

PART III

**TOWARD NEW
PROCEDURAL MODELS?**

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Continuity and Technological Change in Justice Delivery

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The speed at which technology has been changing the way we do things in many fields of human activity has been nothing short of astonishing. This great potential for change observed in technology once appeared to hold the promise of rejuvenating justice. To many of us, the adoption of new technology seemed the obvious course that would quickly generate new models and lead us to achieve cost- and time-effective justice delivery, the course, in other words, that would lead us to the Holy Grail of access to justice. This techno-utopian view was understandable at the time when computers first made their way into law firms and then into courtrooms. Programmes aimed at improving access to justice, such as small claims courts and legal aid, had already been implemented in many jurisdictions and deemed insufficient. The seemingly intractable problem of access to justice would finally find a solution in eAccess.

With hindsight, all agree that the practices, norms, and assumptions of justice delivery proved more resistant to change than had been anticipated. Without denying the enormous long-term potential of eAccess to justice, the chapters in this section take a step back from the techno-utopian view to reflect upon the extraordinarily complex web of values, norms, and practices that support our systems of justice. Change is difficult because law's function is in part to resist it, and because the values that underpin justice delivery are always in tension, and interwoven with norms and practices whose slow evolution is not

always easy to grasp. These themes are addressed from the standpoints of sociology, political theory, and legal theory by Pierre Noreau, Daniel Weinstock, and Clément Camion, and taken up in two case studies by Katia Balbino de Carvalho Ferreira and Xandra Kramer, respectively on Brazil's and the European Union's e-justice initiatives. These illustrate both the potential and the challenges of top-down regulatory interventions in the complex web of values, norms, and practices found in large multi-jurisdictional entities.

Continuity and Incommensurability

One obvious reason for law's resistance to change is the legal profession's ingrained conservatism, which, as observed in several of the chapters in this section, is linked to the function of law as a "stabilizer" of social relations, and the pursuit of the core value of "predictability" through which it notably achieves this function. One of the ways in which law ensures predictability is by pursuing normative coherence. This means that no change to an element of the existing legal corpus can be made without a consideration of the corpus as a whole. Another way in which law nurtures predictability is by relying on procedure, or "secondary rules," to resolve disputes. If substantive agreement is not within reach, resolution under law can nevertheless be achieved through established and authoritative procedures, which in turn will generate normative clarifications that improve predictability for third parties. The resort to procedure also induces notions of due process that, in time, take on a fundamental importance, as is constitutionally recognized in many contexts. Those are fairly obvious reasons why the legal profession naturally balks at the prospect of change in general and why, in particular, the renewal of procedural models proves such a formidable task.

In his very significant contribution to this section of the book, Pierre Noreau, drawing on resources from the field of sociology, invites us to reflect upon the broader and deeper reasons for resistance to change in highly institutionalized settings. To this end, he proposes a highly textured model comprising three levels of social action that range from the symbolic to the instrumental: the abstract "referential" level of social values and world views; the middle level of norms; and the practical level of ways of actually engaging in social action. The model is not specific to change in legal relations but offers a useful reminder of the interrelation between the three

levels and how they combine to erect tightly interwoven barriers to change. This reminder is very helpful in multiple ways and particularly in the identification and analysis of a mistake commonly made in attempts at introducing change, which consists in focusing on the normative level of action without paying attention to practices and the values in which norms are embedded. Deliberate attempts to introduce technology in legal processes without consideration of the values and practices of the legal profession are thus bound to fail. This conclusion has, of course, already been borne out by experience in many jurisdictions.

A further layer of difficulty and complexity in the introduction of change, which Daniel Weinstock usefully highlights in his contribution, is the fact that the values found at the referential, or symbolic, level are very often in tension rather than harmony. Therefore, even when taking account of the referential level, and when deliberately pursuing a value, such as equality, one can easily run afoul of another referential value and thus jeopardize a fragile equilibrium attained incrementally and not necessarily consciously through practices. As Weinstock concludes, any human institution must “try to balance a large number of values that are sometimes related in complicated ways” and “there is no algorithm to identify the right way to perform such balancing.”

Weinstock's conclusion provides a good explanation for the historical insight, which Noreau points to, that important social change appears easier to achieve when brought “wholesale,” that is, when a situation of crisis allows for the blanket rejection of social institutions and a purported replacement of the entire referential baggage, a major paradigm shift. As Noreau himself acknowledges, however, these “meta” crises, or revolutionary situations, are rare. And even when they do occur, the strong tendency of social actors has been to place new references within the frame provided by discarded references, and to follow well-established patterns of interaction where possible. The American Revolution provides a telling illustration of this phenomenon. The resulting constitution looks as though—and is often presented as if—it created a new order from whole cloth, when in reality, the bulk of legal relations and practices continued to be governed by the unwritten rules of the common law inherited from the old imperial regime. Change, even drastic change, must find some ground in existing, and ongoing, social practices, norms, and references.

Rule of Law, Private Harmony, and Efficiency

The paradigm shift that Noreau would welcome—if only the conditions were ripe for “revolutionary” change—would move, in his words, from “juridical truth and authority” to “party autonomy and a continuous adjustment of expectations and practices.” As Clément Camion explains in his contribution, however, one should give serious consideration not only to what one might wish for, but also to what may be lost if the wish came true. The change in paradigm from “juridical truth and authority” to “party autonomy and a continuous adjustment of expectations and practices” outlined by Noreau appears to track very closely what the new Quebec *Code of Civil Procedure* aims to achieve: justice redefined as the ability to resolve one’s disputes privately, at one’s own cost, and without undue expectations or insistence as to the vindication of one’s legal rights. This stance has been referred to, time and again, as the promotion of a culture of harmony. Although this may appear to many as the “conciliatory” way of the future, it bears mention that it has also been the way of the past. The fourth Qing emperor of China, Kangxi, is well-known for his application of Confucian principles of harmony to the question of civil justice. He recognized that there would be too much litigation if people were not afraid of the law courts and so made clear by way of edict his desire that “those who have recourse to the tribunals should be treated without any pity and in such a manner that they shall be disgusted with the law and tremble to appear before a magistrate.”¹ In this manner, he continued, “good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commune” and, as for “those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts.”² The provisions of the new Quebec code seem at least compatible with this striking picture conjured up from the past. It is worth asking, however, what exactly is missing from the picture.

Clément Camion explains that what could go missing in a drastic move toward private justice is the contribution of the justice system, or the resolution of disputes, to the rule of law. To those who are not quite prepared to discard the rule of law as a “primitive” stage of social organization,³ the loss matters a great deal. Camion points to the “positive externality” of public litigation: “during public adjudication, legal norms (both procedural and substantive) are

articulated for future reference in the process of resolving disputes.” Katia Balbino de Carvalho Ferreira, in her contribution to this section, likewise highlights the social importance of precedent and the promise of greater transparency in this respect offered by technology. When dispute resolution goes private, by contrast, “there is no ‘public norm,’ substantive or procedural, that is articulated and published for the benefit of third parties or society in general.”⁴ Perhaps more importantly, as Camion also explains, it is difficult to see how law’s ability to meet “the fundamental human need to stabilize expectations” could survive if “juridical truth and authority” were to give way entirely to “party autonomy and a continuous adjustment of expectations and practices.” No one takes issue with the immense difficulty attendant upon the project of providing a reliable and accessible enforcement of the legitimate *ex ante* expectations arising from laws and contracts; but no one, to my knowledge, has come up with a credible alternative to the rule of law as a basis for social organization. Thankfully, as Noreau acknowledges, the contextual conditions for the paradigm to shift away from rule-of-law references are unlikely to be met, and legislative attempts in that general direction are unlikely to have much impact, at least in the short term.

eAccess, Awareness, and Value Balancing

For Camion, information technology is an opportunity for bridging the knowledge gap that prevents both access to justice and a greater measure of dispute prevention. Instead of incessantly discussing efficiency in terms of costs, delays, and backlogs, and systematically ignoring the valuable contribution of litigation to the rule of law as well as the myriad other values fostered by a justice system, we should perhaps take more seriously the potential to bring about greater legal awareness and education. This potential has increased tremendously with information technology and certainly holds the promise of reducing the legal-knowledge gap that has plagued many access-to-justice initiatives.

In respect of the further uses of technology in legal proceedings, all are optimistic about the positive impact of their adoption, notably in the massive jurisdictional contexts of the European Union and Brazil, which are both addressed in this section. In her contribution, Katia Balbino de Carvalho Ferreira, with the benefit of her experience as a Brazilian federal judge, presents the integration of

technology as an imperative, as well as an opportunity to expand the actual social reach of the justice system. Xandra Kramer, in her contribution, is also optimistic about the potential of technology to improve access to justice in the European space. She is mindful, however, of the risk, to the quality of both justice processes and results, inherent in the pursuit of efficiency. In his contribution, Weinstock also shows optimism but warns about the possible indirect consequences of every change in our practices, rightly insisting that the impact on the different values of the system should be borne in mind at every step. The contributions from the field, in Europe and Brazil, also provide a glimpse of the considerable difficulties of integrating technology in highly complex, multilevel judicial organizations and federal contexts.

Xandra E. Kramer's contribution, which provides a very useful high-level view of the main European initiatives regarding integration of technology and the cross-border difficulties they address, is particularly interesting in its consideration of procedural risk. Apart from the risk relating to the multiple languages used in the European Union, she looks at the tricky management of the relationship between geographically distant dispute resolution initiatives and the values of due process embedded in the European human rights instruments. Concerning the European small claims procedure, she explains that the hearing is in principle to be conducted in writing, and that an oral hearing is to be held only if it is considered "to be necessary or if a party so requests." This is a standard position seen in many contexts. The relevant regulation goes further, however, by stating that the party's request for an oral hearing can be refused if it is "obviously not necessary for the fair conduct of the proceedings." This is a noteworthy attempt at suggesting a "practicable" interpretation of the provisions guaranteeing the right to be heard. It is this kind of value-balancing exercise that is at the core of the socio-legal mediation needed to make technology work in the context of justice delivery.

There is consensus among the authors who contributed to this section about the importance of being alive to the complex web of values, norms, and practices that support our systems of justice. Change is difficult because law's function is in part to resist it, and because the values that underpin justice delivery are always in tension. These values are also intertwined with norms and practices that are constantly mediated and interpreted through human interactions, and which are therefore difficult to read. The chapters in this section give

us a valuable framework for thinking, with the required sophistication, about legal change in general, and in particular about change brought by information technology to civil justice and its accessibility.

Notes

- 1 See Tahirih V Lee, *Contract, Guanxi, and Dispute Resolution in China* (London: Routledge, 1997) at 97; see also Jeffrey C Kinkley, *Chinese Justice, the Fiction: Law and Literature in Modern China* (Chicago: Stanford University Press, 2000) at 106.
- 2 Kinkley, *supra* note 1.
- 3 A Hong Kong barrister is famously reported to have told author Jerome A. Cohen, "The trouble with you Westerners, is that you've never got beyond that primitive stage you call the 'rule of law.' You're all preoccupied with the 'rule of law.' China has always known that law is not enough to govern a society" (Jerome A Cohen, *The Criminal Process in the People's Republic of China, 1949-63: An Introduction* [Boston: Harvard University Press, 1968] at 4). Note that the comment was made in the context of a discussion about the criminal justice system.
- 4 This point was famously made in Owen Fiss, "Against Settlement," *Yale L J* 93 (1983-84) at 1073.

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