

The future of ODR: One brief glimpse

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Abstract

This brief paper seeks to explore a few ideas related to ODR that seek to kindle, jar and even anger the imagination to engage with ideas that lie at the heart of ODR systems design and implementation in the years to come. These dialogues in support of shaping next-generation ODR systems is seen as essential to avoid the development of systems that cannot fully grasp and respond to the complexities of social, commercial and political transaction in real and online worlds.

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Sanjana's research into ODR follows the virtualisation of conflict transformation models for peacebuilding in Sri Lanka. He is deeply committed to the exploration of mobile telephony technologies, internet radio and other community media to augment the benefits of ODR to remote communities. Sanjana's interest in ODR stems from active field experience and research interests in peacebuilding. He is published in local and international media, in print and online, and has also been invited to present his research at international *fora* in Sri Lanka, Australia, France, Bangladesh, India, Nepal, Netherlands, Singapore, Egypt and the United States. His vision for new iterations of ODR systems to address ethno-political conflict and the complexities of peacebuilding has won wide recognition and resulted in invitations to facilitate discussions on ODR by the University of Massachusetts, Amherst and requests to participate in global online forums discussing the state-of-the-art in ODR, such as Cyberweek 2005¹.

¹ <http://www.odr.info/Cyberweek2005/>

Introduction

Much is written on the state of Online Dispute Resolution from a legal perspective. Indubitably, the pace of change of ODR in recent years is indicative of a systemic shift in its conceptualization, design and application in the transformation of disputes. In 2004, I made a presentation that called for an expanded view of ODR – moving away from the resolution of disputes to the transformation of conflict. This idea was influenced by my work in fields of ethno-political conflict transformation, far removed from the boardroom scenarios of ADR and commercial ODR.

Subsequent papers of the author explored the terrains of ODR in post-conflict zones and in particular the integration of mobile telephony into ODR platforms to a degree more pervasive than existing systems. Calling for a revolution in the way ODR as a theory is defined, as a concept is envisioned and as an application is designed and implemented, these papers submitted the importance of looking at markets different to those in the Global North to radically influence the next generation ODR systems.

These ideas have not gone unheeded. Much, however, remains to be done. Today, we are at the cusp of a new generation of ideas and technology that allow us the opportunities for even greater strides forward in revolutionizing ODR. This is not to say that ODR is now an ossified beast lumbering towards extinction. The vibrant debates in Cyberweek 2005 (in April and in October) displayed a marked interest in theories and ideas that sought to transform ODR from the realm of geeks and specialists to the domains of citizens who

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could avail themselves of pervasive architectures, real and virtual, to transform disputes on a wide spectrum of issues.

Mitigating the potential of new endeavours in ODR is, as in any other domain, is the resistance of the *ancien regime* – early adopters and even early visionaries now unable to grasp the significance of new technologies, mobility, mash-ups and the evolution of the web for ODR in the future. Central to the challenge of revolutionizing ODR is to engage with those who have thus far driven the field into what it is now – a mature theory with mature systems able help in the resolution of complex disputes.

This brief paper seeks to explore a few ideas related to ODR that seek to kindle, jar and even anger the imagination to engage with ideas that lie at the heart of ODR systems design and implementation in the years to come. These dialogues in support of shaping next-generation ODR systems is seen as essential to avoid the development of systems that cannot fully grasp and respond to the complexities of social, commercial and political transaction in real and online worlds in the future.

The situation at present

The web is evolving.

Previously disparate technologies such as search engines, geographical information systems (GIS), radio frequency identification systems (RFID), wi-fi, wi-max and mesh networks, the increasing affordability and availability of multimedia capable mobile phones, PDA's, instant messaging and presence awareness along with Voice over IP (VoIP) technologies, *inter alia*, coalesce and fuse to create wonderful new pervasive architectures of availability and access to the web that even two years ago would have been thought as impossible.

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This revolution commonly referred to as Web 2.0 or mash-ups, is largely alien to ODR, which remains rooted to static websites with a degree of user interaction over text based communication on PC's. In the rare instance, such as Claro Parlade's ODR system in the Philippines (www.disputeresolution.ph), short-messaging service (SMS) based mobile phone interactions are to a degree integrated within the larger website and PC based framework. Some websites that now allow for limited audio and video based interaction. A study conducted in 2004 reveals 115 ODR sites, 82 of which were still operational. Showing an exponential growth from 2003 – 2004, during which time 28 new sites began operations, the sites operated mainly in English, with limited audio and video, but handled an impressive quantitative and qualitative array of disputes².

We can safely assume that the number of ODR sites on the internet has grown since this study two years ago. However, the evolution of new technologies on the web has far outstripped the adoption of such technologies in the promotion and enhancement of ODR services.

There are possible reasons for this. One is the embryonic nature of new technologies on the web. Porous, diverse and constantly evolving, broadly accepted industry standards have yet to emerge to govern the adoption of mash-ups. Interestingly, while constituent technologies in mash-ups might themselves be mature and standards based (such as audio, video and voice transport protocols on the internet) their inter-exchange on a single platform and juxtaposition with complementary frameworks such as GIS and mobile telephones create information architectures that are unparalleled in their potential to reach the millions left behind by the PC based internet revolution. The flip side is that this very nature of an experiment in progress is for some a measure of the limited shelf-life and suspect reliability of such technologies.

There are by no means invalid concerns. However, the scepticism of new technologies should not mitigate the realisation and exploration of their potential for ODR. The central

² <http://www.oecd.org/dataoecd/23/52/34827546.pdf>

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argument in favour of using new technologies now prevalent on the web is the understanding that current avatars of ODR system fall far short of the ways through which they can help communities transform disputes on the ground. Put another way, ODR systems that fail to engage with the specificities of local languages and cultures and are rooted in PC based access architectures fail to realise the potential of the evolution of the web as well as existing architectures of communication that are more pervasive, user-friendly and affordable than existing ODR architectures.

Every time an SMS, a mobile video or audio clip is sent through multimedia messaging (MMS) or the web is accessed through built-in thin web clients in many mobile phones, an opportunity for the expansion of ODR is lost. Seen this way, the ODR community loses a couple of hundred million opportunities for the transformation of disputes every single day.

Much can be done to grasp the potential of the mobile phone revolution in Asia and Africa to promote ODR systems that piggy-back on such networks. As the author notes in a paper on mobiles and ODR³, the integration of mobile phones in ODR systems can have many different applications:

Data gathering

- Plotting the GIS coordinates of the disputed territory, including details of the location, resources and details of adjacent territory
- Details of disputants, including audio and video testimonies, multimedia footage and documentation of case details
- The in-field mediator or contact person can make his or her own notes and add them to the case file – through text, multiple answer questions via SMS, audio notes or video recordings
- Rapid entry of key case details, which the mediator can then go back and expand

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Real time ODR

- System generated messages can be handed out to disputants to follow up with a voice message system that gives them the status of the case in the vernacular
- Mediators can be informed of similar cases in real time using intelligent comparisons of data and disputes
- GIS boundaries of land can be plotted and sent to regional centres which can print out the maps and hand them over to the disputants to visually aid the process of mediation
- Case details can be semantically linked to provide mediators with expert systems that are able to generate options to help with decision making
- F2F synchronous and asynchronous mediation using mobile video conferencing technologies

Offline ODR

- Indexed case histories can feed into knowledge repositories that can be accessed offline, in print or as audio files to help train and build mediation capacities of ADR mediators
- Anecdotal input by mediators can be indexed to create expert system that examine semantic linkages within and between such input to influence options generation – for instance, the family history of a particular disputant, the structural underpinnings to a land dispute which may be linked to loss of face and other observations
- Ability to access thematic or issue based case studies over a given period of time, or examine a particular case against possible options and the probability for resolution based on historical data, or access to case histories in a particular context, region or identity group (ethnic, religious or gender).
- A central repository of information on past and on-going ADR and ODR processes, grouped by issue, region, ethnicity, mode of settlement, mediator etc

Settlement process

- Disputants get vernacular SMS notification of settlement. Those who cannot read also get a voice mail with relevant details. Simple disputes can be resolved on the spot with expert systems that help in options generation for the dispute.
- Video conferencing via mobile phones can aid where disputants are far removed from ADR centres. Mediated voice conferences can aid in settlement processes along with asynchronous video, wherein parties get to see and hear each other's viewpoints.
- Mobile systems can complement and strengthen traditional face-to-face (F2F) meetings but reducing the need for physical meetings, reserving F2F meetings for the most intractable disputes, facilitating virtual F2F meetings between active disputants and those that have successfully resolved similar disputes in the past in the same region or on the same issue, enable mediators themselves to interact with each other to discuss, transfer knowledge and share information between each other.

Low cost of access, explosive growth, ubiquity – these and many other factors strengthen the argument that ODR systems that use mobile phones and are better ideally placed to placed to help communities transform disputes and aid in long term peacebuilding.

The future potential

It hard to explain the potential of new web and mobile technologies to those who have spent many years fine tuning ODR systems for the PC. It may well be that this is inevitable – since the ubiquity of PC based internet access in the Global North negates the need to look at alternatives modes of ODR delivery and access. However, even in countries such as the US, the importance of looking at ODR systems that incorporate mobile and new technologies is growing. However, envisioning and developing such cutting-edge ODR systems oftentimes runs into resistance.

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Why this is the case is linked to the roots of ODR. The legal domain is deeply resistant to change. Continuity, tradition, stability and precedence are overarching values of any legal tradition. ODR systems that seek to establish themselves as significant and secure architectures need to reflect strongly the real-world legal traditions.

This is unfortunate, in that the inherent resistance to new modes of communications and information exchange and the clientelist interactions of present day ODR systems deter new lay users fully engaging with the potential of the technology to help in the transformation of their disputes. Furthermore, the unimaginative architectures of present day ODR systems stifle the full spectrum of human communication made possible by advances in audio and video via the web, even on very low bandwidth situations. It is not impossible to imagine ways through which ODR systems can be more accessible. From multimedia frameworks that enable more intuitive interactions with users through to accessibility on a range of mobile devices, ODR needs to wean itself from traditional PC based architectures to those that are rooted in the geo-political, cultural and communal contexts.

This is by no means a repudiation of the importance of security and stability in ODR. Many mash-ups and Web 2.0 technologies are already well established, standards based and continue to evolve. Furthermore, many web and mobile technologies are built on reliable and secure application programming interfaces (API's) that allow developers to creatively respond to the needs of key users in ways impossible with traditional webpage designs and technologies. ODR systems that resolve cross-border territorial disputes, commercial disputes based on the location of resources, the availability of trained mediators on the ground and their contact details, adaptive complex systems that use artificial intelligence to provide human mediators with strategic options for dispute resolution, virtual single text platforms that enable geographically and politically dispersed members collaborate on blueprints for peace agreements, users in the periphery who can access nodal ODR access points to help with localised disputes – these and many other complex, reliable, secure and imaginative systems are made possible by technologies already present.

Instructive in this regard is the work of InfoShare⁴, which through virtual collaborative spaces, brings together key stakeholders in a peace process in Sri Lanka and Nepal to fashion frameworks in support of sustainable peace talks and a larger peace process. Also noteworthy are the examples of disaster relief systems to resolve disputes between available resources and needs on the ground in traumatic conditions, such as the tsunami, the Kashmiri earthquake and Hurricane Katrina. Many systems in support of humanitarian operations and the mitigation of heightened communal conflict in traumatic conditions used pervasive computing frameworks –Thuraya satellite phones, SMS on local mobile networks, mesh networks – as well as a range of devices – mobiles, PDA's, laptops, two-way radios – to resolve persistent and complex demand and supply issues in the relief operations.

The scalability of these pioneering initiatives remains is an open question. Much depends on the greater awareness of the target audience as well as the developers that pervasive multimedia communications architecture that helps the transformation of disputes. This is particularly resonant in post-conflict situations, where communities in terrains of violence may not always have the ability to meet in a physical space to talk about the mitigation of the socio-political drivers of conflict. In such instances, ODR systems that are able to best harness voices from communities in support of local, regional and national level dialogues in support of dispute resolution / conflict transformation, can be extremely powerful tools in the long-term peacebuilding measures needed to transform violent conflict.

Virtual online dispute resolution?

SecondLife⁵ is described by its makers as:

⁴ www.info-share.org

⁵ <http://secondlife.com/>

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“...a 3-D virtual world entirely built and owned by its residents. Since opening to the public in 2003, it has grown explosively and today is inhabited by nearly 100,000 people from around the globe.”

To date, those who play Second Life are dwarfed by those who don't. The game only works on PC's, requires a good hardware and a broadband internet connection to work best. It is, at the end of the day, a virtual experiment in social interactivity. But Second Life is much more than this. Second Life has a complex business model, a currency pegged to the US Dollar, vibrant commerce and industry within the game, sophisticated intellectual property rights that govern inventions within the game-world of Second Life, and entire livelihoods that take place in a totally virtual domain. To anyone who hasn't played the game, the complexity of the virtual world is less than that of the physical world. In reality, the complexity is far greater – since independent from the laws of gravity, physics and to an extent, morality, religion and social norms, the imagination reigns free within Second Life – giving rise to social and commercial transactions that are sometimes far more complex than those in the real world.

The separation of the real and the virtual is blurred by games such as this. One example is the outsourcing of level advancement to low-paid full time gamers in countries such as China. High income gamers from around the world pay young Chinese gamers to get through the initial levels of a game by slaying monsters or solving puzzles⁶. The case of Qui Chengwei however is more disturbing. In 2005, Mr. Chengwei stabbed Zhu Caoyuan, a fellow gamer in an online game titled *Legend of Mir 3*, over a dispute of a virtual / game-world sword. Though this was the first murder induced by a dispute over a virtual artefact, this incident is indicative of a larger number of people taking disputes over virtual artefacts to the courts.⁷

On the one hand, this raises the interesting issue as to whether the heading to this section hints at, we need virtual ODR systems set up in the gaming worlds to address disputes

⁶<http://www.nytimes.com/2005/12/09/technology/09gaming.html?ex=1291784400&en=48a72408592dffe6&ei=5088>

⁷<http://news.bbc.co.uk/2/hi/technology/4072704.stm>

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between gamers. On the other hand, these examples offer evidence in support of the case that present day ODR are far removed from the evolution of disputes in virtual / online / real world domain hybrids. Courts and the traditional legal traditions are incapable of handling such online disputes. Mediators who don't understand the dynamics of virtual in-game interactions and their spill-over effect into the real world are ill positioned to advise clients on dispute resolution. Given the nature of such disputes, textual web-based clientelist ODR systems will fail miserably to adapt to and address the complex inter-plays of the real and virtual in disputes that involve online worlds.

Ethan Katsh captures this succinctly in the following:

*Mediation and arbitration are labor intensive activities but the online versions include new options and, in a sense, have been reconfigured by exploiting the information processing capabilities of the digital environment. The ongoing history of ODR is a history of the building of an online civic institution and it is, therefore, an example of what might be involved as attempts are made to build other kinds of civic institutions online.*⁸

The civic institutions that Katsh speaks of are of vital importance in the future of ODR. On the one hand, virtual / online communities such as those which diaspora from various countries use to maintain ties with each other and communities back home, as well as those like Second Life which began as games but evolved into livelihoods, offer a challenge to ODR in that they form the cusp of new definitions of community, ownership, property and trust. For instance, do I trust a real-world friend in an online world more than I would someone I had only met and grown to like through virtual interactions? What are the yardsticks of trust and ownership if a business model constructed in Second Life is used by a single partner to create a profitable business venture in the real world? What is communal violence from the real world spills over into flaming and hate between and within communities in Second Life, or vice-versa? Do I

⁸ *Dispute Resolution Without Borders: Some Implications for the Emergence of Law in Cyberspace* by Ethan Katsh, 2006, http://www.odr.info/katsh/katsh_workingpaper_borders.pdf

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have to pay tax for money earned through profitable ventures in online worlds? What is my social responsibility in a new millennium that is soon erasing the borders between the physical and the virtual?

These are questions that form the core of next generation ODR systems. Beyond online, ODR needs to go virtual. Put another way, ODR websites need to evolve to reflect the increasing complexity of real world actors and factors, ranging from the complexity of multi-party international trade dispute to the transformation of protracted ethno-political conflict. On the other hand, and this idea is quite new, ODR needs to go beyond an online mechanisms that help resolve real world disputes and instead address disputes within in-game worlds as well – such as those which resulted in the murder of the Chinese gamer. Even more so, the future of ODR will lie in its ability to bridge the online, virtual and real world in avatars of the same system that exist on the web and within in-game environments.

End thoughts

The salient mediations in this paper each require further research and analysis. Grappling with the financial viability of present day ODR systems, it is imperative that ODR providers keep an eye on the future, so as to respond to complexity through systems that are adaptive, pervasive, empowering and self-effacing. Scalability of ODR systems is another pertinent issue – donor funded initiatives such as InfoShare's one text agreement system need to take root into processes of conflict transformation that are not reliant on external aid and instead driven by local capital, both financial and human.

The central thrust of this paper was to encourage the imagination to capture the rich textures of information that surrounds us and the ways through which we access this information. This information is all around us since the digital divide is not so much the unavailability of information but rather the inability to access it. In this light, ODR systems need to do more to capture the imagination of those who remain sceptical of the potential benefits reaped through the use of such systems. This requires the timbre of

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ODR to resonate to the aspirations of communities hitherto alienated from such frameworks – communities in the pall of violence and recovering from ethnic conflict, communities in poverty, communities suffering from the injustices of the State – the landless, the voiceless.

The rich legal traditions in many countries fail these people. ODR offers them a new promise of social justice through the transformation of their conflicts. To fully grasp the nettle of complex social change, ODR needs to evolve at a pace far greater than what it has to date displayed.

This evolution is seen as inextricably entwined with adoption of new technologies. Such technologies require a fertile imagination untethered to stifling traditions and modes of communication and instead visions new ways of interactivity that helps those in real and online world communicate with each other to find the common ground upon which the transformation of disputes lays root.

It is a commercially viable enterprise to boot. ODR practitioners and systems that are able to envision future scenarios will be better placed to reap the benefits of user and client growth. It is our responsibility to influence this growth in a manner that contributes to the development of mankind through the peaceful and negotiated transformation of disputes.