

# Is ODR ADR?

## Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016

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### Abstract

*This essay presents the observations of a founder of the dispute resolution field to new developments in online dispute resolution, expressing both concerns and hopes for greater access to justice.*

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Attending the 15th annual gathering of those who design, implement and use online dispute resolution (ODR), I am left asking the question, do ODR and 'ADR' (now 'appropriate', not 'alternative') dispute resolution have the same goals? Access to justice? Efficiency and transparency of dispute resolution? Quality of solutions? Satisfaction with dispute resolution? Justice?

The modern 'ADR' movement was founded in the United States in the 1970s (and has now travelled globally for many different reasons) for essentially three different reasons: first, what I call 'quantitative' ADR – for cheaper, faster and more efficient docket clearing from long queues in court, the judicially promoted reason; second, more 'qualitative' ADR, which means more tailored and party-fashioned solutions to legal problems, including a focus on future relations, not just the past; and third, a more politically process-oriented hope for greater party participation and de-professionalization ("let's not have lawyers if we don't need to") and democratization of dispute resolution.

The 15th annual meeting of the Online Dispute Resolution community presented examples of the first and third motivations for taking disputes out of courts and putting them on computers, but left this participant and observer wondering about the second. Online Dispute Resolution is just a bit younger than the ADR movement. Twenty years ago founders of ODR, Ethan Katsh, Janet Rifkin and Colin Rule, all had a hand in online dispute system design by creating and working with eBay's ODR system, which now handles over 60 million disputes a year between online vendors and buyers of goods by a private innovative company that wanted to create a worldwide network with a quality reputation. Imagine if all those cases went to court!

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The ODR meeting demonstrated both how far and how slow parts of the innovations have progressed. While parts of the private sector have advanced with uses of online complaint systems and customer service (Amazon is reported to have better customer service than any bricks and mortar business, but recent newspaper reports suggest that is due to exploitation of Amazon workers – if the customer is always right, maybe it is the employee who is making it possible!)

This conference was devoted to bringing ODR to the public sector – courts and formal dispute resolution. On offer at the meeting was an opportunity to hear several ‘pitches’ of the latest ODR products, intended for use in the public sector, particularly as a supplement, or in some cases a substitute, for parties going to court. Access to justice is the mantra of most platform designers as they hope to interest court systems in moving into the 21st century as so many private companies have done.

The conference began with UK Lord Justice Fulford, who clearly thinks the time has come for the UK, citing Richard Susskind’s committee’s work and the 1 billion GBP now allocated to creating the online court for disputes under 25,000 pounds, to be rolled out within the next 18 months. ‘Necessity is the mother of invention’ might have been the title of this address, as Lord Fulford suggested that the caseloads of modern life cannot be sustained in a paper-filled legal system. Courts, unlike hospitals, businesses and even schools, have resisted change in design and function as we move to an electronically based communication society. Lord Fulford suggested we would dispense with buildings and that consumers and complainants would indeed have access to computers and smartphones and could go to local community libraries to get online to deal with their cases, as physical courts move into ‘Virtual’ courts of streamlined case management and document filing and access, and decisions.

There will be risks – privacy, confidentiality, will judges play ‘candy crush’ in their offices or on the bench, will low value, but factually complex cases, be managed properly, will Rules of Civil Procedure have to be modified for this brave new world? Who will want to be a judge in this computerized world? Will criminal cases be handled without in-person confrontation of witnesses (likely unconstitutional where I come from in the US), though some jurisdictions are experimenting with online admissions of guilt and plea-bargains in minor (mostly driving) cases. Yet Lord Fulford seems to think we are moving to the greatest changes in the legal system in 1,000 years. We in the rest of the world will be watching the UK.

I still have my doubts. The digital divide is still profound – language, both linguistic and computer logic language, age (sight and typing and comprehension for the elderly or those alone), income, access to equipment and learning of constant updates and an inability to talk to a real person to give and get advice about legal matters that do not lend themselves to tick boxes are issues that continue to worry me.

I am most impressed by the Dutch *Rechtwijzer* divorce platform, which combines great computer design and human interfaces – parties will be able to file for divorce and then use financial and calendar programs to figure out support and child custody schedules on their own, but also to access a counsellor or mediator if they prefer some real-life human interaction. Watching how this program can

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work has converted me somewhat to thinking the future of ODR is a combination of a well-designed computer platform where some interactive possibilities still allow human and more flexible and tailored advice and information to come through.

The Dutch were in the lead for legal aid for most of human history, so it is no surprise they might be the prime innovators here. But consider – all of this has considerable support of the state. The UK has suffered massive cuts in legal aid and support for its legal system, and my country never had such support to begin with. And we also heard from a major innovator, the former head of the small claims court in Holland, Judge Dory Reiling, consultant for the World Bank on justice systems, who described her own journey to create a small claims platform for Holland that did not get enough use for further development.

Nevertheless, the greatest innovations will perhaps come from the federal systems, which can experiment by state or province, in smaller piloted programmes, rather than the whole nation at once, like Canada, which is soon to launch a compulsory Civil Resolution Tribunal in British Columbia (all civil cases online); the US, where California (my state) is looking at online case processing for some claims, and Ohio has launched an online property tax assessment dispute resolution system; and Australia (with variations in New South Wales and Victoria states).

Other innovations of some promise are those that dispense legal information (like a demonstrated programme on labour law and advice in the Netherlands), and others in the Czech republic and family matters (RELATE in the UK). On the other hand, the audience at the conference was riveted by the sad tale of two French consumer dispute online designers, website Demander Justice.com (with business and engineering, but no law, degrees), who have been pursued (so far unsuccessfully) by the French and Paris Bars for unauthorized practice of law in several rounds of litigation in criminal and appeals courts, at great expense, with the clear purpose of putting them out of business.

As one who has been studying the challenges of regulating the new platform economies of Uber and airbnb as they both offer new access to services, but also challenge labour, health and safety regulations, and tax payments, I wonder how the regulation of advice giving online will play out in different legal regimes – much will depend on the power of that great profession of monopolization – the lawyers.

Attendees at the conference received excellent presentations from Nancy Welsh and Leah Wing to be reminded of the importance of ‘procedural justice’ and ethics of ODR design. In my personal interviews of several of the platform developers it is clear that ethics and quality are a concern of many – those who attended this conference. What about those entrepreneurial outliers who seek to make money without participating in these voluntary meetings of sharing the state of the art and knowledge at the cutting edge of the field? Platform developers in attendance were there to learn from each other and also to pitch their products. I was approached as a legal academic expert to serve on advisory panels of new groups just emerging to consider what can be done – fallen away lawyers, mediators, disgruntled disputants themselves – all of whom want to make dis-

pute resolution more accessible and easy for others. But what about those who were not there to hear these exchanges and proposed codes of conduct in an unregulated field?

So there was much talk about 'justice', including from this blog's editor, Roger Smith OBE, and access to it. What I heard was that in small, simple disputes, a quick and easy form to be filled in, documents uploaded, monitored communications between the parties (think returns and money refunds, and small fines) and yes, even decisions could be done online. What I wonder about is what drove me to ADR in the first place – where in the tick boxes and the email communications will there be room to brainstorm and create a different solution, give an apology, come to understand someone else's perspective and improve, rather than just 'resolve', relations and disputes. For me Online Dispute Resolution may be one tool for some 'access' to dispute resolution of some kind, but I would not overclaim the 'justice' part. I recently resolved an ongoing dispute with one of my airlines online – what I felt was relief it was over and done, not any sense that 'justice' had been served, and it was very clear that at the other end of my computer was not someone with the power or discretion of a mediator or judge to consider a more creative and tailored solution. I got what the tick boxes or company policy allowed. Will we be getting small claims or civil justice in a programmed set of legally required tick boxes? I thought the common law allowed more flexible rulings and mediators and negotiators working in the 'shadow of the law' could still fashion new and creative remedies that looked to the parties' futures, as well as past conflicts.

I remain intrigued by what ODR might be able to do in some cases, but I remain a bigger fan of old-fashioned in-person ADR, because for me, one size will not fit all – I remain a process pluralist – ODR will work in some matters for some people, but let us not yet throw out the baby (ADR) with the bathwater (the old and rigid legal system).

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