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Changing the architecture of justice: ODR, dispute resolution and design.

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In his 1956 text, The Queen's Courts, Sir Peter Archer suggested that the development of the Courts was more organic than by design, and – though he doesn't say as much – more pragmatic than principled. He calls on Topsy's response to Ophelia in Uncle Tom's Cabin, to suggest that, like Topsy, they "just grow'd". That, however, was more than half a century ago. Contemporary observers of most modern legal and judicial systems would see far more by way of design and conscious reform. In the world of non-judicial dispute resolution, particularly negotiation and mediation, there has also been a deliberate adoption of the idea of design, exemplified in the Ury, Brett & Goldberg book, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1988) and in a number of publications and practical programmes involving the conscious development of dispute resolution systems.

One recent further step in that direction can be seen in the Advisory Group's Report to the Civil Justice Council on Online Dispute Resolution for Low Value Civil Claims (see http://www.judiciary.gov.uk/reviews/online-dispute-resolution/ for a link to the Report and other resources). This development is of importance to us in the mediation field – and dispute resolution generally – for at least these reasons:

The recommendations place ODR at the heart of the resolution and management of civil justice claims. This is not a set of recommendations of the uses of IT in case management (see § 1.5), as that is already well-established in a number of jurisdictions.
The recommendations – echoing the EU Directive of 2008 and the Regulation of 2013 – reflect the need to respond to the gap in consumer protection, given the reality of high volume-low value disputes, in which the costs of litigation far outweigh the value of the goods or services in question and, in any event, the online nature of the bulk of these transactions means that there would be jurisdictional barriers to access to formal justice;
The recommendations go further than earlier moves in this direction. The initiatives of, for example, the EU have been to promote mediation, either online or, if possible face to face, and to require the implementation of member state legislation to ensure a level of uniformity (through training), security (through confidentiality) and enforceability. The Advisory Group's recommendations take the further step, at least within one jurisdiction, of proposing the creation of a new court: Her Majesty's Online Court (see §§ 2 and 6). The unique step in this recommendation would be the creation a Court that operates wholly online.
This recommendation is akin to but a step beyond a development in Singapore which I've

mentioned in an earlier blog: the decision, following pilot programmes, to permit “appearance” in the State Courts via smart phone. In that case, the the Court remains the same kind of bricks and mortar edifice that we’re used to, but the notion of “access” begins to change quite radically. (See http://kluwermediationblog.com/2014/07/23/leaving-disputants-to-their-own-devices/).

The recommendations of particular interest to mediators and those interested in dispute systems design concern the first two proposed tiers of the new ODR system. The will be a first tier, likely to be largely automated and involving online tools that will guide potential litigants through a set of questions in order to assist them in the evaluation of their claim. In addition to the automated process, it is anticipated that there could be online access to offline help, provided by, for example, law clinics. The second tier is where it gets more interesting for mediators: this is a stage of online facilitation (§ 6.3) in which facilitators – presumably trained in both conventional, real time, facilitation and in the unique requirements of working online – will work with the parties, review papers and provide the familiar range of communication resources. The key difference here, however, is that it is anticipated that “the facilitators would tend to be more inquisitorial, participative, and advisory than the current mediators.” (§ 7.7). So, not only are we looking at the changes involved in going online; we’re also looking at a specific recommendation to adopt a stance towards facilitation.

While the argument for this latter recommendation is not, I think, fully developed, it seems to have two key foundations: first, in the experience of financial service sector dispute resolution (of which there are a number of international examples to draw on) where the practice of dealing with complaints has been more investigative, inquisitorial and recommendatory, usually backed by statutory authority; and second, in the requirement of efficiency – the expectations of access and resolution are shaped as much by the interests of speed an efficiency as they are by fairness and participation.

These recommendation are, of course, just that, and there is some way to go before we’ll see all or part of them implemented. What informs these recommendations is not only the practicality of finding mechanisms for dealing with the burgeoning volume of cross-border, low value disputes, where it is clear that access to the courts is simply unrealistic, for reasons of value, cost, and jurisdiction; but also the rhetorical question posed by the Chair of the Advisory Group, Dr Richard Susskind, as to whether courts are a place or a service. Given the last four decades of a common pursuit to find alternatives to litigation and to find solutions where the disputants are rather than dragging them to court, the question is an important one. Given, too, that the more recent developments in IT mean that “access” to all manner of services can be achieved remotely and, these days, primarily through a smart phone or other device, it’s not surprising that the concept of the court (along with the concept of the university) shifts from a location to a service.

But, while I remain a card-carrying enthusiast for ODR, and have been closely engaged with those developments for the past 20 years, I have just a couple of questions that bother me – they don’t undermine the proposed development, but they are questions about access and impact and, metaphorically at least, the architecture of dispute resolution.

First, while it may be true that the image of the court is shifting from location to service, I also suspect this is a false dichotomy. The question more or less obliges us to agree with this latter direction. At the same time, there’s another symbolic dimension that’s still important. In their magnificent book, Representing Justice (2011), Judith Resnik and Dennis Curtis explore, through text and photographs, the architectural, sculptural and locational power of the courts and the judicial process. Now, from a critical perspective, this may be precisely the reason why it has been important to escape the gravitational pull of the courts, in order to free disputants from the thrall

and monopoly of legal power and procedure. At the same time, this is not something to be abandoned too readily. All dispute resolution systems carry some level of symbolic power – and at this stage it's hard to imagine what that might be with an online court.

Which leads to my second point: innovation, whether technological or social, has an impact, and what the natural scientists are beginning to think about is the "soft" impact of technology, bioengineering and so on – those soft impacts being primarily concerned with what might be called the "moral landscape" of sociocultural, ethical and interpersonal values. As law professor, Roger Brownsword, notes in commenting on technological innovation and regulation, it remains necessary to take a broader view of what a community's "moral commitments" might be in the process of implementing technological change, or with ODR, changes created through the uses of technology (see R. Brownsword, "Lost in translation: Legality, Regulatory Margins and Technological Management," Berkeley Technology Law Journal, 26: 1321 [2011]).

My main point in all of this is: while I see the move towards online evaluation, facilitation and adjudication as imperative, fascinating and simply a mark of the direction we're heading in an increasingly mobile world, I suggest also that there's a parallel conversation to be had which is not one about efficiency and speed, but rather one about impact and – dare I say it? – moral implications. In a probably unintended pun on the 1970s slogan, "the personal is the political" Barry Wellman suggests that "the personal has become the portal" ('Physical Place and Cyberplace: The Rise of Personalized Networking.' International Journal of Urban and Regional Research 25: 227–52., 238).

As Prof Luciano Floridi comments, as part of his current multi-volume project on the information society and the philosophy of information:

"The development of ICTs have not only brought enormous benefits and opportunities but also greatly outpaced our understanding of their conceptual nature and implications, while raising problems whose complexity and global dimensions are rapidly expanding, evolving and becoming increasingly serious. A simple analogy may help to make sense of the current situation. Our technological tree has been growing its far-reaching branches much more widely, rapidly and chaotically than its conceptual, ethical and cultural roots. The lack of balance is obvious and a matter of daily experience in the life of millions of citizens. The risk is that, like a tree with weak roots, further and healthier growth at the top might be impaired by a fragile foundation at the bottom. As a consequence, today, any advanced information society faces the pressing task of equipping itself with a viable philosophy of information… [I]t is high time we start digging deeper, top-down, in order to expand and reinforce our conceptual understanding of our information age, of its nature, less visible implications and its impact on human and environmental welfare, and thus give ourselves a chance to anticipate difficulties, identify opportunities and resolve problems, conflicts and dilemmas."
Floridi, "The information Society and Its Philosophy", The Information Society, 2009, 25.3, 153-158; Preprint from http://www.philosophyofinformation.net; p. 5

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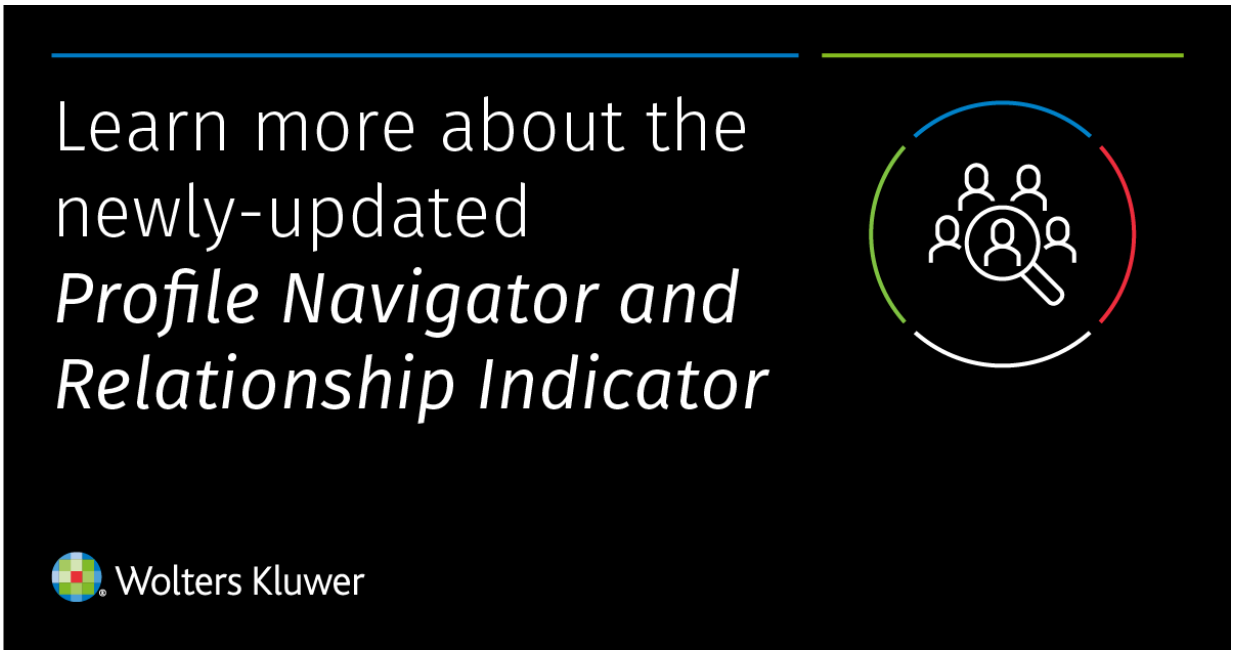

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