Kluwer Mediation Blog

Crowd-Hidden, Whereabouts Unknown

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I begin with two poetic images. One is from an 8th century Taoist poem –

I asked the boy beneath the pines.
He said, “The master’s gone alone
Herb-picking somewhere on the mount,
Cloud-hidden, whereabouts unknown.”

[Chia Tao (777-841)]

And the other, more recent, from W H Auden’s poem “Law Like Love”:

And always the loud angry crowd,
Very angry and very loud,
Law is We,
And always the soft idiot softly Me.

A number years ago, a colleague then working with a national law reform commission, spoke of the process of law reform in the Ancient World. For Athenian citizens – excluding, of course, women and slaves – the process of proposing law reform was open and public: anyone could propose a reform by speaking in the Agora. The only constraint was that a rope was looped around the neck of the would-be law reformer, and the ends of the rope passed back into the crowd. You get the picture: if the proposed reform met with the approval of the crowd, the ends of the rope were dropped; if not, a rapid tug on the rope put an end to the reform and the reformer.

Whether this is apocryphal or not, and whether deliberation preceded the tug-of-law or not, the image serves well as a metaphor for more modern times, when we shift from the literal agora to the virtual or digital agora and to the emerging role of dispersed crowds in decision-making. Without dwelling too long on the quality of conversation and dialogue to be found out there in this modern agora, I’m intrigued and puzzled by a new initiative in the dispute resolution field that relies entirely on the “wisdom of the crowd”.

Recently, a colleague in the field of online dispute resolution sent out a note to those of us in the ODR practitioner and researcher network, informing us of the founding of a new enterprise, Crowdjury.org. Having read their web site a number of times, and having also read the position paper that can be found on that site

[https://medium.com/the-crowdjury/the-crowdjury-a-crowdsourced-court-system-for-the-collaboration-era-66da002750d8#.fot55nk1s], I'm still trying to work out what I think about this. On the one hand, this seems like a practical development in the use of ICT in the rapidly changing landscape of dispute resolution, and the process might well respond to persistent issues of access, cost, participation and so on. After all, the claim made by the originators of Crowdjury.org is that it offers "a framework for court processes of adjudication adapted for the blockchain era. It combines the advantages of crowdsourcing and blockchain to create a system of justice both transparent and self-sustained." On the other, I suspect that the jury is still out – to adopt and adapt their metaphor – on both the wisdom of the crowd and the coherence of crowdsourced decisions.

The core argument of this process is that the judicial system – any judicial system and indeed any adjudicative system – is in effect an "epistemic engine"; that is, it's a device, a process, a set of practices for making decisions based on the gathering of information and the application of experience and practice to the presenting problems. The four essential components of any such epistemic process are, we're told, a procedure (process), an agent (decision maker), input (evidence), and output (decision). There's a separate and also epistemological discussion to be had on the risks of reductionism – as the late American historian Theodore Roszak commented, the problem with reductionism is that it's both true and incomplete. And the risk here, I suspect, is that the model and metaphor is an algorithmic rather than cultural one.

There are two aspects of the "crowdjury" process that are both intriguing and puzzling – though not necessarily problematic. The way in which the process will work is that it draws on "collective intelligence, open government, social epistemology and the blockchain technology [which] enable a radically different way of structuring courts, a way that is both epistemically efficient and financially sustainable." In this respect, crowdjury.org is both a practice of and metaphor for networked communications, crowd sourcing, open communications, and algorithm-driven decisions. In brief, claimants or disputants submit a claim or dispute or offence to the website; a self-selected panel from "the crowd" does the fact checking; if then appropriate a "trial" follows, which is public and transparent; a self-selected, crowd-based jury makes a decision, and "judgment" is rendered. So, the first aspect of this innovation that is at least open for consideration is the role of the crowd in the Internet age – quite apart from any issues of choice of law and jurisdiction.

It's tempting at this stage to take a small diversion into the work of historians such as Prof George Rudé on, for example, the role of the crowd in the French Revolution, or in popular protest in 18th century England, or in 19th century agricultural uprisings – and the often problematic and disruptive nature of crowds, their composition, their collective motivation and their malleability. The contemporary parallels of the crowd in the digital era have yet, I think, to be subjected to the same sustained and critical analysis – perhaps because the phenomenon is too new and too close; perhaps also because the "crowds" are ephemeral, dispersed, of short-term instrumental value (such as fund raising) and low on shared identity or ideology. The question that I still need to work on for myself – and would really appreciate reader input on – is the political, normative, jurisprudential, and (above all) civil identity of the kind of crowd imagined in this process. As the Spanish sociologist of modern networked societies, Manuel Castells asks more generally, what is the "ethical foundation of informationalism" – and, for our purposes in the decision-making, dispute resolution world, what is the ethical and normative "glue" that holds this temporary, instrumental polity together?

So, the first open question concerns the coherence, and civic identity of this anticipated crowd. The

second question is a more technical one: the creators of crowdjury.org anticipate that these dispersed “jurors” will be rewarded for their civic contribution through Bitcoin. More to the point, both Bitcoin and the anticipated adjudicative structure of this process depend on the use of “blockchain” technology. Here’s where I bump up against the limits of my own real understanding of this technology though, the more I read of it the more it seems likely that blockchain technology will be one of the drivers of online and dispersed or distributed decision making. In brief, blockchain is a form of distributed information gathering and storage which is transparent (so transactions can be seen) yet anonymised (for security and privacy) and secure precisely because it is distributed and because each “node” of the storage is both networked and independent. The two anticipated functions of blockchain technology in this online, crowd-based adjudicative process are first, as the means of secure Bitcoin payments for jurors; and second as the repository for decisions, thus building up over time a body of precedents, as a digital analogue of conventional legal precedents.

I dwell on this innovation here because, as has been discussed in earlier blogs, it’s clear that online – and indeed algorithm-driven – technologies are already part of the landscape of mediation and adjudication; and it’s equally clear that our conventional civil justice systems are looking to digital technologies to alleviate the fiscal strains on those systems and to facilitate access to information and decision making. It’s also clear that, in the same way that mediation has fostered the rise of private dispute resolution, so too will there be private initiatives such as crowdjury.org that will push the boundaries of what we regard as conventional and indeed “proper” in adjudication and civic decision making. What remains unknown, in law and technology, is the “soft” impact: soft impacts are harder to measure and are broadly concerned with impact on social roles, normative or moral impacts, or relevance to social or cultural identity. As is the case with the physical or biological sciences, it will be relatively easy to measure hard impacts of the uses of technology in terms of cost and time savings, or the number of cases processed. But what we now see is a growing field of inquiry into the social cost of the “always on“, device addicted, screen fixated world.

The irony is that this crowd-sourced world may have a cost in terms of a retreat from public and civic life. As Sifry points out:

“The rapid rise of social media has generated more talking than listening, more pushing than parsing, and more fragmentation of attention than concentration. The resulting sense of information overload may cause more people to retreat from the public arena, simply because it feels too crowded and noisy.” [M. Poblet, “Rule of Law on the Go: New Developments of Mobile Governance” Journal of Universal Computer Science, vol. 17, no. 3 (2011), 498-512, p. 499, citing Sifry, M.L. 2010. “Point-and-Click Politics”. The Wall Street Journal, October 30, 2010]

Auden’s judge may find it hard to retain his or her normative certainty in this world:

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I’ve told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

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