Enabling access, enhancing capabilities

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This blog entry has its origins in two threads of conversation. First, as I write, we are just three weeks out from the 2018 Forum on Online Dispute Resolution, to be hosted by the NZ Centre for ICT Law and Auckland Law School. What has been an annual – even flagship – Forum is now one of a growing number of comparable conferences on ODR, and on the ways in which courts, tribunals, dispute resolution and legal practices are moving into the digital space. It's not unusual to observe, over time, how the marginal becomes mainstream and the experimental becomes the standard; what is unusual here is the rapidity with which this has happened in the evolution of digital justice. While much of this is made possible – and even driven – by technology, at the heart of these developments is the same concern that motivated the development of mediation and improved access to justice: the recognition that the core resources of justice were out of reach for too large a part of the population. The "access" pathway through mediation in particular is one that both reduces the conventional barriers to justice and – ideally – enhances engagement, participation and capacities.

The second thread to this blog comes from email exchanges and conversations with colleagues working to enhance access to the digital world for people with disabilities – visual, mobility, hearing, language, cognitive and others. The concern here – to be expanded below – is that while the developments in access to justice have significantly enhanced the reality of access for those who might otherwise resign themselves to "lumping it", this has not been an equally shared benefit.

The link between these threads is the recognition that the huge advances in digital technology offer significant new options for disputants and DR providers (both private and governmental), thus widening the scope of access. Those options and explorations range from the relatively simple migration of some aspects of mediation practice online (such as using Skype or Zoom for video conferencing); to the availability of tools for digital document and case management; through to remote, asynchronous, text- and video-facilitated communication; the availability of online courts, tribunals and platforms; to the reality of algorithm-driven 'settlement' processes (such as that employed by eBay); and contracts executed through blockchain. At the same time, the same digital tools provide significant challenges and barriers to those whose disabilities are not catered for by digital pathways. "Access" needs to be expanded to "accessibility" in order to capture the further steps that might still be taken in order to meet the promise of the access to justice movement.

Consider a parallel for a moment: significant progress has been made, since the early days of the new mediation and dispute resolution "era", in acknowledging, researching and designing processes that recognise core cultural and gender differences in dealing with disputes. Many readers will recall the critical reviews of the first edition of *Getting to Yes*, in which the authors were taken to task for their apparent neglect of gender and cultural differences in the design of negotiation processes – a neglect that was, at least in part, acknowledged in later editions. What might have been initially critical, even marginal, voices in the design of DR processes are now central and essential. In taking seriously the notion of "going to where the disputants were" (as Prof Frank Sander put it), it was clear that where they "were" was more than a matter of physical location, and as much a matter of social, cultural, identity and political location. As we shift from rule-centred (one size fits all), to dispute-centred (specialist courts and tribunals) and – increasingly – disputant-centred modes of resolution and settlement, it's clear that the needs and attributes of the disputants move closer to the centre of our concerns.

It's useful to recall, too, that a very early line of inquiry and practice in the development modern ADR involved specific attention to "design": once freed from the constraints of hierarchical imperatives, and emboldened by a sense that dispute resolution was an intentional as much as institutional practice, practitioners and policy-makers alike recognised the possibility of designing procedures that better met disputant and organisational needs. Since the early work by Ury, Brett and Goldberg, *Getting Disputes Resolved* the idea of dispute systems design has shadowed and shaped the kinds of practices we engage in.

However, it's important to note a gap in the thinking here: the "design" largely relates to organisational needs, the design of the negotiation process (such as the identification of stakeholders), and the evaluation of the process. If, however, we go back to the idea that "access" needs now to be read more widely as "accessibility", especially in light of the significant deployment of digital resources, then "design" has another front-end evaluation task, concerning the needs of those who are less immediately able to use digital tools and devices.

As my ODR and disability rights colleagues, Lainey Feingold and David Larson make clear, reliance on digital resources means reliance on tools that create special access needs. The discussion of equal access and digital resources typically draws our attention to the "digital divide" – the uneven spread and availability of resources such as smart phones, adequate broadband, and basic computer literacy. While this gap is diminishing, it remains both real and a matter typically for central government policy.

Consider, however, other forms of "digital disadvantage": if you're reading this on a desktop or laptop computer, for the next 15 minutes (or even 5 minutes) put your computer mouse or touchpad aside and navigate your screen and between web links or pages solely using keyboard commands (with whatever combination of Control, Command, Alt, Option, and arrow keys your have at your disposal). Just to take it a little further, try that with one hand. Access to digital resources – including the emerging world of access to legal information online – will require a degree of manual dexterity that not all possess in equal measure. Now, if you wear glasses, take them off and try to read the standard font on your screen.

Imagine, too, that you are one of the 1 in 12 men or 1 in 200 women who are colour blind (indeed, some of you may not need to imagine this). How much is your navigation of your computer screen dependent on colour cues?

Kluwer mediation blog authors might also note, on the editing page of the WordPress template, in the panel where you select the time to submit your blog, there's a "readability" tag. While we might assume a level of literacy in our audience, the assumption may not always hold true in two respects: literacy and language competence. Take that into the world of website design for digital access to legal information (say, on employment or immigration rights, or relationship property laws, or traffic violations) and again it's clear that accessibility needs to shape access. All the more so where text-heavy web page design confronts someone who is, at best, marginally literate. Or where, as much in New Zealand as elsewhere, migrant and refugee communities face language challenges in access to legal and government services (though the proliferation of multi-language pages is heartening).

Without going into the full range of disabilities that might affect access and thus equity, it becomes clear that a respect for disputant needs becomes part and parcel of the design of dispute resolution strategies and resources. Recognition of variations in visual, mobility, cognitive, auditory, dexterity capacities provide the challenge – with the same degree of moral imperative as cultural, identity and gender differences – in this next phase of digital (and real life) access to justice.

Perhaps – by way of conclusion – the best insights come from the "capabilities" approach to justice of Amartya Sen and Martha Nussbaum, in moving away from the grand designs of theories of justice or emphases on equality or liberty, to focus instead on institutional and social practices that best recognise and enhance the capabilities of citizens. These are, according to Nussbaum, "not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment" [*Creating Capabilities: The Human Development Approach*, 2011]. "The capability approach purports that freedom to achieve well-being is a matter of what people are able to do and to be, and thus the kind of life they are effectively able to lead." [Stanford] It's not too much of a stretch to see those goals as consistent with the founding values of mediation and access to justice.