

The challenges to justice during the third stage of the digital era

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Abstract:

The Ministry of Justice should not allow itself to be “outdated” by the libertarian ideology of the digital world and its legaltechs. However it cannot ignore or underestimate the coming disruption. It must overhaul its organization to continue asserting authority and pursuing its missions in complementarity with what machines can bring.

The digital revolution is disrupting all aspects of social life. The law, no more than judicial institutions, cannot elude it. How to adapt? How to successfully undergo the digital transition? A few lines of force seem to be forming that orient our thinking about this topic in three directions. The first concerns the awareness of the new challenges, which turn out to be more fundamental than what we initially imagined; the second touches on the methods of work in the judicial system; and the third forces us to redefine our assignments and duties.¹

Making a right assessment of digital technology’s impact

An error afflicting many a reform is to make the claim of adapting to a challenge that has not (or poorly) been identified. For instance, the digital transition is often reduced to a merely technological revolution resulting from an unprecedented accumulation of innovations, whereas it is mainly a symbolic revolution — a complete disruption that even affects the “mediations” whereby we apprehend the world. Digital technology is entering our lives, accelerating time and demolishing space. At the same time however, it bears a new conception of democracy by redefining the “human” during its third stage of evolution.

The three stages of the digital revolution

The impact of digital technology on justice has gone through three stages.

At first, this technology compelled recognition as a sector of activity for research and then industry. In this young sector (not more than a few decades old), a special field of law sprang up that has continually grown in importance. This field (we dare not say a niche) has fostered the emergence of highly specialized jurists who combine their mastery of the law with solid knowledge in this technology.

During the second stage, digital tools were seen as making it easier to process the stock and flow of information; and digital technology was said to be an accelerator of justice that would disrupt the economics of the law and the anthropology of its professions and occupations by performing tasks, which used to be assigned to statuses, and, in reverse, by fostering new professions with positions much more important than these statuses. A recent report by the

¹ This article, has been translated from French by Noal Mellott (Omaha Beach, France).

Institut Montaigne² has pushed to its limits this argumentation about digital technology “facilitating” justice: it has imagined “digital-by-default” legal services (to borrow the phrase used in Britain).

Reforms were barely being adopted for facilitating the administration of justice when the third stage started. This stage represents, in fact, a symbolic revolution that forces us to rethink all the jobs and duties of justice in reference no longer to techniques but to the society that they will produce. Services for users and a more flexible institution are necessary, and these reforms need to be accomplished. Nonetheless, they seem peripheral to a much deeper, more worrisome issue: how to redefine the place of the law and of judges when digital technology is claiming to compete with their methods of reasoning and to provide the means for obtaining a fairer result? This is what we have called the third stage of the digital era in law, since its challenges are momentous compared with the two preceding stages.

During this third stage, the law (as in smart contracts, for instance) no longer necessarily relies on a written medium. Engineers are able to come up with legal solutions. In the mean time, we are less and less sure that people, given their cognitive biases, make the best judges. The relation between facts and the law are worked into software programs, aggregations, correlations and recommendations. Decades after the imperfection of the first expert systems, this digital justice is gaining momentum thanks to joint work by computer scientists and jurists. It has ended up producing new norms that, in fact, no longer have much to do with the law.

Faced with the libertarian digital ideology, the need to reassert the virtue of public authority

These considerations will seem very abstract to some people, but this awareness is crucial. Public authorities have to resist being “old-fashioned” as the “party of progress” and the “Internet community” are trying to make them. States must beware lest they be stripped of power over the ideas being formed about what is now happening — a power that is the genuine source of authority. They must not relinquish their power to startups alone, who have too many interests in recuperating it and whose bragging should not be underestimated. The digital field is, nowadays, the focus of an ideology that is, if not libertarian, at least very hostile to institutions in general and to the institution of justice in particular. The wellspring of this ideological discourse — which is so influential that we tend to confuse it with digital technology itself — is the determination to make its critics, along with anyone who would like to forcefully regulate it, “outdated” or “obsolete”.

Overhauling the organization of work in the legal professions

To put it succinctly and somewhat provocatively, digital technology is no longer in the position of facilitating the jobs of legal professionals. It is now a direct competitor of most, if not all, these professions. This holds for activities related to legal information but also for the functions of defense and judgement. The machines claim to be capable of doing what judges, lawyers, notaries and the Ministry of Justice do but faster, cheaper, more reliably and rigorously, in a word, better than them. This is, of course, a myth; but it has permeated the minds of people around us. It stirs up as much fear on the one side as expectation on the other. The myth of delegating activities to machines sustains the hope that computers will replace all legal professions or even that machines will do this work better than people. It is useless to decry this fake belief unless we conduct reforms for overhauling work methods in the legal professions.

² INSTITUT MONTAIGNE (2017) *Justice: Faites entrer le numérique* (Paris: Institut Montaigne), 104p. Available via: <https://www.institutmontaigne.org/ressources/pdfs/publications/justice-faites-entrer-le-numerique-rapport.pdf>.

The Ministry of Justice should not use Katz's theorem for a rule of thumb. This American academic has formulated the equation: (people + machines) > (person + machine). In other words, the people who learn to control machines will always be stronger than the simple addition of a person with a machine. Accordingly, the professions that successfully come through the digital revolution will be those capable of thinking digitally about their future and of redefining the value added to their activities thanks to (and not in opposition to or in the stead of) machines.

How to manage a source of wealth?

The digital revolution has unexpected effects as it makes each of us both a consumer and producer of information. This opens toward a new economy, still to be invented. This nascent confusion of the roles of consumer and producer can clearly be seen at both the individual and collective levels. The justice system thus becomes a potential user who will pay for information services while also being a producer of an immense store of information and, therefore, of wealth.

In France, the Digital Republic Act requires that court decisions be made available to the public.³ Done for the sake of transparency, this "open data" requirement also ensues from the argument that the judicial system has not addressed all the issues raised by the new information commons. This information is not public from the start, and opening access to it brings the (problematic) possibility that private businesses will draw an economic rent from it, since the private sector serves as intermediary between the law and users. So, the public administration is to deliver for free a raw material — produced from the aggregation of the data it has collected at its own expense — to private brokers who not only will sell it back to the administration (after reworking the data) but who might also worsen the inequality between litigants since only the well-off will have access to the consolidated, curated data. If, like Oliver Holmes, we define the law as foreseeing the decisions made by judges, the consequence is that, under the pretense of transparency, the Ministry of Justice indirectly erects obstacles to the access to judicial information and, thereby, organizes this inequality before the law by disrupting the recourse to justice.

Data produced in real time are an extraordinary raw material. The Ministry of Justice must sincerely see to it that it does not give away this information at a cut-rate price. Even more, it must see to it that these data do not become a source that undermines the Ministry's foundational principles (about the recourse to justice, for example) and that — to cap it all — deprives the Ministry of income. The Ministry must reflect on these issues in economic terms, not just to protect itself but also to bring into the Treasury the income that jurisdictions will need.

Redefining the duties of justice

During this third stage in the digital revolution, all legal professions are being forced to redefine their core duties. This holds for the action of judging, given the improved performance of so-called "predictive" software. It also holds for the human part of justice, given the improvements in machine learning and simulations. In this vast field, let us limit our exploration to the prospects for the Ministry of Justice whose *raison d'être* is what we call the "state's duty of justice", which covers, in fact, three distinct duties: protection, jurisdiction and signification.

³ Act n°2016-1321 of 7 October 2016 for a "digital republic" available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&categorieLien=id>.

The duty of protection

The digital revolution is ambivalent. Like any technique, it brings many advantages but along with new risks. New forms of protection must be invented to handle these risks. This was the guiding spirit underlying an act of law in 1978, a spirit we need to revive. The following remarks are limited to mentioning the challenges of the digital revolution to this duty of protection:

- protection of litigants' privacy by making court decisions anonymous;
- protection of court hearings from pressure and intrusions by reaffirming a "principle of unicity" (against abusive predictions) and perhaps by recognizing a "principle of serenity" for hearings (exempted from a digital echo);
- protection of judges (Should judges' personality traits be correlated with the cases they hear?); and
- protection of the action of judging (the correlations to be forbidden outright or tightly controlled).

Committees of ethics are springing up in the field of legaltechs, which have clearly understood what is at stake. But these committees, spring from stakeholders who have very powerful (and sometimes contradictory) interests in the legal business, can only formulate opinions with a "suggestive" value. The Ministry of Justice must, therefore, closely monitor the evolution of startups, some of which are based in countries that have different legal traditions or do not have the same respect for the law as France. The Ministry could rely on a system for accrediting or ranking these firms, or even issue warnings to the firms that do not meet up to minimal standards.

It is also necessary to imagine new institutions suited to these new protections. Why not create an independent administrative authority, like the National Commission on Informatics and Liberty (CNIL), that could issue injunctions and even sanctions those who do not comply with injunctions? The objective is to remind economic agents of the rules in a business that bucks any limits.

To ensure that algorithms are faithful to the text of the law, why not set up a "commissary" for auditing algorithms (like the systems for auditing accountants)? Its services for analyzing the algorithms and, more broadly, digital technology used by companies in the legal field would be available to public institutions, shareholders and stakeholders.

The duty of jurisdiction

Digital technology is also leading to a new conception of the duty of jurisdiction. For centuries, this duty has had the form with which we are familiar but that is no longer the single solution. The state could interpret this duty as the obligation to propose "solutions", a word frequently used by digital revolutionaries. It could benefit from the new digital tools to propose practical orientations and an effectiveness that is lacking in intensively formalistic jurisdictions. How to profit from the new information technology in order to guarantee a better access to effective solutions for settling the claims pressed in court? Should, for example public predictive software be designed to optimize the work in jurisdictions, as some countries, like Argentine, have done?.

The duty of signification

Solutions cannot be imagined unless the Ministry reflects on one of its most important duties. This duty is not limited to settling conflicts; it also involves qualifying them by attributing to certain actions a public meaning or significance. The digital revolution emphasizes efficiency to the detriment of “signification”. As a consequence, public authorities must be concerned not just with providing services but about making sense. This is a significant part of the work of justice. Justice must reinvent its core activities and its symbolic function as an institution during this new era.

The quest for more cooperative, horizontal, functional methods of work risks making us overlook this essential symbolic function. Nonetheless, this function cannot be preserved in its old forms. This is not too serious a problem since the function is not itself a form; but the question remains: how to address this problem? By inventing a new symbolic “economy” where the highly emblematic cases (“reference cases”) that necessitate time, legal resources and means are set apart from the other cases, perhaps more technical but derivative in relation to the former. By imagining a digital labeling system that signals the presence of public authorities. By defining the borderline beyond which cases can only be handled in a human manner (cases such as disputes involving physical persons, in particular those under age or under a guardian’s care).