

Kluwer Mediation Blog

Reading the virtual landscape of disputes: the expanding world of digital justice

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“I see contemporary patterns of disputing as an adaptive (but not necessarily optimal) response to a set of changing conditions. There have been great changes in the social production of injuries as a result of, among other things, the increased power and range of injury-producing machinery and substances. There has been a great increase in social knowledge about the causation of injuries and of technologies for preventing them; there has been a wide dissemination of awareness of this knowledge to an increasingly educated public.”

Marc Galanter, “Reading the Landscape of Disputes: What we know and don’t know (and think we know) about our allegedly contentious and litigious society”, [1983] 31 *UCLA L. Rev.* 4, 71

At the time I wrote my previous blog, we were just a couple of weeks away from hosting the 2018 Forum on Online Dispute Resolution at the Centre for ICT Law and School of Law in Auckland. Now, a month later, that Forum has happened, the 70+ delegates from 14 countries have dispersed and returned home, and we’re left with a clear sense that this field is now bigger than the name implies, and instead encompasses a radical array of developments that will shape dispute resolution and legal processes – and the ways in which we work in those fields – almost beyond recognition. And yet, as I’ll suggest later, much will remain the same – in terms of the role of institutions of justice (albeit digitally reconstructed); the role of human intermediaries (still essential despite algorithm-directed information seeking); and the ethical challenges of living together (and disputing about it) will remain, and even become more important.

Some 35 years ago, American legal commentator Marc Galanter surveyed the ‘landscape’ of American dispute resolution, in the first decade of burgeoning ‘alternatives’ to litigation, and noted that, while part of the driving force for those alternatives was the litigious climate of modern life, it was important to note that this too was a reflection of our capacity to invent new ways to generate conflict. By way of parallel, one of the founders of modern online dispute resolution, Prof Ethan Katsh, has noted that, far from being the utopian tool for a modern connected world, the Internet has proved to be a less than peaceful place. So much so indeed, that the man credited with inventing the World Wide Web, Sir Tim Berners-Lee, now heads [calls](#) for the creation of a [new Internet](#) ; and other key early players have offered an [apology](#) for the Internet. In these recent developments, two key features of digital life can be seen: on the one hand, the radically useful resources of data management, connectivity, communication, and access to information that online

tools provide; and on the other, the equally radically disruptive, intrusive, disconnecting impact that those same tools have.

For that reason, delegates to the Forum were asked to think of their contributions in terms of two key themes: innovation and impact.

Under the ‘innovation’ heading, I’d identify two key themes from the many rich topics discussed: first, the growing significance of digital technology in the courts; and second, the potential for automation in access to legal information and resources. At the core of both of these developments was the same concern that has driven the last several decades of innovation in mediation and alternatives to court-based resolution: better access to justice. And, while courts and lawyers and mediators might never be far from the conversation, the ‘actors’ of most concern in modern dispute systems design – and the ones most likely to benefit from digital innovation – are self-represented litigants and other disadvantaged disputants.

On that first point – the growing role of technology in the courts and, indeed, of “Internet courts” – there’s a parallel with the trends in recent developments in “analogue” forms of ADR, to the extent that what begins as alternatives to formal and court-based litigation increasingly has a presence in judicial processes and a foundation in legislation. Substantively, digital strategies are central to the design of developments in, for example, consumer protection, commercial law, insurance claims, [money claims](#)– whether by way of platforms to enhance access to legal information, or algorithm-based decision trees and blind bidding, or platforms for asynchronous and text-based communication and document sharing. And, while these developments are central to enhancing simple, cost-effective, and timely access to resolution, it is now seen to be equally important to reconfigure courts in order to take advantage of digital resources and the efficiencies they offer to both litigants and justice systems. This doesn’t need further expansion here as earlier blog entries and a number of articles have touched on the very rapid move towards Internet Courts and Tribunals, key examples of which are British Columbia’s [Civil Resolution Tribunal](#) or the [Hangzhou Internet Court](#) and the very new [Beijing Internet Court](#). By the time of the next annual ODR Forum, we can be sure there will be many further examples.

As an aside, and as this is a mediation blog, I need to note also that the design of digital strategies for courts almost invariably involves a mediation component, as an intermediate, and human-assisted step between a largely automated “triage” or problem definition stage and – where necessary – an adjudicative stage. Mediation is, to this extent, embedded in the design of digital justice.

One aspect of digital innovation that runs in tandem with the developments in the more conventional fields of dispute resolution involves ground-breaking work in the role of information technology in emergencies, civil conflict and disaster management [see for example, <https://ict4peace.org/activities/>]. There’s no space in this blog to expand on this important development; suffice to say that mobile technology, distributed decision making, access to reliable information and co-ordination are at the heart of it. And, in the same way that critical thinking in international conflict resolution has informed the field of civilian dispute resolution, so it seems will digital developments in these two tracks enhance the development of practice – and, in the end, meet comparable goals of improving life chances.

Briefly, on the second aspect of the ‘innovation’ theme, the presentations at the Forum made it clear that we’re embarking on a path that is well beyond the mere migration of one’s mediation or

legal practice into digital spaces, or the use of digital technologies (tablets, mobiles, video conferencing) as additional tools, which I'm guessing is what many of you already do. Rather, we're moving into a world of artificial intelligence, machine learning, the role of [legal bots](#) to assist research, decision making and advice, and the potential of digital choice architecture (often by way of web page design) to assist people in making [choices](#). Cynically, of course, you know that this is already happening, but for commercial and advertising ends rather than the goals of access to justice – but at least the world of dispute systems design is now drawing on the experience gained in “nudging”, as one of the remote presenters, [Dr Ayelet Sela](#), indicated.

Of the second key theme of the Forum – Impact – it's not too much of a stretch to say that the discussion centred on the challenges of ethics and digital technologies and, if we were to focus even more, it's on the question of trust. As Siva Vaidhyanathan notes in *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy*, “norm-building is so much harder than technology development.” Or more broadly, the Spanish sociologist Manuel Castells notes, in his *The Rise of the Network Society* (p 213), all the elements of decentralisation form the new paradigm but “they still lack the cultural glue that brings them together”. “What” he asks, “is the ethical foundation of informationalism? And does it need an ethical foundation at all?” It's clear that the development and design of digital technologies for access to justice is, and must be, informed by a parallel conversation on the same essential norms that have shaped both formal and informal dispute resolution developments: trust, accessibility, transparency, equity, accountability, legality and – of particular importance – security. [See, for example, N.Ebner & J. Zeleznikow, ‘No Sheriff in Town: Governance for the ODR Field’, *Negotiation Journal*, Vol. 32, No. 4, 2016, pp. 297-323; Leah Wing, “Ethical Principles for Online Dispute Resolution”, *International Journal on Online Dispute Resolution* 2016 (3) 1, 12]. This is a question perhaps for later discussion, but it's also important to note that the trust we have hitherto assumed to depend on reputation, reliability, and relationships, now is increasingly to be derived from the apparent immutability of algorithm design and the security of blockchain-based transactions.

Finally, one element of the conversation that takes us beyond usual world of access to justice arises from the impact of the digital world on our human interactions. I anticipate that, just as we'll spend more time in future looking at the rise and role of Internet courts and digital decision trees, we'll also address the “existential” questions that now turn up in recent books such as Max Tegmark's *Life 3.0* or Jamie Susskind's *Future Politics* – discussions not just on the jurisprudence of automated decision making but on what it means to be human in a digital age. In one all too brief exchange at the Forum, this came up in response to a reference to “data subjects” – that is, you and me, the human beings who are increasingly at risk of being reduced to [commercially interesting] bundles of data. The switch from the human to the digital priority is both increasingly familiar and potentially alarming. And, just as mobile phones are now practically essential tools in television dramas (along with representations of text messages on my TV screen), so will digital devices – and probably, digital deliberation – be part of future surveys of the landscape of dispute resolution.

That last part of our conversation at the Forum reinforced the recognition that the development of technologies (here, those directed towards law, disputes and resolution) cannot be separated from a discussion about what Prof Roger Brownsword refers to as the “moral community” in which those technologies emerge. [R. Brownsword, “Lost in translation: Legality, Regulatory Margins and Technological Management,” *Berkeley Technology Law Journal*, 26: 1321; @ 1335 [2011]]

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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