LLM, PhD, Judge Danny Weinstein Managing Director, Straus Institute for Dispute Resolution; and Associate Professor of Law and Practice, Pepperdine University Caruso School of Law.

1. Raj Kumar & Seema Deshwal, *Principle of Force Majeure - An Assessment of Commercial Contracts in India in Context of COVID-19*, (Cambridge Open Engage, Working Paper, 2021); Terrie

one may be concerned that the “little guy” is overlooked because other commercial cases may take precedence on virtual platforms, other private cases may be able to pay their way to resolution, or, for those who are unable to afford the technology to continue working or seeking justice, access to justice may have been unattainable for them in an economic regard. However, looking at economic data, technology prices may not have been as much of an obstacle as one might think.

In the world of dispute resolution, peaceful resolution of disputes (by international standards) includes conciliation, negotiation, mediation, and arbitration.<sup>2</sup> It is argued that such processes help promote access to justice, especially in legal systems that are not accessible to the public.<sup>3</sup> On one hand, the pandemic has introduced new innovations as a result of the long-term online operations, in both businesses and in legal institutions.<sup>4</sup> If we look at access to internet, which people worldwide relied on to work and to socialize during the pandemic, a Pew Research Center survey conducted in April 2021 found that nearly 53% of U.S. adults said internet was essential for them during the pandemic.<sup>5</sup> However, the availability of internet tools

---

Louise Walmsley, Adam Rose & Dan Wei, *Impacts on the U.S. macroeconomy of mandatory business closures in response to the COVID-19 Pandemic*, 28 APPLIED ECONOMICS LETTERS 1293 (2022).

2. U.N. Charter art. 33, ¶ 1.

3. Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391 (2020). Professor Nolan-Haley argues that the above quoted ADR mechanisms seem to enhance access to justice internationally. *Id.* She cites numerous secondary sources that are important parts of the conversation: MARY ELLEN O’CONNELL, *INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS* (2d ed. 2012); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT’L L. 1 (2010); HAZEL GENN, REINHARD GREGER & CARRIE MENKEL-MEADOW, *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 15 (Felix Steffek & Hannes Unberath eds., 1st ed. 2013). For ADR and access to justice in Ghana, see Jacqueline Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 HARV. NEGOT. L. REV. 59, 75 (2015).

4. George A. Bermann, *Dispute Resolution in Pandemic Circumstances*, in *LAW IN THE TIME OF COVID-19* (Katharina Pistor ed., Columbia Law School 2020). The virtual structure of litigation and arbitration became streamlined with the transition to an online platform. Some argue that shifting to an online structure is a positive change for dispute resolution. For instance, in regard to timing, cases became more efficient. However, critics of the online structure argue that the time efficiency sacrificed some crucial information (e.g., witnesses could submit videos or come in at a different time, which thus eliminated observation of their body language). Additionally, because the jurors could not observe body language and because they are in a different environment (i.e., their home) rather than a courtroom, these factors could cause them to come to a different decision than they otherwise would have in a traditional, in-person setting. This piece grapples with the two opinions of online dispute resolution, and ultimately argues that the online structure provides a net benefit to the discipline.

5. Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak* PEW RSCH. CTR. (2020), <https://www.pewresearch.org/internet/2020/04/30/53->

doesn't solve justice accessibility issues for those to whom who do not have access to technology. Per the same study:

overall, roughly one-in-five parents with homebound schoolchildren say it is very or somewhat likely their children will not be able complete their schoolwork because they do not have access to a computer at home (21%) or have to use public Wi-Fi to finish their schoolwork because there is not a reliable internet connection at home (22%). And about three-in-ten parents (29%) report that it is at least somewhat likely their children will have to do their schoolwork on a cellphone.<sup>6</sup>

Important to add is that the concerns were more prevalent among parents with lower incomes.<sup>7</sup> While the pandemic drove innovation in the technology that allowed businesses and courts to move online, these lower income parents and other households without Wi-Fi did not benefit from it.

## II. PRE-PANDEMIC CONCERNS

One of the biggest hurdles to access to justice in the United States is legal fees. They exclude a large section of American society from accessing the conventional justice system. The pandemic didn't create this problem but only exacerbated it. We already had a civil justice crisis.<sup>8</sup> The United States is experiencing a downward trend in access to justice, especially in pandemic years. From 2019 to 2021, it dropped eleven places in the Word Justice Project map rankings.<sup>9</sup> By various estimates, many of the legal needs

---

of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/  
[<https://perma.cc/7NKU-UMZY>].

6. *Id.*

7. *Id.*

8. Thomas Friedman, *Our New Historical Divide: B.C. and A. C. - the World B.C. Before Corona and After*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/opinion/coronavirus-trends.html> [<https://perma.cc/7VHP-Q5BP>].

9. *WJP Rule of Law Index*, WORLD JUST. PROJECT (2020), <https://www.worldjusticeproject.org/rule-of-law-index/factors/2020/Civil%20Justice/> [<https://perma.cc/J5L6-2EKV>]; Kathryn M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811 (2021); Anthony Victor Alfieri, *Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 HARV. C.R.-CIV. LIBERTIES L. REV. 629 (2019).

of low-income Americans remained unmet before the pandemic.<sup>10</sup> As per Professor Sandefur, an associate law professor at the University of Illinois in Urbana-Champaign, many problems that appear to be legal in nature are actually access to justice problems. Additionally, people don't understand that while the justice system is an option, they can instead resolve issues through alternative systems like the Better Business Bureau.<sup>11</sup> People can also be afraid due to a misunderstanding of legal privilege. For example, some parties in a dispute may avoid sharing information with their attorney due to a belief that lawyer-client communications are not in fact confidential.<sup>12</sup> This fear could be based on power dynamics that exist outside of the courtroom.<sup>13</sup>

### III. THE 2020 CONCERNS

In 2020, federal and state judiciary systems were forced to operate in unprecedented ways to maintain essential services. In many jurisdictions, physical access to the courts was curtailed or suspended completely, making it difficult for individuals to seek legal assistance.<sup>14</sup> Courts now routinely use telephonic and videoconferencing services to move dockets forward and are continuing to change and implement new procedures as the pandemic evolves. There is still uncertainty, however, surrounding whether such measures can effectively substitute for in-person proceedings long-term, or if they increase or decrease access to justice.<sup>15</sup>

---

10. LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (June 2017) (available at <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/VY9Z-J3AN>]).

11. See Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016); Jon Lewis, *Mediation and Access to Justice During a Pandemic*, ABA (2020), [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/mediation-week-2020/mediation-and-access-to-justice-during-a-pandemic.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/mediation-week-2020/mediation-and-access-to-justice-during-a-pandemic.pdf) (last visited Jan. 23, 2021).

12. Daniel Kenealy & Stuart MacLennan, *Legal Professional Privilege of Advice of the Attorney General*, 24 COVENTRY L.J. 81, 81–87 (2020) (available at <https://pure.coventry.ac.uk/ws/portalfiles/portal/27803981/Binder3.pdf> [<https://perma.cc/B7HX-AU2R>]).

13. *Id.*

14. Zhao Liu et al., *Access to Justice in Light of COVID-19: Benefits, Burdens and Lessons*, AM. BAR ASS'N (Sept. 16, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/09/access-to-justice/](https://www.americanbar.org/groups/business_law/publications/blt/2020/09/access-to-justice/) (last visited Oct. 19, 2021).

15. *Id.*

During the pandemic, the uncertainty caused by the lack of physical access to legal services bolstered the success of LegalZoom, but as life returns to normal, the question of how to accommodate a self-help mindset remains.<sup>16</sup> A self-help mindset is one in which an ADR or court system is more user friendly through the use of mechanisms such as plain language. Having a self-help mindset will aid in incentivizing individuals to seek legal help when they otherwise may not have done so.<sup>17</sup> If they are incentivized to seek help, they are creating an opportunity to have more access to justice. Furthering the issue of distance from physical courts and ADR rooms is the fact that the pandemic and its subsequent economic hardships will result in two prominent issues for lower-income demographics: (1) high legal fees remain despite many people being unable to earn a salary during the pandemic, and (2) many people have faced legal issues (foreclosure, debt/bankruptcy, etc.).<sup>18</sup> Others have argued for new attention to the digital life overall; for instance, some scholars want to do a study of an “expansive, ambient and consolidated media ecology that shapes the conventions of public discourse whether digitally mediated or not.”<sup>19</sup> In other words, scholars argue that the prominence of the digital age is a permanent change, meaning that parameters and convention of online discourses will need to be further established. While there is the short run cost of the cost of legal fees and technology, long run market forces can aid in lessening the cost over time.<sup>20</sup>

---

16. Benjamin P. Cooper, *Preliminary Thoughts on Access to Justice in the Age of COVID-19*, 56 GONZ. L. REV. 227 (2020).

17. *Id.* See also EQUAL ACCESS TO JUSTICE: OECD EXPERT ROUNDTABLE BACKGROUND NOTES, OECD (Oct. 2015) <https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf>. On self-help services in the United States:

The main idea of self-help services is to provide litigant information and tools to help them understand how to start a judicial procedure, to move a case forward, to present the facts to the judges and to comply with the court's order. The advantage of self-help services is that it will reinforce the traditional lawyer-client model. Through self-help services legal aid lawyers can focus their limited resources on those citizens that need more in-depth representation, because the citizens with self-help services will receive assistance from the court or from other sources of help.

*Id.* at 20.

18. *Id.*

19. E. Johanna Hartelius et al., *Digitality, Diversity, and the Future of Rhetoric and Public Address*, 24 RHETORIC & PUB. AFFS. 253, 254–55 (2021) (available at <https://doi.org/10.14321/rhetpublaffa.24.1-2.0253>).

20. *Id.*

Fortunately, there is some economic evidence, however miniscule, that the socioeconomic divide as it relates to ability to obtain technology is decreasing as the real mean family income has steadily increased over time.<sup>21</sup> 2020 was a year of economic growth, as illustrated by the U.S. Bureau of Labor Statistics' tracking of the selling price of Internet services, telecommunication, and cable. From March 2009 to December 2020, there was a net decrease of 10% in the price of these services. The prices of these services have never been lower than during December 2020, after the pandemic hit. Back in March 2020, the prices of these services had steadily declined, and that trend continues today.<sup>22</sup> When considered alongside the trend of decreasing prices for Internet services, the increased real mean income shows that Internet services most likely will take up less of a family's budget over time and are hence more affordable and accessible. In fact, the ready availability of Internet, telecommunication, and cable created such a strong foundation for virtual dispute resolution at the beginning of the pandemic that virtual dispute resolution may be here to stay in the long run.<sup>23</sup>

#### IV. TRANSITIONING TRADITIONAL DISPUTE RESOLUTION

Transitioning justice online has gone differently for different countries.<sup>24</sup> For developed countries like the United States, the United Kingdom, and Australia, the path was "smoother" since there were sources in place to maintain dispute resolution in a remote environment. On the other hand, developing or underdeveloped countries rely more heavily on

---

21. *Real Mean Family Income in the United States*, FEDERAL RESERVE BANK OF ST. LOUIS (FRED), <https://fred.stlouisfed.org/series/MAFAINUSA672N> [<https://perma.cc/NB64-J46G>] (citing official U.S. Census Bureau data).

22. *Producer Price Index by Commodity: Telecommunication, Cable, and Internet User Services: Internet Access Services*, FEDERAL RESERVE BANK OF ST. LOUIS (FRED), <https://fred.stlouisfed.org/series/WPU374> [<https://perma.cc/N443-FKV3>] (citing U.S. Bureau of Labor Statistics data).

23. Dorcas Quek Anderson, *Taking Disputes Online in a Pandemic-Stricken World: Do We Necessarily Lose More Than We Gain?*, in *LAW AND COVID-19* 215 (2020) (available at [https://ink.library.smu.edu.sg/soI\\_research/3232/](https://ink.library.smu.edu.sg/soI_research/3232/)).

24. *Courts and COVID-19: Delivering the Rule of Law in a Time of Crisis*, IT COUNTRY JUSTICE (Mar. 26, 2020) <https://thetcountryjustice.wordpress.com/2020/03/26/courts-and-covid-19-delivering-the-rule-of-law-in-a-time-of-crisis/> [<https://perma.cc/IB5L-3Y4F>].

the “physical presence model of justice.”<sup>25</sup> During the pandemic, due to the nature of arbitral procedures, arbitration was able to almost seamlessly transition to resolving disputes online compared to litigation and its virtual transformation; this observation more so applies to the former countries, yet there is potential for the latter to follow suit in the long-run. Additionally, many leading, international arbitration institutions united to form a mission statement to direct them during the pandemic.<sup>26</sup> The mission statement helped guide the institutions to minimize the effects of COVID-19 on their arbitral proceedings.<sup>27</sup> This international cooperation set the tone for franchisers and franchisees to follow, which hopefully will mitigate some of the immense economic repercussions of the pandemic.

Consistent with above innovations in certain countries, empirical evidence shows that other agencies and countries also experienced rapid transition of other forms of alternative dispute resolution to online modes of communication.<sup>28</sup> In the U.S., the Financial Industry Regulatory Authority (“FINRA”) transitioned to an online model during the pandemic, with dispute resolvers receiving special training for virtual and phone cases.<sup>29</sup> In India, the online model of mediation (referred to at times as e-Mediation) grew during the pandemic because it decreased costs and aided in the ability to Zoom in from a location convenient to the party.<sup>30</sup>

Access to online mediation, however, does come with challenges: there is low uniformity regarding which online platform is used, there are connection issues due to limited accessibility to high-speed internet, and there are new concerns with privacy, especially for clients with limited resources.<sup>31</sup> Other issues include a lack of trust, concern over language barriers and literacy, and generally negative mindsets about online dispute

---

25. Tania Sourdin & John Zeleznikow, *Courts, Mediation and COVID-19*, AUSTRALIAN BUS. L. REV., Forthcoming (2020) (available at <https://ssrn.com/abstract=3595910>).

26. Tran Thi Dung, *Covid-19 Pandemic Impact on Franchise Industry and Franchise Dispute Resolution*, 486 ADVANCES IN SOC. SCI., EDUC. & HUMAN RSCH. 239, 242 (2020) (available at <https://doi.org/10.2991/assehr.k.201105.043>).

27. *Id.*

28. Anderson, *supra* note 23.

29. Kristen Blankley, *FINRA’s Dispute Resolution Pandemic Response*, PA. STATE L. REV., Forthcoming (July 2021) (available at <https://ssrn.com/abstract=3879045>).

30. Pooja Bali, *Emerging Trends in Mediation Amidst COVID-19 Pandemic: Indian Perspective*, 9 INT’L J. OF MULTIDISCIPLINARY EDUC. RSCH. 149, 160 (2020).

31. *Id.* at 160–61.

resolution.<sup>32</sup> In the U.S., to overcome the concerns surrounding the costs of mediation, FINRA offered mediations at no-to-low cost during the initial stages of the pandemic.<sup>33</sup> Finally, other concerns involve lack of innovation readiness, lack of community response, and issues with video conferencing.<sup>34</sup>

A significant contributor to the growing pains of ODR mentioned above is that the online format creates a buffer to the basic principles of mediation and ADR. For instance, the difficulty increases in holding longer sessions online than in an in person format; this idea is commonly known as Zoom fatigue.<sup>35</sup> Because of Zoom fatigue, there may be a time constraint to the typical length and duration of the mediation process. This is problematic because it can place parties at a disadvantage since there may be less total time available to reconstruct their narrative. In this sort of situation, word efficiency in articulation is imperative, yet many parties lack this skill to varying degrees. With the time limitations impacting the parties' narrative, the neutral does not have a full grasp on the perspectives at hand and consequently may have an unintentional bias towards one party.<sup>36</sup> This sort of foundational issue lends itself towards larger issues, as mentioned above.

## V. INTERNAL CHALLENGES

The next plausible cause for unequal access to justice as a result of the pandemic pertains to internal challenges: implicit and/or explicit biases in mediators and parties. In the wake of the Black Lives Matter movement and related events in May and June of 2020, high racial tensions grew even more fraught. Hartelius observes that society recently reevaluated norms and biases, including language. For instance, there have been distinctions made

---

32. Rakhi Singh Chouhan, *Streamlining Online Dispute Resolution with Alternative Dispute Resolution: Chances and Challenges*, 17 PALARCH'S J. OF ARCHAEOLOGY OF EGYPT/EGYPTOLOGY 5848, 5850 (2020) (available at <https://www.archives.palarch.nl/index.php/jae/article/view/2773>).

33. Blankley, *supra* note 29.

34. Tania Sourdin, Bin Li & Tony Burke, *Just, Quick and Cheap? Civil Dispute Resolution and Technology*, 19 MACQUARIE L.J. 17, 26–27 (2019).

35. Brenda K. Wiederhold, *Connecting Through Technology During the Coronavirus Disease 2019 Pandemic: Avoiding "Zoom Fatigue"*, 23 CYBERPSYCHOLOGY, BEHAVIOR, & SOCIAL NETWORKING 437 (2020) (available at <http://doi.org/10.1089/cyber.2020.29188.bkw>).

36. Erik Björling, *In the Procedural Surroundings of Consumer Protection: Online Dispute Resolution, the Adversarial Principle, and Tendencies toward Settlement*, 13 MASARYK UNIVERSITY J.L. & TECH. 311 (2019) (available at <https://doi.org/10.5817/mujlt2019-2-7>).

between “institutional and vernacular language.” The basis of this distinction is because one demographic has controlled education for so long that academic and/or professional language is encoded in favor of that demographic. This consequently prevents other demographics from speaking out.<sup>37</sup>

Vernacular versus institutional language could prove an issue in dispute resolution. Say a mediator and one party were educated in similar ways, but the other party hails from a different background. The mediator and the similar party may form a natural rapport, which causes an unequal access to rapport with the supposedly neutral mediator, and consequently to justice, for the other party. The pandemic and the subsequent push for racial equality allowed for society to open its eyes. As a result, people are calling for ADR training to have more comprehensive cultural components. This new training, in addition to lower legal fees, will hopefully level the playing field in terms of access to justice.<sup>38</sup>

There is no denying the fact that no quick solution exists to solve the deep divide in our society caused by systemic racism and decreased access to justice for minorities in the United States. We have seen that Black Americans experience the criminal justice system differently than white Americans. Black Americans are more likely to be adversely impacted by

---

37. Hartelius et al., *supra* note 19.

38. John D. Feerick, *Covid-19's Impact on Best Practices in Arbitration and Mediation*, 39 ALTERNATIVES TO THE HIGH COST OF LITIGATION 113, 115–19 (2021). While making a specific reference to Marylanders in the Spring 2021 published report *Confronting the COVID-19 Access to Justice Crisis* by the Abell Foundation, the report concluded:

Even before the pandemic, most low- and moderate-income Marylanders were navigating this civil justice system on their own, without legal help or assistance. They frequently faced severe and unjust consequences—like eviction or the denial of protection from abuse—not because they did anything wrong, but because they did not understand their rights, did not know where to get help, or did not receive help when they sought it. As with so much else before the pandemic, the difficulties in navigating the system fell most heavily on low-income persons, people of color, and those with disabilities. Because of longstanding structural barriers and racism, Black and Hispanic communities are more likely to face eviction, debt collection, and health disparities, which in turn make them more vulnerable to and exacerbate the collateral consequences of COVID-19.

*Confronting the COVID-19 Access to Justice Crisis*, ABELL FOUNDATION (Jan. 2021), <https://abell.org/publications/confronting-covid-19-access-justice-crisis> [https://perma.cc/9ZY8-YDGZ].

our criminal justice system.<sup>39</sup> This reality is internalized as well. In the pre-pandemic world, as per one survey, 84% of Black adults say that white people are treated better than Black people by the police, and 63% of white adults agree.<sup>40</sup> At the center of the U.S. civil justice system, there is a higher chance that minorities lack the income necessary to pay for legal interventions against unjust treatment, preventing them from pursuing claims following experiences with financial fraud or difficult relationships.<sup>41</sup> From linguistic barriers to financial barriers, there are a few obstacles parties must face in order to receive the justice they deserve. These biases barricading the criminal justice system are not occurring in a vacuum, meaning it is safe to extrapolate similar tendencies in an ADR setting as well. Thus, it is necessary for these biases to be addressed in order to move forward.

## VI. MOVING BEYOND THE PANDEMIC: LESSONS LEARNED

The pandemic taught consumers of the U.S. civil justice system that specific concerns, as they pertain to the traditional in-person dispute resolution mechanisms, transfer to the online environment. In the early applications of online dispute resolution (“ODR”), a strong potential for the use of ODR was predicted.<sup>42</sup> Within these discussions, limitations with the ODR world were identified, including but not limited to: (1) how can body language be properly read via camera?<sup>43</sup> and (2) how can the process be managed remotely? Most importantly, researchers questioned whether trust can be established in the online environment.<sup>44</sup>

---

39. Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 L. & SOC’Y REV. 960, 960–87 (2018) (available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/lasr.12366>).

40. Drew Desilver et al., *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> [<https://perma.cc/DGR3-PYW7>].

41. Robert H. Frank, *How Rising Income Inequality Threatens Access to the Legal System*, 148 DAEDALUS 10 (2019) (available at [https://doi.org/10.1162/daed\\_a\\_00530](https://doi.org/10.1162/daed_a_00530)).

42. Karim Benyekhlef & Fabien Gelinat, *Online Dispute Resolution*, 10 LEX ELECTRONICA 1, 9 (2005) (available at <https://ssrn.com/abstract=1336379>).

43. *Id.* at 87.

44. *Id.* at 2.

The question of “trust” still lingers today, and has only become more salient. For communities left behind by our criminal and civil justice systems, can the world of online dispute resolution offer a trustworthy partner, especially when the stakeholders themselves have not changed? Now we have an additional question: what happens to less powerful parties who wish to enforce the online dispute resolution result against a party that is more powerful?

In some industry sectors, there are more parties finding themselves unable or unwilling to uphold contractual obligations and seeking a legal way out by relying on force majeure, frustration, and impossibility.<sup>45</sup> How will this impact the minorities in an online mediation world? Take for example a party that is non-represented, so they attend a mediation online. Due to excellent work by the mediator, they reach a settlement with the other party—who *was* represented in the mediation. If the represented party did not like the agreement after reviewing it, who is more likely to (a) know that they can use force majeure, frustration, and/or impossibility, and (b) more likely to rely on force majeure, frustration, and impossibility? The short answer to these questions is the unrepresented minority parties because they may not be able to enforce the settlements—thus preventing them from accessing justice while also making it harder to establish trust in future proceedings.

Some have criticized that dispute resolution fails to provide substantive justice based on legal rights. This complaint has continued despite the pandemic and our technological innovations during the past two years.<sup>46</sup> On the other hand, the argument that mediation is a much better and cheaper alternative to traditional litigation, and hence must help with access to justice, is only feasible if mediation is well-known in the legal and non-legal field.

Even in 2020, many parties in the context of divorces, foreclosures, evictions, collections, and business disputes did not know any potential

---

45. *COVID-19: Implications for the Future of Dispute Resolution*, BAKER MCKENZIE, at p. 1 (2020), <https://www.bakermckenzie.com/en/insight/publications/2020/04/covid19-implications-future-dispute-resolution> [<https://perma.cc/2XNC-Q5ZE>].

46. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605 (2018); Cooper, *supra* note 16.

avenues for resolution except for the court system.<sup>47</sup> Access to justice will improve if knowledge about dispute resolution alternatives and online options was widespread, but only if those alternatives are conducted in a manner that respects the interests of all parties. However, to better protect parties engaging in dispute resolution, protections can be added by statutes. These protections could be similar to those provided to *pro se* parties, where a judge or an independent attorney must review the outcome and endorse the result.<sup>48</sup> Indeed, the ABA Model Standards of Conduct for Mediators, Section IX, Advancement of Mediation Practice, guides a mediator to make mediation accessible by providing services at a reduced rate or on a pro bono basis as appropriate.<sup>49</sup>

Pertaining to the legislative solution as mentioned above, the proposed legislation would need to address the paradoxical problem of the presence of the adversarial principle and the tendency towards settlement in ODR. The adversarial principle outlines the process in which the parties in a mediation present their perspectives to the neutral, and the neutral guides them to resolution. The parties are incentivized to share as many facts as possible so that the neutral is able to epistemically understand their individual narrative. This is a process that takes time, yet it is at odds with the consumer preference for a desire to reach a settlement as quickly as possible. The final dimension is the neutral needing to balance the enforcement of individual rights without forming a bias, while also, in this example of commercial cases, not violating market principles. A way to remedy this issue is to systemize the process of ODR better so that participating parties are able to easily register their issue on ODR platforms while maintaining realistic expectations about the process. A system will allow market forces and laws to remain interrupted while the individual is able to resolve their conflict with “simplicity, justice, and efficiency.”<sup>50</sup>

---

47. Jon Lewis, *Mediation and Access to Justice During a Pandemic*, AM. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/mediation-week-2020/mediation-and-access-to-justice-during-a-pandemic.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/mediation-week-2020/mediation-and-access-to-justice-during-a-pandemic.pdf) (last visited Jan. 17, 2022).

48. *Id.* (“If the independent individual finds any abuse or gross unfairness, that person can explain her opinion to both parties, and they can either return to mediation, or they can scrap the agreement and proceed to court.”).

49. *Id.* (“Section IX[(A)(2):] . . . Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.”).

50. Björling, *supra* note 36.

## CONCLUSION

As the world waits for the COVID-19 pandemic to end, the words of Hon. Judge Daniel Weinstein (Ret.) become increasingly relevant: “[T]he pandemic has truly made us self-reflect as to what we have and what we don’t, and how can we fight for those that don’t have as much we do.”<sup>51</sup> The community of dispute resolvers has a lot to reflect upon. The pandemic has unearthed a host of concerns with our traditional view that dispute resolution provides access to justice.

As addressed in this Essay, perhaps the best way to move forward and acknowledge the shortcomings that dispute resolution as a field possesses is to legislate to strengthen the rights of cultural minorities and work towards educating the public on both remote and on-the-ground dispute resolution mechanisms. Dispute resolution systems, as they exist today and pending a few exceptions, can only provide access to justice if they are known, are effectively conducted, and are respected.

---

51. Interview with Hon. Daniel Weinstein (Ret.), Distinguished Mediator in Residence, Straus Inst. For Dispute Resolution, at Pepperdine Univ. Caruso Sch. of Law (Oct. 19, 2021).