The Culture in the Code

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INTRODUCTION

In the United States, and in much of what has come to be known as the Global North, alternative dispute resolution (ADR) has become a routine, and sometimes even a dominant force in the resolution of disputes that traditionally would have gone through some formal, legal process. We could belabor the issue with examples, but one observation from the United States will probably serve to make the point. The American Bar Association (ABA), the premier professional association for attorneys in the United States, now has as its largest interest group the Section on Dispute Resolution – a group within the ABA dedicated to dispute resolution outside the formal legal system.

Fuelled by the rise in international and trans-national business conducted online or abetted by technology, and by the same urge to export that has driven Hollywood movies, network television, Nike athletic shoes, and Coca-Cola into the far reaches of the world, ADR is now being exported. The first wave of ADR exports consists of face-to-face interaction designed, and often delivered by, consultants and academics from the Global North. As Nadja Alexander observes:

> ADR programs for the 'third world' are being funded through 'first world' institutions as part of economic and legal reform. In this context western mediation is frequently introduced to reforming countries by well-intentioned consultants as a culturally-inclusive and value-free process – which, of course, it is not.[1]

As online dispute resolution (ODR) has followed ADR into more common use in the United States and the rest of the Global North, ODR is following ADR into the export market, a process that is given impetus by the development of technology infrastructure and the introduction of "mainstream" online business technology in developing areas.[2]

The growth and development of international or trans-national online commerce and communication, and the growth of online dispute resolution systems to handle conflict generated online, have been discussed in great detail in other venues - we will not restate that history.

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[1] Nadja Alexander, "Mobile Mediation: How Technology is driving the globalization of ADR," forthcoming, Volume 27, Hamline Journal of Law and Public Policy (Spring 2006). Alexander cites two reports on the exportation of ADR: "ADR: A Practitioner's Perspective," (www.info.usaid.gov/democracy/techpubs/adr), and "USAID Supports Alternative Dispute Resolution in Latin America and the Caribbean," (www.usaid.gov/locationslatin_america_caribbean/pdf/dg_conflict.pdf).

[2] Mohamed Abel Wahab has written about the technological Global Divide and some of the projects underway to bring more e-commerce and e-communication to the developing world. For his perspective and references to specific developmental efforts, see: "The Digital Divide, E-Commerce, and ODR: Constructing the Egyptian Information Society," (www.odr.info/unece2003/pdf/wahab.pdf), and "Online Dispute Resolution and Digital Inclusion: Challenging the Global Digital Divide," (www.odr.info/unforum2004/Wahab2.doc).

The points we will elaborate are: 1) Online commerce and communication created a type of dispute that was not suited to traditional dispute resolution systems, and demanded a willingness for parties to "flex" into an online system that might look very different from dispute resolution systems available offline; 2) there are some basic attributes that ODR systems must have in order to be successful, regardless of the willingness of parties to flex; 3) the exportation of ODR systems from the Global North to the rest of the world brings along cultural assumptions embedded in the ODR application code, just as they are embedded in the basic "North American models" of mediation; 4) as the use of ODR systems moves out of a commercial context and into a "social" context, the impact of cultural assumptions embedded in the code become more pronounced; and, 5) there are some things that ODR system developers and third parties who use ODR tools can do to adapt to different cultural contexts.

ODR, Commerce, and Online Communication

The growth of online dispute resolution is, as has been noted by many, tied to the growth of commerce and communication on the Internet. Ethan Katsh observes that:

> The decision by the National Science Foundation in 1992 to lift its ban on Internet-based commercial activity was highly controversial and enormously significant. After the ban's removal, disputes related to online commerce began to surface.[3]

A driving force behind the development of online systems was the inability of existing legal systems to cope with disputes among parties geographically dispersed and with no real hope of developing a proximate relationship. As Colin Rule argues:

> Legal systems are tied to geography almost by definition. . . . It is obvious that transaction partners who meet on the Web can take little comfort from the redress options provided in the face-to-face world. You can't merely recreate offline judicial mechanisms online and expect them to work, with e-judges making e-rulings enforced by e–police running e-jails. The model doesn't work, on a fundamental level . . . .[4]

The number of available sites offering ODR services fluctuates from year to year, and indeed varies depending upon one's definition of the term ODR. There are, however, a growing number of ODR service providers, and it is not surprising that the largest number of sites and the largest volume of

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[3] Ethan Katsh, "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace," *Lex Electronica*, vol. 10, no. 3, Hiver/Winter 2006 (http://www.lex-electronica.org/articles/v10-3/katsh.htm), p. 3.

[4] Colin Rule, Online Dispute Resolution for Business, Jossey-Bass, 2002, p. 5.

cases appear to fall into two broad categories: "consumer disputes," and "Internet disputes."[5]

Conley Tyler puts commercial disputes in a category that includes "family, workplace, and neighborhood" disputes. We argue that commercial disputes, including disputes about consumer issues and purely online exchanges such as disputes over domain names, are qualitatively different from disputes that arise in the family, or in neighborhoods, or in workplaces, or in politics. For the purposes of this paper, we will refer to disputes occurring outside the narrow confines of online commerce and interaction as "social" disputes. A basic belief that we hold is that the field of dispute resolution finds itself at a time of transition in the use of ODR tools – a transition from the conceptualization of ODR as the application of cyber-tools to resolve cyber-disputes, to the application of ODR tools in a wide range of traditionally face-to-face venues. ODR technology is being used in labor-management bargaining and grievance mediation,[6] workplace disputes,[7] and in peace building efforts.[8]   This period of transition brings with it new stresses on ODR technology, and new challenges for third parties who attempt to apply technology to disputes in a wider range of venues.

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[5] See Melissa Conley Tyler, "115 and Counting: The State of ODR 2004," International Conflict Resolution Centre, The University of Melbourne, (http://www.odr.info/unforum2004/ConleyTyler.htm).

[6] For example, the U.S. National Mediation Board is engaged in an extended program using ODR tools in bargaining and grievance mediation for the U.S. airline and railroad industries. The project is in partnership with the University of Massachusetts at Amherst and is supported by a research grant from the U.S. National Science Foundation (NSF Award #0429297, "Process Technology for Achieving Government Online Dispute Resolution"). For an overview of the research project, see "Researchers Working to Develop Tools for Online Labor Mediation," (http://www.umass.edu/umhome/news/articles/9552.php).

[7] For example, the U.S. National Institutes of Health is in the early stages of a pilot program, in cooperation with The Claim Room, to apply ODR technology to workplace disputes at the various campuses of the NIH.

[8] For some views about the application of technology to peace building, and the problems of using ODR technology in culturally sensitive disputes, see the discussion led by Sanjana Hattotuwa, Head, Research Unit, Info Share, Sri Lanka, and editor of the Peace Library, during Cyberweek 2005, (http://www.odr.info).

Some features of disputes that arise in commercial contexts, or in interactions that are wholly online and trans-national in nature, make them less susceptible to the influence of cultural differences than disputes that arise in society at large, and suggest that cultural elements of ODR applications have less impact in commercial ODR.

First, the elements of commercial and purely online disputes exist in a range that is narrower than disputes generated within the family or the community, or among political groups. For example, if party A buys something online from party B, it is likely that a dispute, if one exists, will fall into some predictable categories: I did not receive the item; it was not what you advertised it to be; it arrived broken or damaged; you did not pay me, etc.

Second, it is likely that, whatever micro-culture from which the parties come, they are used to operating within yet another micro-culture – the culture of online business and trade. One may be a father, brother, son, elder, leader, etc., in one's home culture, but when operating as a seller or buyer of goods and services over the Internet there is a role one assumes that brings with it expectations and behaviors different from the ones at work in the home culture.

Third, there is a tacit acknowledgment among most of the disputants involved in trans-national online commerce that, in lieu of a set of universal e-laws, e-judges, and e-police, both parties must, in order to resolve their dispute, find some mutually agreeable process to follow. Both parties step into a process that may not be what either party would prefer, but which is seen by both as an expedient way to reach the goal of resolving their conflict.

By analogy, one could think of athletes competing in international venues. The sports attire may not be what the individual athlete's culture would dictate, and in fact may be somewhat scandalous in the context of the athlete's home culture. The drive for individual achievement and reward may be at odds with the collectivist nature of the athlete's home culture. But, if the athlete wants to play in the international sports arena, there is an understanding that all athletes from all cultures will flex into the expectations and norms established for the competition. In essence, the athlete willingly steps out of her or his home culture and, for a time, steps into the culture of international sports, adopting the rules and norms associated with that context. Individuals who enter into international or trans-national commerce face much the same situation. They can either flex into the norms and rules associated with online commerce and communication across borders, and the dispute resolution venues that come with those norms and rules, or they can choose not to play.

Of course, this is an impossible dilemma. Given the direction in which international commerce has been heading over the last decade or two, no party, anywhere in the world, can reasonably choose *not* to play in the growing global marketplace. Alexander's comment on the dominance of 'first world' funding of 'third world' ADR programs underscores the hegemonic dominance of the 'first world.' This imbalance in contribution may support critics who accuse the Global North of constantly imposing its cultural paradigm on the rest of the global community. As online technology moves into arenas now dominated by face-to-face dispute resolution, the perception of dominance is a consideration to explore in future evaluations of ODR and the potential of its role in facilitating constructive global relations.

One implication of the need and willingness to flex into a common online dispute resolution environment is that a significant number of ODR services have handled successfully a great number of online disputes across national borders.

In 2004, Conley Tyler cited large volumes of cases in the commercial and consumer arenas, with settlement rates as high 95-100 percent, and she noted that ODR services were offered in twenty languages.[9]

It would be reasonable to assume that many of the concerns expressed in discussions of the impact of culture on face-to-face dispute resolution would apply to the application of online dispute resolution tools. Kevin Avruch has been a leader in the discussion on the role of culture in conflict, representing a school of thought that has argued against the marginalization of culture in conflict resolution approaches.[10] He argues that culture is an important variable in conflict, and he criticizes theorists who relegate culture to the status of a mute variable in conflict. Avruch argues that culture is present in the parties' and interveners' worldviews, and impacts their analysis and understanding of disputes and social conflicts. He writes that practitioners who take what he calls the "cultural turn" have learned to conceive culture as a) constituting different norms, values and beliefs for socially appropriate ways to "process" conflicts and disputes"; b) affecting significant perceptual orientations towards time, risk or uncertainty, affect (in self and others), hierarchy, power, and authority; and c) comprised of different cognitive representations of frames such as schemas, maps, scripts or images bound up in metalinguistic forms as symbols or metaphors. According to this view, to conduct an effective conflict analysis of a dispute requires a cultural analysis to include the perceptual and cognitive features that can impact the communication aspects of conflict both for the parties and interveners.

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[9] See Conley Tyler, "115 and Counting." In 2006, SquareTrade on its web site claims to have successfully handled over 2 million online disputes, with a success rate of approximately 85 percent as cited by Conley Tyler.

[10] See Kevin Avruch, "Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice," Conflict Resolution Quarterly, vol. 20, no. 3, Spring 2003, 351-371.

If one accepts this approach, movement into more culturally sensitive venues presents ODR interveners with questions regarding their readiness to deal with cultural issues and the impact of the technology on the cultural elements of conflict. Among other things, it may be necessary to redefine the notion of cultural competency as a skill that gains additional importance when dealing with intercultural disputes online, and which may look very different from cultural competency applied in face-to-face settings.

Avruch points out that there are caveats involved in analytical thinking about the influence of culture in conflicts. It is possible to overplay or overestimate the role of culture in interpreting what is happening in a given conflict. He defines these situations as Type I or Type II errors. In a Type I error, the third party undervalues culture in the analysis of the conflict and thereby appears to have what Avruch calls "a tin ear."[11] In Type II errors, one overvalues culture and its impact on the conflict and the disputants, seeing problems where none may exist.

We will not attempt to create an exhaustive list of Type I and Type II errors, but there is an example of a context in which these errors can occur that illustrates a problem of particular importance to ODR practitioners. In face-to-face interaction the third party is able to track communication, picking up cues regarding indicators of racial or ethnic bias. Leaving aside for the moment the issue of the growth of synchronous online exchanges with video components, tracking communication in an asynchronous, text based environment and picking up cues regarding attitudes and biases is much more difficult. Monitoring communication is a troublesome task for any intervener, but the skills necessary in an online environment are different from the ones needed in a face-to-face environment.

Again, the point we are making is that stepping outside the world of online commerce and communication and into the world of social disputes

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[11] Avruch, p. 362.

brings with it a change in the perceived need for parties to flex out of their own cultures, and brings a different set of concerns and responsibilities for the third party.

Given these observations, and the fact that a variety of trans-national dispute resolution processes, including a number of online processes, have been successful in handling a wide range of commercial and Internet-based disputes, we think insisting that cultural differences among commercial disputants will radically affect the willingness of parties to use ODR systems is almost surely a "Type II" error. That is to say, arguing that cultural differences will doom commercial ODR to high failure rates, even where the disputant's cultures are quite different, is probably a case of seeing problems where none exist. However, not recognizing the impact of cultural differences in the application of online technology to social disputes is, we think, a Type I error. We should also be clear that cultural influences on ODR will have an impact on international and trans-national disputes, but will perhaps be even more important in intra-national disputes where race, class, sex, tribal affiliation, etc., are important.

Basic Demands on ODR Systems

Regardless of the willingness to flex into systems that are not totally compatible with the parties' own home cultures, there are some basic attributes that ODR systems must have in order to be successful, even with parties operating in an online commercial environment.

Through hearsay, direct experience, and through assumptions molded by personal experience with disputes and dispute resolution systems in the offline world, potential users of ODR systems for social disputes will form attitudes about ODR that affect their willingness to use online services. Even though social disputes are not necessarily generated online, it may be desirable, for a number of reasons, to use online tools as a way to help resolve them. Without attempting to create an exhaustive list of elements that ODR services need to have in order to be effective, our experience with face-to-face conflict resolution and with ODR systems tells us that some attributes necessary for ODR in both commercial and social contexts are tied to expectations about trust, respect, and communication.

The need for trust in conflict resolution systems is related directly to the fact that, in order to engage in conflict resolution at all, it is necessary to step forward and, on some level, expose one's self, identifying the issues causing conflict and identifying the other party in the conflict. This is not without risk. A range of fears running from anxiety at actually facing the other party to anxiety regarding information being gathered, stored, and possibly used to cause harm, affect the willingness of parties to use ADR/ODR systems. It is, then, first necessary that parties in dispute resolution trust that they will not be harmed, either by the other party or by the use of the dispute resolution process itself.

The need for trust already has been identified by ODR providers as a fundamental prerequisite for success in online dispute resolution, both within

countries and cultures, and across national and cultural borders. Among disputants in the Global North there is generally a trust in the process of the law and in established systems, although even that may be stretched in some situations. For ODR to effectively operate as a trustworthy alternative to legal proceedings, whether in the Global North or in the Global South, there must be created a trust in the ODR process that is equally strong.

A consumer or disputant living in North American knows, for example, that there is a real chance of being a victim of identity theft or fraud online, and that there are viruses capable of infecting computer systems. There is a risk in doing business on the Internet. However, the basic trust in online systems and in the basic soundness of major social systems allows, or even encourages, users to routinely go online to buy goods, transact banking business, and even buy airline tickets to come to conferences like this one in Cairo. Convenience far outweighs risk – *if* there is a basic trust in the integrity of the systems and the organizations operating those systems.

In some locations, the trust in law and established systems does not exist, and by extension there is a tendency to distrust any process run by a powerful third party. In some way, both for online commercial disputes and for social disputes, the ODR provider must establish in her or his service a basic sense of safety for potential users. Without the basic ability to trust the system, commercial disputants may be less willing to flex into the system, and social disputants may not be willing to risk attempts at dispute resolution.

This raises the issue of how parties feel they are being treated by the process, the other party, and the third party. Basic willingness to use dispute resolution systems is enhanced when parties feel they are respected and treated appropriately by the third party and the process. In a commercial context, the buyer/seller relationship and the assumed roles of

the parties, drives the perception of appropriateness or respect. In social contexts respect may be related to social status, age, sex, or other factors that vary widely from culture to culture.[12] Online applications generally treat the parties as equals, with no deference given to either side. In a buyer/seller relationship where the primary issue is likely to be tightly focused and oriented toward a monetary exchange, this likely is not a problem, even across divergent cultures. However, when conflicts move outside the commercial context, treating every participant as an equal may cause discomfort or a feeling of inappropriateness.

The desire to feel that communication is possible and appropriate, is, we would argue, a third "constant" that all dispute resolution systems must meet, no matter the context. Appropriate communication goes beyond the ability to understand the language being used by the other party, although that is a large factor in international online dispute resolution. Also involved in the concept of appropriate communication is the need for parties to feel that their voices, and their ideas, actually are being heard and understood by the other party. In fact, in some conflict resolution efforts, the ability to convince one party that he or she has been heard and understood may be all that is necessary to open the way to resolution.

In a set of experiments with new software developed under a U.S. National Science Foundation grant[13], participants were divided into groups and asked to use an asynchronous online application to develop a problem statement, a set of interests, and a list of suggested options for resolving the

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[12] See Amr Abdallah, "Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature," Journal of Law and Religion, Vol. XV, Nos. 1 & 2; and Mohammed Abu Nimer, "Conflict Resolution Training in the Middle East: Lessons to be Learned," Journal of International Negotiation, Special Issues on Conflict Resolution Training, Fall, 1997.

[13] See note 6 above. The primary researchers for the University of Massachusetts at Amherst are Leon Osterweil, Ethan Katsh, and Norman Sondheimer. Significant contributions to the preliminary results cited here were made by Lori Clarke, Leah Wing, Alexander Wise, Alan Gaitenby, Matt Marzilli, and Jane Miller.

problem. Afterwards, they were asked to complete a survey in which two of the questions sought to discover if they felt "heard" by the other party and the mediator. In these experiments, over 80% of the respondents indicated that they felt heard by both the other party and by the mediator. The overwhelming majority of the test subjects indicated that they would be willing to use this ODR application again for other conflict resolution efforts.

In these early tests of the ODR prototype software, the application was trusted, the participants felt they were treated appropriately, and they heard by the other parties. The result was a high level of comfort and a strong willingness to use the ODR application further. The participants were comfortable with technology, and were from the North American culture that created the standard models of dispute resolution on with the ODR application was built. Their level of comfort and their willingness to use the application further may well have been different if they had not been so culturally homogenous.

Even if one accepts the idea that there are constants across cultures, and constantly required attributes for online and offline dispute resolution systems, there is still the problem of figuring out how to define and achieve trust, respect, and communication across cultures. What looks safe and fair to me may look risky and biased to you.

Exporting ODR and Moving Into Social Disputes

If one assumes that ADR and ODR are being exported from the Global North to the rest of the world, and if one assumes that the use of ODR will continue to spread beyond online commerce and communication, cultural assumptions made by the exporters can be expected to become a more important factor in the success or failure of ODR use. We have argued that for online commercial disputes there is a high willingness to flex into ODR systems for convenience and necessity. As ODR applications are turned toward more offline social disputes, we argue that willingness to flex decreases, and the impact of cultural elements increases.

The concept of ODR software as a "Fourth Party" is, by now, well known and accepted.[14] If the software is a fourth party, we argue that the fourth party brings cultural assumptions and biases to the table just like any other party. As Nora Femenia argues:

> A basic principle of dispute resolution theory is that people bring their cultural assumptions, as a naturalistic mindset applied to any dispute resolution process, be it face-to-face or online mediation, arbitration or any other online dispute resolution procedure.[15]

Third parties using ADR internationally (and even intra-nationally) bring their cultural assumptions not just in their own experiences but in the structure of the ADR process they are taught to use. It is reasonable to assume that ODR systems and practitioners will do the same.

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[14] Ethan Katsh and Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace, Jossey-Bass, 2001.

[15] Nora Femenia, "ODR and the Global Management of Customers' Complaints: How Could ODR Techniques be Responsive to Different Social and Cultural Environments?," presented at the Joint Conference of the OECD, HCOPIL, ICC, The Hague, Holland, December 12, 2000.

Cultural assumptions, for the fourth party, exist in the basic building blocks used by the programmers who put the applications together – the fourth party culture is in the code.

There is no shortage of discussion about the impact of culture on dispute resolution generally, and there is even some ongoing discussion of the impact of culture on ODR specifically. Much of the discussion surrounding ODR and culture to date has focused on the problems surrounding language and law as expressions of culture,[16] or on the pitfalls of multicultural exchanges without a face-to-face component.[17] We think the issue is much deeper than that, and we would start with the cultural assumptions that are embedded in the North American models of dispute resolution.

For example, consider the cultural elements identified in one effort to differentiate between dispute resolution parameters in two very different cultural contexts. Comparing Middle Eastern cases of dispute resolution with cases in a North American context, two sets of assumptions emerged.

North American assumptions about dispute resolution were characterized by:

- rational problem solving;
- cost-effective calculations;
- interest based negotiation;
- information oriented processes;
- highly individualistic processes;
- calls to separate the people from the problem;

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[16] See for example, Siew Fang Law and David Peter Leonard, "Culture, Language and Online Dispute Resolution," (http://www.odr.info/unforum2004/law_leonard.htm).

[17] See for example, Sharanya Rao, "The Cultural Vacuum in Online Dispute Resolution," (http://www.odr.info/unforum2004/rao.htm).

- adapting to a legal orientation;
- processes guided by professionals and professional standards.

By contrast, Middle Eastern assumptions about dispute resolution:

- were relationship based;
- were grounded in a holistic approach;
- were experience oriented;
- were based on parties representing the collective and community;
- did not call for separation of the people from problem;
- were informed by social tradition;
- preferred third parties selected according to status and social stratification.[18]

John Paul Lederach offered similar insights when he studied cultural differences and compared non-industrial and traditional Latin American methods of handling conflicts with North American Models of mediation.[19]

In addition to the culture-specific examples above, one may begin to understand the cultural foundations of North American models with the observation that, in those models, the dispute resolution process is essentially linear, with a sequence of events leading either to a resolution or the realization that a resolution is not possible. The "normal" ADR sequence consists of steps a well trained western mediator has encountered many times: convening; framing; establishing interests; optioning; clarifying; applying standards; and crafting a written agreement, if resolution is

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[18] See Mohammed Abu Nimer, note 14; and, J. Laue and G. Cormick, "The Ethics of Social Intervention in Community Disputes," in G. Bermant, H. C. Kelman, and D. P. Warwick (eds.), The Ethics of Social Intervention, John Wiley & Sons, 1978.

[19] See John Paul Lederach, Conciliation Quarterly, Summer 1986; and, Preparing for Peace: Conflict Transformation Across Cultures, Syracuse University Press, 1995.

possible, to memorialize the outcome. The sequential nature of this process is itself culture laden.

Following ADR models, ODR applications generally assume a sequential process, even if variation from the sequence is allowed. In the sequence, the parties name the issue at hand, discuss it, clarify it, and resolve it. In cultures with a high context communication style, a synchronous sense of time, low uncertainty avoidance, and a high need for face saving, the sequential process can be jarring and inappropriate at every step.

If the basic model of dispute resolution dominant today is a North American model, and if online applications bring this model with them across cultures, how may one observe or describe the culture in the code of ODR applications?

In addition to the sequential nature of the ODR process, online applications support the basic idea that the third party should be neutral, not influencing the parties with her or his observations or actions. Even in the United States, where the idea of third party neutrality was born, there is often a problem with assumptions of neutrality in face-to-face mediation. After going through the usual opening explanation of the ADR process, one of the parties in a mediation session said to one of the authors, "if you have some expertise in the area where we have a dispute and you are not willing to share it with us and help us make a decision, what good are you to us?" Granted, there is a way to answer that question, but it does point out that, even in the home of the North American models, in many cases the parties may expect more of the mediator than neutrality.

Neutrality is a topic of much debate among North American practitioners. Professional associations, like the Association for Conflict Resolution, tend to include neutrality as part of their professional standards

for mediation practice, but there are those, even in the North American context, who are uncomfortable with the idea of neutrality.

Christopher Moore, reviewing the mediation process and the customary introductory rituals for mediators, writes that mediators generally feel a need to explain that they are impartial in their views and neutral in their interactions with the parties. He differentiates between impartiality and neutrality, explaining that:

> Impartiality refers to the absence of bias or preference in favor of one or more negotiators, their interests, or the specific solutions that they are advocating. Neutrality, on the other hand, refers to the relationship or behavior between intervener and disputants. . . . Neutrality also means that the mediator does not expect to obtain benefits or special payments from one of the parties as compensation for favors conducting through the mediation.[20]

Others join Moore in differentiating between the terms, speaking to different levels of engagement of the mediator in the process. When impartial, the mediator should exhibit behavior that is free from bias. In other conceptions of the term, the mediator should give equal attention to the parties. In the case of ODR, equal attention may, for example, involve developing sensitivity to the frequency of communication.

On the other hand, Deborah Kolb calls mediators' attitudes towards neutrality and impartiality a myth of "impartial neutrals who have no wish to impose their views on the disputing parties."[21] Bernie Mayer maintains that there are several problems in defining a concept such as neutrality, particularly because "neutral" has different meanings in different cultural contexts. He explains:

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[20] C. W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict, Jossey-Bass, 1996, p. 52.

[21] D. M. Kolb, When Talk Works: Profiles of Mediators, Jossey-Bass, 1994, p. 460.

In some contexts, the term neutral is associated with being inactive, in effective or even cowardly. In others, it is viewed as *sine qua non* for third parties to establish respect. But even in middle-class North American context, the acceptability of a neutral stance varies greatly from conflict to conflict. In the middle of intense conflict, many do not believe anyone can or should be neutral. Someone who professes neutrality is therefore likely to be viewed with suspicion or even disdain. Our ability to assist people in conflict can therefore be seriously constrained by the neutral role.[22]

One can easily infer from Mayer's comments that the different roles assumed by practitioners are not divorced from the social context. More importantly, however, Meyer's remarks carry an element of advocacy for issues that practitioners care for and deeply value. Ury, LeBaron, Abdallah and Abu Nimer write as practitioners and theorists who believe that third parties and "third-siders" having a vested interest in the outcome of the conflict are able to successfully assist the parties and initiate societal change.[23]

The issue of neutrality for practitioners is not just academic. A major project undertaken by the Association of Labor Relations Agencies (ALRA), a U.S.-Canadian association of labor-management third parties, is called "The Neutrality Project." Their work assumes that neutrality, or at least impartiality, is a positive trait, and exhaustively explores the definition and application of the concepts of neutrality and impartiality in a labor-management context.[24]

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[22] B. S. Meyer, Beyond Neutrality: Confronting the Crisis in Conflict Resolution, Jossey-Bass, 2004, p. 83.

[23] See William Ury, The Third Side, Penguin, 1999; Michelle LeBaron, Bridging Troubled Water, Jossey-Bass, 2002; and Michelle LeBaron, Bridging Cultural Conflicts, Jossey-Bass, 2001.

[24] See the ALRA web site (http://www.alra.org/) for information about the association. Their description of the group working on the Neutrality Project is illustrative: "The Neutrality Project Committee is an ad-hoc committee to provide assistance to member agencies in cultivating, practicing, and promoting neutrality in

The mass of literature surrounding neutrality should be a clue that any assumption of neutrality or impartiality is questionable even in the North American context, is based in cultural attitudes about the parties and their relationship with the third party, and has the potential of being a cultural factor affecting the ability of ODR technology to bridge cultural divides.

How do ODR applications assume or encourage the notion of third party neutrality?

ODR applications that automate dispute resolution by using algorithms to establish ranges of resolution for monetary disputes,[25] and applications that offer categories of disputes and categories of resolutions to disputants using a fourth party without a third party,[26] essentially eliminate the third party altogether. That is about as neutral as it gets.

Where there is a third party, ODR applications may be written with the assumption that the third party has no role in developing options, and this may be expressed in the ability of the parties to post information and engage in online discussions without the third party having the ability to filter or frame the discussion. Even where ODR applications give the third party the ability to engage in "shuttle diplomacy," reframing communication before it is shared with both parties, ODR third parties are generally trained to operate as neutrals, reframing, but not changing or guiding the parties' toward a specific resolution. This neutral or impartial assumption clearly may be culturally inappropriate for social disputes in some contexts.

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agency operations and administration of labor relations statutes, and ethics in the field of labor relations."

[25] Cybersettle is one example of a double-blind, algorithmic ODR application.

[26] The automated ODR application used by eBay, in conjunction with SquareTrade, relies as a first step on an automated resolution process with narrowly defined dispute types and outcomes.

For example, if one takes the Middle Eastern desire to choose third parties based on status and social stratification (a desire that is shared by many non-western cultures outside the Middle East), any encoding of neutrality (like giving the parties the ability to bypass the mediator in posting information), or any inclination toward the interchangeability of third parties can be a significant barrier.

An experience in face-to-face work with parties drove home the power of non-neutral third parties for one of the authors. In Indonesia a group of third parties from the United States was working with a mixed group of Indonesian and foreign (to the Indonesian) professionals to address conflict that had arisen as a result of work on a complex technical design project. The Indonesians were respectful of the process and were grateful for our assistance, but it was not until we added another member to our team that they became completely comfortable with the process. A professor from the local university, who had no background in dispute resolution and who had no knowledge of the technical aspects of the dispute, became a high-status, elder member of our team. He was seen by the Indonesians as one who would know how to craft a "proper" resolution to their problems. He was of inestimable value as a counterbalance to our "neutrality."

Beyond a sequential structure and an assumption of third party neutrality or impartiality, most ODR applications based on North American models assume there is a need for the parties to be perceived as "equals" in the dispute, and to maintain independence and equality in the decision making process.

This assumption can be expressed in ODR applications in a number of ways. Most strikingly, some ODR applications offer the option of completely anonymous input from the parties, making it impossible to tell who said what and removing any status or power element from the posted statements.

Some applications go so far as to make anonymous input mandatory.[27] In a two party resolution effort where the parties are comfortable operating with a North American model, this may not be a significant cultural issue. But in resolution efforts involving parties who are not as comfortable in a North American model, particularly in dispute resolution efforts involving multiple parties or multiple-member groups, anonymity may be a significant disadvantage.

As with face-to-face resolution efforts, ODR resolution efforts generally assume that the parties involved in the dispute, and who are online, have "at the table" the ability to make a deal and to bind themselves and others to that deal. Even though it is possible for parties at the virtual table to consult others between postings to asynchronous sites, resolutions are achieved through mutual consent of the parties actually involved in the online process, and are memorialized in agreements mutually crafted and accepted by those parties.

In cultures where there is a perceived appropriate inequality in status, or in cultures where decisions are made based on the impact they have on the family or some other social unit, the design of ODR applications to accentuate independence and equality could be barriers to the resolution of social disputes.

Usually the first step in ADR, and in ODR applications, is to produce an issue or problem statement, thereby boldly framing the nature of the dispute and "naming" the problem overtly. At the real table, and at the virtual table, dispute resolution efforts in the North American tradition usually begin with some variation on the question, "what's the problem?" In cultures where indirectness is valued, and direct bold statements of a problem are

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[27] For example, Facilitate.com offers anonymous input in a way that guarantees that identity cannot be ascertained, even by the system administrator, after the statements are posted. The UMass/NSF software being developed under the grant cited earlier allows only for anonymous input.

considered rude or disrespectful, the need to produce an issue statement may be enough to keep parties from using an ADR or ODR process.

The task of assembling a complete list of cultural elements and assumptions behind ODR applications and the training of third parties to use ODR applications we leave for other venues. Our point here is that these examples show how the cultural assumptions that underlie North American models of dispute resolution are built into ODR applications and the way third parties are trained to use those applications. As the use of ODR technology moves farther into the realm of social disputes, these cultural elements and assumptions will become more of a barrier to ODR use and success.

Creating Culturally Flexible ODR Applications

The question that is left after considering the nature of culture and its influence on the use of ODR applications is a practical one: if culture is a factor in online social dispute resolution efforts, what can ODR application developers and third parties do to reduce the negative influence of encoded cultural elements?

In order to address this question, it is useful to first look at the general nature of ODR programs that have been developed and are available for use in intercultural contexts.

We divide the current world of ODR applications into three groups: applications that are function driven; applications that are process derived; and applications that are process driven.

Function driven applications start with the basic assumption that there are certain functions or actions that must be performed at some point in the dispute resolution process in order for resolution to be achieved. For example, in North American models it is assumed that at some point we have to know what the issue is and state it; at some point we have to generate some ideas about how to address the issue; and at some point we have to express some preferences about those ideas. In function driven applications, these actions can be sequential, or they can be applied as the third party sees fit, mixing the sequence up, skipping steps, etc. Input can be anonymous or attributed, and online communication between the parties can be filtered by the third party or allowed to proceed unfiltered.

The positive nature of this type of function driven applications lies in their flexibility – potentially, function driven applications could be adapted to a wide range of cultural needs, based on the ability of the third party to read the cultural needs and apply dispute resolution functions sensitively. The

Third party could begin with storytelling, avoid direct statements of conflict definition, allow for status differences, and encourage inclusion of social groups not actually at the virtual table.

The negative side of function driven applications is that they are generally more costly than simpler applications, and more complex for the third party to manipulate, requiring a longer and steeper learning curve, and taking away some of the third party's attention from the dispute and the parties.[28] Using complex, function driven applications assumes that the third party is willing and capable of investing a significant amount of time and money in acquiring and maintaining expertise in the manipulation of the software, or that there will be someone on call to manipulate the software for the third party.

Process derived software is based on the assumption that most cases will proceed along the sequence that is "normal" for North American models, but they leave some discretion to the third party in terms of how the steps are handled. They tend to be simpler than function driven applications because some process definition, however broad, guides the decision of what should be included in the third party's range of choices. Process derived applications tend to offer a default sequence based on that process definition, freeing the third party to pay more attention to the parties and the dispute, reducing the learning curve and complexity.

So, for example, using this type of application the third party could have a series of choices to make based on her or his reading of cultural needs, could defer the definition of the issue, could filter or not filter communication from the parties, etc. The range of choices is generally not as broad as the range presented by the fully developed function derived

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[28] One example of function driven ODR software is Facilitate.com. The application includes a very wide range of functions, all available on demand to the third party, and able to be applied in any sequence.

applications, but making and implementing the choices is generally easier to accomplish. [29]

The positive aspects of process derived applications also lie in their flexibility and in the fact that there tend to be fewer available choices to the third party, making use of the applications easier. The negative aspects of process derived software tend to lie in the more limited range of choices, relative to function driven applications.

Process driven software is at this point mostly extant only in the realm of commercial ODR, in the form of applications that conduct blind bidding and use algorithms to establish settlement ranges.[30] The assumption behind process driven software is that there is an precisely definable process to be followed, that the process is well and fully described, and that movement from one step in the process to the next is dependent upon completing the prior step. In a blind bidding model, for example, first both parties agree to an acceptable range in which agreement may occur, then they enter their monetary ranges, then the application determines if they are in the zone of settlement, then the application either calls for another round of entries or declares a settlement.

There is another type of process driven software being developed under the U.S. National Science Foundation grant program cited earlier.[31] Here the assumption is that a complex mediation process can be accurately

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[29] An example of process derived ODR software can be found in the SquareTrade application as it is used for e-Bay disputes, or in any number of group process applications, such as The Claim Room and Caucus. Mediators are trained in the classic western model, but the software is flexible and can be applied creatively.

[30] Again, for example, Cybersettle uses algorithms to automate settlements, and uses telephone based facilitators in cases where the parties are close but not close enough to settle using only their "double-blind" bidding system.

[31] See Leon J. Osterweil, et al., "Using Process Definitions to Facilitate the Specification of Requirements," submitted to the 14th IEEE International Requirements Engineering Conference, 2006.

modeled, and software can be written that enforces the steps of the process described by the mediator and the parties, while still allowing for anticipated exceptions or variations.

Positive elements of process driven software center on their exact application to context. Designers elicit an accurate description of processes from party and third party input, and then use that input to produce software that accurately captures the process. The Little JIL process modeling application in use by the University of Massachusetts at Amherst in the above cited NSF grant project has the added advantage of being able to take into consideration multiple exceptions to the normal process. If the process elicitation is done well, and if the application is tightly bound to the process, the resulting ODR application can ensure that the agreed upon process is followed by the mediator and the parties. There are some obvious advantages to developing software in this manner. First, it frees the third party from much of the administrative work that is required to use other types of software, allowing her or him to focus on the parties and the dispute. If all works as expected, the process itself should be second nature to the third party because it is one that he or she helped describe. Second, the parties should be comfortable with the process because they, too, had input into the description of the process and the design of the application.

The negative side of process driven software is that it tends to be narrowly focused on one process, in a specific context, so that it is not easily adaptable to multi-cultural situations. The development of process driven software requires that the developers ask the users to describe, in great detail, the process they will use, and then to create software that tracks the described process exactly. The result is that one could create software that is very good at dealing with conflicts in one cultural context and terrible at dealing with conflict in another cultural context.

Recommendations

In order to make ODR applications work in a range of cultural settings outside online commerce and communication we have some broad recommendations, keeping in mind that trust building, treating parties with appropriate respect, and facilitating communication cut across all ODR applications.

First, using function driven and process derived ODR applications leaves the third party a lot of room to make decisions about how to apply the software. Essentially, if the third party is aware of potential cultural implications, it is possible to adapt the cultural assumptions of the fourth party to make them more compatible with the disputants' cultural norms. This would suggest that the first and easiest approach to the appropriate use ODR applications in culturally sensitive social contexts should be to instill in third parties a desire to act in a culturally sensitive manner. In this effort, much of the literature in dispute resolution generally should be applicable to practitioners using online tools, and much of the training that is available for offline mediators should be directly applicable to the use of ODR tools. Applications that allow for cultural sensitivity exist now, and can be used by third parties trained to work in intercultural environments.

Second, generally available commercial ODR applications in development now and in the future should be designed to be as flexible and changeable as possible. This can take two routes – one is to continue to create comprehensive, flexible, function driven systems (which greatly complicates the application's use for the third party), and the other is to create simpler targeted "modules" that can be applied by third parties in the appropriate context. For example, brainstorming software such as the prototype Storm application developed by UMass and the NMB can be used in a broad range of dispute resolution efforts.

Third, it is possible to develop process driven applications that are culturally sensitive, and perhaps even more appropriate and potentially successful than function driven or process derived applications. The more narrowly drawn process driven ODR applications become, the less they are able to flex across cultures. This is an innate property of process driven applications: they are intentionally designed to fit narrow contexts and narrow party expectations. However, if process driven applications are designed for specific cultural contexts they should avoid the North American model problems, and should maximize comfort and trust in ODR systems for multicultural users.

ODR application developers should, where possible, use a requirements elicitation approach to get the parties to identify their needs and define their culturally appropriate processes. This is a much more time consuming and demanding process than developing function driven or process driven applications, but it has the advantage of producing, for each community, a specific culturally sensitive application.

Fourth, ODR practitioners should begin to think of online dispute resolution in a broader context. When the acronym ODR was created the thinking about online dispute resolution was centered on disputes created online, needing an online venue for resolution. If a consumer buys something from a seller in another country *via* an online marketplace, there is little available in the way of dispute resolution except a fully online application. As the notion of ODR has moved forward, however, more and more practitioners are finding that "online" dispute resolution may encompass elements that are not, technically, online. Brainstorming and ranking applications used online may also be available for use in face-to-face interaction, and pieces of online applications may be used in combination with face-to-face interaction to resolve disputes. These are not online applications, in the strictest sense, but they do involve the use of technology

as an aid to dispute resolution, and some of us think that approach belongs in the ODR tent.

On the far edge of the ODR spectrum, third parties are using broadcast radio and other "traditional" technologies as part of the mix for dispute resolution in far flung populations and for particularly severe and dangerous dispute resolution efforts. Creative development of flexible applications, elicitation of requirements from specific cultural communities, and the creative use of non-traditional online technologies together can address most if not all of the problems inherent in the exportation of dispute resolution models and ODR applications beyond the Global North.

Beyond direct recommendations we suggest that there are some issues facing the dispute resolution community that have direct implications for dispute resolution practice as ODR continues to move into the social arena.

How does one define success in the application of ODR tools? This has been an ongoing issue in the dispute resolution field ever since the concept of ADR was introduced. Is success measured by the number of settlements? Is it measured by the percentage of settled cases in an overall case load? Is it measured by the trust level engendered in the target user population? Is it measured by improvement in the long term relationships among parties? It is possible that success in social use of ODR tools can be defined precisely and in the same way it is defined in the dispute resolution community at large. But we would not count on that. Therefore, we suggest that the issue of defining success in social ODR efforts be on the table for active discussion.

How does the use of ODR technology impact the standard training available to third parties? Many online dispute resolution providers, including SquareTrade and The Claim Room, offer ODR training for their applications, but there are certainly some skills and approaches to online practice versus

offline mediation and facilitation that need to be pursued in a systematic manner.

Finally, are the ethical standards and guidelines for practice currently in place for offline mediation and facilitation the same as the ones needed for online practice? Perhaps, but again we do not assume they are the same and we suggest that practitioners and researchers in the world of conflict resolution at large put these questions on a fast track, extending a debate and discussion that is already underway among members of the ODR community. If the discussion of these issues is on a slow track, it seems likely to us that use of ODR technology in the real world will progress quickly without an adequate debate about ethics and standards of practice.

CONCLUSION

Why do we consider the use of ADR and ODR in multicultural contexts an important topic?

We think it is important to discuss because ADR and ODR will, inexorably, continue to move out from the online commercial context to more social contexts, just as the use of technology continues to make inroads in other arenas of social interaction. As ODR becomes more and more an accepted feature of dispute resolution in the Global North, and in commercial contexts across cultures, it is natural to assume that the technology behind ODR will be exported and will find applications in local and regional dispute resolution. If no attention is paid to the underlying cultural assumptions driving ODR technology, success may be achieved in the application of ODR tools, but sensitivity to culture will, we think, ensure greater success. Perhaps more importantly, adequate discussion of cultural issues may ensure that ODR efforts are brought to Global South cultures with more sensitivity and with more respect for differences in values and needs.

Also, we think it is important to address these issues because the move into social contexts will bring local and regional governments, NGO's, and other organizations into the ODR arena in places where cultural assumptions are very different from the ones where the ODR applications are currently being developed. Given the sometimes warranted distrust of governments and the very real possibility of harm in dispute resolution efforts gone wrong, it is important to attempt to develop ODR systems that are as trusted, safe, and sensitive as possible.