

# Architectures of Enunciation: Reassembling the Legal

Richard Mohr & Francesco Contini\*

Paper delivered at the  
Third Justice Environments Conference  
(UWS, AIJA)  
Sydney, 20-22 May 2010

## **1 Introduction**

Court processes increasingly operate with and through information and communication technologies (ICT) and community networks, while the conflicting logics and demands that each entails are not always well understood. The paper explores common elements, conflicts and overlaps between the therapeutic and socially reintegrative functions of courts, their legal traditions, and the related operations of ICT. We hope to demonstrate how the specific characteristics of each of these domains influence the nature of the interactions and outcomes that take place. While apparently leading to equivalent outcomes – default judgements, establishing liability for a debt or a fine, particular bond conditions – the alternative paths to these outcomes are not exact functional equivalents of the traditional operations of courts. Because they employ different architectures, with different modes of access and meaning structures, as well as different ways of processing information, the various technologies produce diverse results, even if they are called by the same name.

The material, social and legal frameworks that enable the functioning of each process shape the ways in which they can handle their common tasks. Some of the examples we will study suggest that courts are not just working with different networks of people, but seeking degrees of integration with competing or alternative institutions. However, these alternative networks are not fully autonomous institutional domains. Each of our examples is operating within a framework of legal and governmental relationships that are ultimately coordinated through conventional court systems. Our thesis is that the interactions of these different traditions are generating new institutional forms we call assemblages. These grow at the intersections of the various logics operating in and around court systems.

To make this analysis more concrete and specific, we now clarify the common tasks we will be considering, and the instances of each mode of operating that will constitute our case studies. There are constitutional and practical reasons why only courts and judges may issue binding judgements in adjudicated disputes. However, as is well known, the adjudication of disputes is but a small part of the courts' work. This analysis focuses on certain common tasks that are carried out within these domains, which can be collectively called the management of changes of legal status.

Most minor criminal charges are admitted, and few small debts are contested. It is in handling these matters that we find the most obvious overlaps between courts,

---

\* Richard Mohr (rmohr@uow.edu.au) is director of the Legal Intersections Research Centre, University of Wollongong, Australia, and Francesco Contini (francesco.contini@irsig.cnr.it) is a researcher at the Research Institute on Judicial Systems (IRSIG-CNR) in Bologna, Italy. While this paper is the result of a joint effort of the two authors, for the purposes of the Italian processes of research evaluation, individual sections may be attributed as follows: Mohr: sections 1-3, 8; Contini: Sections 4-7.

electronic processing and therapeutic or social approaches. That is to say, these are the areas where the alternative approaches appear closest to each other, where functional equivalence is most likely to be assumed, and, therefore, where the elements of our thesis may be most clearly examined. What each domain is doing when confronted by a guilty plea or an undisputed claim is negotiating a possible change of status. Determining a sentence, confirming a debt, arranging time to pay or setting conditions of a bond are all means of registering liability and recording an obligation. In each of our case studies, while these are not disputed judgements, they are legally binding decisions. The status of the defendant is officially recorded as 'guilty', or 'debtor', and certain consequences and obligations flow from that and from the other decisions recorded.

We have chosen several case studies as relatively pure forms of the conventional or curial, the electronic and the social approaches, while ensuring that we are only dealing with legally binding judgments in uncontested matters. We leave out of consideration alternative dispute resolution and judgments in disputed claims or charges. In calling these 'relatively pure forms', we must clarify that there are important overlaps. The legal form of court remains at the centre or the apex of these systems. Where a matter is disputed or where the default electronic or social approach cannot deliver a result, the case can always revert to the conventional form. There are, of course, even purer forms of electronic or social (eg restorative) processes, but they have tenuous links to the law and the courts, and are of less interest to judges, court managers and justice departments.

## ***2 Three architectures***

The socially reintegrative approach we consider is that of circle sentencing, as carried out in Aboriginal communities in New South Wales. These decisions require the presence of a magistrate to make them legally binding. However, they are by definition undisputed, since the defendant can only appear in them having admitted guilt. Despite the equivalence of the legal arrangements, it is the architecture that distinguishes circle sentencing from the local court. Aboriginal elders sit with the magistrate, while the offender and other interested parties (possibly including police, prosecution, relatives or victim) sit in a circle and discuss the offence and the consequences or sentencing options.

The purest form of electronic processing to be considered is the system of Money Claim Online (MCOL) operating since 2002 in England and Wales. MCOL illustrates the ways in which courts can make use of information and communication technology to manage debt claims online. If the claim is undisputed, it remains within the electronic environment through to judgment, while if disputed it can at any time be switched to the judicial track to be dealt with in court. This system illustrates some overlaps and imbrications between the electronic processing of legal claims (also known as 'e-justice') and conventional courts. MCOL is a web-based service for issuing money claims and resolving fixed money disputes. The service has been widely and rapidly adopted and represents a good example of how ICT-based systems and artefacts can be deployed within justice systems to help manage transactions between the courts and citizens or organisations. Even if MCOL is a service offered by the Court Service, different public agencies (County Court Bulk Cases Center, Northampton court and other County Courts,) and private companies (EDS, credit card companies and banks, etc) are directly engaged in its delivery.

Conventional courts are too well known to require much description here. Simply flagging the salient features we will be discussing, they are convened under the sign of law, as a creature of legally defined processes. They are characterised by an

impartial judge hearing two parties to a dispute. In the type of matters we are emphasising here, of course, there may only be one party present (as in an uncontested claim), or there will be no formal dispute between the parties, one of them admitting guilt or liability. The parties and the court functionaries gather in a specific place (a court room) at a determined time. Behind this public presentation of the trappings of impartial resolution of disputes there is a court registry, which receives claims and other documents or depositions and which retains the records of cases and their resolution.

To simplify the picture of the architecture of each of these domains, let us point out their most basic geometrical features. Circle sentencing is named after the specific geometrical form in which participants gather. Sitting in a circle, as about a round table, is presumed to equalise the participants and to facilitate the free flow of communication between them.

The architecture of the ICT systems through which a web-based mechanism like MCOL operates is, of course, a net or 'web'. There are multiple entry and exit points for different purposes and participants, and information may be located at any of these points: the user's PC, the bank's secure data base which identifies account holders and accesses their funds, or the court's server where the files of the case are held.

Each of these contrasts with the classical architecture of the courtroom and the traditional legal decision-making process that takes place in a concentrated system. With the focal point at the bench and the parties equidistant from the judge on either side, the courtroom lays out the triangular model of the scales of justice on its floor plan or, in a particular classical model of court design, in its triangular Greek pediment. (Brigham 1994) The impartial third, brought in to resolve disputes between parties, is placed at the apex of a triangle. The architecture of the courtroom persists, of course, even in those most numerous cases where the judge, magistrate or registrar is simply hearing a plea, registering an agreed settlement between the parties, or entering a default judgment.

In what follows we will illustrate each of these case studies in more detail by referring to their ways of operating in each of the key functions they perform. Before getting to that level of detail, it will be necessary to lay some more ground work for our analysis by developing two key concepts. The first is enunciation, or the performative discourse whereby legal status can be changed. There we consider the minimum conditions for successful status change, which allows us to specify what may be required of any effective domain. Next, we need to clarify the notion of assemblage, which is the key term we use to analyse the interrelations of components in any one of the domains, and to understand their intersections with each other.

### **3 Enunciation**

Law iterates and re-iterates a legal order. The legal order is generally held to be a key guarantee of the social order, and indeed unless law is to be a formalistic end in itself, it must serve such broader social ends. A key element of law's iteration of the legal order is to manage and record the status of people, including the legal obligations between them and their relationships to certain material assets. Law does not only *record*, but also *confers* changes of status. One cannot make a transition from single to married, from free to detained, from debtor to bankrupt, unless the proper legal forms are followed.

Garfinkel's (1956) classic paper on the role of courts in managing status change was titled 'Conditions for successful degradation ceremonies'. With a nod to that tradition, we would like now to consider the conditions required by ceremonies or 'performances' that result in a wider variety of changes of status. In the examples we are using for this inquiry: debts may be confirmed or discharged; offenders may be obliged to enter into certain bond conditions or go to jail; each according to law.

The performance of these 'proper legal forms' that authorise transitions of status constitutes one of the crucial moments of law as well as some of the founding tropes of theories of the performative and enunciation. These moments, and the theories that invoke them, are particularly important for an understanding of discourse and the interactions between the traditional forms of justice and the electronic and reintegrative forms.

Law negotiates status using various codes, including written and oral language. The theory of the performative (Austin 1980) showed that language did not simply communicate information, but effected transitions, such as legal changes of status. Language is a necessary but not sufficient condition: the context of the utterance must be the right one. Many of the early examples of the performative concentrated on the authority of the person speaking (Nancy 1982). The authorised adjudicator must be appointed in accordance with a particular formal tradition, deriving from a constitution or Grundnorm (Kelsen 1967) or 'order word' (Deleuze & Guattari 1988, 81-2).

The *context* of the performative utterance must itself, however, be continually re-enacted: the performative does not only enact status change as a one-way street, e.g. from the bench to the party before the court. Butler notes the importance, yet indeterminacy, of the context of the performative; reiteration remakes the institutional context. Each new iteration always has the potential to change the relations of authority, to reaffirm but also to modify, however subtly, the social order. (Butler 1997) Yet without this reiteration, authority remains unspecified, unperformed.

Latour (2002) relates this expanded notion of enunciation to the legal work of the courts.

'[Law] protects all the traces of disengagement to tirelessly reattach, by the perilous tracks of the signature, the archive, the text, the file, the statements to their speakers (les énoncés à leurs énonciateurs).' 297

Let us sum up this consideration of the nature of discourse in the relevant context of the transformation and recording of status. In this context, discourse has consequences. To make admissions, to accept responsibility, to blame or to deny culpability are all means by which status is conferred, negotiated or changed. There must be records of those transactions (now rarely oral, usually written, increasingly digital) if their effects are to be lasting and not ephemeral. The law courts have long managed those processes of performance, enunciation and recording. As we come to recognise the fuller social context of the courts, it is no longer possible to isolate their discourse within the exclusive 'system' of law and legal formalism. The collective assemblages that confer authority and recognition include the social position of the interlocutors, and the media and architecture of the communications. These may refer to the parties' communities of reference: the locations of the interlocutors, whether defined by traditional court architecture, by recognition of belonging to an Aboriginal community, or by a computer's unique identifying number or a user name. They will also include the files, databases, and communication channels through which they interact and in which their status (together with their commitments, admissions and

denials) is recorded.

Once the entire context—social and temporal—is admitted to the proactive landscape of the affirmation of the social (and not just legal) order, then new actors are recognised: not just the judge, but all the interlocutors; not just the bench, but all the furniture, equipment and architecture that frame and authorise the enunciation; not just the signature, but the bodily gesture that enacts it, and the context in which the commitment is made.

#### **4 Assemblage**

This discussion of the architecture and context of enunciations shows that effective legal statements (those that succeed in changing legal status) are the result of a combination of personal actions and institutional settings. As just noted, those settings include the architectures of communications and of movement within the institutional field. This will be demonstrated in more detail in relation to each of our case studies in the points of entry, the coding of information, the ways participants are recognised and categorised, the ways information is processed, and the means for making and recording definitive statements. Each domain – the electronic, the social and the legal – has its own doorways, codes and channels, which mesh together to process information and to produce outcomes. At the same time that they have internal ways of communicating, there are also ways in which information and styles of discourse move between the different domains. A party to a case can be recognised as such whether they file electronically, front a court in person, or take their place in a sentencing circle. And while there are profound differences in the experience and the nature of these encounters, there are also meta-codes that allow us to recognise the equivalence between an oath, a signature and an on-line declaration made by selecting a radio button or entering a password.

Lanzara draws attention to the points at which digital systems interact with legal and political institutions to create new institutional ‘landscapes’. Assemblages can be identified at these points of contact, resulting ‘from the encounter and the multiple mediations between large ICT systems and the existing institutional frameworks and codes of the society’. (Lanzara 2009, 11) These assemblages are composed of protocols, codes, technologies and architectures which may be derived from more than one specific domain.

Assemblages ‘are made up of heterogeneous components displaying multiple logics which cannot be easily reduced to one another. Hence, assemblages are not “hybrid” entities, but rather “composites” – collection[s] of components which tend to maintain their specificity’. (Lanzara 2009, 11) Acceptable models for e-filing or handling digitised documents within court operation can be found. However digital processes, on one side, and courts on the other, maintain their own institutional and technological specificities. Rather than perfect and peaceful integrations, assemblages are rich in overlaps, tensions and temporary solutions. As noted by Lanzara, following insights of Lessig,

‘More often than not a competitive field is generated, where technology and the law strive to ‘civilise’ one another, each trying to reduce the other to its own precepts or requirements.’ (Lanzara 2009, 12)

Each of the characteristic architectures that we described earlier has its own nodes at which it opens to and communicates with other domains. These nodes and openings are most numerous in the case of the web of ICT, specifically designed to interconnect each with all.<sup>1</sup> The courtroom is established as the appointed place at

which each of the participants comes together, identified by their place in the architectural schema. Even in the case of the circle, inward-turned as it is, the participants are linked to social and institutional networks of communities, families, and social, police or justice services, which place the circle itself at the node of intersection of a number of networks.

In each case, the interactions of various domains or networks may be understood as an assemblage, a combination of patterns of social interaction, hardware and institutions, each having their own means of communications and logics, and which also link in to other assemblages. Thus, the assemblage of the sentencing circle is a meeting point of a formal legal system (represented by a magistrate, in the NSW system), a police system (represented by police prosecutors or another representative such as arresting officer), an indigenous community, with its authority and kinship systems and ties to land, and other possible community networks of victim and family or business interests. Some of these assemblages link back to formal systems of law, databases and files, while others link to oral networks of place and interpersonal recognition.<sup>2</sup> The notion of assemblage is valuable for its potential to explain and promote new and innovative connections that can be seen between the courts and other institutional domains, such as information technologies and local communities. These can then lead to composite assemblages such as those introduced by e-justice or circle sentencing.

In the next part of this paper we look in more detail at three key processes that are common to all 'enunciation ceremonies'. In order to arrive at a pronouncement on legal status, each must accept data and code it into a form in which it can be processed by that domain; each must have means for identifying parties or other relevant participants, so they may be accorded their proper status and role; and each must pronounce and record the outcome, i.e. the resulting change of status.

## **5 Coding**

The notion of coding data from one form into another that is compatible with a specific type of system is familiar from ICT. ICT has developed increasingly sophisticated methods at that interface between oral or written information and the digital codes in which it can be processed. These evolved from punch cards to data entry programmers to networks where each participant is charged with entering their own data.

Efficiency of court systems has impelled increasing emphasis on user-entered data. Debt collection agencies and law firms have long been able to present bulk claims on disk to be uploaded to a court server. In the MCOL example, this is now decentralised so that any claimant with a PC and internet connection can access the court's public interface to upload their claim through the internet. Once the data is in a digital form compatible with the court's systems, it is available to be processed or downloaded within that ICT environment. Since the data is stored, it can be accessed and processed at any time, dispensing with the need for synchronicity of proceedings at a specific place and time.

---

<sup>1</sup> Since each of these nodes is problematic, we expect operational problems to increase with the number of nodes. In future work these could be mapped for MCOL and circle sentencing.

<sup>2</sup> Lanzara (2009, 14) notes that assemblages in ICT and public administrative contexts may be explained *either* by systems theory *or* by actor network theory. By using the terms 'networks' or 'systems' here we are not wishing to stress one explanation over the other. Nor are we using the word 'system' in a strict Luhmannian sense. The advantage of the concept of 'assemblage' is that it suggests a greater openness and potential for intersection and imbrication than do the more hermetic concepts of systems theory.

In MCOL proceedings there are different stages at which the process can, or must, switch from digital to conventional and vice versa. Once the claimant has entered the required data and has paid the court fees using a debit or a credit card, and after checking by the Court Service, the Royal mail serves a 'claim pack' (summons, information about how to proceed, user name and password to log into the MCOL website) on the defendant as it would do in the conventional paper based system. At this stage the defendant's reply can be paper based, using regular mail, or electronic, using MCOL. From that point the parties can follow the digital path or switch to a conventional paper based system at each procedural stage. As noted elsewhere, of course, the whole process can switch to the formal legal system if a claim is disputed.

The concept of 'data entry' is less familiar in the traditional setting of the law court, but it is just as crucial. Courts, like computers, can only deal with data once it has been coded into a specific form. Evidence is admitted to court under the strict conditions of the common law and the *Evidence Act 1995*. Legal argument is likewise coded for acceptability by the court, but it is admitted through the 'law' portal, distinct from the one so carefully labelled 'fact'. The law's obsessive gatekeeping of the forms in which information may be brought into the courtroom means that, once it enters, it is clearly identifiable within a known legal category, and is ready for processing by the law. In the same way that computers can only process data that has been digitised, following the technical rules that dictate the relevant codes and coding devices and their mode of use, so too the conventional law court requires an analogous process of gatekeeping, translation and data entry.

Not all information introduced to court enters at hearing, of course, so we must be just as attentive to the office registry functions of courts as to their courtrooms. Registries are the courts' entry points for claims, affidavits and all sorts of other documents. There they are placed on physical files with other documents, or keyed into computer systems. Evidence, claims or other legal material entered into registry computers is at the intersection of the legal and the digital. In traditional registries, the paper file itself formed a transition between data coming in from the outside world and the legal world in which it could be recorded and processed. Twenty-first century registries may not have become 'paperless', but the points of connection between the documentary, the legal and the digital have multiplied, each setting certain conditions for the other forms, constraining them while also opening the possibility of new assemblages.

The sentencing circle is less familiar and less well studied, but some recent work in restorative justice suggests ways in which it, too, might code information so that it may be processed within its specific domain. The most persuasive interpretation comes from researchers in the fields of linguistics and theatre studies. Paul Dwyer and others at the University of Sydney, observing youth conferences, have identified tropes that might be explored in Aboriginal circles and other restorative contexts. While access to a sentencing circle or youth conference is predicated upon admission of the offence (an issue explored further below), Dwyer points out that the youth conference does not work with a 'technical, legalistic admission of the offence', but instead seeks consensus around a 'story' of the offence. The conference participants work in a narrative mode to weave the offender into a story. While that story may include certain facts surrounding the offence, its most critical aspect is subsequent reflection, responsibility and remorse: 'feelings, not facts'. The offender

is expected to collaborate in developing a narrative and to agree with it: to 'sign up to the story', as Dwyer puts it.<sup>3</sup>

Files, whether digital or paper, are in the background to this process. The offence is of course recorded, as is the sentence (to which we return), but the genre of the circle brings the participants together in the immediacy of time and place.

Again, we can identify points of contact between traditional legal court proceedings and sentencing circles. Admission of the offence is a formal legal requirement. Sentences decided by circles are recorded by a magistrate and have the force of law. If the charge is disputed, then the determination must be made in formal court proceedings. If the circle were to impose bond conditions that were broken, then the legal consequences would be the same as any other such breach. The circle, like the youth conference, is an adjunct to the court, opening the way to new assemblages of criminal process.

## **6 Identification**

Before one can even begin to talk about access to justice, it must be noted that there are strict limitations on who may be admitted to judicial or other legal proceedings. One must have standing, a recognised role in the process. In the simple matters we are considering – in local courts, small claims and circle sentencing – this involves no great legal disputes, but it must begin with the identification of the parties. This must be ascertained in a formally appropriate manner. In conventional legal practices, identity is ascertained with a set of well established practices endorsed by formal regulations, such as a signature on a document, or certain statements under oath.

In circle sentencing formal legal identification practices can be supplemented by the acknowledgment of the members of the community. In order for a sentencing circle to deal with a particular offender, she or he must not only be recognised as a unique legal person, but also as a member of a particular community. The process of identification must be linked to the offender's place in a community. This includes their relationship to the elders, who must be seen to have authority over the person. This is a personal form of authority, based on a different form of identification than that of the universal authority conferred upon a state court.

The question of online legal identity, on the other hand, is still problematic. Indeed, while many technologies can provide more or less robust technical solutions, such solutions are not necessarily acceptable from a legal point of view. User names and passwords, accepted in so many areas of online transactions, are often not accepted by the legal system. In other words, the question of digital identity is a quintessential case of the difficult mediations between technology and the law.

When more complex architectures have been selected, this has been done in the name of the law, arguing that the levels of security provided by more simple technologies were not sufficient to meet the expected legal requirements (Fabri 2009). In this techno-juridical battleground, the more complex the technologies authorised by the law, the more expensive and exclusive they become. For instance

---

<sup>3</sup> Dwyer's remarks were made at the conference *Towards Restorative Justice* at the University of Sydney on 8 December 2009. Other participants contributing to the discussion that we draw on here included Frances Rock and Lise Berry. Michele Zappavigna and Jim Walsh collaborated with Dwyer on the research. Further work with these researchers may help in understanding how the story of the offence is reconstructed and shared. In a certain way, MCOL too is a process intended to reconstruct a (very precise kind of) story. We may note the different "working temperatures" of the three systems, based on their immediacy in space and time.

where these need to be established for any proceedings, unless a user has a digital signature registered with the court, the hurdles become greater for one shot players compared with repeat players or practitioners. This can soon create a digital divide between the systems of the courts and those of the users, as in the Italian case in which an expensive technological infrastructure is required to get connected with the courts<sup>4</sup>.

On the other hand, in the case of MCOL, identification takes place with the act of paying the court fee with the plaintiff's debit or credit card. This technology has been legalised with a change in the procedural code, on the grounds that what works for banks can work also for the public sector. An even simpler solution is seen in the Finnish courts, which accept filings through normal email. In this case the argument is that there are no reasons to believe the claimant is not who they say they are, and that the error would soon be reversed if this proved to be the case.<sup>5</sup> (Contini 2009, 252-3)

In magistrates' courts, in circle sentencing and in MCOL, the identification of parties to allow their admission to proceedings is fulfilled in different ways. Each identification process reflects the structure of the social relations in a bureaucracy, in a community or in cyberspace. It is inscribed in the artefacts available in a given context such as an identifying document (such as a driving licence or passport, designed to certify identity at bureaucratic level) or credit or debit cards (produced by some company to certify identity in a given type of transaction), or it is granted by face to face relations of the members of a community.

Each of these systems is in principle self-referential, linking the identification of a party to some database that exists within their own universe of meaning (bureaucratic, banking, or intersubjective recognition). But it must be stressed that to perform effective changes of status, any of these ways to verify identity must be 'legalised'. By this we mean that there must be some specific interface that is established to translate the identification inscribed in the external database into a form that can be recognised within the legal framework. This is explicit in the procedural codes of England and Wales (in the case of MCOL) and Finland (for email filing). The degree of complexity of this accommodation depends to a large extent on the degree to which the legal system is prepared to accommodate external frameworks of meaning. In the Italian case, the digital signature was to be established within the legal system, based on its own meaning framework. Since it was exclusive (used only by the court), and even required hardware as well as software protocols, it was inaccessible to all but the most motivated, initiated and cashed-up players. It may also be possible for external systems to accommodate to the legal framework. In the case of circle sentencing, the elders and the community must recognise the authority of the conventional court (and vice versa), not only in reaching a decision, but even in identifying an offender (as an individual and as a member of an indigenous community, as noted above).

Further ways in which external systems, notably digital systems and those of private companies, have adapted to the courts are identified in the following section.

---

<sup>4</sup> This can be explained in terms of shared information infrastructures (to be developed in further work).

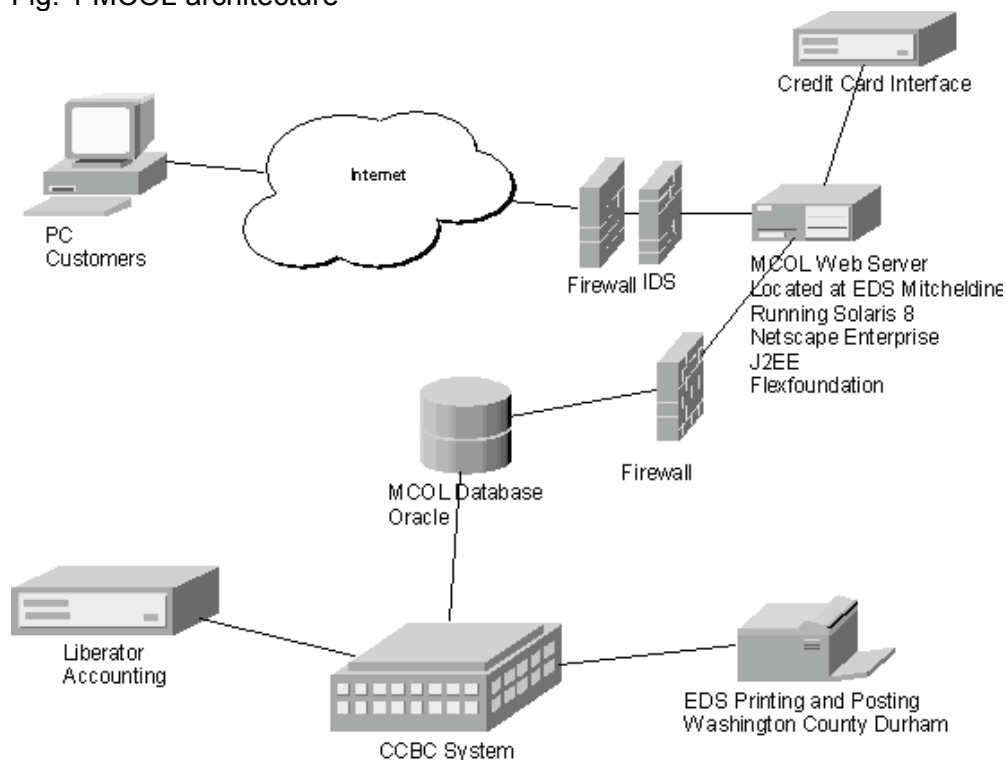
<sup>5</sup> We are grateful to Mr Warwick Soden, CEO of the Federal Court of Australia, for pointing out in conference discussion (21 May 2010) that a similarly low level of proof has traditionally been required in accepting signed documents into courts. The signature is assumed to be genuine unless proven otherwise.

## 7 Effecting and recording status change

Any institution charged with legal changes of status must go through a number of necessary steps, while the detail varies between the instances we are considering. Once the parties have been identified and admitted into the proceedings, the institution needs to gather information on claims, liability, and any areas of agreement or disagreement between the parties. Since the institution does not carry out its own fact finding (beyond verifying that the parties are who they say they are), this information must be provided by the parties. Once the information is coded, as noted above, into a form that is able to be stored and utilised by the institution, it forms the basis of a decision-making process that follows rules to reach a public pronouncement. That is to be announced in a prescribed form so that all interested parties are aware of it, while being recorded in a permanent form for future legal reference to the party's status or obligations.

MCOL, like any other ICT application mediating and channelling the exchange of information between courts and parties, is usually described as a *web* or as a network. At a closer look, this common representation reveals the actual complexity of the morphology of the web. Indeed, communication is based on a complex architecture of technological components, hardware (computers, servers, firewalls, routers, cables, monitors) and software (protocols, applications, data base and so on) provided by different actors (public agencies and private companies).

Fig. 1 MCOL architecture



In the case of MCOL, one of the simplest developed in Europe, a number of technologies and technology providers are involved. MCOL has been developed taking advantage of the organisational and technological installed base, the pre-existing technological component and related organisational facilities (the court's bulk service of notices). The MCOL database has been developed within this facility to store the case related information. A firewall protects the secure area of the court service from external threats from the internet, granting selective access to the

computers of MCOL users. What users actually see (and interact with) is the MCOL web server. This system is located in a private company (EDS), and is protected by other firewalls. In addition it is linked by networks and gateways with debit and credit card systems used for paying court fees and for digitally certifying the identity of the claimant.

Since MCOL also includes data interchange between the web server and back-office systems (MCOL database, CCBC, accounting system and printing facilities), it becomes clear that a growing number of organisations are involved in the delivery of the service. In the end, the physical interface of the court counter and the interaction between the court user and the court staff is now mediated by a wide range of actors, technologies and service providers as well as by complex new regulations. This analysis of the disclosure of the components of the network shows how judicial procedures are administered and driven by a number of systems, some of them placed outside the judiciary (with none placed inside conventional courts). Private companies contracted by the court service run two key components: the MCOL web server and credit and debit card systems. All these features are typical indicators of the displacement of judicial proceeding to electronic systems.

Each technological component performs specific tasks required to enact the performative utterance of judicial proceedings: to codify, channel, regulate, and finally transmit a specific set of data from one system to another. These technologies for managing status do not operate in isolation from other institutional domains. Indeed effective changes of status can take place if technology is *legalised* by formal regulations, such as procedural laws and technical rules describing what technology can and cannot do (Lessig 2007). Furthermore, as revealed by the components of the network, *contracts* between public agencies and private companies make available relevant technological components and services. The end result, the performative required to change status, is therefore the result of an assemblage of different institutional domains, each one with its own peculiarities, logics, and self referential dynamics. Market driven companies (such as EDS) and the bureaucratic structures of the judiciary (Court Service) must sign long term bilateral contracts, affected by a high degree of uncertainty.

Maintaining continuing interactions between law and technology, market and bureaucracy, online and offline, requires difficult mediations. Many of the problems related to the performance of these new systems are consequences of the mediations that are required to keep the components assembled, as illustrated in the case of digital identity.

## **8 Reassembling the legal**

In introducing the concept of the assemblage, we noted the tendency for competition between the various fields, so that, as Lanzara (2009, 12) noted, 'technology and the law strive to "civilise" one another'. A very similar 'clash of civilisations' can be observed between therapeutic or community-based procedures and courts. In such battlegrounds mediations are difficult but necessary to keep the composite features of the emerging institutions in their assembled state. Whether courts are interweaved with ICT or with Aboriginal communities, this requires continual communication between the systems, and constant attention to the switching points at which information flows from one domain to the other. This is not as simple as simply keeping a communication channel open, but also requires that the necessary recoding allows the information to flow seamlessly, so meaning is not unduly distorted or transposed between one and the other.

This is not simply a case of managing a technical protocol capable (for instance) of translating between digital and alphabetical codes. As seen in the previous examples, these switching points are maintained by higher level agreements, including public-private contracts and degrees of trust between indigenous communities and the dominant legal institutions. Relationships within the external domains are similarly important, so that the operation of both the intersecting systems may be threatened by loss of a key expert, breakdown of an ICT server, death of an elder, or a rupture in trust within an Aboriginal community.

The number of independent actors involved in deciding the configuration of a system and in keeping it running forms part of the architecture of the system itself. The decisions about the technological and normative features of the systems have to be negotiated between several independent agencies. External providers, whether Aboriginal elders or ICT companies, have to be identified and contracted. Their services have to be linked into courts' operations, introducing new players with responsibilities for delivering judicial services. This brings a new layer of complexity and new players into courts, and substantially changes the way in which justice is administered. While, in the conventional landscape, courts have a monopoly of unilateral control over the system, now private agencies providing network connectivity, security, and data (banks and credit card companies) have to be integrated in the delivery of the service. In the case of circle sentencing, it is community networks of elders, aunties and community service providers who must be linked into the communications that decide on the nature of the offence and any appropriate punishment, reintegration or reparations. Each of these interactions affects the outcomes of status change procedures, taking them into spheres that have rarely been touched on by the judiciaries.

None of these three institutional domains is in a stable state. Any agreement about the way in which the management of status flows between the different institutions is affected by any instability in any one of the interlocking systems.

In framing the questions to be addressed in this paper we narrowed our scope to the successful enunciation of changes of status. Any broader definition of the 'legal' or of the work of the courts would risk bringing with it excess baggage about the specific form of ceremonies or presuppositions of the expertise, certification or language (code) by which these performatives are to be enacted.

It is enough, then, to ask how it is that various protocols and communication systems can operate together to effectively enact status change. While focusing more closely, in this analysis, on the interface between the digital and the legal, we have tried at each stage to generalise our observations to ask how community processes might reflect similar issues in their crossover with the legal domain.

The challenge of organising operations following different codes and cutting across different institutional domains will continue to confront courts as well as other public sector agencies. Virtually all of these are regularly required to reorganise their activities to increase efficiency, effectiveness, and legitimacy. The need to come to terms with technology, community and management, each bringing their own codes and operations, is therefore a general trend to be investigated from multiple perspectives. Our work is just a first attempt to explore the new assemblages emerging in the justice landscape. It has allowed us to identify a perspective from which we can simultaneously observe circle sentencing and MCOL (as embodiments of community and technology respectively) as symptoms or phenomena of the same broader process of the institutional reconfiguration of courts.

Further work is required to spell out these parallels and to determine how far the analogies can be pushed. However, we have found a number of elements that work at the intersections of the legal and other domains. We hope to have demonstrated our thesis that the intersections of law courts with digital and community processes leads to the elaboration of new assemblages. Courts are increasingly challenged to organise their activities and develop their institutional frameworks while considering – or taking advantage of – the know-how, capacities, and operations of other institutional domains. In this paper we have discussed some of these challenges and opportunities in relation to information and communications technology and local indigenous communities, while in other work we have turned our attention to management (Contini and Mohr 2007; Contini and Mohr 2008).

This work offers some suggestions as to how such interactions might be improved in future, some basis for speculation as to what future assemblages might be possible, and some lessons from their vulnerability to disruption.

Our most fundamental finding is that status change can be successfully negotiated drawing on more than one code. The ‘pure legal form’ seen in the courtroom (if it ever did exist in a pure form) can reach out to other forms of communication. Does it incorporate them? Not exactly. Does it colonise them? Up to a point. The key is that neither legal codes nor alternative ones can be translated literally into each other’s domain.

Each domain is forced to retain its own self-referential codes. In other words, the compatibility between the different codes is limited. As the example of MCOL shows, only a carefully selected set of sub-procedures of money claims have been fully translated into the digital environment. As soon as the value of the claim has to be ascertained (or the claim is contested), the procedure must switch from digital to conventional. As noted by Kallinikos, digital technologies can only effectively handle the most functionally simplified procedures. This limited capability reinforces the need for constant interactions between the institutional domains, to facilitate crossovers and track-jumping between them. Meanwhile their limited mutual compatibility means that constant work is required on both sides to maintain the switching points. Each domain exhibits shifts and drifts that can lead to the collapse or to the disaggregation of the assemblage.

Each of the fields has its own imperatives for the maintenance of meaning. Digital systems developers must find ways to import and manipulate data within the digital environment. Indigenous communities must be able interact with legal authorities while maintaining their relationships to each other, to offenders and to offending behaviour in ways that are consistent with their own meanings and relationships. It hardly needs stating that legal processes must always conform with legal requirements, even if the conventional forms in which they are enacted might be modified in contact with other systems.

So how is it that these forms can come together to achieve a successful outcome by formally negotiating changes of status? Channels of communication, switching points and recognition of each others’ protocols must be established. While they are working, each system must be capable of recognising an analogy to one of its own codes in the codes of another system. The court system must recognise digital identity by means of a credit card or email. The Aboriginal community must be able to accommodate formal legal recognition, while being permitted their own identification processes. These are never established once and for all, but are constantly renegotiated. Information transfer from code to code is not achieved by a single translation protocol, but is constantly adapted. Even after a good working

relationship has been established this must be renegotiated if an elder leaves the circle, if banks change their security protocols, or if a service provider changes the architecture of the server.

How these might be negotiated will depend on the perspective of the player, and the code in which they are versed and which they are responsible for maintaining. The law may decree a specific accommodation that legalises the code of the other domain. Comparing the Italian experience of digital signatures with the more flexible British or Finnish mechanisms shows that the law can adapt to alternative codes better than it can design such codes within the legal environment. For its part, technology has its own dynamics of evolution. Simply put, if the legalised technology is not available yet, or not shared by those that are supposed to use it (as in the Italian case), or if the judicial procedures to be inscribed into a technological system are too complex (or not functionally simplified), this will only result in new legal codes, and not a functioning interface. The operation will not transfer to a different institutional domain, and the technology cannot integrate with the legal domain.

We have drawn attention to successful assemblages, all the time emphasising their precariousness, in the event that protocols or agreements between domains break down at the formal level of the system. The assemblages that we have discussed constitute alternative means of bringing more than one domain, or code, into play in order to change legal status. We identified some successful instances: the codes can be mutually recognised, the enunciation is made, the performance is felicitous, the status is changed. Given the precarious points of contact and the misunderstandings that can arise at each one, this is a remarkable success. We may attempt a rough summary here of some of the conditions that can promote successful assemblages.

Each of the domains has its own inherent fragility, as in the examples noted above in case of a failure of the system or of trust. The elements requiring constant maintenance, where these failures can be amplified into other fields, are at the switching points. These are where communications must be recoded between systems, whether from legal to digital or between law and community. They are also the points at which matters may jump tracks from one system to the other. These principles suggest two areas for further examination: communicating, and jumping tracks.

Mediation between domains must be able to accommodate drift within or between any of the domains. This requires flexible and robust communications, so that representatives and operatives in adjoining domains may be apprised of any switching problems early, and act on them quickly. Participants must recognise that they are operating in different meaning systems, which do not speak the same language. Such recognition highlights the need to continually identify the questions of translation and recoding that are required in order to recode, repair or re-plumb at the switching point.

Where recoding cannot take place, or fails to be successful, across the gap between the two domains, then there must be provision for the matter to stay within the one domain. In court systems, the conventional legal procedure is normally the default track. Any problems or excessive complications lead the case to default to the judicial track (as in the case of MCOL). However, it is important to be aware of the expectations and issues of trust that arise at this point. When participants are expecting their matter to be dealt with along a particular track, be it legal, electronic or community-based, then any failure to maintain or continue on that track may be seen as a disappointment, a breach of trust or worse. A party may admit an offence

in order to be heard by a circle of elders, or may file or respond to an electronic claim in order to avoid court appearances. Jumping tracks in such a situation is not simply a matter of technological or legal expediency, but goes to the heart of the expectations of justice, e-justice or circle sentencing.

## References

- Austin JL. 1980. *How To Do Things With Words*. Oxford: Oxford University Press
- Brigham J. 1994. Exploring the Attic: courts and communities in material life. *Law in Context* 12
- Butler J. 1997. *Excitable Speech: A Politics of the Performative*. New York: Routledge
- Ciborra C. 2002. *The Labyrinths of Information. Challenging the Wisdom of the System*. Oxford: Oxford University Press. 195 pp.
- Ciborra C. ed. 2000. *From Control to Drift*. Oxford: Oxford University Press
- Contini F, Lanzara GF, eds. 2009. *ICT and Innovation in the Public Sector*. NY: Palgrave Macmillan
- Contini F. 2009. ICT, Assemblages and Institutional Contexts: Understanding multiple development paths. In *ICT and Innovation in the Public Sector*, ed. F Contini, GF Lanzara. NY: Palgrave Macmillan
- Contini F, Mohr R. 2008. *Judicial Evaluation: Traditions, Innovations and Proposals for Measuring the Quality of Court Performance*. Saarbrücken: VDM Verlag. 136 pp.
- Contini F, Mohr R. 2007. Reconciling Independence and Accountability in Judicial Systems. *Utrecht Law Review* 3:26-43
- Deleuze G, Guattari F. 1988. *A Thousand Plateaus: Capitalism and Schizophrenia*. London: The Athlone Press
- Fabri M. 2009. E-justice in Finland and in Italy: Enabling versus Constraining Models. In *ICT and Innovation in the Public Sector European Perspectives in the making of e-government*, ed. F Contini, GF Lanzara, pp. 115 -45. Basingstoke: Palgrave
- Garfinkel H. 1956. Conditions of Successful Degradation Ceremonies. *American Journal of Sociology* 61:420-4
- Hanseth O. 2003. Design as Bootstrapping. On the Evolution of ICT Networks in Health Care. *Methods of Information in Medicine* 42:385-91
- Kallinikos J. 2009. Institutional Complexity and Functional Simplification: The case of Money Claim Online service in England and Wales. In *ICT and Innovation in the Public Sector*, ed. F Contini, GF Lanzara, pp. 174-210. NY: Palgrave Macmillan
- Kelsen H. 1967. *Pure Theory of Law (Reine Rechtslehre)*. Berkeley, CA: University of California Press
- Lanzara GF. 2009. Building Digital Institutions: ICT and the rise of assemblages in government. In *ICT and Innovation in the Public Sector*, ed. F Contini, GF Lanzara. NY: Palgrave Macmillan
- Latour B. 2005. *Reassembling the Social: An introduction to Actor-Network-Theory*. Oxford: Oxford University Press
- Latour B. 2002. *La fabrique du droit. Une ethnographie du Conseil d'État*. Paris: La Découverte
- Lessig L. 2007. *Code and other laws of cyberspace. Version 2.0*. New York: Basic Books
- Nancy J-L. 1982. The Jurisdiction of the Hegelian Monarch. *Social Research* 49:481-516