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Foundations of Civil Justice

Toward a Value-Based Framework for Reform

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Foreword

This book is the product of research work conducted by a section of a working group on new procedural models at the Montréal Cyberjustice Laboratory. The working group, which I have the pleasure of leading, is part of a vast, multidisciplinary research programme on cyberjustice involving researchers from several countries and continents in the disciplines of anthropology, history, information sciences, law, philosophy, psychology, and sociology. What is presented here does not specifically address cyberjustice. It is, rather, the groundwork upon which the working group hopes to build in pursuing further work on the new procedural models that information and communications technology may render possible.

Some of the infrastructural costs of the social science aspects of the research are generously funded by the Social Sciences and Humanities Research Council of Canada, which encourages not only excellence in interdisciplinary research but also the training of tomorrow's researchers through the active involvement of students in all research activities. For this particular project, it was decided that those who had contributed to research and writing as students would be acknowledged as co-authors of the manuscript on the same level as their professors.

Some of us worked on the entire manuscript while others worked more specifically on certain of the chapters. Karine Bates contributed particularly to Chap. 1 and Catherine Piché and Mariko Khan to Chaps. 2 and 4. Siena Anstis and Emily Grant joined the project midway and helped bring greater structure, consistency, and polish to the entire manuscript. Clément Camion's contribution, finally, was the most significant among those of my co-authors. From the very beginning, his boundless intellectual curiosity was a major driving force for the project. The main ideas for the book were shaped notably by countless, wonderfully stimulating discussions we have had over the years.

Two recently published papers were based on the same body of research and reflect some of the ideas and analysis presented in this book: Fabien Gélinas & Clément Camion, *Efficiency and Values in the Constitution of Civil Procedure*, 4 Int'l J. Procedural L. 202 (2014) and Fabien Gélinas, Clément Camion & Karine Bates, *Forme et légitimité de la justice – Regard sur le rôle de l'architecture et des*

rituels judiciaires, 73 Revue interdisciplinaire d'études juridiques 37 (2014). Another such paper is currently under review: Fabien Gélinas, Clément Camion & Karine Bates, *Architecture, Rituals, and Norms in Civil Procedure*.

I conclude with a word of thanks. My thanks go first to my co-authors, who displayed collegiality, flexibility, patience, and good humour throughout the research and writing process. Thanks also go to my friend Karim Benyekhlef, who leads the Towards Cyberjustice programme and with whom I co-founded the Montréal Cyberjustice Laboratory. His energy and leadership are incomparable and get credit for the collaborative nature of this work. I also wish to thank Karine Gentelet, who co-ordinates, with grace and great aplomb, the logistical needs of some 40 demanding researchers associated with the programme. My thanks also go to my dean at the McGill Faculty of Law, Daniel Jutras, for his unflinching support over the years. I am grateful, finally, to my McGill doctoral students Cléa Iavarone-Turcotte, Kuzi Charamba, and Giacomo Marchisio, who in various ways, direct and indirect, have helped this project along.

Montréal, QC, Canada Fabien Gélinas
January 2015

Introduction

This book reviews the knowledge corpus concerning access to civil justice across disciplines and legal traditions, and proposes a new research framework for civil justice reform. This framework is intended to foster further critical analysis of justice systems in a systematic and organized way. In particular, the framework underlines the tensions between different values considered as central to a civil justice system and, in doing so, should facilitate conscious, reflected, and enlightened choices about the values that are to be prioritized in the reform of justice systems.

In this respect, the analysis underlines a patent problem in the literature: the absence of a consensus around the distribution of values that a justice system should embody. In the face of competing values, decision-makers and academics seem to focus strictly on improving a judicial system's efficiency. This is partially understandable. After all, it seems desirable to achieve the same results with fewer resources, thus generating resources that can be channelled toward other policy objectives. At the same time, however, efficiency does not provide an answer to the question of what *results* a civil justice system is intended to achieve, and what *values* should inform the structure and process of administering and rendering civil justice. The rhetoric of efficiency must be approached cautiously. Efficiency is an instrumental value, in other words, a means toward an end. Greater attention needs to be paid to defining the "end"; otherwise, justice reform may simply lead a civil justice system to produce undesirable results at a more efficient rate.

Thus, limiting the debate to efficiency threatens to replicate the current distribution of values without questioning whether there are missing values, whether the prioritization of values is fair, or whether the results produced by the civil justice process are equitable and justifiable. In response to this problem, the research framework we propose facilitates a reflection on the complexity of justice systems and the plethora of values they do (or could) embody, as well as the identification of values that are of particular interest to different societies or cultures. It also allows for greater consideration of what values appear to be necessary in a functioning

justice system, and for re-assessment of how these values should be distributed or redistributed.

Methodology

In the following chapters, we aim to guide the reader through the veritable labyrinth of sources dealing with the organization of civil justice. A number of values emerge from this review. It also quickly becomes apparent that certain values can be described as existing in tension with others. For example, is a public or private justice system preferable? Is it better that justice be done or that justice be seen to be done? Should a civil justice system aim at reconciling short-term interests, or should it address long-term interests? Prioritizing or reconciling these values should be at the core of civil justice reform. While we need not take an "all or nothing" approach by, for example, choosing private civil justice over public civil justice, a conscious and deliberate process of selection must be carried out in order to ensure that a justice system produces results that are fair and justified in light of what society considers to be most important.

This book demonstrates that part of the complexity inherent in the study of civil justice systems comes from the fact that the interests of key actors can be divergent. The research framework we propose in the final chapter is meant to reflect the interests of individual and institutional participants in a justice system. While we do not provide any definitive answers regarding how these values should be reconciled, we consider this framework to be an important launching point for further research on civil justice systems from a holistic standpoint that takes into consideration the fact that civil justice has to perform in a way that embodies the values prioritized by those who interact with it. Further, when we speak of reforming a civil justice system to facilitate access to justice, these values must be considered in determining what types of reforms are appropriate.

Structure

This book is divided into five chapters:

Chapter 1: Judicial Architecture and Rituals. In this first chapter, we discuss the symbolic importance of judicial rituals and judicial architecture. The literature demonstrates that judicial rituals and architecture can play an important role in legitimizing judicial decisions. When considering arguments in favour of a more efficient civil justice system, we suggest that it is necessary to acknowledge and consider how efficiency—which could lead to reduced judicial ritual and less concern for judicial architecture—may affect the underlying value of legitimacy. Overall, we believe that legitimacy, which is generally supported by judicial ritual and judicial architecture, but which may also be generated by increased

participation, is a value that must remain central to any discussion of how to restructure civil justice.

Chapter 2: The Need to Reform Civil Justice. In this chapter, we focus on the access to justice reform movement and address other current problems present in civil justice systems, such as the commercialization of the legal profession and the limited roles for women and minorities. What emerges from our analysis is the troubling lack of data by which to assess how best to implement access to justice reforms, as well as the powerful structural impediments in the legal profession that contribute to a homogenous civil justice system that is not necessarily reflective of the values of individual participants.

Chapter 3: Converging Adversarial and Inquisitorial Traditions. Adversarial and inquisitorial approaches to civil justice have traditionally been construed as incompatible. However, there is a growing body of literature recognizing that the two systems have an increasing number of basic values in common, which we identify and explore in this chapter. The growing similarity between these two forms of civil justice is further reflected in a movement to harmonize rules of civil procedure in different jurisdictions. This suggests that it is possible to identify guiding principles determining what civil justice systems should achieve, despite the fact that the systems belong to different legal cultures.

Chapter 4: The Challenges of Participatory Justice for Public Adjudication. A movement toward "participatory" justice links the adversarial and inquisitorial civil justice models. This chapter explores the phenomenon of the "vanishing trial", and raises a number of important questions, in need of further exploration, with regard to the role of alternative dispute resolution (ADR) and judicial dispute resolution (JDR) in civil justice. In particular, it is necessary to consider how "participatory" justice interacts with other values informing civil justice.

Chapter 5: A New Research Framework. In this final chapter, we draw on the literature and arguments reviewed in prior chapters to develop a new research framework for civil justice reform. In particular, we provide a list of values that need to be considered and weighed in the reform process. This research framework is particularly relevant where actors insist on a more "efficient" judicial system. While efficiency is perhaps inherently desirable, civil justice reforms must first focus on ensuring that a reformed civil justice system will use procedures and lead to outcomes that are reflective of the values we highlight.

Future Research

This book is an attempt at synthesizing the numerous arguments that inform civil justice reforms. It should also be read as suggesting that more systematic, data-driven analysis is necessary in order to determine how the values we identify in Chap. 5 should be balanced in any civil justice reform initiative. To this end, this book is an introduction to a research framework that requires extensive interdisciplinary study, particularly as access to justice becomes an increasingly serious issue in need of well-designed, thoughtful, and tested solutions.

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Chapter 1
Judicial Architecture and Rituals

Efficiency lies at the heart of judicial reform in a time when public institutions face a situation of shrinking resources and when "managerial thinking" about justice is prioritized.[1] The public is told that judicial systems need to undergo structural reforms in order to make dispute resolution more efficient. From this perspective, a concern for judicial rituals may appear anachronistic. A decision to adopt more efficient judicial structures would necessarily require a reduction in the use of judicial rituals, which can be time-consuming and expensive. But, before making the decision to discard judicial rituals in favour of efficiency, we need to ask two important questions. First, can disputes be resolved without judicial ritual? Second, would a de-ritualized dispute resolution process result in a loss of legitimacy for the entire judicial system?

In this chapter, we discuss the symbolic function of ritual in civil disputes and the necessity of such ritual in the judicial process. While retaining an anthropological and historical point of view, we review literature dealing with judicial ritual and judicial architecture, and address current issues in civil justice reform, including the fairly recent development of managerial requirements regarding justice. For the purposes of this study, we embrace a broad definition of judicial ritual. The term thus encompasses a number of practices used in dispute resolution, both past and present, such as ordeals, oracles, lottery-like games, courtroom customs, clothing, language, the rules of evidence and procedure, architecture, and other forms of nonverbal discourse. We generally see in judicial rituals an attempt to formalize the process of resolving a dispute.

Are rituals anachronistic? Do participants perceive them as useless? Is it possible to explain a ritual's relevance without undermining its performative effect and, by

[1] Judith Resnik first coined the term "managerial judging". She refers to judges who increasingly exercise managerial functions in addition to or instead of their traditional adjudicative functions. For example, they help shape pleadings, schedules, the scope of disclosure, and the use of alternative dispute resolution, among other factors. *See* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982). Also see Chap. 4 of this book for a more extensive discussion.

F. Gélinas et al., *Foundations of Civil Justice*, DOI 10.1007/978-3-319-18775-4_1

way of consequence, the legitimacy of the judicial process? At the outset, it should be said that there is a tension between the concept of ritual and that of party autonomy. On the one hand, judicial rituals are imposed on users of a justice system in order to inspire authority and respect for dispute resolution. Procedural rules, on the other hand, can serve to establish party autonomy as fundamental to justice, especially, but not only, in the common law tradition. Indeed, procedural autonomy is so deeply engrained in our sense of justice that it is almost taboo to question it. Yet, judicial rituals interfere with this fundamental principle by limiting autonomy, defining and constraining how parties can act. Overall, we argue that, while the imposition of judicial rituals may run against a party's interest in the short term, such rituals respond to the on-going need for broad social legitimacy that characterizes the institution of civil justice.

Judicial Architecture

Judicial Architecture as a Discourse

Is it possible to think about a justice system without material or physical representation? Is justice solely embodied in process and practice, or does judicial architecture—the place in which justice is rendered—have a purpose in the process of delivering justice? Academics trained in both civil and common law jurisdictions have noted the communicative importance of the physical manifestations of justice. In other words, *where* justice is delivered communicates, in and of itself, certain messages to its audience. These messages are carefully and consciously selected.

Scholars recognize that judicial architecture plays a key role within legal systems, expressing norms contained in law through visual representations. For this reason, "judicial architecture must be construed as an integral part of legal discourse."[2] Judicial architecture serves to communicate symbols that may otherwise be beyond the grasp of the layman and thus fosters access to justice by materializing notions that are abstract by definition.[3]

In France, for instance, Arnaud Sompairac has underlined the importance of judicial architecture through his contributions to general guidelines that form part of the programme architects must follow when designing new courts. He proposes three guiding principles. First, monumentality has to be expressed through a specific architectural vocabulary using, for example, columns, pediments,

[2] Eliana Patrícia Branco, *Justice et architecture : la relation entre accès au droit et architecture judiciaire*, *in* Espaces du droit et droits des espaces 49, 52 (Guillaume Protière ed., 2009) (translated by authors).

[3] Others have suggested that architecture should influence the construction of a legal rule. For example, René Cassin argued that the text of the Universal Declaration of Human Rights should be compared to the portico of a Greek temple. *See* chapter 10 in Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001).

Fig. 1.1 Extension of the Bordeaux courthouse (architect: Richard Rogers, 1997). "Bordeaux Palais de Justice" by GFreihalter (Own work) [CC BY-SA 3.0 (http://creativecommons.org/licenses/by-sa/3.0)], via Wikimedia Commons

staircases, statuaries, etc. Second, transparency has to be used to create an open space for thought. Third, courthouses have to fulfill certain theatrical and pedagogical functions by staging judicial temporality through their designs.[4] Figures 1.1, 1.2, and 1.3 present the exteriors of a selection of newly designed French courthouses, informed by these architectural principles.

In the same vein, David Marrani explicitly links judicial ritual and architecture with the development of a complex system of values. For this reason, rituals should be taken into account prior to designing a courthouse:

> In the case of judicial architecture, what is interesting is the presence of a specific judicial ritual that mixes with architecture. There is a complex system of values that becomes

[4] Caroline Lecourtois, *"Espace de conception" d'architectures judiciaires : les nouveaux palais de justice (Caen, Melun, Nantes, Grenoble et Pontoise)*, 4 Diagonale phi 31, 37–38 (2010) (citing A. Sompairac, Conception architecturale des Palais de Justice (M.A. Neveu ed., 1992)). Lecourtois defines these guiding principles as follows:

> 1) la *monumentalité* qui doit passer par un vocabulaire architectural spécifique (colonnes, frontons, emmarchement, statuaire); 2) *l'ouverture* à penser relativement à un traitement de la transparence et 3) la *théâtralité ou pédagogie* qui doit être mise en scène relativement aux temporalités de la justice (séquences judiciaires, salle des pas perdus et salles d'audiences).