eAccess to Justice

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Seeking efficiency first and foremost when designing dispute resolution processes carries the risk of producing unprincipled justice.

In this article, I explore actual and proposed measures promoting efficiency in civil dispute resolution. I argue that current, widespread focus on efficiency in judicial systems and civil justice reform endeavours worldwide may cripple other fundamental values of justice. We, decision-makers and academics, tend to define “efficiency” too narrowly. We also focus too much on efficiency, without sufficient consideration for other fundamental values of justice. For example, we intuitively embrace Alternative Dispute Resolution processes (ADR) such as mediation, or the notion that information technology implementation and eAccess to justice projects increase efficiency, without having consciously weighed the legitimate need for better, faster dispute resolution against the need for legal precedent. As a consequence, we risk confining the courts’ jurisdiction to a narrow, if not trifling understanding of “public interest.” This, in turn, may contribute to diminishing the legitimacy of the state and may undermine long-term social trust. In other words, the quest for efficiency in civil justice involves three trade-offs: (1) overlooking other fundamental values of justice besides efficiency; (2) systematizing resolution without precedent; and (3) ultimately narrowing the courts’ jurisdiction to “public order” without sufficient consideration for what public interest means and should mean.
“Efficiency” Is Too Narrowly Defined to Mean Coping With Costs, Delays, and Backlogs

Let me start with an illustration of several decision-making processes inspired by the comic book and film series, *Batman*.

Batman’s decision-making process is principled. He makes decisions with the goal of preventing harm to human lives through (what he deems to be) necessary force. His decision-making process is predicated on some sense of human dignity and the use of proportional means to protect the value of human lives.

Batman’s nemesis, the Joker, also displays a principled decision-making process, albeit a perverted one. Led by a fundamental disregard for human life, the Joker seeks the most efficient way to achieve mass terror. In this respect, reducing human lives to mere means toward mass terror, through all types of deception, and more generally behaving erratically and unpredictably, can be construed as rational precisely because it is unforeseeable and thus efficient (toward achieving pure evil).

Both Batman and the Joker are involved in strategic thinking based on substantive values and thus, at times, both must delay decision-making. Two-Face’s decision-making process, however, is purely procedural in nature. This villain goes about his affairs by reducing fundamental dilemmas to a binary choice, and resolving them by flipping a coin. By surrendering his fate to a coin flip (and at times, bending complex questions into a false dichotomy), he achieves extreme efficiency. In other words, pure efficiency in decision-making is achieved through a ritual where no value of justice intervenes. The authority of the coin is absolute. There is only gravitational force, and no consideration for the merits of the case.

The core of this paper will revolve around how we, as actors of the judicial system, policy-makers, and scholars of procedural law, define “efficiency” in the judicial context. I argue that we should broaden our understanding of what efficiency means in the judicial context in order to produce better policies and make better-informed reform decisions.

Why Do We Define “Efficiency” So Narrowly?

1. *What Is Efficient Dispute Resolution?*

Judicial efficiency may be defined as the ability of the judicial system to perform its function efficiently. An efficient judicial system produces the effects we expect it to produce using a proportionate, or rational, amount of resources, both public and private. This may seem trivial,
but this simple definition raises difficult questions. What do we expect from the judicial system? What do we consider “efficient” in this context? How do we assess whether the required amount of resources is proportionate for private parties? What is the acceptable cost of justice on public resources?

2. “Productive Dispute Resolution”

In current streams of thought on civil justice and judicial reform, “managerial justice”—an approach to case management that favours increasing the power in the hands of judges and chief justices to better control proceedings—plays an important role in defining the judicial system’s functions and its rationality. More and more, we have come to think of judicial systems as a set of actors and institutions dedicated to the “productive resolution of legal disputes,” where “disputes” are defined as conflicts between two or more parties that survive negotiation, thus requiring a third-party neutral’s intervention in order to be resolved. The third party may be a judge, or the law applied by a judge, but also an arbitrator, an amiable compositeur, a mediator, or even an online settlement service, such as a machine. Under this framework, the judicial system’s output is, theoretically, the final resolution of legal disputes. Overall, “efficient dispute resolution” thus reflects the notion that judicial processes must be geared toward productive dispute resolution. To that end, judicial processes should be focused and speedy, without undue burdens, and aimed at reaching a legally sound solution, using the least—or an appropriate or a proportionate—amount of time and resources, public and private.

This understanding of the judicial system is widespread, and its success is easy to understand; nobody likes waste. No one wants to achieve less with more, or even, less with the same resources. However, this definition proves problematic today for two reasons. First, “efficiency” has been narrowly construed to mean coping with costs, delays and backlogs. Second, this narrow definition of “efficiency” has retained a lot of scholarly attention, to the detriment of other fundamental values of justice, mostly for lack of meaningful data.

3. “Coping With Delays and Backlogs”

Many judicial systems worldwide are inefficient. Many reports document how judicial systems face serious challenges in terms of backlogs in the courts’ case dockets, serious delays between the filing date and a court’s final decision, and overwhelming costs for the parties as well as for the states, thus undermining access to justice
for economic reasons. In addition, law is widely perceived as too complex, and lay persons often live with unresolved legal issues, for lack of information on what to do about them, and lack of education on how to detect the legal dimension of their everyday problems.

Although concern for judicial efficiency is not recent, a distinct stream flowed from Lord Woolf’s seminal 1996 reports in the United Kingdom; followed by studies conducted by the Council of Europe’s European Commission for the Efficiency of Judicial Systems (the CEPEJ); closer to us in Canada, studies by the Canadian Forum on Civil Justice; and more recently, the Honourable Justice Cromwell’s report on access to justice—to name just a few. These concerns arise in both common-law and civil-law jurisdictions. In all of these reports, and despite the broad societal issues undermining access to justice, solutions are presented in terms of “efficiency” gains, in reaction to challenges depicted in terms of docket backlog, delays, and costs, both public and private.

There are three types of measures available to cope with backlogs, delays, and costs: (i) procedural and managerial arrangements that save resources; (ii) substantive legal reforms that reduce the number of cases before the courts; and (iii) increasing the resources allotted to the court system.

(i) Efficiency measures may consist, for example, in transferring cases from adjudication by a panel to adjudication by a single judge, or, where jury trials are available, by allowing majority verdicts as opposed to unanimous verdicts, thereby avoiding mistrials and thus doubling the need for resources. Sometimes called “managerial strategies,” efficiency measures usually involve institutional or procedural changes. Although they may affect the parties’ rights and obligations directly, for example when a default judgment is entered instead of a judgment on the merits, or, in criminal matters, when guilt may be pronounced on a majority verdict, such reforms generally leave substantive law untouched. Except for procedural rights, the rights and obligations of the parties remain the same.

However, a distinct type of efficiency measure consists in avoiding litigation altogether. This tendency has been described as the move to Alternative Dispute Resolution (ADR), or the “vanishing trial phenomenon.” If institutional design or procedural law adjustments are described as reformist, then ADR mechanisms may be (and often are) presented as revolutionary, because they consist in leaving
aside the traditional procedural arrangements set out by states, and turning to private dispute resolution mechanisms. Although controversial not so long ago, such approaches to dispute resolution have gained considerable traction, so much that the default course of action has shifted, not only in practice but now also formally in statutory law, from formal public adjudication to private mechanisms.11

With such efficiency measures, cases are dealt with by fewer judges, or by less stringent procedural rules, but with private resources instead of public ones, in a private setting instead of a public one.

(ii) Clearing the courts’ dockets may also be achieved through substantive legal reform. Legal reforms often stem from the trivialization of certain acts or conduct in society, which used to require legal attention under the law, but no longer constitute socially meaningful “disputes” and are now considered a source of congestion in the courts rather than cases worthy of judicial attention. The existence of an overwhelmingly frequent pattern or a decrease in the moral stigmatization of certain acts or conduct—in other words, a mismatch between the law and consensual social practice—render trial-based adjudication meaningless or inconsequential, and thus wasteful of justices’ time. The response consists in shifting the law’s grasp regarding a specific type of dispute in order to move the dispute outside the traditional court system, ideally for better and faster resolution, or for no resolution at all. Such was the case when legislators shifted the law from fault-based to strict liability responsibility in work-related personal injury cases, leading to innovations in insurance policies,12 or to no-fault compensation schemes in bodily injury road accident cases,13 or from fault-based to no-fault divorce.14

In such cases, legal reform really means streamlining dispute resolution by moving from a purely legal scheme to a quasi-judiciary, administrative, or even a privatized administrative scheme (public or private insurance compensation), or to a non-legal one (certain acts or types of conduct become legally irrelevant), thereby alleviating the workload on triers of facts. It is noteworthy that non-adjudicative alternatives have often been insurance-based solutions, where, from a systemic point of view, insurers play the role of mutualizing the costs and delays of litigation that lay persons cannot absorb on their own. Litigation between insurers may arise occasionally, but the stakes are generally high in intensity, with costs and delays being less of an issue than for injured persons who depend on
compensation to go on with their lives. Substantive legal reform may also transform, intentionally or not, what was considered a “dispute” into a “non-dispute,” in that case with no formal resolution at all. This usually happens when prior political or social motives or the legal basis for judicialization have become irrelevant, or even unconstitutional. Such is the case with the decriminalization of certain offenses, like recent reforms regarding simple possession of marijuana in certain states, or the decriminalization of abortion or homosexuality.¹⁵

(iii) Finally, increasing court resources, by appointing additional judges and adding to the courts’ budget, is another type of measure used to reduce delays and backlogs—but not costs. It essentially comes down to admitting that all things considered, productivity cannot be increased; in that case, sustained efficiency requires more resources or less volume. Relying on resource increases is somewhat utopic in the context of systematically reduced public spending and states’ ever-shrinking tax bases. As important and fascinating as this issue can be, possible solutions to balance state budgets lie outside the realm of the efficient administration of justice and far beyond the scope of this paper.

**We Focus Too Much on Delays and Backlogs**
What about costs? What about feelings of fairness and satisfaction? There is virtually no available data other than data on dockets, costs, and delays, and therefore no other metrics by which to assess, define, and ultimately address efficiency issues.

1. **Lack of Data**
If nobody hears the sound of a tree falling in the woods, can we safely say that no tree has fallen at all? Of course not. The fact that a phenomenon is not perceived does not entail that the phenomenon is not real. Lawyers, of all people, are familiar with the notion of wilful blindness; looking the other way is not a defense against knowing only a little bit, but enough, about an inconvenient truth.

The main reason why so many scholars and policy-makers focus on dockets and delays is that they are among the only reliable metrics available to assess the efficiency of adjudication. While other metrics are available, delays and dockets are the only points of performance that are being systematically measured, usually as part of the courts’
management strategies. They are also easily comparable data. Where additional data is available, it is not necessarily usable or applicable, let alone comparable with other jurisdictions’ data. Additional data may be too old and unreliable; moreover, it was often measured in another jurisdiction with very different procedural arrangements, making it cumbersome to use at best.

Enthusiasm for civil justice reforms in Canada seems to flow from the practitioners’ subjective perceptions rather than sound data. The Honourable Supreme Court Justice Cromwell’s report on access to justice in Canada, for example, refers to studies conducted in the United States and the United Kingdom when it comes to statistics about access to justice, not because such data is taken to be accurate, but because there is virtually no Canadian data available on the matter. Foreign studies conducted in similar Anglo-American common law jurisdictions are the next best options available to understand our own judicial system.

I do not suggest that we are wrong when we say that there are clear issues preventing meaningful access to justice, that justice is too complex, too long, and too costly for too many people. However, given the statistical desert in which we currently evolve, systematically and routinely acquiring data, over the long run, and making sure that we train experts to both acquire and analyze it, is central to sound reform. One step toward building up our expertise consists in systematically including data collection and interpretation as part of funding applications for research and reform projects. Measuring impact is paramount to proposing sound rather than ideological policies. In the meantime, we should remain cautious not to restrict the way we define efficiency and the types of solutions we imagine for lack of broader data.

2. What Should We Measure, and How?

Although costs are in theory already quantified, measuring the costs of judicial dispute resolution is an exercise in night vision. It is confronted with many roadblocks to acquiring the data, which then proves complex to interpret. However, measuring costs, including a distinction between the public and private costs of litigation, would be a good starting point to further develop our knowledge and our expertise. But data collection should go further. The risk with focusing too much on efficiency measures, that is to say reducing costs, delays, and backlogs, is to fall into what I would call a
“metonymy trap,” where we conflate the container (productive dispute resolution processes) with the content (satisfying results from both individual and systemic standpoints). By focusing solely on currently available data, we run the risk of narrowing our statistical understanding of the judicial system to case dockets, costs, and delays, and of reducing productive dispute resolution to resolving the few problematic features that we are able to statistically assess today. This overlooks the human, multidimensional aspects of legal problems that the judicial system is supposed to help resolve. In other words, such a methodology comes down to fetishizing efficiency, keeping ourselves oblivious to the need for prevention, (e.g., through legal and financial education), and more importantly to the social roots of disputes, evidenced by the tendency of (physical persons’) legal problems to come in clusters linked with health issues, poverty, and education shortcomings, all calling for prevention and outreach rather than mere productive adjudication. Thankfully, such aspects are envisioned in the roadmap for change in access to justice. Unfortunately, the roadmap for change is not sufficiently grounded in meaningful Canadian data.

There are also methodological implications. Because we are not acquiring enough meaningful data, we are progressively losing the expertise to analyze such data.

**Fundamental Values of Justice Are Overlooked**

*What Is the Judicial System’s Function—and What Should It Be?*

Dispute resolution is at the heart of any judicial system. It is a fundamental building block with which we must work. However, the rule of law runs the risk of being left out of our definition of “judicial efficiency” if we only aim at dispute resolution. The judicial system’s function is thus better defined as “productive dispute resolution plus the rule of law,” or minimally, “dispute resolution in accordance with the rule of law,” but maybe even “dispute resolution actively promoting the rule of law.”

Some may think that the rule of law is a precondition for the very existence of a judicial system, thus also a precondition for such a system to be efficient. In other words, the rule of law would not be part of the equation and should not be considered when reflecting on judicial efficiency. However, such a view comes down to artificially classifying the costs of promoting the rule of law outside the judicial system, when, in practice, they are mostly absorbed by the
judicial system and fall within ministry of justice or justice department budgets. Therefore, we should consider how productive dispute resolution and promoting the rule of law are intertwined.

1. Dispute Resolution...Plus the Rule of Law

The interrelation between dispute resolution and the rule of law can be described as follows: if the rule of law is an idea (and an ideal) and the judicial system’s performance is the expression of that idea then, for all practical purposes, how the rule of law is perceived and criticized depends largely on how the judicial system performs (given that ideas can only be understood once they are expressed; otherwise they are doomed to remain in the realm of subjective thoughts).

There are fascinating philosophical debates about how we gain “access” to new ideas, for example on whether we are born with the idea, or at least a sense, of, say, justice. But for our purposes here, it is fair to say that the idea of the rule of law is not innate. We may have an instinctive, unsophisticated sense of fairness. But we know about the rule of law because we have been confronted with various expressions or interpretations of the idea, and hopefully we have seen that behaviours in the judicial system are in line with that idea, at least to an extent sufficient to render the idea of the rule of law credible and thus meaningful in practice. In that sense, the rule of law—any law, really—is a social construct. It is meaningful because it helps guide the practice of dispute resolution and because we attribute some credit to its practical validity.

Figure 1
The rule of law is an idea held “intersubjectively,” that is, a social construct. Maintaining the belief that the rule of law currently exists and will continue to exist in the future is crucial. You may lose a case once, but overall you agree to submit a case to the courts because you believe that they will be capable of delivering fair results in the future, regardless of whether or not one particular decision turns out to be in your favour. This belief system is essentially an extension of the fundamental human need to stabilize expectations. In particular, adjudication is deemed to remain fair in the future, not because of wishful thinking but because it has been rendered in an impersonal manner according to principles and values that will remain a constant. This is more than merely respecting due process; it requires a fair process producing just decisions. What really matters is the notion that fair processes and just decisions are and will keep being delivered in the future. Defining what “fair processes and just results” means exactly is a tremendous task that we do not need to perform here. We only need to become familiar with the notion that an important issue of procedural reform is how do we send the signal now, in a specific instance of private dispute resolution, that the rule of law will continue to exist in the future?

Here is one possible answer.

2. Upholding Fundamental Values of Justice

During our research with Professor Gélinas, we summarized the ideals of civil procedure in a series of fundamental principles. We looked at civil procedure and procedural arrangements in civil- and common-law jurisdictions, hoping to identify some common ground, and we delved into the works of prominent scholars who emphasized the importance of simplifying the technicality of procedural arrangement to think about their underlying principles. In a way, we tried to sort out the necessary from the contingent in procedural justice. We also looked at the ALI/UNIDROIT Principles of Transnational Civil Procedure. To make a long story short, we then classified all the values we were able to identify on a gradient, ranging from values that are typically held by private actors to the more systemic and thus less easily incarnated ones that require “judicial offices” (as opposed to physical persons), courts, and faculties, that is to say, institutions.

The following “tree of justice” summarizes our findings.
Figure 2

Fundamental Values of Justice

- Integrity of the Judicial System
  - Efficiency
    - The administration of courts themselves is rational.
  - Legitimacy
    - Norms or rituals do not prevent the parties' participation or understanding of their own case.
    - Norms are proportionate with the intensity of the dispute, the issue at stake, in particular with the private or public nature of the issue.
  - Judicial Truth
    - Decisions are grounded in facts substantiated by evidence and certain factual reasons.
    - Decisions are grounded in applicable, prospective and ascertainable legal rules.
  - Access to Justice
    - Judicial and legal fees and costs are affordable.
    - Timelines are ascertainable.
    - Dispute resolution does not extend in time so as to make the dispute moot by the time it is decided.
  - Respect and Dignity
    - Being treated with respect, dignity and care.
    - With regards not only for the rights but also for the social status of the parties.
    - Consideration for the claims and arguments of the parties.
    - Identification of the needs of the parties.
    - Honesty.
    - Decisions based on the merits (form) rather than personal opinions or biases.
    - Respect for due process (equitable process).
    - Decision based on the merits (legality).
  - Neutrality of the Decision Maker
    - Honesty.
    - Decisions based on the merits (form) rather than personal opinions or biases.
    - Respect for due process (equitable process).
    - Decision based on the merits (legality).
  - Satisfaction of the Parties
    - Ability to make one's case.
    - Right to be heard.
    - Being treated with respect, dignity and care.
    - With regards not only for the rights but also for the social status of the parties.
    - Consideration for the claims and arguments of the parties.
Where present, the principles identified in the tree of justice (Participation, Respect and Dignity, Neutrality, Impartiality, Access to Justice, Judicial Truth, Efficiency, Legitimacy) taken together reinforce the feeling that the process is fair, the solution is just, and ultimately, that it deserves to be respected. In other words, the bindingness of the solution is at stake (in fact, not in law).

Note that efficiency is only one in eight of the fundamental values identified. The need to put efficiency in perspective becomes immediately apparent when represented side by side with other incompressible values of justice.

The reason why people obey the law, or the terms of an agreement resolving their dispute, is not merely because there is a carrot, or a stick, or both, to incentivize them. Indeed, there is no carrot when losing a case, and law enforcement by police services would be untenable if it were to be systematically used. “Obedience” is much more complex and intricate.

In the aggregate, making sure that people feel that the process was fair, the decision just, and that fair processes and just decisions will keep on being delivered in the future is what makes people obey the law and self-enforce the rules. This does not mean that the possibility of sanctions (and ultimately police intervention) is irrelevant. But the difference between the possibility of police intervention and actual police intervention represents enormous economies of scale in law enforcement. Jeremy Bentham understood this very clearly when he designed the panopticon, and Michel Foucault, while illuminating and criticizing the adverse consequences of “surveillance,” also identified how self-government has progressively been identified as the most efficient way of enforcing norms—much more so than physical punishment and sanctions that require enforcement. 21

Restricting Public Courts’ Jurisdiction to “Public Order”

Positive and Negative Externalities of ADR

1. Cheaper, Faster, and Closer to the Parties’ Needs

What we commonly refer to as the “move to ADR” or the “vanishing trial” phenomenon affects the quality of dispute resolutions. By quality, I mean that we basically renounce what economists would call a “positive externality”; during public adjudication, legal norms (both procedural and substantive) are articulated for future reference in the process of resolving disputes. Among the benefits of ADR, we
find faster and cheaper resolution of disputes. Proposed resolutions are often more flexible and thus closer to the parties’ needs and interests rather than their positions. These positive internalities (benefits for the parties involved) are intrinsic to the resolution process. There are also positive externalities to ADR (benefits for the general public that are unintended by the parties and are not a relevant factor in deciding to choose ADR). For example, ADR produces the positive externality of clearing court dockets.

2. Privatizing the Expertise of Dispute Resolution
However, there are also negative externalities (losses for the general public) that have to do with the bindingness of a resolution. Court-based decisions are generally binding on third parties, usually not as individual decisions, but at least in the aggregate through the creation of jurisprudential streams and legal precedent. On the other hand, mostly because of standard confidentiality agreements, ADR does not produce legal precedent, that is to say, decisions that are at least potentially binding on third parties. The solution, and even more so the process, are very often confidential, meaning that there is no “public norm,” substantive or procedural, that is articulated and published for the benefit of third parties or society in general. Privately developed norms are not kept on record, or even held by judges appointed by officials under public scrutiny. They are at best held in the expertise of a community of private arbitrators and mediators. The locus of knowledge, skills, and know-how, and ultimately power, progressively shifts outside of public officials’ grip, into the private sector, and away from objective media (the office of a judge, printed or otherwise recorded materials, but also away from press coverage) into private expertise and oral transmission.

3. Favouring Short-Term Resolution Over Public Norms
ADR decisions are only binding, if at all, with respect to the parties themselves. Because they are closer to the parties’ needs, especially where their bindingness is agreed upon after full knowledge of the implications for the parties, ADR decisions stand a very good chance of being self-enforced and are thus considered efficient, not only because of reduced costs and delays at the decision-making stage, but also at the execution stage. However, we may argue, so would a clear and well-known norm; it would be self-enforced through negotiation and would prevent disputes from arising in the first place.
Yet achieving legal clarity and sufficient legal education proves much more difficult than providing two parties with a forum to discuss their own specific case. It is costly and presupposes broad collective means of action; it also is inherently limited due to intrinsic vagueness in the law, and due to normative inflation, both in volume and technicality. The “beauty” of ADR is that it is predicated solely on the interest of the parties rather than on a well-shared collective understanding of the law that presupposes trust among peers and large-scale legal-education programs. In other words, private dispute resolution is more efficient because it is, by definition, personalized and customized. Ultimately, the tendency is to circumvent a costly intermediary—the law and the institutions that apply it—by substituting the back-and-forth movement from particular facts to general norms to particular solutions through “legal qualification” and “application of the law,” for a simpler process moving directly from particular facts to particular solutions, provided that they respect the law. In essence, the move to ADR means that we are renouncing the benefits of the incremental refinement of legal norms through their confrontation with particular facts, for the sake of dealing with our issues more quickly and more cheaply. Short-term resolution outweighs long-term societal vivre ensemble.

**Gauging the Need for Public Norms**

Where should we draw the line between fast and cheap dispute resolution and the need to interpret the law? Should we let the “market” decide? Should we set a figure in dollar amount below which a case is deemed too low in intensity to be processed by public courts? Should we keep certain subject matters “public,” that is to say “inarbitrable”? Which ones, and why?

1. **“Public Order” As the Last Resort of State Legitimacy**

Ultimately, the move to ADR comes down to renouncing abundant jurisprudence and bears the risk of confining the areas of public courts’ legitimacy to certain issues that involve “public order.” For example, we may deem low-intensity consumer issues not to be of public concern and decide that ADR or ODR are more appropriate than small claims court to resolve those disputes. But it may turn out that a seemingly low-intensity consumer issue hides a systemic issue that is very much a concern for the general public. In a system
where such issues are systematically expedited outside of courts, issues of concern to the general public may very well escape the grip of much-needed public adjudication.\textsuperscript{23}

Without adequate metrics and sound data, there is no way of knowing in advance what is actually worthy of public courts’ attention, nor how often such cases arise, nor with what social and societal ramifications. This fundamental uncertainty may well be the raison d’être of large court jurisdictions leading to complex, protracted public adjudication processes.

With the move to ADR, we seem to be shifting from a process-oriented judicial system that, in theory, is capable of dealing with any issue and may thus, at times, deal with unforeseeably important societal concerns, to a judicial system that will be prevented from hearing socially important cases because they do not sufficiently touch on public order.

This is of concern because the definition of “public order” is very political in nature. In short, political views on what public order should mean will end up defining the courts’ jurisdiction.

**Conclusion**

We have identified several trade-offs to seeking judicial efficiency in dispute resolution:

1. “Efficiency” is too narrowly defined, having come to mean coping with costs, delays, and backlogs, a restriction which is understandable because we do not have sufficient meaningful data on other metrics. However understandable, this definition proves short-sighted and fetishist in the sense that it focuses so much on efficiency measures that it remains oblivious to the fact that legal problems tend to cluster with other health, poverty, and educational issues. Because we take “efficiency” to mean something too narrow, and because we focus too much on “efficiency” gains, we forget the wider social roots to legal disputes that need to be addressed.

2. Fundamental values of justice other than efficiency could be overlooked when designing or redesigning dispute resolution processes. Such values include Participation,
Respect and Dignity, Neutrality, Impartiality, Access to Justice, Judicial Truth, and Legitimacy. Taking them into account ensures that “fair processes leading to just results” are the norm and will remain the norm, which promotes a thicker version of the rule of law. In other words, even if focusing on “efficiency” meant a generally more productive dispute resolution system, “efficiency” alone would not be enough to sustain a rich and vibrant rule of law. Trying to compress other values of justice, in this respect, may undermine social trust in the long run.

3. Finally, seeking efficiency in dispute resolution also means, ultimately, restricting public courts’ jurisdiction to “public order” cases, while leaving untouched the political question of what “public order” is and what it should be. This question is crucial because, ultimately, the definition of “public order” could be the last criterion by which to assess whether cases should be heard by public courts or forums, or whether they should be dealt with in private.

By way of conclusion, it is worth widening our understanding of the time frame of dispute resolution processes, in order to reflect briefly on the reason why disputes arise in the first place. As we have seen, the law and its application are, in a way, a costly intermediary in dispute resolution processes. In this respect, ADR processes intervene as more economical and less stringent alternatives. Although we do not question the need for an intermediary to intervene at some point when a dispute arises, we would like to stress the need for principled intervention in line with the fundamental values of justice identified in this article. This consideration seems highly important when considering technological innovations meant to foster eAccess to justice. How do electronic or online processes of justice fare when assessed with the framework represented by the tree of justice above? Do they fulfill all or most of the values of justice identified?

Finally, more upstream intervention may be the key to more efficiency. If legal education and prevention were taken seriously, lay persons would be better informed, more able to detect the legal dimensions of their issues, thus more precautious, more equipped to deal with the problems they encounter, more proactive and responsible, and more inclined to seek early advice; there would be more prevention, thus fewer disputes, and therefore less demand for
dispute resolution in the first place. Such early, upstream intervention is demanding. It requires that legal norms be designed to be clear and efficient, and that they be communicated clearly and efficiently, even broadcast, online or in the traditional media. Beyond plain language, clear and efficient communication strategies are key to making legal information, rights, and obligations more transparent, and widely understood. Clear communication is an expertise worth considering when reflecting on efficient dispute resolution, including resolution online. It is especially relevant with regards to enhancing the legibility and usability of online services. It could also surprise many stakeholders, public and private alike, who will enjoy unsuspected efficiency gains.24

Notes

1 In practice, final resolution of a dispute may be undermined or perverted in several ways. To be perfectly productive, the final resolution of a dispute would ideally be self-executed by the parties themselves without further intervention. In this scenario, consensual resolution based on the needs of the parties proves particularly efficient. However, in a second-best-case scenario, the final resolution is binding on the parties, leaving only a possibility that things turn sour at the stage of executing the resolution. In this case, a very efficient decision-making process can be undermined by the uneasy or even impossible execution of the resolution, e.g., when a debtor is insolvent. In practice, the final resolution of a dispute may very well take the form of a default judgment or an interruption of the resolution process, clearing the court’s dockets without much consideration for whether the final decision is in fact a resolution or a non-resolution. In such cases, a final but inadequate solution may boomerang back into the court system. Montreal’s municipal court’s docket, for example, is clogged with applications for judgment revocations, because the parties are informed of the proceedings against them at the time they receive notification of the judgment.

For the United Kingdom’s most recent domestic endeavour, see Lord Justice Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (London: Ministry of Justice, 2009), with raw data on costs awards only.


6 More information available at Council of Europe, online: <www.coe.int/cepej>.


11 See Quebec’s *Code of Civil Procedure*, CQLR c C-25.01, art. 1–7.

12 See, e.g., Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les obligations. La responsabilité, volume 2 (les conditions)* (dir. Jacques Ghestin) (Paris: LGDJ, 1982) at 18 (arguing that innovations in insurance policies made it possible to indemnify victims of “social risks” such as dangerous labour conditions (during the industrial revolution) by progressively abandoning the requirement to prove the employer’s personal fault). See also, on the emergence of presumptions of fault and no-fault liability schemes in French civil law, Louis Josserand, *De la responsabilité du fait des choses inanimées* (Paris: A Rousseau, 1897).

13 This was achieved in Quebec through the *Automobile Insurance Act*, CQLR c A-25 and the *Fonds d’assurance automobile* (An Act Respecting the Société de l’assurance automobile du Québec, CQLR c S-11.011, art. 23.0.3). Several, but not all U.S. legislatures have enacted such schemes.
This was achieved in Canada with the modifications brought in 1985 to the Divorce Act, RSC 1985, c 3 (2nd Supp).

This was achieved in Canada with the Criminal Law Amendment Act of 1968–1969, RSC 1968–69, c 38.

Action Committee on Access to Justice in Civil and Family Matters, supra note 2 at 4 (particularly notes 29 and 31).


Action Committee on Access to Justice in Civil and Family Matters, supra note 2 at 11–14.


Gélinas and Camion, supra note 3; see also, Fabien Gélinas et al., Foundations of Civil Justice: Toward a Value-Based Framework for Reform (Berlin: Springer, 2015).

Michel Foucault, Surveiller et punir (Paris: Gallimard, 1975) (in particular the chapter on discipline at 159).

Even then, private arbitrators are not prevented from applying public-order rules.


In 1970, Citibank rewrote its loan agreement in plain language in an attempt to decrease the amount of litigation in link with this specific contract. Not only did it work, but the bank also gained market shares, training time for the employees was reduced by half, and the information given to clients was more accurate. More recently, Manitoba rewrote the Small Claims Court acts, forms, and brochures in plain language, with the effect of increasing the staff’s productivity by 40%. See Joseph Kimble, “Writing for Dollars, Writing to Please,” Scribes Journal of Legal Writing 6 (1996):1 at 8; see also Stéphanie Roy, “Rédiger des contrats clairs: une stratégie d’affaires gagnante,” in Communication juridique et judiciaire de l’entreprise, ed. Hugues Bouthinon-Dumas (Brussels: Larcier, 2015).
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