

RESPONSIBILITY AND RESPONSIVENESS IN THE DESIGN OF DIGITAL AND AUTOMATED DISPUTE RESOLUTION PROCESSES

Maria Claudia Solarte-Vasquez / Petra Hietanen-Kunwald

Maria Claudia Solarte-Vasquez, research fellow, Tallinn University of Technology, School of Business and Governance, Department of Law, Tallinn, Estonia; maria.solarte@taltech.ee.

Petra Hietanen-Kunwald, postdoctoral researcher, University of Helsinki, Conflict Management Institute, 00014 University of Helsinki, Finland; petra.hietanen-kunwald@helsinki.fi; <http://www.comi.fi>.

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Abstract: *This position paper focuses on responsibility and responsiveness as two core attributes of trustworthy and desirable technology-based dispute resolution systems. It discusses some measurability dimensions that could operationalize their application in the design of processes within those systems that are consistent with the current regulatory and institutional ADR frameworks, and discusses the risks of a hurried increase in computational power, in the absence of procedural fairness and built-in proactive conflict management features.*

1. Introduction

Dispute resolution is a key governance function and a field where the spread of computational technologies will derive in radical changes and cause unprecedented institutional stir. The growing deployment of digital technologies and automation in the development of self-regulatory options and/or Alternative Dispute Resolution Systems (DRSs) is especially concerning, in view of the crucial role these methods are expected to play in the strengthening of the digital markets. This paper claims that *responsibility* and *responsiveness* are two core and interdependent attributes of trustworthy and desirable technology-based dispute resolution systems and discusses measurable design dimensions and criteria (such as standards, principles and factors) that could operationalize their application. These attributes¹ are worth striving for, because they are empowering, functional, and represent pre-digital conflict management goals² and post-digital proactive commitments.³ Building them into processes by design, would reduce some of the transitional tensions that digitalization and automation may cause to the existing regulatory framework.⁴

Computational methods and digital technologies affect judicial proceedings, adjudicative and Alternative Dispute Resolution (ADR) processes alike, but it is in the ADR field where the impact may become the most detrimental. A critical regression could be anticipated because the digital and algorithmic dispute resolution capacities dilute the relational components required in the collaborative management of human exchange interactions. Furthermore, if technology-based systems are deprived of procedural fairness features, no consis-

¹ Responsive design is more narrowly defined in this paper as receptive to certain assumptions on human needs and general interests, and measured according to legitimate criteria. Consult on the responsive exercise of regulatory capacities in general in PARKER 2013, keeping in mind that the design of dispute resolution systems is a classic regulatory activity, both in the public and private spheres.

² Infra, note 4.

³ Proactiveness and collaboration for effectiveness and satisfaction, and efficiency, respectively.

⁴ The most tensions could arise when the increase in computational power does not gauge and monitor efficiency, effectiveness and satisfaction for balance and the realization of legal values and principles for effective dispute resolution and conflict management.

tency with legal standards can be ensured. For example, self-executing transactions, based on blockchains, are indifferent to the integrity of essential contracting elements, such as informed consent (and its vices), consideration, capacity, and so on.⁵ The proactive design of responsible and responsive DRSs is a fundamental epistemic concern in legal innovation. The institutionalization of procedural fairness and its values and principles and the systematization of advanced design heuristics in law are advancing,⁶ but not to the extent and with the consistency necessary to foster a widespread adoption. A plausible barrier is the proliferation of competing proposals and conceptual fragmentation within the community of practice. This paper proposes parameters of general application and easy uptake,⁷ to facilitate the production and quality assessment of mediated legal artefacts (including products, services, information, documents, activities, processes and/or systems).

The expression procedural fairness will be used broadly to refer to objective⁸ and subjective procedural justice⁹ components and other transaction design standards that add value far beyond the efficiency and scalability of technology-based systems. *Responsibility* and *responsiveness* are defined by essentialist criteria of legality and subjective experiences of procedural justice (procedural fairness and other legitimizing¹⁰ components) on the one hand, and strategic and human centered transaction design standards on the other. According to this perspective, the objective and subjective procedural justice requirements could be combined with transaction design principles and legal Usability/User Experience (UX/UXI) factors,¹¹ to increase procedural fairness in legally relevant digital and automated processes and interactive systems.¹² Embedding due process and other procedural fairness features in automated proceedings would meet the objective and some subjective standards in decision-making processes. At the same time, UX/UXI upgrades and transaction friendliness qualities would enhance the subjective experience of justice. These measurable adjustments would mark the trustworthiness and legitimacy extent of automated DRSs.

The next section will present the procedural fairness components amounting to *responsible* dispute resolution design, and greater legitimacy. It will be followed by a perspective of *responsive* design that relies on measurable factors (and therefore increases certainty, accountability and trust in a narrow sense). The last section outlines a few concluding remarks.

2. Standards of responsible dispute resolution

There are three basic models of dispute resolution processes: umpiring (adjudication), mediation and negotiation.¹³ These basic models can be found in different combinations and be connected to or implemented by technology that may either assist or replace human agents. Adjudication and mediation models are guided by certain fairness standards that show as legal principles, are taken into account by public policies or regulated by the law. Therefore, at least some legal responsibilities stem from procedural fairness considerations and

⁵ See more on these limitations in SOLARTE-VASQUEZ/NYMAN-METCALF 2017.

⁶ On both the merits and complexities of heuristics in law see GIGERENZER/ENGEL eds. 2006.

⁷ See SOLARTE-VASQUEZ/RUNGI/NYMAN-METCALF 2019 on the ease of adoption argument when revisiting SOLARTE-VASQUEZ, 2013 as derived from the nature of self-regulatory processes, and mainly deployed and diffused by the private sector.

⁸ On objective and subjective procedural justice see LIND/TYLER 1988, p. 3.

⁹ THIBAUT 1975 p.748, HOLLANDER-BLUMOFF/TYLER 2011, p. 3.

¹⁰ On the function of a process to legitimate its outcome see LUHMANN 1983, 34; in respect of mediation see HIETANEN-KUNWALD 2018, 143.

¹¹ Formulated first in SOLARTE-VASQUEZ/JÄRV/NYMAN-METCALF 2016, based on the integration of essentialist criteria for the formation of valid transactions, combined with the best practices and standards for legal drafting, and basic usability and user experience factors in Human Computer Interaction (HCI).

¹² These dispute resolution systems are meant to involve a range of prompt and efficient technology based and/or mediated adjudicative and consensual methods and processes within the Online Dispute Resolution (ODR) denomination, including ADR. Consult further in MENKEL-MEADOW 2016.

¹³ On primary forms of dispute resolution: ROBERTS/PALMER 2005, p. 87. And their relation to technology: ADRIAN 2018, p.x; SELA 2018, p. 99.

may be evaluated using objective criteria. It is in this light, that *responsibility* is argued to be a *desirable* and to a certain extent *measurable* dispute resolution system attribute.

Procedural fairness has a specific function in dispute resolution regardless of whether the dispute resolution process is adjudicative or consensual. The fairness of processes enhances the legitimacy¹⁴ of outcomes. Objective procedural rules and safeguards justify the bindingness of a decision, and ultimately the availability of State enforcement. They are related to the due process, a universal and fundamental principle manifest in the legal system as the right to a fair trial. In the European Convention on Human Rights (ECHR), it is provided in art.6 referring to the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The due process requirements are not unique to adjudicative litigation. Due process principles¹⁵ are reflected in the New York Convention, in the international soft law on arbitration, in various national legal systems, and in case law.¹⁶

In consensual forms of dispute resolution the parties' consent is often considered sufficient to legitimate the outcome of a dispute resolution process. However, these views are too narrow. In mediation, for example, the parties consent to the settlement under the assumption that mediators are impartial and the mediation process fair. Even if the ECHR does not apply, due process principles should be considered. Objective standards of due process, such as the principle of impartiality of the mediator, the self-determination of the parties and fairness requirements have emerged and are consistently invoked by soft-law and legislation on mediation.¹⁷ Due process features increase the acceptability of agreements entered into by the parties and legitimize, together with the consent of the parties, the mediated settlement agreement.¹⁸ The need for legitimation increases when mediated settlements are to be declared enforceable in accordance with the European Union (EU) Mediation Directive.¹⁹

It is evident that every dispute resolution process has its specific characteristics and that due process in litigation has a different meaning than due process in arbitration or mediation. However, from beneath the objective requirements some common core values and perceptions of fairness can be discerned. Psychological procedural justice research has demonstrated the impact of procedural justice experiences on the acceptability and perception of legitimacy of a decision. It has been suggested that factors fostering the perceptions of legitimacy in alternative dispute resolution conform to elements that define the rule of law.²⁰

To identify the core values behind due process it is useful to examine the four elements of procedural justice.²¹ The first is *voice*; the disputants must have the opportunity to present their case and tell their story. In arbitration this is reflected in the parties' right to have a reasonable opportunity to present their case and the *audiatur et altera pars* rule.²² In mediation the parties are directly engaged in decision-making and must be given adequate opportunities to do so.²³ The second element is *impartiality* of the third party. It represents neutrality and is assessed directly by the parties. Impartiality is anchored in regulation on adjudicative and consensual forms of dispute resolution. *Trustworthiness* is the third element. It is subjective inference of the disputants,

¹⁴ TYLER 1990, p. 172.

¹⁵ On due process in arbitration see: KURKELA/TURUNEN 2010, p.12.

¹⁶ *Mutu and Pechstein v. Switzerland*, judgment of the European Court of Human Rights, nos. 40575/10 and 67474/10, 2 October 2018 § 95 and §§ 121-123.

¹⁷ See, for instance, the Mediation Directive 2008/52/EC, the European Code of Conduct for Mediators and national legislation implementing the Mediation Directive. In comparative legal research, for instance, the neutrality of the mediator has been identified as an indispensable basis for mediation: HOPT/STEFFEK 2013, p. 76.

¹⁸ On procedural fairness as justification for the bindingness of the mediated settlement agreement: HIETANEN-KUNWALD 2018, p. 202.

¹⁹ Compare Article 6 of the Mediation Directive 2008/52/EC.

²⁰ HOLLANDER-BLUMOFF/TYLER 2011, p. 2.

²¹ On the four elements: *ibid.*, p. 5.

²² KURKELA/TURUNEN 2010, p.186, 206.

²³ See, for instance, Article 3.2 European Code of Conduct for Mediators.

based on the behaviour of the third, neutral party. The last element is *dignity* or respect, which consist of the parties' perception of deference and consideration that are dispensed during the process.

Not all of these elements are reflected in legal and quasi-legal instruments in a similar way. While the process related elements *voice* and *impartiality* could be expressed in the form of legal principles and rules, the interpersonal elements cannot be easily determined for they constitute complex subjective perceptions that nonetheless strongly influence the acceptability of the decision.²⁴ Their significance in dispute resolution must not be underestimated;²⁵ trust in the neutral third party and the process has a meaning beyond the interpersonal relationship and is connected to the function of the legal system in a wider sense. It enhances – as does the legal system – the peaceful functioning of a society. Closely connected to the trustworthiness of mechanisms of dispute resolution are the requirements for the predictability and transparency. To trust, all parties need to be aware of the nature of the decision-making process and the rules, principles and criteria that will apply, prior to starting the proceedings. For legal procedures presided by courts, it is set forth in art. 6 ECHR: the decision needs to be taken by a tribunal *established by law*. In arbitration and civil and commercial mediation the forum selection capacity of the parties arises from the principle of self-determination. The parties can only exercise self-determination and take informed decision in respect of the process, if educated about the nature of the process and the rules and principles that will apply.

Trustworthiness, transparency and predictability, the right to an impartial and independent third party and the right to voice can be considered the central values and principles that determine responsibility in dispute resolution. These requirements apply not only to non-digital and traditional procedures, but extend – quite naturally – to DRSs and processes mediated, assisted or carried out by computational systems and technological means. Trustworthiness has also been proclaimed the core value of Artificial Intelligence;²⁶ thus, its operationalization and measurability should be priority concerns in the development of legal technologies and the design of DRSs where AI will find extensive areas of applications.

Fairness principles are consolidated in the field of dispute resolution irrespectively of the medium used. However, ensuring the adherence of technology based and automated decision making, and even of simple digitalized processes (such as Online Dispute Resolution (ODR)) to these principles, is an extraordinarily complex regulatory challenge. In respect of regulation and compliance, technology-based or assisted dispute resolution is confronted with similar difficulties as ADR.²⁷ Just a few DRSs, for instance technology assisted court litigation, are centralized and can easily be regulated in detail by the law. Most ODR and automated decision-making take place outside the courts, over privately owned platforms, administered by companies or private and semi-private institutions or conducted directly between the disputants. In a globalized and interconnected society traditional dispute resolution institutions and rules are less efficient as the processes and the regulation are fragmented.²⁸ Dispute resolution services may be offered across borders and as a consequence national regulation of the dispute resolution mechanism may be of no effect. Moreover, the person or legal entity that is supposed to uphold these principles is hard to identify, is not subject to effective controls or is unaccountable in practice.²⁹ The technology in use, the actors involved and the standards considered are unknown.³⁰ From the point of view of procedural justice this lack of disclosure and transparency compromises the perception of justice, and consequently the legitimacy and acceptability of the decision and the DRSs.

²⁴ HOLLANDER-BLUMOFF/TYLER 2011, p. 10.

²⁵ Ibid.

²⁶ Independent High-Level Expert Group on Artificial Intelligence 2018. On trust: KATSH 2016, p. 331.

²⁷ On regulatory models in mediation see: ALEXANDER 2008, p. 3., 2013.

²⁸ KATSH/ETHAN 2017, p. 174.

²⁹ EBNER/ZELEZNIKOW 2016, p. 304.

³⁰ Ibid, p. 305.

3. Standards of responsive dispute resolution

The standards of responsiveness, in contrast to those of responsibility, are modestly institutionalized. Responsiveness in DRSs is mainly a question of quality in the design of processes and transactions. Human-centered proactive transaction design is seen to play a key role in legitimizing transactional interactions especially in the principled management of conflict, and in dispute prevention and resolution. Proactive design anticipates risks, initiates and controls human-centered interventions, and encourages desirable outcomes using methods and techniques consistent with sector-specific best practices and the institutional exchange relations environment.³¹ It is in this sense that *responsiveness* is claimed to be a *desirable* and *measurable* dispute resolution system attribute.

The subjective procedural fairness elements discussed above overlap with the UX/UXI transaction design factors under satisfaction, and the collaboration principles from the list synthesized by SOLARTE-VASQUEZ/NYMAN-METCALF³². Responsiveness is of the nature of the designers' mind-set and of the tools for the human centered practice, also when these applications in law are allowed, for instance, in the way the proactive law movement scholars have conceptualized and endorsed.³³ Legal design and its proactive applications extend to all subject matters, at all regulatory levels, in the benefit of all the stakeholders and users of legal information. Concretely, in the conflict management and ADR fields, collaboration is to the legitimacy of the processes what information accuracy is to understanding and all these components together, predictors of compliance that may be supported by transaction design strategies.³⁴ Strategic legal design involves responsive techniques similar to the needs and interest based transaction design models popularized by ADR experts decades ago, and it is responsible insofar as strengthening procedural fairness.

Proactive conflict management and dispute resolution or ADR share some of the core assumptions and purposes with transaction design, drawing the two fields phenomenologically and ontologically very close. Both practices aim to provide for efficient, effective and satisfactory transactional experiences, thus, also in this sense, they are fundamentally responsive.³⁵ Conceptually, principled and proactive conflict management must inform the most innovative and technologically advanced models in the practice, if to enrich dispute resolution progress with lessons learned from the collaborative,³⁶ preventive,³⁷ and relational exchange³⁸ scholarship. Most recently, legal design has been argued to offer a smoothing option or a transitional pathway to the automation of legally relevant processes,³⁹ to prevent the problems that may result from hastening the implementation of computational methods in law. To effectively respond to the call for increase empowerment, accessibility to legal information and to justice at a global scale, dispute resolution systems design should incorporate ample safeguards to the rights that technological progress could negatively affect.

³¹ Look at POHJONEN 2006, for a primer on the proactive approach; SIEDEL/HAAPIO 2010, on its strategic value; BERGER-WALLISER 2012; and, supra note 1, about its place in the continuum of conflict management and dispute resolution evolution.

³² The principles are from SOLARTE-VASQUEZ/NYMAN-METCALF 2017, supra note 5.

³³ Predigital models of dispute resolution revealed a gradual transition to collaborative methods evidencing more responsive and engaging methodologies. The proactive law approach, because it is collaborative, contributed to the emergence of legal design and the introduction of its human centered logic to law, adding to it responsive dimensions. This includes considering all the stakeholders (situational), their relations, and human interaction at the center of any given transaction, collaboration, self-reliance and empowerment.

³⁴ They belong to a proactive contractual management strategy and concept called Smart Contracting, that proposed transferable principles and criteria for the preparation and screening of transaction design, contract drafting and other processes in contractual management cycles and operations. They were formulated by SOLARTE-VASQUEZ/NYMAN-METCALF and JÄRV, in supra, note 9, and SOLARTE-VASQUEZ/NYMAN-METCALF 2017, in supra, note 5.

³⁵ Supra, note 12.

³⁶ On the basis of collaborative law see: PRATT 2015, and on its origins: PEPPET 2008.

³⁷ Preventive law is conceptualized in BROWN 1951.

³⁸ The relational theory of exchange represents the life work of IAN MACNEIL, as presented by the paper by Campbell in CAMPBELL 2004.

³⁹ Supra, note 5.

Transaction design risk-reduction and management considerations were proposed in a Taxonomy of Legal UX/UXI Factors and a set of principles to guide the production of balanced and value-driven relational interfacing of legal or legally relevant interactions. In these designs, efficiency is not a leading concern and does not prevail at the expense of other usability standards or/and achievements on the regulation of complex exchange relations (for instance, consumer protection legislation, the principles of good faith, and prohibition of the abuse of rights, etc.).⁴⁰ The principles are six, and coupled as follows: strategic-proactive, principled-collaborative, and interdisciplinary-technical.⁴¹ The UX/UXI factors, which are key categories in the reduction of information asymmetries without degrading the conventional representation of transactions, derive from the three international usability standards:⁴² efficiency, effectiveness and satisfaction, specified as 18 parametric categories. Readability, consistency, organization, information visualization, learnability, flexibility and interaction control are classified under *efficiency*; Completeness, collaborative features, communication effect on consensus, pleasant memorability and relational sustainability under *effectiveness*; and awareness, accurate understanding, consensus, associative compliance, positive experience of the exchange and sustainability of the outcomes, under *satisfaction*. These last factors amount to transaction friendliness and due to their correspondence with the subjective procedural components of fairness would help design and build functional procedural justice experiences in DRSs.

These standards set by the factors and principles should not only guide the design of dispute resolution processes and systems in the way they instruct transaction design, but also may offer a practical responsiveness assessment checklist to research and monitor their performance.

4. Conclusions

Responsibility and *responsiveness* in the design of technology-based DRSs are attributes worth striving for, because they are empowering and represent pre-digital conflict management goals such as fairness, in as much as post-digital proactive commitments. In addition, in DRSs, these attributes are core to being trustworthy and desirable, considering that they must be highly reliable, and centered on human needs. The institutionalization of procedural fairness and its values and principles, and the systematic application and assessment of advanced design heuristics in law should be the first steps in achieving these purposes in practice.⁴³ To that end, this paper explained procedural fairness dimensions and referred to the UX/UXI transaction design factors and principles⁴⁴ that could effectively operationalize the *responsibility* and *responsiveness* attributes of dispute resolution processes and DRSs. DRSs and platforms may be modelled with built-in features following legal UX/UXI standards to stage improved experiences *during the management, settlement and resolution of disputes*.

Procedural fairness was posited to provide general criteria to test the *responsibility* of dispute resolution processes and systems because it has been largely supported by legal standards and is uncontroversial in the field. This is notwithstanding some limitations regarding the elements of trust and dignity, and transparency, in the case of mediated and automated proceedings. In turn, the transaction design factors and principles promoted in proactive legal strategies were deemed to deliver on *responsiveness*. They are sensitive to pre-digital dispute resolution values and informed via retrospective learning about the optimization of ADR and smart systems design.

⁴⁰ Even though the strongest theoretical substantiation of the legal design approach and practice find roots in the conflict management and dispute resolution field, it has gathered speed under different slogans by initiatives on the use of design thinking and tools to empower and for self-help, accessibility to legal content and information, and access to justice.

⁴¹ *Supra*, note 5.

⁴² Look further in JOKELA/IIVARI/MATERO and KARUKKA 2003.

⁴³ On both the merits and complexities of heuristics in law see GIGERENZER/ENGEL eds. 2006.

⁴⁴ The principles are from SOLARTE-VASQUEZ/NYMAN-METCALF 2017, *supra* note 5.

The rise in computational power of legal technologies in dispute resolution will cause more tensions than benefits, if values and principles such as fairness and proactiveness are not effectively operationalized by the systems. Such failure could further compromise people's access to justice and result in the modelling of dysfunctional conflict management and regressive dispute resolution processes. It was stated that embedding *due process* and *procedural justice* features in technology-based and automated processes, combined with adjustments to enhance *transactional* experiences would increase their legitimacy and trustworthiness.

More discussions about procedural fairness measuring parameters and the development of substantive legal usability criteria are needed. Fostering this dialog could get the ADR and legal design professionals closer to reaching a well substantiated consensus, both at the ontological and the epistemological levels, to consolidate the research field, disseminate legal methods innovation, and smooth the technological transition of dispute resolution practices.

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