

Cyberjustice and International Development: Reducing the Gap Between Promises and Accomplishments

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Ever since President Truman's famous Point Four Program, the gap between the promises and the achievements of official development assistance (ODA) has obsessed what is customarily known as the "development community" and its observers. This can be seen from the repeated conferences and declarations on assistance effectiveness (the Monterrey Summit, Paris Declaration on Aid Effectiveness, Accra Accords, Busan Forum, etc.) and the critical literature on development assistance, such as the works by Dambisa Moyo and William Easterly.¹ However, it is probable that no one has expressed this questioning better than Gilbert Rist in his non-hagiographic history of development:

How could it have been thought necessary and urgent to do everything to speed up the process of "development," ostensibly favouring the prosperity of countries in both North and South? After all, for centuries no one – or virtually no one – took it into their head to relieve the misery of others by structural measures, especially when they lived in different continents. What is the origin of this collective task which, though constantly criticized for its lack of success, appears to be justified beyond all dispute? What sense can we make of the numerous debates which, for nearly fifty years, have offered a solution to the problems that majority destitution poses in the face of minority opulence? How

are we to explain this whole phenomenon, which mobilizes not only the hopes of millions but also sizeable financial resources, while appearing to recede like the horizon just as you think you are approaching it?²

Indeed, as Rist shows, the situation is a little like that of the first Christians, who were expecting the Kingdom and got the Church instead: ODA policy consists in continual renewal of discourse and tools to maintain the belief in salvation/development despite constant postponement of achievement of the “developmentalist” ideal.

An analysis of the gap between the promises and the achievements of development assistance, no matter what the sector, therefore has to take some distance from the idea that the “development community” has of itself, and this requires trying to understand the mentality and bureaucratic behaviour that guide its action.

One of the characteristic features of this mentality is what we can describe as the superego of modernization. The theory of modernization, according to which development, owing to a unilinear conception of history, is driven by impersonal forces—urbanization, literacy, mass communications, and development of the media—has been instrumental in the genesis of development assistance. However, although modernization has been rejected as a source of inspiration owing to its Western ethnocentrism, it nonetheless constitutes a superego of development built on a foundation of conceptually attractive images.

The injunctions of this superego are particularly important in the relationship of the development community with technological innovation and reform of institutions, including those of justice. The belief of the “development community” in impersonal forces dictating the fate of communities without human contributions makes it receptive to a technology-worshipping vision, leading to celebration of technology in itself and to modelling visions of institutions on a conception of “information machines.” In the relationship to justice institutions, this superego leads those institutions to focus on effective services so as to send signals that give investors a reassuring image of transaction security.

However, it becomes clear that justice, in particular, is an area where the reforms guided by the superego of the development industry collide with symbolic images of the institution/virtue of justice that are fully anchored in reality and shared by ordinary people. It

is based on this distortion between the real need for justice institutions and the illusory benefits of development assistance that the present article will try to analyse the missed opportunities in the meeting of development, justice, and digital technology.

Modernization: the Development Superego

In order to illustrate the illusory nature of development, we have to point out that there is not even a shared definition of the term itself. On this, Gilbert Rist rightly observed that psychologists speaking of development of intelligence, mathematicians speaking about developing an equation, and photographers talking about developing film share the same definition of the word “development.” However, this definition is different from the one that can be used to signify the level of economic prosperity in North America and Europe,³ a process of growth with its primary source in society,⁴ or a goal to expand the range of choices offered to the population, which makes it possible to render development more democratic and more participatory.⁵

As Rist explains it, “[t]he principal defect of most pseudo-definitions of “development” is that they are generally based upon the way in which one person (or set of persons) pictures the ideal conditions of social existence.” Rist characterizes this as a system of Western thought.⁶ Nonetheless, he adds the following caveat:

Yet “development” does exist, in a way, through the actions that it legitimates, through the institutions it keeps alive and the signs testifying to its presence. How could it be denied that there are developed and developing countries, development projects, development co-operation ministers, a United Nations Development Programme, an International Bank for Reconstruction and Development (better known as the World Bank), institutes for development studies, NGOs responsible for furthering development, and many other institutions and activities with the same stated aim. In the name of this fetishistic term – which is also a portmanteau or “plastic” word – schools and clinics are built, exports encouraged, wells dug, roads laid, children vaccinated, funds collected, plans established, national budgets revised, reports drafted, experts hired, strategies concocted, the international community mobilized, dams constructed, forests exploited, deserts reforested, high-yield plants invented, trade liberalized,

technology imported, factories opened, wage-jobs multiplied, spy satellites launched. When all is said and done, every human activity can be undertaken in the name of “development.”⁷

Thus, the effort to find a definition does not seem to overcome the tension between a “subjective feeling of fulfilment varying from individual to individual” and “a series of operations for which there is no *a priori* proof that they really contribute to the stated objective.”⁸

In order to remedy this indeterminacy, Rist applies Durkheimian methodology consisting, on one hand, in including the totality of the phenomena under consideration and, on the other, looking only at external features, which leads to classifying, from a sociological point of view, one set of countries as “developed” while others are labelled “developing” based on practices that are clear to all.⁹ Rejecting quantitative comparison (number of schools and roads, size of currency reserves, per capita calorie intake, computers and cell phones, etc.) Rist suggests a definition that makes it possible to describe the mechanisms of social change characteristic of development:

“Development” consists of a set of practices, sometimes appearing to conflict with one another, which require – for the reproduction of society – the general transformation and destruction of the natural environment and of social relations. Its aim is to increase the production of commodities (goods and services) geared, by way of exchange, to effective demand.¹⁰

Rist’s work is especially laudable in that he has managed to capture the superego of development impregnated by the theory of modernization, the crucial primary inspiration of the development community, the importance of which can never be emphasized enough.

Greatly inspired by the work of Walt Rostow, whose seminal book, *The Stages of Economic Growth: A Non-Communist Manifesto*, tried to identify the constant features of modernization of societies, the theory of modernization is about social change that presumes a universal, linear evolution of the development process. According to Rostow, every country experiences in the course of its development a certain number of identical stages in going from the traditional society, characterized by an essentially agricultural, low-productivity economy, to the society of mass consumption, which meets the basic needs of the population and has a major service sector. According to

this theory, developing countries are perceived as “backward” in relation to developed countries, which are portrayed as models because, having entered the era of mass consumption, they have reached the ultimate stage of development.

However, probably the most important aspect of the theory of modernization is less Rostow’s thesis, presented at the time as an “anti-communist manifesto,” than its sociological component, inspired in particular by Talcott Parsons and Alex Inkeles. It has been summarized in the following way by Christopher Lasch, based on a reading of Inkeles:

Once information about the modern world had begun to circulate among newly urbanized populations, it was impossible to deny the masses a place in the sun. “Exposure to modernizing influences,” as Alex Inkeles put it, generated an irresistible demand for the better things of life. It led to an “openness to new experience,” “increasing independence from the authority of traditional figures like parents and priests,” a “belief in the efficacy of science and medicine,” “ambition for oneself and one’s children,” and a strong interest in politics—the whole “syndrome of modernity.”¹¹

The “development community” has taken distance from modernization theory, an American conceptual weapon during the Cold War, considered too marked by Western ethnocentrism. It has been replaced by a series of reformulations (dependency theory, social autonomy or self-reliance, the New International Economic Order (NIEO), the vital-needs approach, structural adjustment, human development, and the struggle against poverty), but it has remained in a way the superego of development. To assess this, let us look at the following passage from the book by Hilton Root, *Dynamics among Nations*:

Modernization theory has had a deterministic influence on contemporary understanding of global development, both within the academy and among the policy community. Its influence is so widespread that it is even difficult to refer to modernization as a theory; its visceral intensity in the framing of US development policy has been a matter of faith under democratic and republican administrations. Under Bill Clinton, modernization theory led US policy makers to believe that open trade and rising

incomes would bring democracy to China and Russia. Under George W. Bush, it led to the belief that a democratic transition would spontaneously follow the eradication of dictatorship in Iraq and helped gain bipartisan support for the invasion. Bush's secretary of state, Condoleezza Rice, espoused confidence that a rising middle class in China would assume its "universal" role and demand democratic rights of representation and a free media. The grip of modernization theory on policies of international relations did not change when the Democrats won the 2008 election. President Barack Obama links open economies, open societies, and open governments, just as his predecessor did. All administrations since Jimmy Carter's have asserted that human progress has a single trajectory: it may start with the economy, but it must ultimately end with democracy.¹²

In short, in the development community, modernization is what remains when everything else has been forgotten, except that this "visceral intensity" continues to infuse the imagination of the "development community" with a set of impressionistic visual images of modernization, including of the relationship to technology, especially of the information society, which is an essential component.

In this respect, modernization's impact on development brings to mind Raymond Ruyer's analyses concerning the construction of a magical vision of society by the effects of technology in technological societies that have become unaware of technology. Analysing the effect of the media in particular, Ruyer says:

It [media technology] has, through an apparent paradox, fostered the reign of the image or pseudo-idea based on an image of a very sensorial form of aesthetics with very little intellectual content. We photograph and film, seeking effects that are "superficial" by definition: it is not a question of a scientific film. Cinema is the specialty not of technicians, but of young aesthetes, fascinated by cultural or political revolution. Ingenious reproduction processes end up putting sensational photos in the hands of the public, and those photos act like hallucinatory drugs. The reign of technology does not result in a magical vision of nature, but indeed in a magical vision of society, or in an impressionistic vision, in other words, a very superficial vision of certain social "effects," in a state of unawareness of any infrastructure.

The (cerebral) consciousness of a living being is also superficial in relation to the infra-consciousness of organic machines. However, it does not claim to constantly intervene in the life of the body in accordance with its own ideas. As we know, when it does intervene it creates neuroses and psychosomatic problems. Superficial consciousness of social life, combined with ignorance of technological means, leads to analogous, ideofunctional social problems. Superficial awareness does not renounce the claim to know what it ignores. It compensates in a single stroke for all its ignorance with pseudo-decoding, pseudo-explanatory ideologies. Lovers of "socially committed" films are no better informed about social mechanisms and crucial economic and government issues than they are about chemical optics. They are competent only with respect to the aesthetic of images in the director's *final* cut. Yet they nonetheless aim to remake all of society in reverse, in other words, based on what can be learned from the final cut or aesthetic of images, and its impressionistic manipulation.

The scientific technology of the media thus ends up having fostered less the propagation of ideologies than their creation, the creation of ideologies that are increasingly superficial, based on aesthetic images.¹³

Like Ruyer's film buff, development-agency workers and consultants are trying to remake a distant society in reverse, beginning with what can be learned from the final system with which they are surrounded, in other words, based on a representation of a superficial aesthetic of what constitutes development informed by the superego of modernization.

In the field of law and justice, since the superego of modernization requires that the social transformation has to be orchestrated to generate growth and development toward mass consumption, this produces a penchant for transaction security guaranteed by a deployment of technological innovation.

Given this penchant, the encounter of the development community, justice institutions, and information technologies is thus structured essentially around the tastes, customs, and aesthetics of the international investor. Moreover, that investor shares the same features with those who work for international financial institutions and their international consultants because they have all done the

same studies, often worked for the same bodies, spent time in the same business-class lounges in major international airports, and stayed in the same hotels, where the price is the same as that of the hotels in major Western cities.

It is thus not surprising that, in courthouses, hospitals, schools, and police stations, development entrepreneurs want to find, as in their hotel rooms in Luanda and Kuala Lumpur, the same external signs of modernization as at home, and sometimes better, since they are involved and, in order to keep their jobs, have to justify expenditures that produce measurable, and consequentially visible, development. Indeed, what could be better in the imagination of a justice-reform consultant than an entirely computerized postmodern courthouse that smashes the case-processing speed records of richer countries and is peopled by smiling stakeholders, confirming in opinion polls all their trust in the justice institutions and expressing their gratitude to the generous donors? In short, the equivalent, in the field of dispute resolution, of a four- or five-star hotel; in other words, a place that might just as well be located in Kansas City as in Jakarta or Bangui.

However, since development-assistance budgets, as impressive as they may be in absolute terms, unfortunately remain essentially well below the goal of 1% of GDP repeatedly promised by Western leaders, choices have to be made. For development consultants and officials, if it is not possible to have a high-tech crystal-palace courtroom managed in an orderly way according to Toyota “lean justice services” principles by alumni of McKinsey or the Boston Consulting Group, the next best solution is thus “showroom justice” equipped with external signs of technology. This may be embodied by a commercial arbitration and mediation centre, or by a state-of-the-art commercial tribunal created to provide international investors with the aesthetics of transaction security, while having the advantage of giving governments the peace of mind delivered by the Dantesque show of civil and criminal justice for the local people.

A variation leads to funding for computerized case-management systems, the massive, costly nature of which calls to mind the spirit of telematics inspired in France by the Minc/Nora report on the “computerization of society.”¹⁴ Like telematics, centralized, “massificating” computerization supported by development through case-management systems is sure to be a failed combination of digital technologies and justice, for which microprojects will be able to compensate only along the margins.

From Ideal to Achievement: The Reality of Cyberjustice Programs Funded by Development Assistance

In *L'Empire et les nouveaux barbares* (The Empire and the New Barbarians), published in 1991, Jean-Christophe Rufin provided a subtle analysis of the fundamentals of public development assistance based on quantitative assessment of the economy. Here is what he said about low-income countries, which were called at the time “the least developed countries” (LDCs):

Today, the purpose of cooperation in the poorest countries is no longer development. It remains outside of political-economic processes and intervenes on two levels: the first, right on the bottom, is the microproject that tries, despite everything, to meet the country's needs and help the people. Apolitical, those running the microproject refuse to look higher and further. They act locally and in the present, coping with corruption. The other level, right at the top, is macroeconomic assistance, the form of aid that funds government programs either a priori (cooperation) or a posteriori, by cancelling or regularly re-arranging debt. [...] Cooperation is limited to introducing wealth so that the predatory mechanism operates without breaking down. In a way, it does this from both ends: at the local microproject level and at the overall government level.¹⁵

Let us illustrate these remarks as they pertain to cyberjustice using the case of Ivory Coast.

In October 2012, the Abidjan Commercial Court opened its doors in Ivory Coast. It had received financial support from both the World Bank and the government of Ivory Coast. After “decades of criticism from business people concerning the failures of the Ivory Coast justice system,” its goal was “to reassure national and foreign economic players.”¹⁶

In order to do things properly, the World Bank did not stint on means and funded a computerized management system inaugurated in the presence of the president of Ivory Coast in July 2014. Its purpose was to improve the court's efficiency while fostering transparency.¹⁷

At the same time, Ivory Coast's “technological and financial partners,” among which figure in particular European Union and French and American cooperation agencies, were rushing to the

bedsides of the common-law courts to fund their information systems based on a pilot project for developing business applications for criminal and civil-justice systems at the court of Yopougon.¹⁸ The French cooperation project, implemented under a debt-reduction and development contract for which an agreement concerning payment of the second installment has just been signed, allocates €190 million to the justice sector over 20 years. A substantial portion of the money is to be used for computerizing the justice system.

To complete the picture, we need to consider the situation regarding preventive detention, considered one of the major problems affecting developing countries in particular.¹⁹ Before Ivory Coast's 2010–2011 post-electoral crisis, the NGO Prisoners Without Borders (PWB) had developed, with very little funding, software that made it possible to enter the data on each prisoner on a simple computer supplied to detention centres so as to ensure rules of procedure were followed and to clearly and immediately identify all those whose term of preventive detention had come to an end. Every two weeks, a representative of the NGO collected the data using a USB key and took it to the public prosecutor and the investigating judge, if applicable. The program was reinstated by PWB with funding from the European Union after the post-electoral crisis in the form of a limited prison computerization project specifically targeting preventive detention.

This is a perfect illustration of what Rufin said about the vast ODA bureaucracies' strategic interest in communication concerning microprojects:

Microprojects are on a human scale according to a formulation shared by Bernard Holzer, Chair of the *Comité contre la Faim et le développement*, and Plato, the Greek philosopher. The modesty of the action pleases everybody. Private organizations, with limited means, are rightly considered the inventors of micro-projects. They are proud to have been joined in the field. Major international institutions see microprojects as remedies for dilution of their work, which causes their action to dissipate given the size and inertia of their bureaucratic mechanisms. The mountain gives birth to a mouse, but it is a visible mouse.²⁰

Ivory Coast is far from the worst case since it has a strong economic fabric with the most commercial litigation in the region, along with better trained, more numerous technicians than in neighbouring countries.

However, donors tend to replicate the same sort of operation everywhere. For example, the World Bank is also funding the creation of a commercial court in Cotonou, Benin, even though there are no more than 500 commercial cases under the jurisdiction of the Court of First Instance of Cotonou.

Similarly, for more than ten years, Benin has been enjoying the assistance of technology teams funded by various sources, including the European Union and the Millennium Challenge Corporation.²¹ However, here is the 2013 assessment by the program director and the forecast for the Ministry of Justice provided at a workshop on prediagnosis of computerizing the justice system:

Thirteen years after the Estates General of Justice, and ten years after adoption of the PIRSJJ (*Programme Intégré de Renforcement des Systèmes Juridiques et Judiciaires* – comprehensive program to strengthen the legal and judicial systems), the anticipated direct and indirect effects of computerization on the efficiency, effectiveness and quality of services for users have not been achieved. Computerization of the system remains limited to implementation of business applications of which the jurisdictions make little use. It has not been possible to ensure interconnection of jurisdictions in a reliable, sustainable manner. Internet access is in the best cases at low speed and not universal. The intranet and electronic messaging have never really functioned. Networking and computerization of the Ministry of Justice, the public prosecutor's office, officers of the court, and stakeholders are non-existent.²²

In comparison with Ivory Coast, the problem of preventive detention is even worse in Benin, where 74.9% of prisoners are estimated to be in preventive detention and cases of such detention can last up to 17 years.²³ Moreover, the conditions in which prisoners are kept are deplorable, with a very low number of guards per prisoner (6 for 397 in one Benin prison), not to mention the over-population in some institutions.²⁴ Prisoners Without Borders also operates in Benin, but is not undertaking any ICT projects there.

Moving away from microprojects, the instrumentality and communications uses of which we have highlighted, let us look at two of the most costly types of intervention: commercial-justice showrooms and computerized case-management systems.

There is at least one rational, eminently challengeable and cynical foundation for building “justice showrooms”: to improve rankings

in scales such as Doing Business in order to send signals to foreign investors.²⁵ This is all the more irresistible when funding agencies are willing to allocate resources to such reforms for the purpose of improving the business environment.

However, it is more difficult to justify the attractiveness of a major justice computerization project based on business-management systems when we know the tendency for such projects to fail in developed countries.

According to a 2012 McKinsey study, half of information and communications technology projects with budgets over \$15 million spend 45% more than the estimated budget, 7% are late (33% in the case of application projects), and systems deliver 56% fewer functionalities than anticipated.²⁶ In 17% of cases, computer projects turn out so poorly that they end up endangering the undertaking's survival.

The number of projects that have turned out to be complete fiascos can no longer be counted. For example, there was the *Système intégré d'information de justice* (SIJ) in the province of Québec, which was abandoned after an estimated CAN\$75 million had been wasted, and the integrated justice system management project in California, whose estimated cost upon its design in 2004 was \$260 million, but whose budget was revised in 2010 to \$1.9 billion, according to the Auditor General of California.²⁷ Moreover, the system would have been obsolete as soon as it was implemented if it had not been abandoned in 2012, after having cost the jurisdictions and the Administrative Office of the Courts over \$400 million.²⁸ This is not to mention the Cassiopée saga in France, with its over 40-month delay, the goal of which had been for no sector of the French government service to be spared the idiosyncrasies of a telematic computerization of society, flowing straight out of the imagination of the Inspector of Finances' office. We will also avoid thinking about the Phénix soap opera in Belgium, which was a grand-scale computerization program for the Belgian justice system launched in 2001 but abandoned in 2007, after spending three years in death throes and forcing the Belgian government to take legal action for an estimated €28 million in damages from the provider, Unisys.

As the above examples show, major justice computerization projects are especially perilous, even in OECD countries, because they require time, money, and good project governance, as well as steadfast support from the government, which is responsible for making and implementing a number of decisions crucial to the undertaking's

success (internal and external development of chains of implementation, choices in terms of networks and related interconnections, choices of technology and application systems, computer stock renewal planning, governance structures in charge of developing and enforcing justice information system policy, amendment of legal infrastructure to integrate the use of Information and communications technology (ICT), etc.).

The main problem with major projects is that they are often seen by an organization as an opportunity to solve problems that the project is relatively poorly equipped to deal with, or that the project makes even more complex. For example, a body that is experiencing organization problems with respect to filing cases and documents certainly has fundamental organization problems. A transition to a “global virtual computerized infrastructure for work stations, servers, storage and establishment of a ‘private cloud’”²⁹ requires much more complex organizational capacities for planning and management—and much greater means—than those required to file cases in a manner that makes it possible to extract what is necessary when needed.

Sometimes the rush to insert complex technology into institutional creations that are difficult to sell can endanger the creation of the institution, as was pointed out by *Financial Times* columnist Gary Silverman concerning the disastrous launch of the Affordable Health Care Act in the United States:

The problem with Obamacare is that its creators couldn’t resist putting the whole kit and caboodle online. It wasn’t good enough to just do good; they had to do it with the latest bells and whistles.... The irony is that this tendency to opt for the highest tech solution to a problem is one reason we needed to reform the healthcare in the first place. We all know we spend too much on expensive drugs and invasive procedures – and pay too little attention to traditional remedies that might work just as well.³⁰

Latin America, the site of the first experiments with justice computerization projects funded by development assistance, is, in this respect, according to available information, far from having achieved tangible results, as Linn Hammergren notes:

Latin American courts also have a considerable amount of automation, some of them having invested substantial time and

national funds in introducing it. However, most of this automation has not been used to create improved databases, but rather for word processing of ordinary documents, e-filing and creation of “e-files” which are really only a collection of the traditional documents now scanned and uploaded, retrieval of information on case status by internet, and automated catalogues of archive holdings and/or bar-coding of files and documents. All of this is helpful, but represents bits and pieces of a reform, and in the absence of good data on case flow, it is not even possible to evaluate the impacts. In Brazil, even after nearly twenty years of automation, and the introduction of some state-of-the-art ICT, performance data and statistics remain rudimentary, limited to disposition rates calculated by comparing dispositions with filings for each year, and most courts either do not have or do not use the capacity to do finer analysis. While courts there and in most other countries speak of a goal of reducing delays, they rarely can calculate current average disposition times or the incidence of factors contributing to them. The stock of pending cases is frequently a black hole – no one knows how many cases are included, of what they are composed, how old they are or what tends to get left behind. The automated registries created by many court systems are composed largely of text entries making analysis difficult if not impossible. Cases going from one instance to another rarely retain the same case number making it difficult to track them. All of these omissions represent the most basic elements of any good case management system, but few countries seem prepared to adopt them or see any reason to do so. Instead there appears to be a blind faith in the power of more ICT to fix systemic problems, something which experience suggests is unlikely to happen, and which the very absence of data makes impossible to verify.³¹

Despite the known dangers, the development community’s preference for major projects and justice showrooms stems from the objective-based management that characterizes development assistance, the result of which is that visibility and, let us not forget, frequency of spending, are sought more than utility. As William Easterly notes, objective-based management in the development industry produces the consequence that, when goals are defined

ahead of time, development programs pursue some of them (those entailing long-term benefits for the communities concerned at low cost) weakly, while concentrating resources on those producing the least benefits at a high cost (the ones on which a lot can be spent in a short time and concerning which we can communicate results in the short term, in other words, activities transformed into proven results by tracking-assessment magicians wearing the hats of communication specialists).³²

For funding bodies, major projects have the advantage of attracting attention when they are announced and ensuring strong media coverage of the expected benefits. They make it possible to give a visible impression of modernization and at the same time pave the way for programs with deep disbursements. Since they are supposedly apolitical, costly, complicated to implement, and thus mobilize major amounts of local and foreign expertise, computerized management systems are perfect for development project designers. All of this leads to overinvestment in what Barry Walsh has called the myths of cyberjustice projects.³³ These myths go from interconnection of tribunals through integrated systems³⁴ to e-filing as a means of accelerating procedures,³⁵ and indeed entirely computerized tribunals, which is the justice-system version of the paperless office.³⁶ These overinvestments are made to the detriment of what is really useful for rendering justice (e.g., compliance with procedures; decisions rendered in accordance with the law; knowledge of flows, case congestion and processing times per type of case; access to legislation and case law; etc.).

In contrast, it seems that no project has seriously considered allowing use of mobile phones for linking stakeholders and justice institutions in countries where postal systems are non-existent and people are difficult to reach by means traditionally used in legal systems in developed countries.³⁷

The Limits of the Focus on Effectiveness Dictated by Modernization

Can funding of justice showrooms and/or tribunals equipped with computerized case-management systems be the foundation for policy designed to legitimize justice institutions in emerging countries?

We have to wonder about this given what can already be observed in developed countries, where it would be somewhat of a stretch to say that the creation of exceptional non-territorial justice

for financial players and multinationals and the use of technology in public justice services have helped to strengthen the legitimacy of justice institutions.

In fact, ICT have been used instead by stakeholders to avoid the legal system at all cost and to evade the transaction expenses associated with justice professionals when resolving low-value legal problems and disputes.³⁸

It is a different matter in developing countries, where low-value problems such as those addressed by way of online dispute resolution platforms are only peripheral and generally better resolved by community pressure than by law.³⁹ In contrast, issues that hardly ever go to court in developed countries, such as cases involving civil status, tend to absolutely require recourse to the justice system owing to the weakness of the government services in charge. This makes solutions complex, long, and essentially iniquitous.⁴⁰ Problems of relatively small importance in developed countries tend to become human tragedies, such as prison sentences for very minor offences⁴¹ and police involvement in debt collection that puts the debtor in custody despite the fact that debtors' prisons have long been abolished.

When we look at these problems, we have to be suspicious of what the concentration of ODA means in computerized case management projects and justice showrooms for foreign investors.

In addition, justice, to a greater extent than other institutions, has had its own symbolic imagery since time immemorial. It is anchored in reality, which explains why the phony reforms by the development industry fail on the whole: their symbolic anchoring among the people is insufficient.

For example, if we refer to Dickens' description in *Bleak House* of a case set at the time of the first Industrial Revolution in England, we can only be skeptical about the belief of the development community that court networks operating according to the precepts of Taylor's "scientific management" and producing decisions in record times will effect the desired social transformation by creating the conditions of trust required for economic development.

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to

all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession. Every master in Chancery has had a reference out of it. Every Chancellor was “in it,” for somebody or other, when he was counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers in select port-wine committee after dinner in hall. Articled clerks have been in the habit of fleshing their legal wit upon it. The last Lord Chancellor handled it neatly, when, correcting Mr. Blowers, the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, “or when we get through Jarndyce and Jarndyce, Mr. Blowers”—a pleasantry that particularly tickled the maces, bags, and purses.⁴²

Dickens’ description of *Jarndyce v Jarndyce* at the time when England was indisputably the world’s leading economic power and the great modern nation in Europe suffices to put to rest the idea that economic development depends on Taylorized justice. It illustrates the great confusion that bogs down the “development community” when it reduces the problems of justice institutions in developing countries to their effectiveness, when in reality what it needed is to make them common.

The point is in no way to maintain a kind of nostalgia for a form of justice resembling the Dantesque descriptions of Dickens

or Balzac or to claim that justice rendered with greater speed is an objective that should not be pursued, but rather to point out that making institutions legitimate initially requires something other than effectiveness alone. Paraphrasing Antoine Garapon, we can say that as soon as justice has settled on effective delivery, it ceases being a common point of reference.⁴³ He says that a symbolic institution “is precisely one that introduces a rupture in space and time, and suspends reaction to take time for reflection.” Justice institutions cannot claim to foster trust if they compromise on “the authority of speech over automation [...] the transcendence of discussion, the domination of law common to all parties, the inviolability of basic rights.” These principles are poles apart from development economists’ obsession with modelling, and it is clear that they are not the guiding forces behind the justice reforms funded out of ODA coffers.

Justice-reform experts’ conceptually attractive image of irenic justice with surgical precision and clockwork timing is contrasted with a completely different image in the allegory by Giotto in the Arena Chapel in Padua, which made Proust think of “a Justice whose grayish and meanly regular face was the very same which, in Combray, characterized certain pretty, pious, and unfeeling bourgeois ladies I saw at Mass, some of whom had long since been enrolled in the reserve militia of Injustice.”⁴⁴ According to Proust,

the startling strangeness, the special beauty of these frescoes was due to the large place which the symbol occupied in them, and the fact that it was represented, not as a symbol, since the thought symbolized was not expressed, but as real, as actually experienced or physically handled, gave something more literal and more precise to the meaning of the work, something more concrete and more striking to the lesson it taught.⁴⁵

The idea that justice institutions fixating on mere efficiency could be the foundation for mechanisms of social transformation through growth contradicts the symbolic reality expressed by Giotto. Certainly, the allegory of the virtue of justice evokes security, but as Judith Shklar points out, justice offers no commandments respecting social engineering. Shklar notes that in the allegory, there is nothing implying public or private wealth, or people actively engaged in political debates or cooperative projects.⁴⁶

Insisting that the purpose of justice is universal and abstract, Shklar instead shifts attention to the contrary of impassible, distant justice: the vice of injustice, represented by Giotto on the opposite side of the fresco in the Arena Chapel by the features of a cruel, shiftily bureaucrat, who is not however fleeing his function. According to Shklar, reducing passive injustice, in other words, political injustice resulting from public inaction, is much more the purview of the inventiveness of politics, so repugnant to development ideologues, than of Taylorized justice. By engaging in a politics of avoidance of the true problems of legitimacy facing justice institutions, by setting up justice showrooms for foreign investors, and by injecting millions into projects to computerize court case-management systems, has not the development community condemned itself to remaining in the same “reserve militia of Injustice” as the young ladies of Combray?

Notes

- 1 Dambisa Moyo, *L'aide fatale, les ravages d'une aide inutile et solutions pour l'Afrique* (Paris: JC Lattès, 2009); William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (London: Penguin Books, 2007); William Easterly, *Tyranny of Experts, Economists, Dictators and the Forgotten Rights of the Poor* (New York: Basic Books, 2014).
- 2 Gilbert Rist, *The History of Development from Western Origins to Global Faith*, translated by Patrick Camiller (London: Zed Books, 2009), at 1.
- 3 *Le Petit Robert*, 1987, *sub verbo* “development.”
- 4 South Commission, *The Challenge to the South: The Report of the South Commission* (Oxford: Oxford University Press, 1990) at 10–11.
- 5 United Nations Development Programme, *World Human Development Report 1991* (Oxford: Oxford University Press, 1991) at 1.
- 6 Rist, *supra* note 2.
- 7 *Ibid.* at 10–11.
- 8 *Ibid.* at 11.
- 9 *Ibid.* at 12. [Translator's note: I could not access page 12, so I have paraphrased the quote. I have intentionally used words that are a little different from the French in the hope that my translation will be different from the official translation.]
- 10 *Ibid.* at 13.
- 11 Christopher Lasch, *The True and Only Heaven: Progress and its Critics* (New York: W. W. Norton & Company, 1991) at 189.

- 12 Hilton L Root, *Dynamics Among Nations* (Cambridge, MA: MIT Press, 2013) at 35. We could also refer to the following passage from Christopher Lasch, *supra* note 11 at 194: "The concept of modernization no longer dominates the study of economic development in the non-Western world; but the conceptually seductive images with which it is associated still color the West's view of its own history. It was the transformation of Western society by the industrial revolution that first gave rise to the concepts of tradition and modernity, and the habit of charting our course by these familiar landmarks lingers on. Critics have again and again exposed the inadequacies of the modernization model, even for an understanding of the West. It still stands, however—a deserted mansion, its paint peeling, its windows broken, its chimneys falling down, its sills rotting; a house fit only for spectral habitation but also occupied, from time to time, by squatters, transients, and fugitives."
- 13 Raymond Ruyer, *Les nuisances idéologiques* (Paris: Calmann-Lévy, 1972) at 234–35 [passage translated by author].
- 14 Alain Minc and Simon Nora, *L'informatisation de la société: Rapport à M le Président de la République* (Paris: Seuil, 1978) [passage translated by author].
- 15 Jean-Christophe Rufin, *L'Empire et les nouveaux barbares* (Paris: JC Lattès, 1991) at 125–27 [passage translated by author].
- 16 "Tribunal de commerce d'Abidjan, une juridiction qui redonne confiance," *Abidnan.net*, February 25, 2014, online: <news.abidjan.net/h/490104.html> [passage translated by author].
- 17 Mireille Kouakou, "Le Tribunal de Commerce d'Abidjan adopte la technologie pour plus de transparence," *RTI*, online: <www.rti.ci/actualite-8825-le-tribunal-de-commerce-d-abidjan-adopte-la-technologie-pour-plus-de-transparence.html>.
- 18 See Agence Française de Développement, "Request for Proposal" (25 September 2013), online: <afd.dgmarket.com/tenders/np-notice.do?noticeId=9309670>.
- 19 Open Society Initiative, "Presumption of Guilt, the Global Overuse of Pretrial Detention, OSI" (September 2014), online: <www.opensocietyfoundations.org/publications/presumption-guilt-global-overuse-pretrial-detention>.
- 20 Rufin, *supra* note 15 at 123–24 [passage translated by author].
- 21 Benin's business applications were initially experimented with in a few jurisdictions before being used throughout the justice network. Then, following a new call for tenders and a change in the technical assistance provider, the second team recommended abandoning the system and developing a new one, which is in the pilot project phase.
- 22 "Pré-diagnostic de l'informatisation du MJLDH: pour instaurer une justice de qualité, crédible et accessible au justiciable," *La Nouvelle*

- Tribune, April 5, 2013, online: <www.lanouvelletribune.info/index.php/societe/vie-societale/14091-pre-diagnostic-de-l-informatisation-du-mjldh-pour-instaurer-une-justice-de-qualite-credible-et-accessible-au-justiciable> [passage translated by author].
- 23 OSI, *supra* note 10 at 26.
 - 24 Ibid. at 66.
 - 25 In reality, everyone knows very well that security in an environment such as that of Benin depends more on good relations with the government and that recourse to a formal dispute resolution system is virtually impossible aside from commercial arbitration abroad or through an investment arbitration centre.
 - 26 Michael Bloch, Sven Blumberg and Jürgen Laartz, "Delivering Large-Scale IT Projects on Time, on Budget and on Value," *McKinsey Quarterly* (2012), online: <www.mckinsey.com/business-functions/business-technology/our-insights/delivering-large-scale-it-projects-on-time-on-budget-and-on-value#0>.
 - 27 California State Auditor, "Administrative Office of the Courts, The Statewide Case Management Project Faces Significant Challenges Due to Poor Project Management," Report of the Auditor General of the State of California, Report 2010-102, February 2011, online: <www.bsa.ca.gov/pdfs/reports/2010-102.pdf>.
 - 28 Ibid.
 - 29 According to the wording in a digital court project announced in Morocco, *Le Matin*, online: <www.lematin.ma/journal/-/194036.html> [passage translated by author].
 - 30 Gary Silverman, "Obamacare Woes Need a Paper Cure," *FT*, October 17, 2013, online: <www.ft.com/cms/s/0/f5963b14-35c8-11e3-952b-00144feab7de.html#axzz45doDOgBK>.
 - 31 Linn Hammergren, "Judicial Governance and the Use of ICT," online: <www.ijjusticia.org/docs/Linn.pdf>.
 - 32 Easterly, *supra* note 1 at 255.
 - 33 Barry Walsh, "E-Justice Projects – Distinguishing Myths from Realities," online: <www.ijjusticia.org/docs/Barry.pdf>.
 - 34 Regarding the above, Walsh notes that California, where all the courts had developed their own individual business management computer systems, ended up with 130 different types of software and 70 independent operating systems for a justice network of 58 counties and 2,100 judges. Moreover, between 1999 and 2009, the California justice systems managed to process 99% of the 10 million cases per year within 24 months and 86% of criminal cases within 12 months. However, the centralizing, massification ambition of the government's senior justice officers lead to a program that was abandoned after having spent more than \$300 million. Ibid. at 2.

- 35 A number of projects focus on e-filing, which saves only a very small amount of time and requires heavy, costly solutions, as Barry Walsh explains. While such systems make it possible for stakeholders to avoid travel and to save small amounts of money, the benefits of e-filing systems are concentrated exclusively at the point when a claim is lodged or a request filed, and in no way concern the speed with which cases are processed. Ibid. at 3.
- 36 Many projects aim to make all files virtual (e-files), put case status online and use bar codes for files and documents. However, according to Walsh, digitalizing legal documents would essentially result in duplication, not substitution and digitalization, which is a heavy process and does not eliminate inaccuracies or ensure files are complete. Moreover, it requires equipping not only courthouses but also lawyers, and providing stakeholders with broad access to the same technologies. This condition is difficult to meet in low-income countries. Finally, digitalization of proceedings makes the service vulnerable to equipment breakdowns and power failures, which are especially frequent in developing countries. Ibid. at 10–11.
- 37 For example, on a radio show, Lionel Zinsou, a French-Benin businessman, said that in the year 2000 it was forecast that 100,000 people in Benin would have a mobile phone by 2014. Currently five million Beninese have such a device. See Lionel Zinsou, “Le développement économique de l’Afrique,” podcast audio, July 6, 2014, online: <www.franceculture.fr/emission-l-esprit-public-le-developpement-economique-de-l-afrique-avec-lionel-zinsou-2014-07-06>.
- 38 Finding a model contract on a site like legalzoom without going through a lawyer, resolving a consumer dispute using the dispute resolution system of E-bay or Amazon; however, there are few applications aside from dispute resolution platforms for online transactions.
- 39 On this, see R. Beauchard, “La résolution en ligne des litiges, gage d’une justice de proximité en Afrique?,” *Notes de l’IHEJ*, Institut des Hautes Études sur la Justice, June 2, 2013, online: <www.ihej.org/la-resolution-en-ligne-des-litiges-gage-dune-justice-de-proximite-en-afrique/>. Problems related to distance sales are only marginal and disputes are more often between members of a given community, which often regulates relations more effectively than the justice system, which is feared by all.
- 40 In many developing countries, especially in Africa, the registry of civil status is poorly kept, or inexistent. This opens the way to many abuses and problems for citizens, and recourse to state justice to solve problems is not uncommon. Here again worship of technology leads to an all-or-nothing choice: a computerized registry with biometric applications or nothing at all.

- 41 It is not unusual, in a country like Benin, to see a prosecutor call for a prison sentence for low-value theft (a box of soap, two chickens, etc.). In fact, such offenders are relatively lucky because more often than not, suspects fall into a hellish spiral leading from custody to provisional detention to oblivion and, finally, to the realization that detention has exceeded the maximum duration authorized without trial or compensation.
- 42 Charles Dickens, *Bleak House* (London: Phiz, serialized 1852–53).
- 43 Antoine Garapon, *La raison du moindre État* (Paris: Odile Jacob, 2010) at 79 [passage translated by author].
- 44 Marcel Proust, *Swann's Way: In Search of Lost Time*, translated by Lydia Davis (New York: Penguin Classics, 2002).
- 45 Ibid.
- 46 Judith N Shklar, *Faces of Injustice* (New Haven: Yale University Press, 1990) at 103 [Translator's note: I do not have access to the original English text, so I have removed the quotation marks and paraphrased it].

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