

Cyberjustice and Ethical Perspectives of Procedural Law

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In Canada, as in other countries, there is an enormous problem of access to justice. Many courts are clogged, and people who have to rely on them for their cases to be heard are often required to wait for an unreasonably long time. Since access to justice is not entirely exempt from market forces, it is often prohibitively expensive for those who need it most. Like access to health care, which probably causes more ink to flow, access to justice is a major issue of distributive justice.¹

One of the justifications for introducing virtual platforms into the administration of justice is the claim that it could help to alleviate this major distributive justice problem. “Cyberjustice” would shrink costs and waiting times related to justice proceedings by relieving congestion in the courts, reducing costs related to the need to pay various types of workers in the legal field, and so on.

In the present essay, I will not try to challenge these claims. Let us therefore take it for granted that cyberjustice would entail major improvements in access to justice. Instead, I would like to look at the risks that could flow from overuse of virtual tools in the legal context. I am starting from the hypothesis that the *design* of any complex social institution has to take a multitude of values into account, values that are sometimes in tension. While use of virtual platforms may be an improvement in terms of access to justice, does it entail risks in relation to other values that are just as central for legal institutions, risks that could significantly reduce the overall benefit brought about by the introduction of new technologies?

When we are assessing the emergence of such platforms, we have to avoid two extremes. On one hand, we have to avoid succumbing to the temptation to adopt institutional conservatism, which results in unfounded idealization of the procedures that we have at this time, and which sees any departure from present institutional forms as a sign of degeneration. On the other hand, we also have to avoid being tempted by technological determinism, which sees all technological advances as desirable. The more subtle question that we have to ask in relation to the emergence of information technologies and virtual platforms in justice processes is how to embody values that are always important in the administration of justice in a system that will give an even greater role to digital processes.

As a working hypothesis, I will assume that the changes that will be made to legal processes through the adoption of technological tools will be substantial, in other words, that such tools will replace traditional ways of administering law, rather than serve simply as instruments within procedures that are relatively similar to those with which we are already familiar. It may be that scenarios of this type will not be achievable in the near future. If this is the case, I hope that the following reflections will make it possible to find ways of achieving the values that will be in question here within procedures that have been dramatically reconfigured by new technologies.

The four normative considerations to which I will briefly refer in the following lines are equity, trust, respect, and what could be called epistemic confidence. I will briefly describe each of these values before drawing very preliminary conclusions about the way in which “cyberjustice” should be integrated into modern legal practices.

Equity

Equity is the value in the name of which cyberjustice proponents consider that the administration of justice should give a greater role to virtual processes. The best-off in our society can hire the best lawyers, and have the luxury of being able to expect that their cases will be heard. This suggests that, in these circumstances, law exacerbates rather than overcomes social inequalities.

It would thus be ironical if the introduction of tools and virtual processes into the administration of justice resulted in other costs from the point of view of equity. How could this be so? How could

making proceedings less cumbersome, ensuring that certain types of functions are done by digital applications rather than by (paid) human beings do anything other than smooth out inequalities?

In order for the introduction of new technologies not to give rise to new inequalities, we have to ensure that we take measures to guarantee that the dividends are not distributed unequally. The introduction of information technologies into social institutions has not always improved equality. It is clear that when such technologies have been introduced in health care,² education,³ and politics,⁴ problems of inequality have arisen. These problems stem from the fact that in these areas, new technologies have been introduced without attacking “digital divide” problems present even in the most technologically advanced societies.

We can imagine two types of mechanisms through which the introduction of new technologies creates problems from the point of view of equity. The first is related simply to the fact that there is a digital divide. “Digital literacy,” a term which has to be understood to include all competencies enabling individuals to use new information technologies and to feel at home in cybernetic worlds, was studied by Statistics Canada in 2011. According to the findings, digital literacy is unequally distributed across the population, and these are largely consistent with existing inequalities and vulnerabilities, for example, those related to levels of education.⁵

The second mechanism is related to the fact that in the context of a system of administration of justice based on an adversary logic, it is very likely that the introduction of any new technology into the system will give rise to strategic calculations. Any lawyer who takes seriously the responsibility to promote client interests will try to use any changes to case processing in ways that will benefit his or her client. It is difficult to predict precisely what form such strategic considerations will take in the case of new technologies, but it would be naïve to imagine that any change in the way justice is organized would not be the object of such strategic considerations.

In order to ensure that the improvements in terms of equity that will result from relieving congestion in the courts and the savings to be made through greater use of digital platforms are not accompanied by other inequities, it will be important to try to deal with the causes of potential unfairness when new technologies are introduced. How? First, we have to address the above-mentioned digital divide, which has already caused failures when new technologies have been

introduced into other areas of public policy, such as those mentioned above. Cyber-literacy campaigns have to be conducted, and in so far as the divide is a function not only of unequal distribution of *knowledge* concerning how digital tools function but also of such technological *media*, we have to take action to ensure that people are not disadvantaged in material terms because they do not have access to the technological tools needed to enjoy all the benefits resulting from the virtual transformation of justice structures.

How can we ensure that the strategic use of new technologies will not give rise to new inequalities? In a context where the system of justice is based on arguments put forward by two adverse parties, there is not much that can be done to prevent strategic behaviour. The organization of systems based on contests between adversaries is based on the hypothesis that justice will emerge as “system effect” where two parties compete (within a framework of rules) to win their cases.

Strategic behaviour creates inequalities when adverse parties do not have comparable resources. What poses a problem is not so much strategic calculation but the fact that one party may be armed with powerful digital tools, while the other may have only an abacus.

We have seen above that proponents of cyberjustice may be hoping to serve the cause of equity in the field of justice by relieving congestion in the courts, thereby reducing both costly waiting times and also expenses related to the administration of justice. However, equality also depends on the adversaries in a legal case having comparable resources, no matter what other costs the introduction of new technologies may make it possible to avoid. It is difficult to see how, in itself, the arrival of new technologies would reduce access disparities in a society where access to justice still depends at least in part on market forces. On the contrary, as has been the case in other areas, there is reason to fear that if new technologies are introduced into a system in which there are still economic inequalities that make themselves apparent in individuals’ capacities to pay for high-quality legal services, technologies will only exacerbate such inequalities.

The cause of equity in the field of administration of justice will thus be served by the introduction of new technologies to “virtualize” certain aspects of proceedings in so far as they are accompanied by measures that reduce the digital divide and the very unequal distribution of digital literacy among our fellow citizens. Further, these new technologies should not exacerbate the material inequalities

already present in the administration of justice, making it likely that use of these new technologies will benefit those who already draw the greatest advantage from the legal system.

Trust

Naturally, equity is a fundamental value of the justice system, and any introduction of technologies tending to render certain aspects of the legal process virtual rather than embodied will have to ensure that the technologies do not reproduce social injustice and inequality.

However, it is not sufficient for the justice system to produce equity, or at least avoid deepening inequalities. It also has to inspire trust among citizens. A social system may very well be built around morally defensible values, but it will not succeed in making those values a reality in society unless people have enough trust in the system to take part in it rather than escape from it. A justice system that does not inspire people's trust is a system that they will not use to resolve their disputes unless they are forced to do so.

Of course, the justice and equity of a system are among the factors that help to inspire trust. Moreover, no one would want a system of justice that did not deserve to be trusted, in other words, one that did not provide justice to those who use it. However, trust is not related only to the effects produced by a social system, but to other types of factors as well.

Elsewhere I have defended the idea that it is difficult for complex systems to inspire trust. The reason is that trust is above all a dimension of interpersonal relations rather than relations that individuals have with impersonal entities such as complex institutions, the rules of operation of which are often impenetrable for common mortals.⁶ Character dispositions and judgement abilities that we have acquired in order to decide to trust someone depend on our capacity to react in an appropriate manner to the messages that other people send us through their behaviour, non-verbal communication, and so on.

We have difficulty formulating judgments of trust or distrust in relation to complex institutions, but also in relation to human interactions mediated by technology. The arrival of the internet and the many technological platforms for engaging in commercial, as well as emotional, relationships has given rise to a great deal of thought on the conditions for establishing trust among individuals in a medium as new as the internet.⁷

Any user of a platform such as Airbnb or Uber knows that the success of these virtual commercial initiatives depends on the creation of simulated interpersonal relationships. The purpose of the information placed on these sites is of course to reassure sellers and buyers of the “objective” reliability of the person to whom they are preparing to rent an apartment. However, the sites also increase the number of mechanisms by which interpersonal relations are recreated, even among strangers who may never meet other than through the mediation of virtual tools.

The legal process probably does not inspire all of the trust that it should. That it instead gives rise to distrust is probably owing to the inequity that it too often seems to produce, and to the layers of bureaucracy that people come up against when they try to use it to assert their rights—and these are the very vices that we hope to deal with by introducing virtual elements into legal processes.

While some aspects of the legal process tend to produce distrust, others probably have the opposite effect, namely, that of rallying members of a community to legal institutions. The aspects of these procedures that tend to produce trust are probably those that give the parties involved the impression that they are dealing with members of their community and that they are being recognized, through their participation in these institutions, as members of the community. For example, in his writings on criminal law, the philosopher of law R. A. Duff insisted on the importance of aspects of ritual in criminal proceedings through which members of a community affirm one another as members of the same community. According to Duff, some aspects that may seem at the limit of theatricality help to humanize the judicial process of assigning criminal responsibility so that all concerned, both the guilty and the accusers, can recognize one another mutually as members of the same community.⁸

As in the case of equity, the introduction of technologies designed to eliminate a source of distrust must not introduce a new one. Like virtual platforms through which individuals transact, or set up blind dates, virtual platforms designed to replace certain aspects of embodied legal process by virtual equivalents will have to find a means of inspiring trust. If the hypothesis described here is plausible, designers will have to find ways of reintroducing the interpersonal dimension required so that individuals who use the platforms can make appropriate judgments with respect to trust. Here the point is not to defend the idea that the thing is impossible.

We have managed to do it in a number of virtual contexts. However, the institutional design we adopt in order to integrate virtual aspects into legal processes must not overlook considerations on how to produce trust.

Respect

One of the main issues that opposed two of the greatest philosophers of law of the twentieth century, H. L. A. Hart and Lon Fuller, concerned whether it was important for members of a complex modern society to have an “internal point of view” in relation to legal institutions. Hart considered that it was essential for the officers of such institutions—judges, lawyers, police officers—to be motivated by an attitude that was more than simply instrumental in relation to such institutions. In other words, it was important for them to adhere to the ideals and claims on which the legal system is based. Fuller, in contrast, lauded what he called “fidelity to law”; in other words, the loyalty that people feel to a system of law that treats them as subjects and agents.⁹

However, the debate between Fuller and Hart concerned the conditions that have to be met for us to be able to say that there is a system of laws. According to Hart, whether or not people have an “internal” attitude to law is not a necessary condition for the existence of such a system. However, he conceded that such an attitude was desirable.

It is desirable to have an internal attitude to law because without such attitude, the legal system cannot have *authority* in relation to those subject to it. For the purposes of the present argument, let us assume that a system of laws has authority if the rules that follow from it are seen by people as reasons to take action.¹⁰ The fact of having authority means that a system has less need to count on coercion to obtain people’s obedience. A system of justice that has authority in the sense defined here has to invest less in monitoring and punishing than a system that imposes itself on people through fear of detection and penalties.

Once again, it is not a question of wanting a legal system to have authority with respect to those subject to it without that authority being accompanied by the appropriate moral virtues. An unjust system that enjoys authority without meeting the appropriate moral conditions would not be desirable. Conversely, a legal system

worthy of authority but unable to inspire a feeling of respect in people would not be desirable either.

As in the case of trust, it is not simply through the fact of embodying certain moral values, such as justice and equity, that a system can have authority. In order to prepare the transition toward a system of administration of justice that gives a greater role to virtual platforms, we have to study the aspects of the physical form of that system that could promote respect.

In a recent work and a series of articles,¹¹ Linda Mulcahy put forward the hypothesis that people's feeling of respect for their legal institutions, and the related legitimacy and authority they enjoy, are partly a function of their architecture. The architecture of court-houses (which are called *Palais de Justice* in French, something that we should think about!) has always incorporated ideas about the important role of justice in society. At a certain time, according to Mulcahy, the goal was to reflect the sacred nature of justice in the architecture and location of courts. Today, other values are embodied in the *design* of places of justice. The great bay windows of the Supreme Court of Germany were apparently chosen explicitly in order to give physical expression to the value of transparency that leaders wanted to breathe into the country and its primary institutions in the post-war period.

Mulcahy has also expressed reservations about the use of virtual platforms in the context of court proceedings. The possibility of testifying using technological means rather than in person could, in her view, have a negative impact on the perception that participants, as well as people in general, have of court proceedings as socially important forms of ritual. The introduction of screens that in some cases replace embodied agents could make the proceedings seem less special by allowing people to testify elsewhere than in a highly ritualized space.

Once again, this is not an attempt to exaggerate the degree to which the current administration of justice fully inspires people's respect or to claim that it would be impossible to create such an attitude of respect by introducing more virtual platforms within rituals of justice. The point is simply to ensure that, in the design of future institutional sites, heed will be paid to putting in place the conditions necessary to establishing the legitimacy of justice institutions—which may be difficult to engender in terms of people's internal point of view—in particular by taking into account the impact that disembodiment of justice could have on people's endorsement of it.

Epistemic Confidence

In this last section, I would like to look at another dimension of the justice process, in particular that of court proceedings. Not only do such procedures have to embody a certain number of moral values, but they also have to perform important epistemological functions. They have to make it possible for judges and juries to render fair verdicts based on epistemically defensible readings of the facts. Among other things, court proceedings have to be constructed in a way that increases the probability that the truth will come to light in virtue of the use of legal procedures.¹²

What are the aspects of the design of court proceedings that make them good epistemic tools? A major part of the answer to this question is related to the fundamental structure of the proceedings. In the case of a system based on opposition between two adverse parties, truth is expected to be an outcome of the system. The underlying hypothesis is that the two parties to a dispute both seek to reveal the facts most favourable to their cases, and that this will engender the truth as a kind of emergent property.

However, the capacity of legal proceedings to produce truth does not depend only on the main institutional pillars on which they have been built. This capacity also depends on details, which we do not take into account adequately except when we pay attention to the human dynamics that occur in justice processes and in court proceedings in particular. Speaking of the tendency that some theorists of criminal law have to reduce the theory of evidence to rules that define admissibility and inadmissibility, Paul Roberts writes that “orthodox conceptions of the Law of Evidence eschew any real interest in the dynamics of adjudication or the practical realities of fact-finding.”¹³ According to Roberts, the capacity of court proceedings to produce truth depends as much, for example, on the instructions the judge gives to the jury on how to understand evidence introduced in court as on the formal components that, in a way, constitute the architectural base of proceedings.

In *R v NS*, the Chief Justice of the Supreme Court of Canada refers to the “common law assumption that the accused, the judge and the jury should be able to see the witness as she testifies.”¹⁴ The justification for this assumption is largely epistemic: “Non-verbal communication can provide the cross-examiner with valuable insights that may uncover uncertainty or deception, and assist in *getting at the*

truth (emphasis added).¹⁵ As we know, the Supreme Court's decision in this case was to not require in all circumstances that witnesses testify with their faces uncovered because in some situations the fact of not being able to observe the individual's expressions does not affect the ability of the cross-examiner or of the jury to assess the credibility of what he or she says. However, the Chief Justice also recognized that in some circumstances the non-verbal dimension and behaviour of a witness can have epistemic importance.

If virtual mediation were used, for example, to have distant witnesses testify or to introduce pieces of evidence by means other than testimony, there would be at least in principle a risk of losing certain epistemic advantages of traditional legal proceedings. As in the cases of equity, trust, and respect, I am not claiming that it would be impossible to compensate for the epistemic loss through other mechanisms that could be integrated into the use of virtual platforms. The point is rather to remind designers of these new technologies that it is important to include reflection on the epistemic dimension of justice proceedings and the challenges it imposes when we marginalize or reduce the role given to an individual's judgement of the credibility of another individual through in-person observation.

Conclusion

Every complex human institution has to try to balance a large number of values that are sometimes related in complicated ways. Whether the issue is an electoral system, market regulation authorities, or in the case that concerns us here, the design of justice proceedings, there is no algorithm for identifying *the* right way to perform such balancing.

The introduction of communications technologies and virtual tools intended to alleviate long delays in courts and reduce certain court costs could result in fabulous improvements in the access to justice, and therefore in the fairness of administration of justice systems. However, other values also have to be embodied by our justice systems. This short essay provides no answers. It simply points out that, in the way that we integrate new technologies, we have to take into account perverse effects in terms of equity and also ricochet effects on other values that could be produced by the introduction of such technologies into the administration of justice.

Notes

- 1 Deborah Rhode, *Access to Justice* (Oxford: Oxford University Press, 2005).
- 2 Mollyann Brodie et al., "Health Information, the Internet, and the Digital Divide," *Health Affairs* 19:6 (2000) at 255.
- 3 Gwen Solomon, Nancy Allen and Paul Resta, eds., *Toward Digital Equity: Bridging the Digital Divide in Education* (Toronto: Pearson, 2002).
- 4 Pippa Norris, *Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide* (Cambridge: Cambridge University Press, 2001).
- 5 Statistics Canada, *Literacy for Life: Further Results from the Adult Literacy and Life Skills Survey* (Ottawa: Government of Canada, 2011), 141 at 141–60.
- 6 Daniel Weinstock, "Trust in Institutions," in *Reading Onora O'Neill*, ed. D Archard et al., (London: Routledge, 2013).
- 7 See in particular the work of Helen Nissenbaum, "Securing Trust Online: Wisdom or Oxymoron?," *Boston University Law Review* 81:3 (2001) at 635.
- 8 R A Duff, *Trials and Punishment* (Cambridge: Cambridge University Press, 1986).
- 9 H L A Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71:4 (1958) at 593; Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71:4 (1958) at 630.
- 10 Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
- 11 Linda Mulcahy, "The Unbearable Lightness of Being? Shifts Toward the Virtual Trial," *The Journal of Law and Society* 35:4 (2008) at 464; Linda Mulcahy, *Legal Architecture* (London: Routledge, 2011).
- 12 Larry Laudan, *Truth, Error and Criminal Law* (Cambridge: Cambridge University Press, 2006); Susan Haack, *Evidence Matters* (Cambridge: Cambridge University Press, 2014).
- 13 Paul Roberts, "Groundwork for a Jurisprudence of Criminal Procedure," in *Philosophical Foundations of Criminal Law*, ed. R A Duff and Stuart P Green (Oxford: Oxford University Press, 2011) at 379.
- 14 *R v NS*, 2012 SCC 72 at para 23, [2012] 3 SCR 726.
- 15 *Ibid.* at para 24.

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