HiiL innovating justice

Trend Report

Trialogue

Releasing the value of courts

HiiL Trend Report on the future of courts

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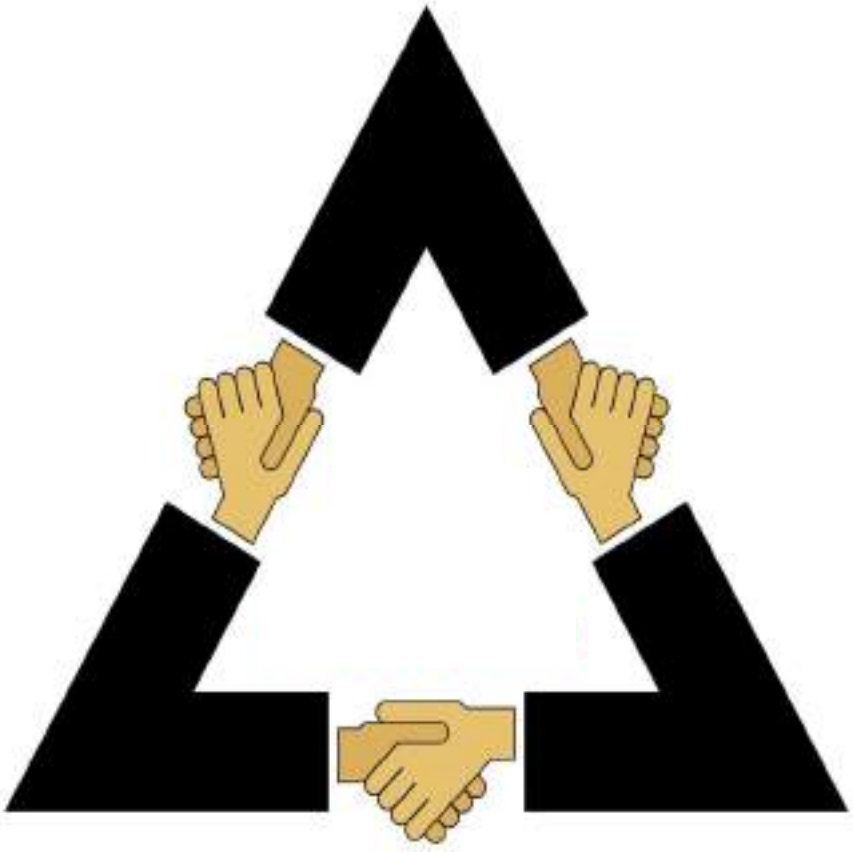

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Executive Summary

Essential and valuable

Courts will continue to be essential for holding societies together. Some form of third party adjudication, public or private, is necessary for resolving the most difficult conflicts and dealing with the worst possible crimes. No country, no city, no community of reasonable size can do without these institutions. Courts can start procedures and take decisions to which all parties have strong incentives to submit. They also provide a check on government power and thus help to give government actors legitimacy. Courts provide symbols and rituals aimed at doing justice and, through their decisions, they further develop laws and regulations.

Alternatives to courts, such as mediation and private arbitration, only tend to survive in the shadow of well-functioning courts, or are performing court services under different names. Finally, courts deliver highly valued goods such as recognition, voice, respect, fairness, financial security and proportionate retribution. They contribute to finding peace of mind and sustainable relationships.

Courts can be rather effective. A typical European court has 16 judges, serving 100.000 people, for only €27 per year. Courts are under strain, however. In many countries, the judiciary is faced with budget cuts. Legal procedures tend to become more complex, and people using courts are less likely to be served by lawyers as intermediaries. Measured in terms of perceived fairness, neutrality, speed, effectiveness and costs of their procedures, the quality of services provided by courts is sometimes problematic. Elsewhere, there is at least space for innovation and improvements, but reform of court procedures is difficult to agree on and even more difficult to implement.

This report argues that courts should be supported and encouraged. It aims to facilitate dialogue and arrangements between court leaders and partners who are nowadays indispensable for courts to be effective. Courts can create even more value, if they do not take their present way of working for granted, but continue to innovate their services.

Building partnerships

Courts can develop much deeper knowledge of the needs of their users. They need a good framework and agreements about funding, by governments or users, providing appropriate incentives and accountability. The services and the structure of courts are heavily regulated, which requires optimal partnerships with yet other government actors, such as legislators and ministries of justice. Courts intervene in employment relationships, families, business deals, drug abuse, robberies and homicides. For each of these problem categories, they have to work with different organisations and experts in complicated supply chains.

The report shows the trends in adjudication. It also illustrates how new arrangements can lead to breakthroughs in what courts can achieve, directly for their users and for the broader population benefiting from their availability in the long run.

Delivering better outcomes through excellent procedures

Delivering justice to people through offering excellent procedures is at the core of the mission of courts. Courts attract most attention by their judgments. They are perhaps even more effective by being available. It is the option of seeing a neutral adjudicator, that causes people to cooperate and find fair solutions for conflicts that will work between them.

Going to court is thus generally a good thing, not to be discouraged. In the midst of many challenges, courts already find ways to deliver fair and effective procedures at reasonable prices. Litigation about

divorce, employment, minor crimes and business disputes is gradually becoming more attuned to client needs and emotions. Judges, and their clients, can greatly benefit now that court procedures start to move online. Another trend is that court hearings become more interactive, geared towards trialogue in order to build sustainable solutions. But many courts are still struggling with vast demand, want to connect more to the problems of their clients and have yet to work on accountability.

The research literature suggests that courts of the future will offer procedures that are more specialized for the most urgent and frequent problems of citizens, providing standardised solutions and processes that are tailored to these problems. The services of judges are likely to better integrated with the supply chain offering (legal) information, settlement services, expertise, prosecution, corrections or reintegration. Proceedings will become more simple to navigate, empowering citizens and stimulating them to solve the issues by themselves. In order to build and refine procedures, sophisticated innovation methods are helpful. Research also indicates that performance is likely to improve if chief judges have and take broad responsibility.

Courts at a crossroads

Courts are at a crossroads. Detailed laws of procedure and a lack of good funding models tend to restrain innovation at courts, sometimes turning them into an annoying cost for governments who are then tempted to restrict access. Courts are ready to invest heavily in IT, but digitising complex, outdated procedures may lead to frustration of judges and their clients.

Citizens would benefit if courts take their future in their own hands, and they should be allowed to do so. As a step in building a strategy, courts could be more clear about what they offer in each of their procedures. Is it a last resort when all else fails, an avenue for answering legal questions or a neutral forum for resolving disputes and coping with crime? What are terms of reference for such procedures? What are the skills and resources needed?

Releasing the value of courts

If courts negotiate more freedom they can select a strategy, specialise and innovate in a more systematic way. Courts, and their clients, know best what works, and can co-create procedures for the most frequent problems of businesses and individuals. They are in the best position to develop smart models for financing these procedures, either from user fees or from government contributions, but always on the basis that court interventions tend to have far more economic value than their costs.

Taking more responsibility is also risky. But it gives courts the option to become truly independent. If they take the lead, and become more accountable for their performance and accessibility, courts are likely to see trust in them increase.

December 2013

1. The third party

1.1 What follows

In this report, we analyse the future of courts. What is their mission? What are trends in court innovation that can be expected to change the way these age-old institutions work? As we will explain, these are urgent questions. Courts face continuing challenges, such as the one of providing access to justice without becoming overburdened or losing independence. But they also face new ones, such as the need to be more accountable - doing more for less money and bringing their procedures online.

Audience

The target audience for this report consists of leaders in court organisations, or at organisations responsible for regulating courts, who are interested in the trends on how courts develop worldwide. One of our core points is that courts intervene heavily in people's lives and add value by being available for citizens, so their procedures better be attuned to citizens' needs, and perhaps even be co-created together with users. This trend report is thus written in non-technical language. It may sometimes describe things that are obvious to specialists. Our aim is also to open the floor for the many individuals and organisations who want to work with courts, in order to provide feedback, to supply helpful services, or just because they feel the urge to improve the rule of law and access to justice.

Focus on procedures and outcomes

Unlike other reports and research on courts, which may deal with the internal organisation of courts and their external relations, this trend report focuses on the core products of courts: the procedures and outcomes they deliver. We describe how these procedures develop, the challenges and the restraints courts encounter, and the many successes on which they can build.

Data

Our perspective is that of engaged outsiders, researching and consulting on justice sector innovation. We do not work in courts, but often with courts and with judges. Our projects and experience range from helping to set up international criminal courts in The Hague; to facilitating dialogue between supreme courts in Europe; to strategising with court organisations in Kenya, Ethiopia, Yemen, the Netherlands and Canada; to establishing the effectiveness of the procedures of judicial facilitators in Nicaragua. Many of our other projects are about access to justice, which tends to be influenced by the shadow of courts and their procedures.

We have contact with a network of experts that worked with courts and their organisations in almost every country in the world. During the second half of 2012 and the first half of 2013, we held seminars in Singapore, San José (Costa Rica), Addis Ababa (Ethiopia) and Tunis with court leaders, and interviewed them about their most important challenges. From March to September 2013, we hosted a weekly workshop on elements of the future of courts. During these sessions in our Justice Innovation Lab, the central findings and tenets of the current report have been tested and enriched with additional data. Participants have been members of our network, who were visiting The Hague, and persons whom we invited because of their specific expertise.

They told us how there are important differences between countries and pointed at examples of states where structures are weak. Then courts sometimes provide legitimacy to governments that do not uphold basic rights of people. Procedures can easily become a vehicle for judges and other members of the legal elite to increase their income. In these contexts, courts also face challenges on a basic level. Their leaders may need ways to develop more user-oriented attitudes among court staff.

The experts and court leaders further confirmed that more effective procedures and better outcomes are part of any reform effort they know of. This report reflects their experiences. They gave us insight in what they learned about what works for key elements of shaping the courts of the future. How can courts organise an effective dialogue with key partners in their ecosystem? So they build clear terms of reference that help them to in a process of systematical specialization of procedures? And create an environment that has a tolerance for failure and each is motivated to do their part? What are the best practices for moving beyond abstract principles and concepts towards a focus on the needs of people? This report thus builds on the expertise of more than 150 court leaders and external professionals from six continents, who opened up their knowledge base to support and encourage courts worldwide.

Methodology
In Chapter 2, we give a qualitative and quantitative description of the organisation and the caseload of a typical court. It is based on comparative reports published by the Council of Europe and the World Bank, and enriched by data from other sources, including our own projects.

Chapter 3 contains the most urgent challenges reported by court leaders whom we met during projects and with whom we worked in the seminars mentioned above. Research papers, and the popular press, are full of additional indications of what is nowadays expected from courts.

Chapter 4 describes three modes of innovation of court procedures and innovation trends, as well as the trends in court funding and development of online procedures. Here, the innovation experiences about court procedures are compared with the framework for justice sector innovation we presented in our recent book: Innovating Justice, Developing new ways to bring fairness between people.

Chapter 5 evaluates three different types of orientations for court procedures, showing the benefits and challenges connected to them. Chapter 6 summarises, on the basis of the preceding chapters, the most crucial conditions for successful court innovation. It culminates in a call to action: courts can first take and then share full responsibility for the design, the costs, the revenues and the performance of their procedures. Gaining more financial and operational independence, they will be able to deliver better services to their clients, be more accountable and become more worthy of trust.

1.2 A day in Jaipur court

Our story on courts might begin anywhere, as we did not find a place in the world without third party adjudication, but it might as well be Jaipur in India, the capital of Rajasthan. Here, over three million people live together, Hindu, Muslim, Jain, Sikh or Christian. Clients walking up to the Jaipur city court first meet the legal profession, experts in procedure rules that were imported from London more than a century ago. Clad in long sleeved white shirts, lawyers sit at tables in the parking lot waiting for clients. Lawyers are not supposed to hang around in the court building, so they had to negotiate protection from sun and monsoon downpours by constructing a roof made from corrugated iron. More lawyers are in sight than clients, perhaps because the price ranges they quote for an employment or divorce case have substantial upper limits, even for India's emerging middle class.

Inside, the doors of every single courtroom are wide open. That is what the Indian Constitution is believed to demand, open doors as a symbol for transparency. In the first room of the second floor, a judge talks with businessmen and lawyers, each standing on their toes to reach up to the bench, pointing at documents that provide evidence. In a few minutes, the judge may give them a hint how they can settle the case.

Next door, a court clerk is organising the files for hearings in tax matters. A number of uniformed men are sitting together further down the corridor. Here the door is not open, but transparent it is. Behind the slender steel bars, about fifteen male prisoners sit on the floor or walk around, waiting for criminal justice to be done. They look bored, though well-fed. Their naked upper bodies show no signs of anything resembling maltreatment.

And of course there is the library. Handbooks with golden letters on the cover summarise the law of contract, torts and criminal procedure. Here judges and lawyers can study statutes and decisions from higher courts. At this time of the day, nobody is there but the librarian. The entire building breathes the tradition and history of justice in India, which to a large extent resembles that of courts in many other countries.

1.3 Relief in times of crisis

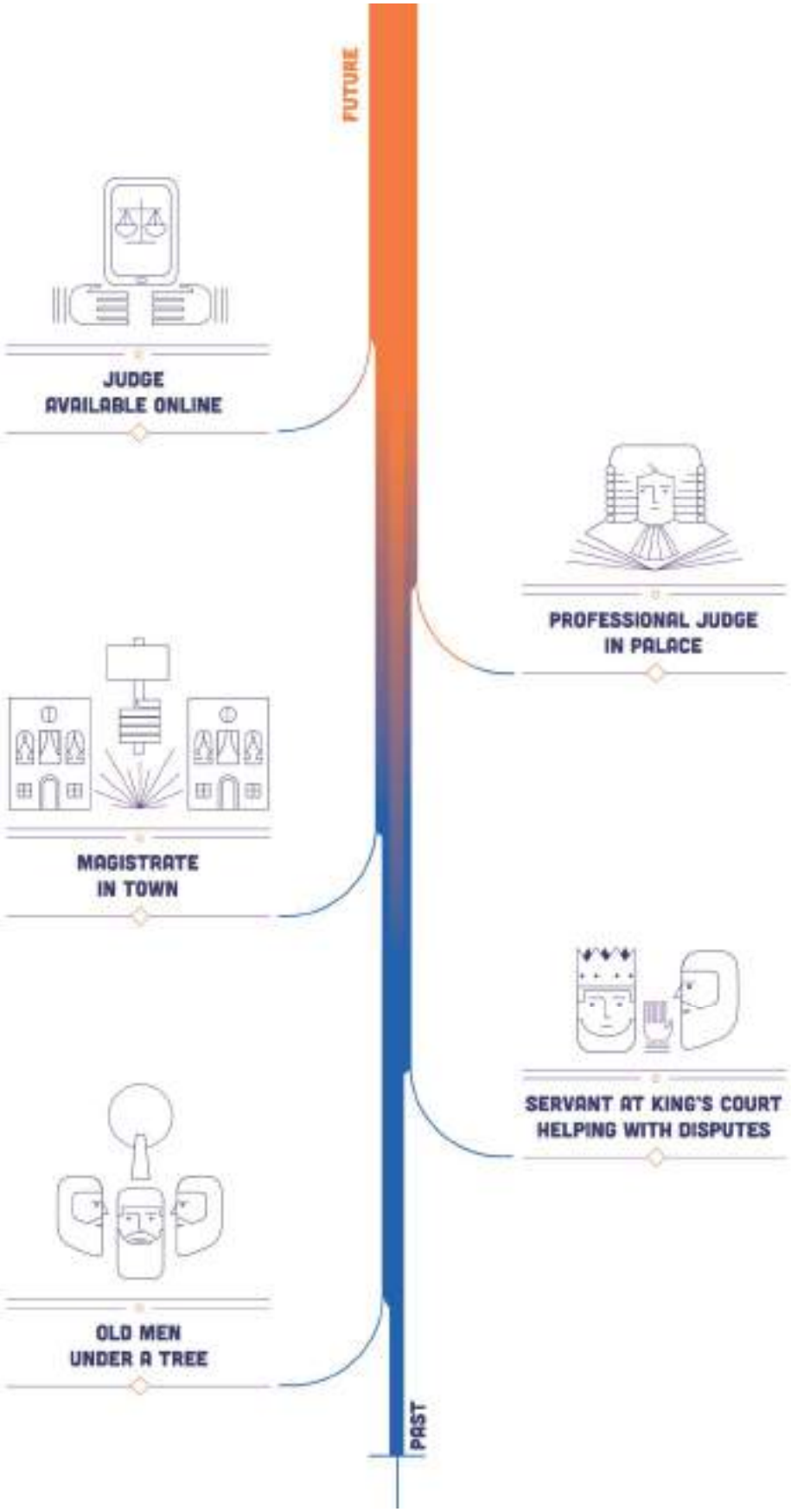
Whenever people start living together, they always end up organising some form of neutral adjudication. There is no country without theft, fraud, violence, divorces, personal injuries, terminations of employment, land conflicts, consumer complaints about failing goods or financial services and debt problems. Courts are needed to settle issues when people have invested in property or in a relationship together. People appearing in court may be bound by being involved in an accident or a crime, or by living together as neighbours.

People going to court become mutually dependent. They have to cope with a severe crisis together, in a situation that economists have called bilateral monopoly. A wife can only arrange a divorce with, or against, this particular husband. Both need to be accountable to a judge to make this work. Without access to court, a victim is at the mercy of the one and only insurance company that covered the loss. Perpetrators, victims and prosecutors are the ones who have to cope with the crime, and may be quite unreasonable, so third party oversight is needed. This is also necessary to protect citizens who have been refused a building permit by their one and only local government.

In order to avoid abuse of power and stalemates, and to enable a fair, balanced solution, access to a neutral third party is the only known solution. So every society uses judges, juries, tribunals, arbiters, village elders, police officers or mayors who help decide conflicts peacefully.

From this long list of third parties, courts of law gained a preferred position. Gradually, courts obtained a central place in states, well defined by constitutions, and known in the west as the third pillar of government next to the legislative and executive powers. Even China's Communist Party, with a view on governance that developed independently from western human rights values, realised it needed effective courts to grow and to live up to its ideal of a harmonious society. China increased the number of judges from around 40,000 in the 1980s to 200,000 now, whilst carefully managing the influence of the Communist Party over the court system.

In times of revolutionary change, courts even adjudicate in constitutional matters. In recent years, the future of Egypt, Pakistan and Venezuela hinged on supreme courts checking leaders who try to extend their powers or their terms in office. In more quiet times, courts ultimately deal with abortion, gay marriage, capital punishment or treaties intended to let Greece stay in the eurozone - all deeply contested moral issues.


FUTURE
JUDGE
AVAILABLE ONLINE
PROFESSIONAL JUDGE
IN PALACE
MAGISTRATE
IN TOWN
SERVANT AT KING'S COURT
HELPING WITH DISPUTES
OLD MEN
UNDER A TREE
PAST

1.4 Struggling institutions?

Looking at this important and stabilising role in society, it is small wonder that judges take great pride in what they do. Every day, judges like the ones in Jaipur, decide millions of cases. They restore justice by granting compensation, correct misconduct and help people to get through a difficult phase of their lives.

Flawed justice?
Still, courts receive criticism and are being pictured as a place to be avoided. Courts may take a long time to decide cases, during which files that lay idle for more than 90% of the time needed for disposition. According to many dispute resolution professionals, litigation can lead to further polarisation, instead of bringing people together. Judges still write, and sometimes speak it is believed, in legal language that is hard to follow for most people in the courtroom. The distance created by their buildings, dresses and rituals can be explained and has its uses. But is also said to get in the way of effective participation by clients. Court procedures, with their many side issues about who can decide what and on what basis, can be Kafkaesque, in particular in countries that still rely on colonial versions of procedural laws.

Many individuals feel they cannot afford to take their issues to court because of high legal costs. Businesses in the US complain they face staggering bills for 'discovery', a procedure that forces them to let lawyers sift through millions of emails and documents only remotely connected to issues in dispute.

Courts occasionally convict people who did not commit any crime. Victims taking part in criminal procedure complain about their emotions and views not being recognised. Asked to refrain from revenge themselves, they are dissatisfied with the way courts let criminals take responsibility.

Courts can easily integrate in a widespread culture of corruption. Most often, it has the form of a business model in which court clerks accept additional fees for moving files up or down the schedule for a hearing or a decision. But they can also be politically motivated or biased in favour of local people or businesses.

In search of sound strategies

Whether these flaws are real or imaginary, courts seem to need quite some reform efforts. Because trustworthy courts are so crucial for the economy and stability, governments and the likes of the World Bank have spent billions of dollars on giving courts in developing countries better resources and on programmes for judicial reform. But they found it very hard to achieve results beyond a decent court building, a new set of computers or a temporary increase in output.

Court organisations tend to become more centralised and powerful. In the meantime, judges complain about high workloads, command and control styles of management and long internal debates about where to go next. Now most countries have a council for the judiciary, working on recruitment, setting performance standards for courts and initiating projects for reform.

Gradually, the need is growing for a convincing and workable strategy for serving all the needs for adjudication. As we will see, a key dilemma is that courts who improve their procedures are likely to attract more cases, but not the resources to deal with them. Before we go into this any deeper, let us first take a closer look at what happens at a typical court.

2. A typical court

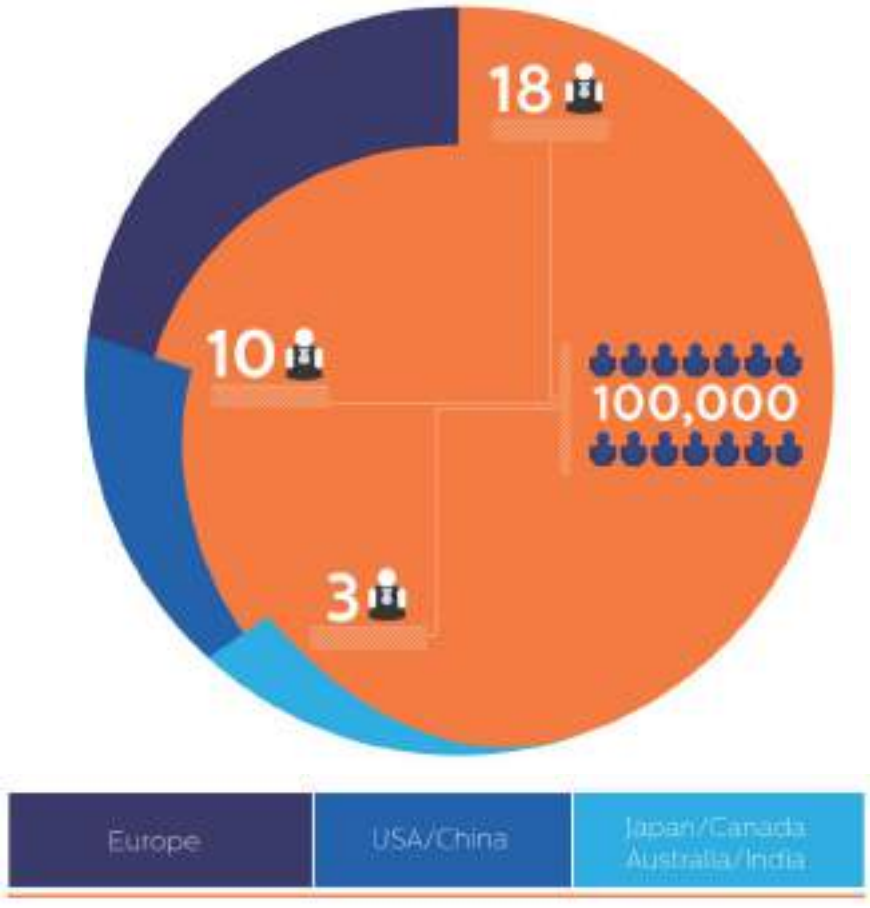
2.1 Countless conflicts and crimes

The European Commission on the Efficiency of Justice (CEPEJ) publishes reports with a wealth of statistics on courts in 43 countries - all members of the Council of Europe. These courts serve 800 million people, living on the crowded island of Malta or deep in rural Siberia, in fair and orderly Norway or in Azerbaijan's war torn areas near the border with Armenia, in crowded and sprawling Istanbul or in Portugal's beach resorts, in London's City or in quiet villages in the Italian Apennines.

18 judges
From each table with data collected by CEPEJ, we took the median value, giving us an idea of a proverbial European court. On average, such a court serves slightly less than 100,000 people. These citizens are served by 18 professional judges. If you think a judge is likely to be an old wise man with a conservative worldview, please reframe and imagine a profession where gender is no longer an issue. Being summoned to appear in a European court room, you are slightly more likely to be tried by a female judge (52%). What has not changed, by the way, is that you are much more likely to be a male yourself.

Outside Europe, the number of professional judges tends to be lower. China and the US have around 10 judges per 100,000 inhabitants, Japan, Canada, Australia and India around three. A World Bank study from the year 1999 comparing ten countries from different continents found an average of seven.

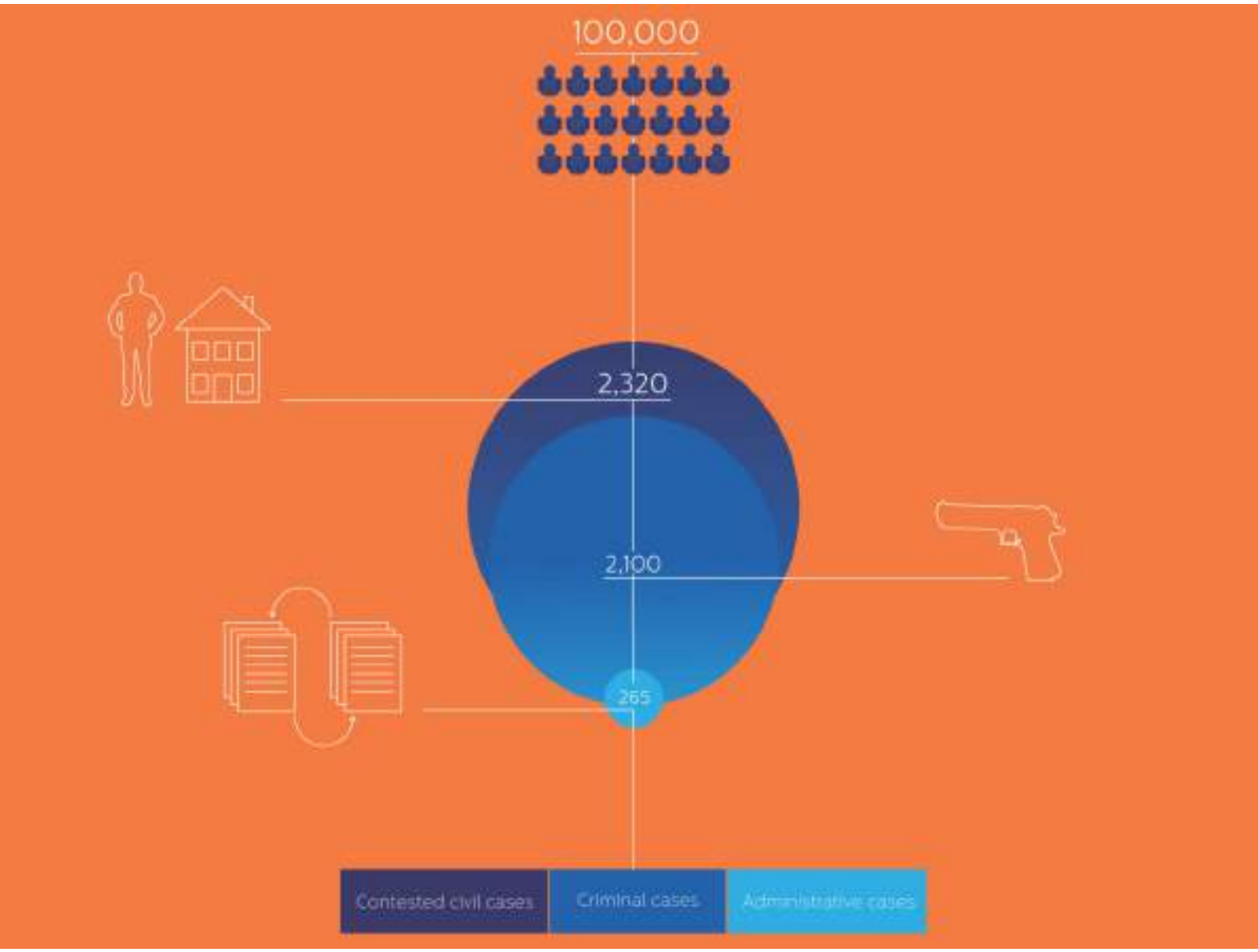
Number of Judges per 100,000 people



Facing a bewildering variety of problems
Each year, 2,320 contested civil cases get filed at the court per 100,000 people. This broad category includes disputes between companies, neighbour issues, complaints about consumer goods or services delivered, divorces, work related disputes, housing or land issues, problems with the media and personal injuries caused by accidents or medical errors.

100,000 people also bring in two or three homicides and 15 robberies; besides thefts, frauds, drug dealings, fights between youth and other crimes - 700 in total. On top of this, the typical court also handles 1,525 offences and 265 administrative matters regarding social security benefits, local governments who do not fix roads or businesses who need a license to operate. A median court may have to deal with registrations of all the companies these 100,000 people set up and with the 1000s of debts they do not pay, eventually leading to dozens of bankruptcies.

Number of Cases per 100,000 people



So each judge has to oversee hundreds of cases each year, decides about assets worth many million Euros and may impose centuries of imprisonment. The variety and complexity of issues entering courts is bewildering. Courts cannot say no to their clients, even if they are overwhelmed by the amount of problems and human suffering in which they have to intervene. Small wonder judges feel overburdened.

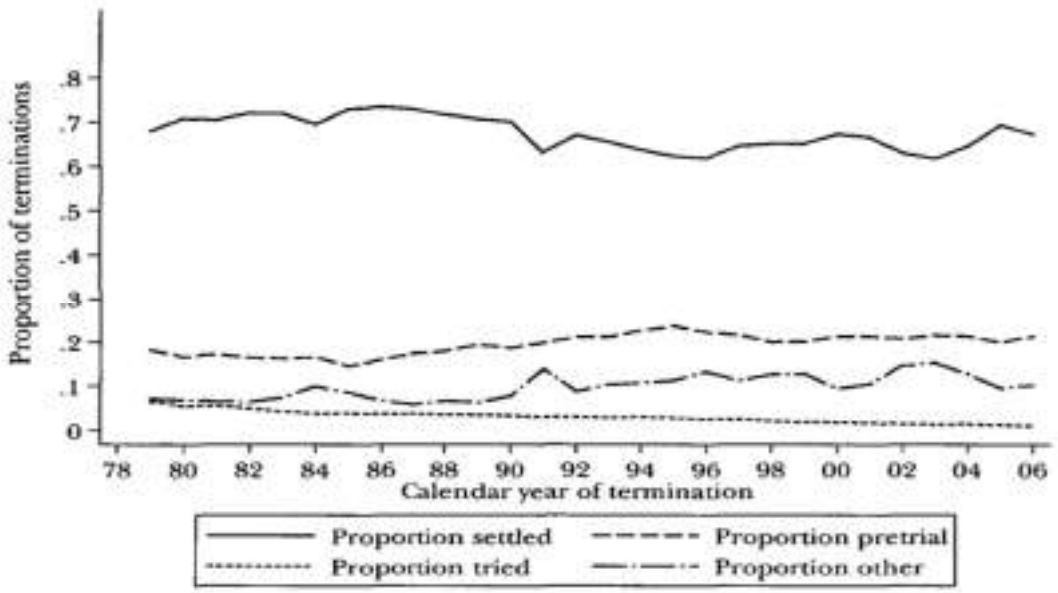
This is even more likely to happen in countries where the number of judges per citizen is lower, or where the caseload is higher. In Africa and the Americas homicide rates tend to be 5 times higher than in Europe and Asia (UNODC data, Wikipedia). In some cities in developing countries, up to 80% of homes are not covered by a formal title, leading to substantial legal insecurity which can easily lead to high numbers of court cases.

2.2 Creating value by being there

Until now we just spoke about files and people actually entering the courthouse. Only a small proportion of disputes between citizens actually comes to court. Legal needs surveys confirm that at least five times as many settle before that, most likely with the help of the private legal sector.

During litigation, the pattern persists. In a literature review of the (few) empirical data about court performance, Kim Clermont of Cornell Law School presented the graph below, showing that of 100 cases filed at US Federal Courts, only one or two go through a full trial. 70% are settled, and around 20% terminate after an interim decision by the court. This may be an artifact of the huge costs of litigation in the US, but in other countries the settlement rate after filing a case tends to be in the order of 50% as well.

The US and the UK are still somewhat special in respect of their emphasis on plea bargaining to settle criminal cases. Although an increasing number of countries introduced plea bargaining during the past 25 years, and in continental Europe at least one third of criminal cases never goes to court because perpetrators and prosecutors agree on an appropriate sanction, this has mostly been applied to minor crimes, and happens under close scrutiny by courts. In the US, an estimated 90% of criminal cases is resolved by plea bargaining. In the UK, the figure is around 70%.



Effective by being there

So overall, before litigation starts and even thereafter, courts produce far more settlements than judgments. This is one of the reasons why the world has so few judges and so many people employed in legal services. According to the CEPEJ data, the 18 judges serving a typical group of 100,000 Europeans are outnumbered by 298 legal advisers (including 98 lawyers admitted to the bar), and matched by eight mediators with an accreditation, by six notaries and by five officials who help to enforce judgments.

Courts are essential to make this happen, however. Bargaining takes place in the shadow of their intervention. Knowing a judge is ready to intervene, and predicting what will be the outcome in court, lawyers and their clients can reach fair settlements. Courts are hugely more effective than we all tend to think by just being there.

Economic value of courts

The added value of the rule of law as administered by well-functioning and independent courts for the economy has always been assumed. But it is difficult to substantiate because of a lack of data on effectiveness of courts. Recent studies focus on decreasing court delay and appeals, and this seems to have positive effects according to a number of recent studies conducted in Russia, Brazil and India.

Faster courts are associated here with higher firm investment and productivity, more bank loans, more access to credit for young companies and fewer breaches of contract. One study even asserts an increase of Pakistan's GDP by 0,5% due to a reform programme dramatically increasing efficiency and causing judges to dispose of a quarter more cases.

2.3 With limited resources

Courts have limited resources to make this happen, but they are not as badly resourced as one might expect. The 18 judges serving 100,000 Europeans have assistance. Between them they share 62 staffers and seven part time judges (who may be lawyers or specialists from other professions). In many countries (examples are the Nordics, Belgium, France, Germany, Switzerland and the UK) they can count on non-judge helpers. These 125 additional adjudicators assist them as magistrates, experts or members of the public who sit together with judges in panels to decide cases.

So a court is a fairly big organisation ran by judges who act as managers, such as the presidents of courts (mostly male, 71%). Judges are also intensively supervised by colleagues. Only 13 of the 18 professional judges decide cases in first instance. The other five are justices in appeal courts and in highest courts, correcting mistakes, giving litigants a second chance and giving guidance on points of law. Judges in higher courts tend to be better paid, and together with the managing positions in each court, they make court organisations rather top-heavy. The career path up to the higher levels of the judiciary is broad and crowded.

Delay and costs
Courts have a reputation for being slow and expensive to use. Do they deserve this? An average litigious case in Europe is decided 287 days after the court was first addressed. More complicated cases, such as trials for murder, tend to take a year, and may drag on for further years in appeals.

In the typical country, customers are not allowed in a court without a lawyer in important categories of cases, adding to the costs of access to justice. Only ten European countries do not have such monopolies of the legal profession. In Jaipur India, and elsewhere, there is much talk - but little evidence - on the size of costs of going to court. The National Centre for State Court did a useful study, however, of the average lawyer fees in common types of cases in the US, ranging from $43,000 in automobile accident cases to $122,000 in medical malpractice cases. Again, the US is possibly an outlier and these are the costs of going through a full trial, so many litigants pay less because the case is terminated earlier. An OECD study found huge differences in trial costs among countries. For a claim with a value of two times GDP per head, trial costs varied from 8% in New Zealand to 31% in Japan.

Category	Median lawyer and expert costs from survey among lawyers in US $
Automobile (accident)	43,000
Premise liability	54,000
Real property	66,000
Employment	88,000
Contract	91,000
Malpractice	122,000

Perhaps courts do not have many incentives to deliver on time and to monitor costs of access to justice? Indeed, according to the CEPEJ report, only seven court systems in Europe have user satisfaction as a performance indicator and only two countries make judges responsible for the costs of judicial proceedings.

Pay OK, job protection excellent
Judges are well paid, but not that good. The median starting salary for a judge is 2.1 times the national average salary in Europe. In Germany and France, being a judge is a very normal job, with starting salaries around the median income in the country. For high status judges, visit the UK, where they earn 4 times as much, but are much less numerous, leaving most of the work to magistrates. Job protection is extremely well. Judges cannot be fired. But increasingly, judges are held accountable. Every year, 1% of European judges have a "day in court" themselves, having to respond to complaints by litigants. 40% of these procedures lead to a disciplinary sanction.

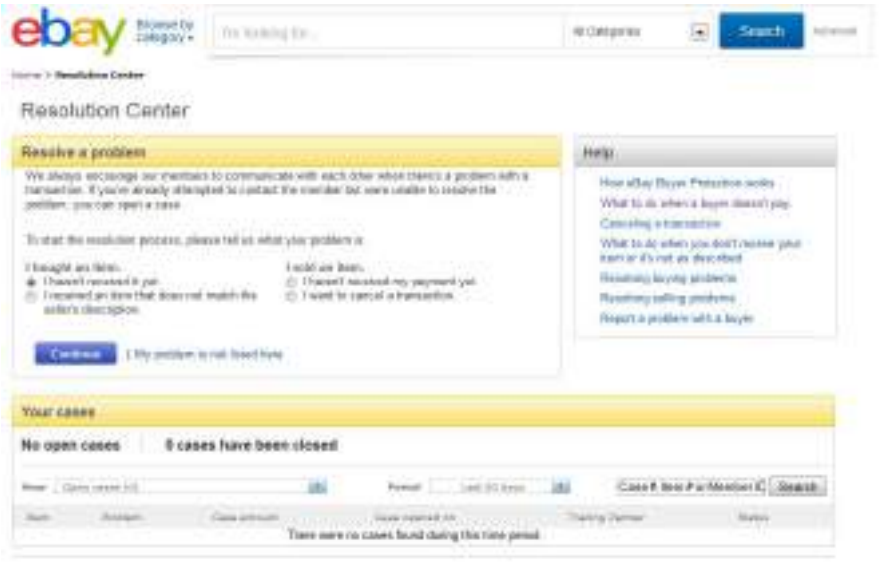
Spending 0,2% of GDP on courts
European countries tend to spend 0,2% of their GDP on their courts. Three quarters of this money goes to salaries and justice expenses, 12% to court buildings and a meagre 3% to IT and e-justice, which may explain why it is still impossible to litigate online before courts in the median European country. Budgets for innovation are nowhere to be seen, but may be hidden in categories such as training (1%) and other expenses.

2.4 Private or public courts?

On 28 May 2013, the Times of London reported that the Ministry of Justice of England and Wales was considering the privatisation of court buildings and staff services. A storm of indignation on Twitter broke out, and was met with a very early morning denial that the government would be engaged in "wholesale privatisation" of courts.

Alternative private and public adjudication systems
Is a court necessarily a government institution? Private courts have always existed, mostly in the form of arbitration of commercial disputes, where two traders opt into a mechanism that provides them with private judges. In the US, quite a few companies now offer their customers and employees arbitration in their sales and employment contracts, walking away from risky and expensive trials. Increasingly, companies integrate their third party dispute resolution systems with their customer service programs.

Arguably the most successful private adjudication system is the one run by eBay. Each year, 60 million disputes between buyers and sellers of goods are settled, mediated or adjudicated through an online process. The penalty for not cooperating is subtle but substantial, beginning with a mention of an unsettled issue which influences the reputation of seller or buyer, and escalating from obligatory negotiation, mediation and adjudication, into enforcement through exclusion from the site.



Governments also created competition for courts. They set up, subsidised or just allowed specialised tribunals to develop: for small claims, for social security issues or for the consequences of accidents at work. For consumer issues, Oxford University's Christopher Hodges counted no less than 700 alternative dispute resolution mechanisms in Europe alone.

Although these mechanisms proliferate, their joined market share is still limited. These competitors of courts seem to have difficulties to scale up beyond a few thousand cases per year.

Research found that, once they have a conflict, most parties fail to agree about whom to address as a third party. This so-called submission problem is the main obstacle for private courts to develop. Only if a defendant has sufficient reason to join the court procedure after a plaintiff files a claim, a private court can deliver its services. The state, with its capacity to enforce judgments without voluntary cooperation, is in a good position to provide these reasons, as is eBay, with the power to influence the reputation of buyers and sellers, or to exclude them from further business. Private or public, an adjudicator has to mobilise the power to exclude people from certain benefits of life, because that will induce cooperation.

3. Justice needs and judges' needs

Courts are easy to criticise for being slow, or out of sync with reality. But who would want to be responsible for running a court? Chief justices and other leading judges are reflective persons, fully aware of their strengths and their challenges. The following is a summary of the issues they mentioned to us during the workshops and interactions that form the basis of this report. These issues indicate where breakthroughs are needed, as well as feasible.

3.1 Coping with vast demand

As we saw, people address courts for an immense variety of issues. These 18 judges, and in some countries less than five, have to be available for everyone of 100,000 persons who fails to settle a conflict or becomes involved in a crime.

Leading judges also signal that the cases entering their dockets have become more complicated. That is likely to be true. Rules proliferate. The costs of writing, printing and doing legal research have dropped dramatically over the past 30 years. So lawyers and their clients can afford to expand on ever more legal issues in ever longer briefs. Police and prosecution collect ever more evidence from DNA, email data and mobile phone use.

...with little control over price and revenues

So judges need more time per case and are always under pressure to hear more cases. Their time is scarce. Unfortunately, no sophisticated mechanism exists for distributing that time. This seems to be the mother of all challenges for courts. Services delivered by companies, and quite some public services, such as water, electricity, public transport, health care, passports or building permits, are priced in order to match demand and supply and to recover costs. Court procedures are not. Judges, supported by parliamentarians, say they want court fees to be low. In their eyes, courts should be affordable for the poor, because they are often the ones who need courts most for protection.

Thus, in most countries, with Germany and Austria as notable exceptions, fees cover up to 30% of the costs of running courts. The price billed for court services tends to flow directly into the state coffers, not to the bank accounts of courts in order to cover expenses.

Court leaders thus have to beg the other state powers for funding, just as any other government agency. Being dependent on only one source of funding is always a problem. For courts, this is even more true, because they also may have a difficult relationship with their paymasters. Occasionally, a court will issue orders that will not be liked by those in power. Moreover, this dependence turns the courts into a cost weighing heavily in times of restrained government budgets.

...or over the services they should offer

Courts do not control the procedures they offer. In most countries, rules of procedure are determined by the legislator, or by the highest court in the country. The products of courts tend to be general purpose procedures for civil or criminal matters, containing many formalities about serving documents and conducting hearings. Often, these procedures are from the 1850s, having had their last update decades ago.

In this setting, it is surprising how well many courts adjust interventions for drug crime to demand in their town or divorce procedures to the latest insights on what works in broken families. One wonders how much innovation would be possible if courts would be freed of these constraints and could design their own procedures.

...leading to justice delayed

Now that courts cannot effectively manage price and product, other mechanisms take over. Because private courts only work under very specific conditions, the only feasible way to regulate demand is to let people wait in line. Sometimes endlessly. Indian courts are notorious for their backlog of around 30 million of cases. Italy has always been a close contender for having the slowest courts.

Suggested and attempted measures for reducing backlogs

- Setting case processing time standards
- Publishing docket data and track records of individual judges
- Listing and labelling old cases for prompt action
- Appointing a backlog reduction team to identify the main causes of delay
- Improved cooperation with external partners (prosecutor office, public defender office, experts, lawyers, clients bringing in many cases).
- Encouraging settlement and plea bargaining, or restricting the right to appeal
- Minimise decisions and written explanation of judgments
- Limit ability for parties to submit new evidence
- Diverting cases to mediation or ADR
- Sporadic 'blitzing' of backlogged cases
- More directive approach, deciding fast on the many preliminary issues
- Employing additional judges to specifically concentrate on writing judgments in old cases and allow regular judges to deal with fresh matters (Malawi, Malaysia)
- Introducing a docket system to help judges better manage their own lists (Australia)

Other countries seem to have "solved" the problem of delays. In the US, publishing the caseload and disposition times of every single judge has been quite effective. In Malaysia, delay is being eradicated now. Selected judges work on cases coming in after a certain date. They have to decide cases in renovated procedures within strict time limits, which are closely monitored. The cases that came in before the ‘big bang’ date are handled in the old way.

Some of these cases die without further action, because there is no more hope of speedy resolution. We were told that this deal has been sweetened by a substantial pay-rise for judges, who saw this as one of the few opportunities for a more appropriate remuneration.

Success, however, is often followed by a relapse. Many of the measures attempted (see Box) are not sustainable, because they do not address the fundamental problem that a faster procedure will, other things being equal, attract more cases.

...or formal procedures

Fast courts may thus be 'regulating demand' in other, more subtle and implicit ways. Judges can allow procedures to grow more complex by giving in to new demands of lawyers or by requiring additional technical expertise. This is likely to raise legal fees and thus the price of access to justice, lowering the number of clients that can afford a court procedure.

No court willfully lets lawyers take over the management of cases in order to relax the pressure. But from the judge's perspective, it is not always attractive to manage cases actively. Judges who do so can expect their court's caseload to grow. They may also be opposed by a powerful lobby of lawyers who want to stay in charge of litigation (and to charge their clients for it). You have to be brave to hold out against your colleagues and the vociferous legal profession. And of course, lawyers are better placed to emphasise the issues most important to their clients than a judge.

Trapped in low access states

The sad truth is that many judges feel trapped. Their procedures are criticised for being slow, formal or costly to use. They feel frustrated that they cannot serve the many people in serious trouble and need of attention. Apparently there is no way out, because becoming more accessible means lowering the price of going to court, which will attract more work, for which most courts will not be compensated.

Clients are trapped as well. Only a small proportion can afford litigation. For lower income groups in developing countries, access to court justice tends to be unavailable. The richest countries can afford subsidised legal aid for these people, but when economic growth stagnates, the funding for this is threatened. The middle class can perhaps use going to court as a credible threat. But for many people from this group, litigation is simply too expensive and they do not qualify for subsidised legal aid either. In the US, arguably the country where litigation is most complex and exhausting, the effect is most dramatic. Less than 2% of cases filed go to trial. The rest is settled, plea-bargained or dropped. Nobody knows how fair the outcomes of the remaining 98% of cases are. Economists studying bargaining, settlement and litigation fear that the party with the most credible threat to go to court prevails. Usually, this is the richer one of the two parties.

3.2 How to put people first

Courts have responded to the state of low access, however, by developing methods that strengthen the capabilities of citizens to broker solutions themselves. A major trend is courts now actively promoting settlement during court hearings. Mediation and conciliation are being integrated in court procedures in China, Thailand, India and Singapore, following trends in Europe and the Americas.

... problem solving
Problem-solving justice is slowly replacing mainstream criminal trials, with the Center for Court Innovation in New York as a major knowledge hub. In the US, there are now an estimated 2,500 drug courts, helping 120,000 drug addicted non-violent perpetrators into a disciplined treatment programme, supervised by a judge. The early successes prompted the development of specialised mental health courts, youth courts, reentry courts, community courts, sex offence courts and domestic violence courts.

... closer to needs and emotions
In Thailand, courts are now supported by social workers who deal with issues of juvenile justice and drug-related crimes. In Singapore, a social service centre will be set up to support the family court. Generally, judges try to relate more closely with problems as experienced by people. They talk with the people in the courtroom, analysing what happened, asking them what they want to achieve and discussing options for solutions. Rather than taking the decisions for them, they give guidance on what the law suggests as fair outcomes. The head of human resources of a major Latin American court confided to us when we asked her about a major ambition. Without any hesitation, she answered: "humanising judges."

...linking to ADR and informal justice
In developing countries, bringing courts closer to people and their problems includes building links to informal justice in rural areas. Leaders in rule of law promotion such as IDLO and UNDP published recent studies supporting this.

How to integrate these ways to dispense justice with court adjudication is still a challenge for court leaders. Are they competitors, alternatives serving different customer groups, another part of one integral supply chain, or more like lower courts that have to be supervised by the official ones?

...supporting self-represented litigants
The number of people that make use of a constitutional right to bring their legal problem to court themselves is ever increasing. Some courts, especially in the UK, US and Canada, show how these "self-represented" litigants can be accommodated. These courts now provide practical manuals and checklists, support through help desks and judges that are especially trained to lead cases with self-represented litigants.

Helping people who have no lawyer find a way through complex procedures and their requirements leads to new challenges for judges. Can they expect the litigants to learn how a court operates, or do they need to change the procedures so that they are more easy to navigate for those who use a court for the first time? How can they be there for these people and uphold their neutrality?

3.3 Neutrality and accountability

"They hold up a mirror [to us] ... and sometimes we don't like what we see," commented one judge, reflecting on a court monitoring programme. Increasingly, courts are being held to account, and make themselves more accountable. How to do this, in the light of ever more intrusive media, but also of judges and citizens demanding respect for their privacy, is a major source of concern as well. Here are some of the dilemmas.

...in the face of power
Courts are expected to be impeccably neutral and independent, even when they have to decide political issues. In times of transition and when other state institutions are weak, courts have to determine whether the process for reviewing the constitution is acceptable or whether the president is allowed a third term in office.

Unfortunately, judges are rather easy targets for regimes with the intention to stay in power at all costs. History suggests that they cannot be particularly resilient in the face of pressure from these forces. Judges who have the courage to hold out are exceptional and can easily overplay their hand. Our sources indicate that this is a continuing challenge for judges working in countries with a regime that tends to the authoritarian.

...or the needs of the family

Employees of courts seem all too human when tempted with material gain for their families. There is no indication that courts are far less corruptible than other public officers in their country. So yes, corruption is a challenge that many court leaders have to acknowledge.

Accountability is an easy part of the answer. Written judgments are seen as one of the safeguards against corruption. But this comes at a cost, especially for lower courts with heavy caseloads.

... appeal and supreme court supervision

When we think of accountability of courts, the silhouette of a man from the age of the Enlightenment appears. Almost three centuries ago, Charles de Montesquieu - thinking ahead of his time - formulated the famous principle of the separation of powers. He taught us that the executive, legislature and judiciary should be separate but independent from one another to ensure balance. For the courts, it means that they do not want to be accountable to the legislator or the executive. They are accountable, but only towards the law as interpreted by their peers in appeal and supreme courts, which is a bit awkward, but better than being a civil servant answerable to his ministers.

International courts are more distant than appeal courts who monitor their colleagues in lower courts, and this may be an explanation for their success as supervisors of national courts. The European Court of Human Rights and the Inter-American Court of Human Rights provide mechanisms to challenge the actions or inactions of national courts and other public authorities if human rights are at stake, including the right to a fair trial.

The problem is, however, that all these higher courts have a limited view of what happens at lower courts. They look at judgments from lower courts, and at elements of the procedure that are observable from the case file. Appellate courts did not yet develop ways to systematically monitor important deliverables such as accessible justice, judicial efficiency, plain language understandable for all participants, fair settlements, speed or respectful conduct of judges during hearings. They also do not tend to assess whether a lower court's decision presents an effective solution to the problem experienced by the parties, or whether an intervention by a criminal court is in conformity with the evidence on how to reduce recidivism, promote reintegration or give victims appropriate vindication. They will only include use these criteria for monitoring lower courts if the law tells them to do so.

... public hearings

Lower courts have found new ways to communicate with citizens, creating new lines of accountability.
An important starting point for this remains the general principle that courts work in the open, which was taken so literally as to require open doors in Jaipur, India. Article 6 of the European Convention on Human Rights, as well as Article 10 of the Universal Declaration of Human Rights, stipulate that everyone is entitled to a fair and public hearing. Furthermore, Article 6 requires that judgments are pronounced publicly and are available for the press and public unless there are reasons not to do so. Open trials enable accountability, so courts everywhere in the world are developing guidelines for videoing and reporting court hearings.

... new ways to communicate with citizens

Media and citizens appearing in courts ask questions, request information, require improvements. They want to ensure that their justice needs are met in the most fair and cost-efficient way. Citizens want transparency and accountability in every part of the public domain. These expectations extend to the courts. It is unsurprising that most courts now utilise websites to convey information on hearings, judgments, and the general operation of procedures.

Furthermore, courts are increasingly turning to social media, connecting to users of justice on YouTube, Facebook, LinkedIn and Google +. In the Netherlands, quite a few judges are participating on Twitter, referring to useful information and engaging with their followers in a similar way as other professionals. The week from 16-23 August 2013 saw 1,500 tweets and retweets with the hashtag #court. These tweets effectively reached the timelines of 3,2 million twitter users.

... citizens monitoring court hearings

Court monitoring schemes become popular in many countries around the world, from Cambodia to the US. Here, lay people randomly visit court hearings and observe the extent to which procedural and substantive rules are observed. In Georgia, similar observations are carried out by staff members of NGOs involved in judicial reform and it will not be long before we see courtroom monitoring apps for smart phones appear on the market.

... publishing performance data

Courts are also expected to collect and publish reliable data on their activities. Time to adjudication; case clearance; age of pending caseload and many other indicators are turning into standards for measuring, assessing and comparing the performance of courts. The following table gives an impression of what courts nowadays want to be accountable for. It is a standard for performance monitoring developed by the US National Center of State Courts.

CourTools Performance Measures

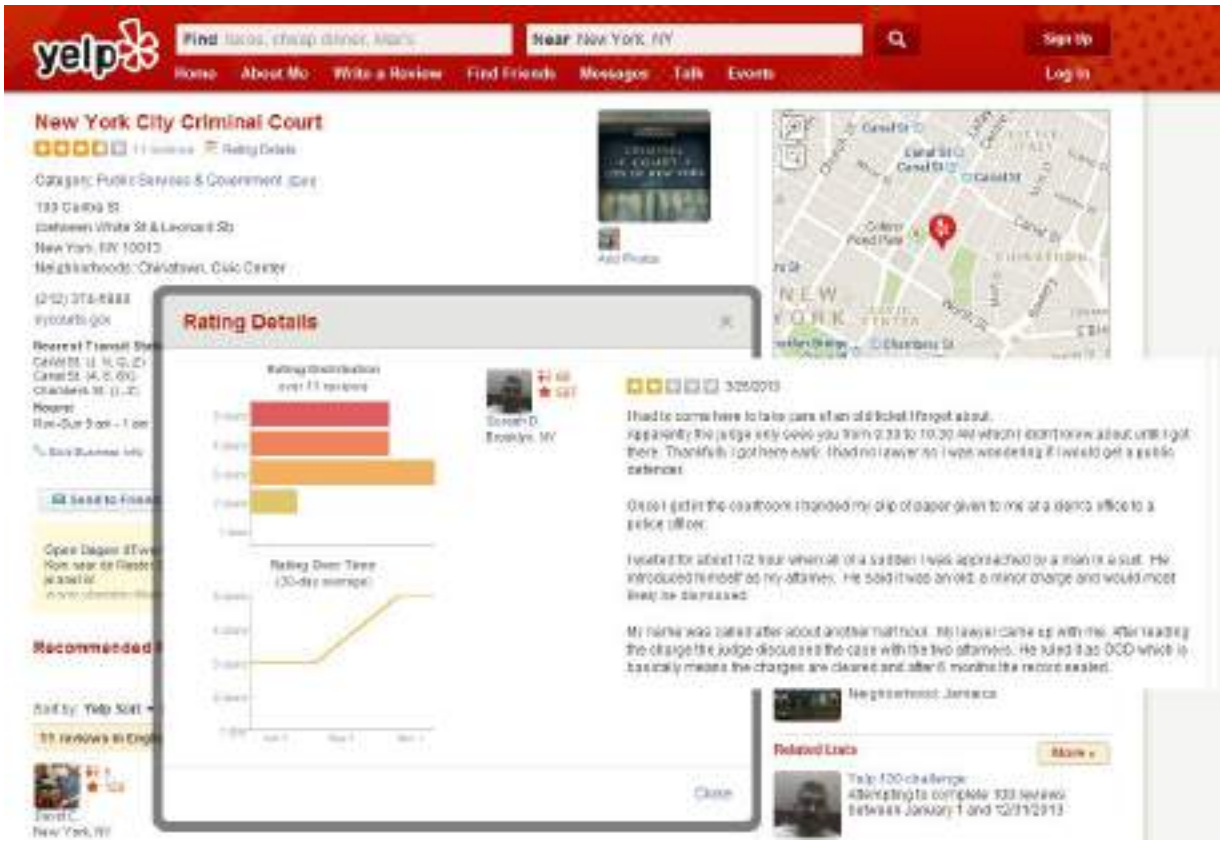
1. Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect.
2. The number of outgoing cases as a percentage of the number of incoming cases
3. The age of the active cases pending before the court, measured as the number of days from filing until the time of measurement.
4. The percentage of cases disposed or otherwise resolved within established time frames.
5. The number of times cases disposed by trial are scheduled for trial.
6. The percentage of files that can be retrieved within established time standards and that meet established standards for completeness and accuracy of contents.
7. Payments collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases
8. Court employee satisfaction
9. Effective use of jurors
10. The average cost of processing a single case, by case type

Source: CourTools, the performance measurement system promoted by the National Centre for State Courts

... user reviews of courts

Web and mobile services provide their users an opportunity to review courts, just as restaurants or holiday homes. Through Yelp, the New York City Criminal Court has been scored with 3,5 out of 5 (based on 9 reviews, until now). One of the reviewers summarises her overall positive experience with the court as follows, but also illustrates the difficulties of reviewing a service with which a person has little experience:

> *"I can't comment on the judge and DA since they are bound to follow the law. I can comment about the bad tempered police officer overseeing the courtroom spectator area. He won't let people take notes (no rationale given and I am not aware of any legal basis for that)."*



Data mining

Databases such as Westlaw, Lexis-Nexis or EUR-Lex provide access (not always free) to petabytes of case law. This information is currently predominantly used by legal professionals. Lay people have limited scope to assess from such data whether courts delivered justice or not. With development of technologies, however, it becomes more feasible to sift through large amounts of data for knowledge. Innovative companies are already filling the void. A company named Juristat promises that it can predict on the basis of available data from the outset of a case the likelihood of judge's decision, and this can easily develop into new ways to monitor courts.

3.4 The moral high ground

... understanding the Sharia tensions
Court leaders in Thailand, Malaysia and Indonesia are worried about attempts to introduce Sharia, whereas Egyptian law always has incorporated elements of Sharia in its secular system, in particular for family law. This tension can have many facets, perhaps as many as there are opinions about Sharia.

Some call for Sharia as a protest against Western legal values in general, or pinpoint values that do not recognise a special place for women and men in their relationship. In parts of Upper-Egypt and Bangladesh, Sharia rules for dividing property among brothers and sisters are seen as more considerate than alternative indigenous norms which show little respect for women's rights. There are many interpretations of Sharia, so scholars point out that religion and courts can be powerful allies against injustice. Sharia law may also stand for a threat of proportionate, and sometimes harsh punishment, however. Lawyers may not be so fond of Sharia law, because it has no place for attorneys in procedures and uses rather straightforward procedures.

... coping with revenge
A recent book by law professor Thane Rosenbaum offers indications the Sharia tension is part of a much broader issue for courts. In 'Payback: the case for revenge,' he argues that the US legal system represses feelings of vengeance and classifies them as uncivilised and immoral, replacing them with the technocratic order and code of courtroom justice.

Instead of leaving the prosecution to "the people" in general, a just legal system should stand by its victims, giving them full voice and participation opportunities as co-prosecutors, at every stage of the trial, including the right to appeal against a sentence that does not reflect 'just deserts.' He points to a long cultural and genetic history of applying the law of talion faithfully and honourably. The victim thus can be empowered, but is not obtaining all power, because the judge oversees whether the victim's proposed remedy is just.

... tuning in with different moral emotions
Recent research into the psychology of justice suggests that this cannot be dismissed as a return to pre-enlightenment values and practices. Jonathan Haidt, in The Righteous Mind, brings together evidence for six moral foundations. These seem to have emerged from the need to adapt to specific challenges of living together in groups, and lead to intuitive moral judgments which we try to rationalise afterwards. These intuitions are very difficult to change by rational argument, and reflected in various combinations in the cultural settings in which people live.

Haidt finds that members of Western, educated, industrialised, rich and democratic (WEIRD) communities are an outlier. They mostly support the morality of care/harm and liberty/oppression, whereas societies seen as more conservative connect to a more balanced mix of the six moral foundations. The following table summarises his findings, and illustrates the deeply entrenched emotions that judges will encounter in the courtroom, and the virtues that they will be asked to promote by people from different backgrounds.

	Care/harm	Liberty/ oppression	Fairness/ cheating	Loyalty/ betrayal	Authority/ subversion	Sanctity/ degradation
Adaptive challenge	Protect and care for children	Having access to food and mates in small groups	Reaping rewards of cooperation without getting exploited by free-riders	Form coherent coalitions	Forge beneficial relationship in hierarchies	Avoid contaminants
Original triggers	Suffering, distress or neediness expressed by one's child	Attempted domination, bullies, tyrants	Protect community from cheaters, free-riders	Threat or challenge to group	Signs of dominance and submssion	Waste, diseased people
Current triggers	Baby seals, cute cartoon characters	Restraints on liberty, government; accumulation of wealth	Abuse of social security	Sports teams, nations	Bosses, respected professionals	Taboo ideas
Characteristic emotions	Compassion	Righteous anger, reactance	Feeling cheated	Group pride, rage at traitors	Respect, fear	Disgust
Relevant virtues	Caring, kindness	Social justice, liberty	Proportionality, reciprocity, punishment, just deserts	Loyalty, patriotism self-sacrifice	Obedience, deference	Temperance, chastity, piety, cleanliness

Courts indeed have to cope with the full range of moral emotions, whenever they decide about accidents, divorce or murder. This can be an enormous challenge for a person trained in law and human rights. How should a judge react to people who are genuinely disgusted by gay love, really feel obedience is due to fathers, sympathise with honour killing or feel deeply that corporal punishment is due for crimes wilfully committed?

Connecting to different moral perspectives

In the face of such strong emotions, a judge cannot rely on his own moral intuitions. She needs to work with feelings that pull her in completely different directions. In the meantime, she needs to think about an effective positioning as an authority in this particular community. Building on this, she must decide and be able to explain her decision somehow, perhaps even in the light of all six innate moral foundations.

During the 90s and the following decade, courts in Western countries amazed many liberal commentators by becoming more tough on crime, going along with the trend to ask for more severe punishment, which contradicts all research showing that sending people to prison make us all worse off in the long run. Many judges felt they had no alternative, when confronted with the moral outrage over unclean and insecure city centres, populated by strangers who could not care less about their neighbours and seemingly did not obey the norms of the community. Likewise, it is perhaps good that courts recognise the intuitions that are at the basis of anti-abortion norms if they decide to protect the rights of women. They might have done a better job in protecting religious symbols and people's reputation against extreme versions of free speech, but at least many judges now tend to see the challenge, knowing that they have to work hard to stay close to the moral values of every group if they want to keep their position as a binding force in society.

The Architecture of Justice

The future of courts is about innovating procedures, using information technology and shifting roles of judges. But what about the brick and mortar of justice? What can future courts look like in terms of their designs?

In the run up to the 2013 Innovating Justice Forum, HiiL teamed up with Platform GRAS, a platform for architecture and urban design based in Groningen in the Netherlands. The Creative Industries Fund NL supported with funding.

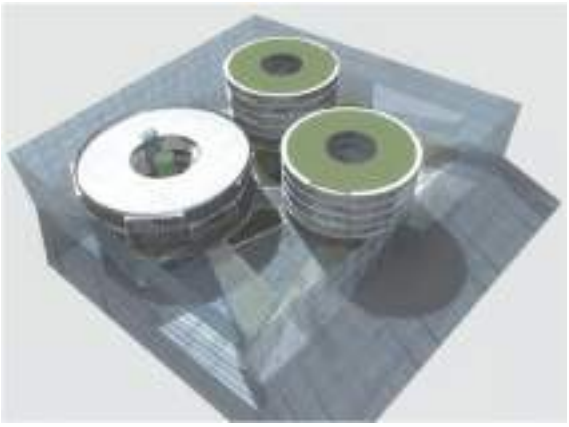
An unlikely coalition of experts from the justice field, architects, interior architects, graphic designers and spatial designers researched courts, the processes that take place there and the people that work in the court buildings. Three teams developed designs for the courts of the future. Each team focused on a different court strategy. *See page 33, 49, 68*

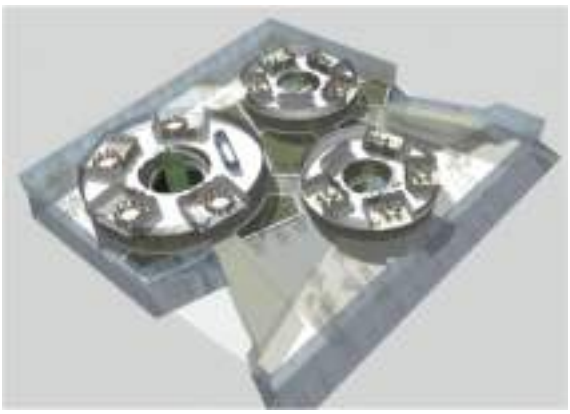
Team 1: The Architecture of Justice: *Designs for a problem-solving court*

Members: Melvin Kaersenhout (spacial designer) / Elsbeth Ronner (Lilith Ronner Van Hooijdonk) Judith Schotanus (Studio Schotanus) / Laura Vellinga (Lavelli) / Laurens Mol (IND) / Ashley Bennett (HiiL)

A problem-solving court does not only focus on the legal problem, but also on the problem behind it. Instead of the abstract legal system, the parties in the conflict are central. A problem-solving process is public, led by a judge and not without obligations.

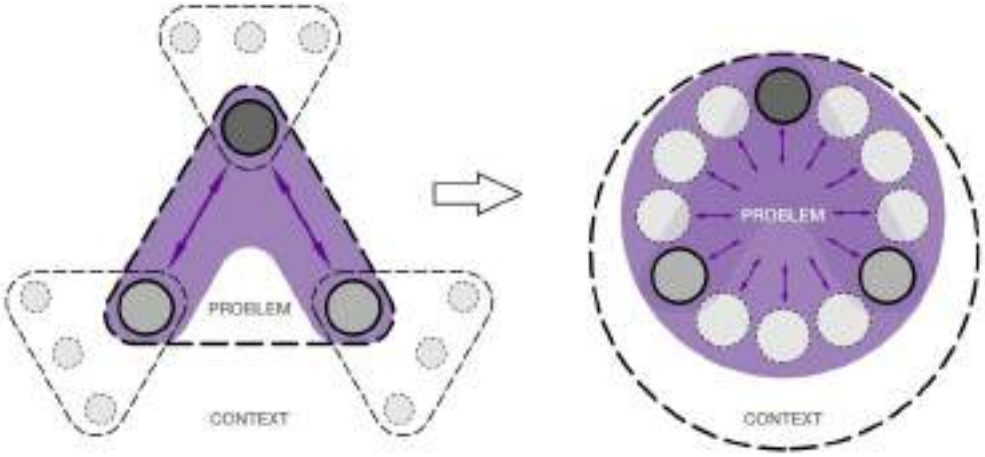
Our team designed a courthouse in The Hague, The Netherlands, on the plot of the Ministry of Foreign Affairs. We propose a large greenhouse, symbolizing its public nature. The building is structured by voids with hanging gardens. The identity of the building is formal in a friendly way. Since parties are more equal in the problem solving process, there will be no separate circulation system for judges and the office buildings will be disconnected from the court building itself. By this transformation the courthouse is smaller, but its identity is much stronger.





The courtroom and public space are designed to accommodate the dialogue. The tone in the courtroom is influenced by what happens in the hallways. This public space is informal and stimulates social interaction. Most general public space is on street level, its use is visible from outside. It contains a coffee corner and canteen. The courtrooms are clustered in three cylinders in the upper layers. Around the courtrooms there will be comfortable half open spaces and narrow bays to have some privacy while waiting for the trial to begin or to discuss the process after leaving the courtroom.

The setup of the courtroom is a circle to facilitate the dialogue. People can look at each other but can also look away. Our starting point for the design is that the form and size of the room influences the atmosphere and can be used as a psychological tool. The judge is able to adjust the room to improve the communication between parties according to the specific needs of the case. The room can be bigger and parties can sit further apart when there is tension, but the judge can make the room smaller with a curtain to put pressure on the parties.



Instead of the abstract legal system, the parties in the conflict, being the defendant and plaintiff or victim, are central. Parties do not only talk to the judge, they enter into a dialogue with each other. Also, the judge can ask experts to participate in the process.

4. Delivering outcomes through excellent procedures

These needs are complex and manifold. Surely, it is challenging for courts to cater to them. But in some way, their task is straightforward. In March 2013, a consortium of court leaders and stakeholders from the US, Europe, Australia, Singapore and the World Bank published the 2nd edition of the International Framework for Court Excellence. In this document, they argue for courts developing sound management practices and state of the art resources, aimed at delivering fair, efficient and effective procedures.

This focus on procedures matches the advice of experts in the field. Linn Hammergren, after many years of studying judicial reform in Latin America and elsewhere, advises a framework organised around outputs of courts, such as resolving conflicts and dealing with criminal complaints, either directly or by mechanisms operating in the shadow of the law, providing a check on government bodies to observe the law and being an arbiter between government agencies, as well as strengthening the normative framework.

According to the Framework for Court Excellence, procedures should fit client needs, attract a high level of user satisfaction, be affordable and accessible and (thus) instill public trust and confidence. Just as great car companies sell great cars, great courts distinguish themselves by delivering excellent procedures. Courts let people file claims, present their case, have a dialogue during a court hearing and move towards a final decision that works. The way they organise this interaction is key to their success. Somehow, they have to make moves from poor, mediocre or good procedures to really excellent ones; free from delay, corruption and unnecessary costs; full of solutions for the problems presented; loaded with recognition for each different moral perspective.

Innovation in the justice sector is by no means easy, however, because it takes place in a situation with many restraints. Based on the experiences of successful innovators and on the literature on public sector innovation, we formulated 6 guidelines for assessing innovation processes.

Successful innovation in the justice sector	
1. Focus on citizens needs	Dimensions of justice, who are users, what are their frequent and urgent problems, involve users and peers
2. Release the mind	Legal thinking on hold, diversity of perspectives and knowledge, capacity for creative thinking, time, space and incubation
3. Shape solutions	Working backwards from outcome goals, selecting fruitful ideas against terms of reference, modelling/prototyping, specialisation, avoid early standardisation
4. Reframe the constitution	Form a new partnership, offering benefits to participants, form a vision, cope with rules and regulation
5. Judging the business	Early funding, a value proposition for users, client relationships, channels of delivery, revenue streams, cost structure, key activities, key resources
6. Getting it done	Metrics for success, management by results, steering change, risk management, acknowledging different points of view

These six guidelines can be compared to three dominant modes of improving court procedures that we will discuss next.

4.1 Reform of rules of procedure

When lawyers talk about improving procedures, they think about committees or legislative bodies deciding on changes in the rules of procedure. The UK had its Woolf reforms in 1998, the US their heyday of civil procedural reform in the 1930s, Switzerland federalised rules of civil procedure in 2010 and China worked on criminal procedure during the 1990s and 2000s.

Although there is no systematic review of procedural reform efforts, and few of these have been evaluated at all, experts are not impressed by the track record of this type of procedural reform. Changes in rule systems do not seem to lead to faster litigation, lower costs of access or higher quality judgments.

Why is that? Rules of procedure tend to tell judges and lawyers when to file a claim, how to respond and what documents to provide as evidence. They provide structure and predictability. But in a setting of controversy, they also become tools for hurting the other party, leading to delay and escalation. At best, the rules provide clear incentives on judges to do what is needed, providing a standard against which their work is evaluated.

Innovation by rulemaking?

Innovating by setting new rules of procedure does not match the state of the art in the innovation literature. Innovation usually starts by taking a careful look at needs, and then releasing the mind, become free from legal thinking about what is presently done and allowed. Innovators warn against early standardisation, and first move to the phases of product development, before entering the phase of regulation.

If procedures are fixed by rules early on, this suggests there is only one way judges can deliver a good procedure. Many different solutions have to be considered, working from terms of reference, rather than prescriptive rules. Rules give little guidance on how to build a web interface that can assist litigants and judges to exchange information or on the optimal design of an appeals system. It is a bit like telling designers of a new car that they should build cars with wheels, an engine and a roof.

Highest courts have known this all along. Usually, they leave the lower courts a great deal of discretion in managing their procedures. This enables judges to find out in each individual case what works. But this also entails risks for the quality of adjudication. Individual judges may not have access to best practices or to research about what works best. There is thus a need for guidance, and a framework, for developing improved procedures, as civil procedure scholar Robert Bone has argued.

A healthy legal framework for innovation of procedures

Our argument is thus not that innovation should take place in a legal vacuum, Innovation in courts resembles innovation in the healthcare sector. It is about finding new remedies that work better to solve conflicts and to restore the damage done by crime. Clients of both the health care and the justice sector want state of the art treatments, but do not want to be exposed to the risks of experiments. The healthcare sector is regulated in such a way that new treatments have to be tested in the laboratory, trialled with patients and approved by the authorities, first for being allowed on the market, and then for being fit for coverage under health care plans.

A similar system could perhaps work for the regulation of court procedures. Principles of procedural justice and effectiveness criteria could provide a legal framework for specialised procedures and other interventions. These can then be developed and tested by courts and other providers, under a regime allowing for controlled and limited trials. Before scaling up, the procedures can be approved by a centralised authority. If necessary, the entities providing such procedures can also be licensed, in the same way as hospitals need a license to operate in the healthcare sector. Such a regulatory system, advocated by professor Gillian Hadfield of the University of Southern California, would also stimulate innovation by allowing non-lawyers to participate in designing new procedures, fulfilling the need for different perspectives and diversity of knowledge.

4.2 Bottom up innovation by judges

A second route to innovation is that of judges who just start doing new things. Australian judges developed effective ways to hear experts, a procedure called 'hot tubbing' that is now used in many other jurisdictions. Judges from Peru go to isolated communities in order to assist people with problems. In quite a few Latin American countries judicial facilitators are very effective local helpers in rural communities working under the supervision of a judge. Judges in New York once started to experiment with the new ways to deal with drug crime, noticing the needs of drug users and the communities in which they live. They developed the product line that is now known as problem solving courts. In Germany and the Netherlands, judges switched from civil procedure based on written statements towards processes in which the hearing is the focal point. A group of Dutch judges now promotes and champions a new problem-solving procedure for neighbour disputes that is online and brings the judge into the homes and gardens of the disputants.

Bringing in outside perspectives
In these instances, judges succeeded in releasing their minds. They brought in outside perspectives, often cooperating closely with innovators from elsewhere. Mediation has been developed independently as an alternative to courts, then became an extra offering on the menu (court-annexed mediation) and is now increasingly integrated in court procedures as judicial mediation or as an additional set of skills used by judges during hearings geared at settlement.

Our website innovatingjustice.com shows a number of innovative ideas that are eager to be next. An app on which users can rate judges on their performance may not be the first one in line. But what about a service offering courts a fully online procedural environment, payable with a small fee for every additional service rendered? That really frees the court from the terrible risks involved in running a major IT project in house. Or a model for a family justice procedure dealing with divorce, that can be used throughout Europe? Or the specialised tools for making evidence more reliable and plea bargaining more fair? Most likely, it is combinations of such innovations that will lead towards truly excellent procedures.

Bottom up innovation requires sound partnerships and business models
One bottleneck for this type of bottom up innovation is apparent, however. After initial enthusiasm and successful pilots, few such innovations succeed in scaling up. They probably lack at least one of two essential elements of a successful innovation: an ongoing partnership supporting them and a sound business model recovering all costs from revenues. A problem-solving mental health court procedure, for instance, will fail if judges have no incentives to use this procedure, if psychiatrists have no proper place in it, or if clients and their lawyers do not get some of the benefits. If extra work needs to be done, by any of the participants, a sound model for recovering these costs is needed.

4.3 Integrated services for specific problems

Great cars result from continuous innovation efforts, forever discovering new needs of customers and catering to them with ABS, silent engines and navigating tools. Innovation is not left to chance, but a core part of company strategy. It takes place in close cooperation with suppliers and matching services. No electronic car without loading stations, no navigation without reliable maps and no ABS without specialised suppliers of anti-lock braking systems, such as the German company Robert Bosch.

Is such a concerted and dedicated innovation effort feasible in the area of court procedures? In Scotland, a holistic approach to justice sector reform is now being tried. Courts, prosecution, legal aid board and Directorate of Justice (the Scottish government has directorates, not ministries) have developed an overall strategy, explicitly supported by evidence.

Developing new procedures and setting up specialised courts for areas such as personal injury is key to this strategy, but it is left to the courts how they organise their procedures through court rules.
Such a framework explicitly encourages judges to take full responsibility for the performance of courts. It enables them to work from terms of reference, developing prototypes, and continuously improving the procedure in a series of versions. Rules are not used as prescriptions how to do it, but as enablers.

Specialised procedures deliver better value
Cooperation in the supply chain is only possible when courts specialise, and that is certainly a trend in court innovation. Most experts on judicial reform support this trend, agreeing that specialised procedures work better than general civil or criminal procedures. Dutch research confirmed that specialised procedures for patent conflicts, business conflicts, agricultural land lease and competition law are much appreciated by stakeholders. Dutch corporations would like to see more specialisation in the courts. An OECD study found that specialisation at commercial courts is related to shorter trial length.

For lawyers working outside the judiciary this is no surprise. A division of labour diminishes costs, improves quality and specialised judges learn faster what the stakeholders need, get more immediate feedback, and are more likely to take measures in order to cater to these needs.

Hansford found evidence that specialisation diminishes the probability of reversal by the US Supreme Court. Judges do specialise spontaneously, if they have the freedom to do that. Edward Cheng discovered that judges tend to choose a number of topics on which they decide 3 to 10 times as often as other judges, whilst avoiding other topics. He also gathered data about the risks of specialisation (influencing by interest groups, tunnel vision) and found a number of measures to deal with those risks effectively.

Setting up a specialised procedure, though, is only worth the effort and resources, if a sufficient volume of cases can be expected. The benefits of specialisation are greatest when they are combined with achieving economies of scale. For small jurisdictions, this means that they may have to cooperate with other states or countries, and set up a combined specialised court.

Innovating procedures against clear goals and terms of reference
Judges in specialised employment procedures, for instance, learn what employees need when they are being fired and what entrepreneurs want who are reorganising their business. For such a dedicated procedure, it is rather more easy to develop forms that take in the most relevant information from personnel records into court files. Court personnel, or an online interface, can ask the parties for views on recurring issues such as new job options within the company or a severance payment. Hearings can be more or less standardised to deal with these issues and to consider the settlement options, guided by schedules for severance pay and notice periods.

This may be a preferred way to innovate towards excellent procedures. It requires a particular mindset and a dedicated R&D effort, beginning with identifying user needs, opening up to a diversity of ideas and technologies and then moving towards implementation, measuring impact and rapid releases of new versions.

Usually, the courts will have to build new partnerships around these procedures. Specialised courts now increasingly reach out to stakeholders. Labour courts talk to unions and associations of employers, for instance. The Scottish strategy mentioned above encourages the development of procedures for everyday problems that can be navigated by most users without a lawyer. In order to compensate for this, it will be necessary to find new partners who can deliver information and advice, such as web-based services offered by law firms, citizen advice bureaux or legal expenses insurers.

Possible Terms of Reference for effective labour court procedures

Employment courts mostly deal with cases in which the contract is terminated by the employer. Usually, the employee has some kind of protection against unreasonable or discriminatory termination. A sum paid to the employee is often part of the solution. Formulas for severance pay are indispensable for this. Researchers from the World Bank found them in 180 countries. We developed a list of further requirements for these procedures from four perspectives, that of the employer, the employee, the judge and the ministry responsible for a well functioning labour market.

Employers terms of reference
“Employers opt out of the system massively. They tend to offer temporary contracts or hire people as independent contractors.”

- Sufficient incentives for employees to find a new job should be part of any dismissal process. Employers surely do not want jackpot severance plans.
- Time is of the essence. Once an employer decides to dismiss an employee, the employment contract and relationship should be terminated quickly for economic reasons, but also to avoid a hostile work environment.
- If the costs for speediness are higher, employers do not seem to mind. Different packages (faster procedures, less or more fact finding) help to meet different needs.
- Employers want to have a clear, understandable and predictable decision for both themselves and the employee, increasing the employer's acceptance and preventing legal trench warfare.
- Linked to that, employers want a procedure to give a decision that is final so they can quickly move on.
- Optimise incentives to invest in company specific skills and to remain "employable" in general.
- Employers want voice, just like any other person facing a legal procedure. A procedure should have at least one hearing where the employer can explain their reasoning for making a decision.
- Both employers and employees want an independent and objective third party involved in the proceedings in order to preserve fairness.
- Small employers would like to be protected against a vexatious litigant.

Needs of employees
"Security of livelihoods, no unexpected shocks"

- Employees need security, another person not being able to change their life suddenly and with a big impact. At the very least an employer should have accountability and a share of the responsibility for the consequences of cooperation not being sustainable.
- Employees would like more clarity up front about what the decision for dismissal is based upon, so they can accept the situation and get on with their lives.
- Employees may want longer notice periods before termination, so they have more time to find a new job.
- A stimulating work environment, without colleagues who are negative or do not contribute to well being at the company.

- Employees may want support from the employer in the form of reference letters, job search assistance, referrals, etc, which will give the employers a better chance at a new job, as it will be clear that there was no termination for a lack of performance.
- They would like recognition of efforts made during their employment, to which they gave a good part of their life.
- Employees would value a secure environment to tell their story without the threat of reprisal.

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- Employees would value a secure environment to tell their story without the threat of reprisal.
- Some laid-off employees would like the company to provide education or a new job placement.
- Employees would also like to have a contract buyout, in the event their permanent contract is terminated by the employer.
- Protection of weak groups, such as the sick.

Judges and other neutrals
"Files are becoming huge. We get complaints about duration of procedures..."

- There is a need for a complete but concise delivery of information. We need a good overview and understanding of the core of the matter to allow for an effective intervention.
- A way to learn whether a judge's intervention is really necessary and effective. This could keep costs low and ensure expedient procedures.
- Judges would like to have the right parties at the table (including the problem owner, such as the direct manager of the employee) to allow for a swift conclusion of the procedure and to be able to address the key legal and non-legal issues.
- Judges would prefer a wide variety of effective interventions to select from.

4.4 Funding procedures

New procedures will not move beyond the pilot phase, unless they have a sound model for funding.
Many innovation processes will not even start without a financial perspective for scaling up. Excellent procedures, designed with the needs of users in mind, in a setting of court delay and flawed current services, will always attract more clients, besides making life easier for the judges and legal service providers involved. Presidents of courts are no Silicon Valley entrepreneurs that innovate first and think about business models later. They will not allow a procedure to be substantially improved, unless they are sure that extra costs are set off by new revenues.
For them it is far less risky to remain in a state of low access to justice, than to get their court in financial trouble.

Who pays? Independence and incentives
Thus somebody should be willing to pay for this redesigned employment procedure, covering the costs of redesign and the costs of serving extra customers, and somebody should be allowed to recoup the savings from more efficient procedures. It could be the employee, the employer, the trade unions, the association of employers, the ministry of justice, the ministry of economic affairs, the chief justice presiding over the court budget or the local government wanting to attract more business and safeguarding employment.

In a 2007 paper, professors Cary Heck and Aaron Roussell sketch the dilemma this presents for court regulators. Most of these people will benefit from a procedure in which the issues are more clearly defined, evidence is collected in a structured way and hearings are geared towards workable solutions. But whoever pays the judge, is likely to gain influence over the judge's decisions and to make the judge less sensitive to other needs.

The easy answer is that governments should pay for courts, so they can be truly independent. Giving courts money with no strings attached is unwise, though. Research has shown that just raising budgets has no discernable effect on the performance of courts. Courts need proper incentives, just like any other organisation, and one of the reasons they sometimes underperform, say the experts, is that they have insufficient incentives.
Money is not the only thing that makes court move. Increasing accountability and aligning incentives with the intrinsic motivation of judges as professionals helps as well. Somehow, the incentives coming from money paid to courts, should be combined with incentives from accountability and professional pride. The table below sketches a number of options. For an effective and efficient employment procedure at a specialised tribunal about a dismissal, this could mean that the full costs of (say) €2500 are born by the employer (who can do most to prevent this conflict), with a smaller contribution by the employee, perhaps both depending on monthly salary and years worked at the company, to reflect the stakes of the conflict.In some cases, however, the local or central government may step in with a subsidy from a legal aid budget, or the unions and employee associations may have to be charged somehow, because they benefit from a precedent in a matter of principle. If employers pay more, the accountability towards employees will have to be improved, supported by the motivation of judges to provide access to justice and a fair procedure to both parties.

Who pays?	Consequences for incentives on courts	Accountability needed towards	Motivation as professional
Complainant	Incentives on courts to attract more cases and maximise revenue	Respondents, general public and government	Create access to justice for those who need it
Respondents	Incentives to give decisions favourable to respondents	Complainants, general public and government	Give a fair hearing and procedural justice
Organisations supporting complainants or respondents (trade organisations, civil society, etc.)	Incentives to make these organisations (feel) important	Parties, general public and government	Contribute to civil society representing different interests and values
Government (local, agency, ministry, parliament)	Incentives not to decide against government and to keep overall costs down, low access state	Parties and others to supply sufficient level of services	Responsibility for proper use of government money
People in need of official documents (property, business registration)	Cross-subsidisation	Groups forced to pay, parties, government	Efficient systems and standardisation

Trend: Financing models will become more subtle
Because a court procedure is a platform that benefits many users, and neutrality is a core asset, financing systems for courts thus tend to become rather complex. A judge is working for complainants, for defendants, for the other people involved (victims, groups affected by decisions) and for the government.

Once any of these pay for courts, judges are more likely to serve their paymasters. But this is also a good thing, because courts are then incentivised to deliver good quality services. In order to end up in a neutral equilibrium, a combination of different sources of income and accountability mechanisms is desirable.

More income from user fees
This fits the current trends in developing new financing models. Courts gradually raise more money from user fees. In Europe, the median is now around 30%, and much higher for civil matters, where most of the court fees come from. Many governments are taking steps to raise fees, so civil and administrative procedures will perhaps be almost fully funded from user fees in the near future.

A recent paper by Stephen Ware of the University of Kansas argues that only some users of courts need to receive subsidies. Others can pay the full costs of court services, or part of it. If these trends persist, courts can be expected to switch from a level of court fees that accommodates the poorest clients, to a level that suits the average client of the procedure and covers the full costs of the service, with a subsidy for those that cannot afford the costs.

Court users can still benefit from these price increases, if redesigned procedures lead to cost savings on their overall litigation budgets. Court fees tend to be a small percentage of the overall costs of litigation. Clients will be happy to pay courts more, if they have to pay less for experts, for lawyers or for waiting years on a court decision. But new court procedures can also lead to extra costs for the parties, for instance when they require clients to submit a large number of documents or to inform the court on many details. The experts warn against this "front-loading of costs".

Pay as you go is the trend

Governments now tend to move towards financing courts not with a lump sum, but on a per case basis, using an advanced case flow demand budgeting model promoted by institutions such as the World Bank. The practice is much more messy though, as can be seen from an analysis of the way budget cuts are implemented in Canada and the US.

In such a system, and also in a system based on user fees, it matters a lot what courts are paid for. If output is measured by number of judgments, courts will be incentivised to produce more judgments over time. For a divorce, they may issue separate judgments on interim measures, alimony and visiting rights, perhaps repeated in appeal. Settlement may become less attractive for them. In contract cases, giving a number of interim decisions may become worthwhile as well. More settlements will occur if courts get paid well for successful settlement efforts, and users pay less if they settle than they would pay for a full trial with a written judgment.

On the other hand, a system for financing courts and for charging court fees should not be overly complicated, because of possible administrative costs incurred when applying the schedules. A moderate pay as you go system with fixed fees is now preferred by experts, with Scotland, England and Germany providing examples for how fees can be differentiated for different services and different classes of cases.

A good payment model produces many winners

More innovation is needed here, but a sophisticated financing model can be used across national borders and will create a lot of additional value. If an appeal court produces a very useful precedent, for instance, giving guidance to many future users of the justice system and enabling them to settle thousands of future conflicts, governments have all sorts of reasons to pay them lavishly.

Just by being there and predictable for parties in a land conflict, a divorce or a personal injury case, courts create a climate that stimulates the parties to solve their problems in a fair way. So the state could pay courts a basic fee for having a modernised and specialised procedure in place, covering costs of innovating and constantly updating procedures. This fee could be higher if disposition times are short and litigation costs are low, and be reduced if a court has delays and procedures that are too complex.

Courts are then stimulated to get their act together. If they add more value, they will also increase their budget, and be able to spend more on future improvements. If a court fails to deliver fair and affordable procedures for a certain class of cases, another court may have to be set up and get the opportunity to serve people in a better way. Most likely, this new court will be as much a website and a mobile service, as a courthouse in the city centre.

4.5 Online courts gain ground

The British Columbia Civil Resolution Tribunal
In 2014, homeowners in Vancouver renovating their house will have access to a new, online way of sorting out problems about the quality of the job done. If there is an issue with the construction company hired, people in B.C. can explain the problem online, in their own words, and follow a menu that will help them with a diagnosis. The Civil Resolution Tribunal will ensure a low cost and effective resolution of such disputes, based on a law that establishes principles of collaborative forms of adjudication, instead of litigation on an adversarial basis.

An online dispute resolution system for claims below €25 000 will help the owner to contact the construction company for negotiation, which will be monitored so that the parties are stimulated to be reasonable. If no result can be achieved, mediation will be available, through phone, Skype or email. Eventually, an adjudicator may have to come in to decide on the amount of compensation to be paid, or the additional work that has to be done by the construction company (see the process pictured below).

Litigation process re-engineering in Singapore and the Netherlands
Courts have long struggled with their strategies to move online. Early efforts were focused on disclosing case law online, PDF-ing the court files and other case management issues, without any substantial changes in procedure. The second generation of online courts is in the making, though. It will be based on “litigation process re-engineering”, a term invented by the Singapore courts, one of the early adopters of online technologies. Here, the procedure is not brought online as it is, but is redesigned to suit the needs of litigants and judges making use of all the options modern IT can offer.

In our Justice Innovation Lab, online adjudication is hot. Dutch courts developed a prototype for a platform for neighbour disputes supporting diagnosis, negotiation, legal information and adjudication. Judges will be accessible online. This online procedure helps the parties and the court staff and judges to work much more effectively and efficiently. So the judges even have the resources to go to people’s homes to have a look and help implement solutions on the spot.

We see other organisations work on online supported processes for personal injury claims.
Legal aid boards from the Netherlands and other countries are now moving beyond experimental sites and building online platforms that can support divorce negotiation, mediation and litigation in an integrated manner as well as processes to resolve consumers complaints.

Coding adjudication: online information sharing and improving human interaction
More generally, the trend is towards online information sharing. This saves the costs and misunderstandings caused by repeated intakes of the same problem by many professionals, first at a legal advice counter, then at a lawyer for each party, again in mediation, at the court or by an expert.

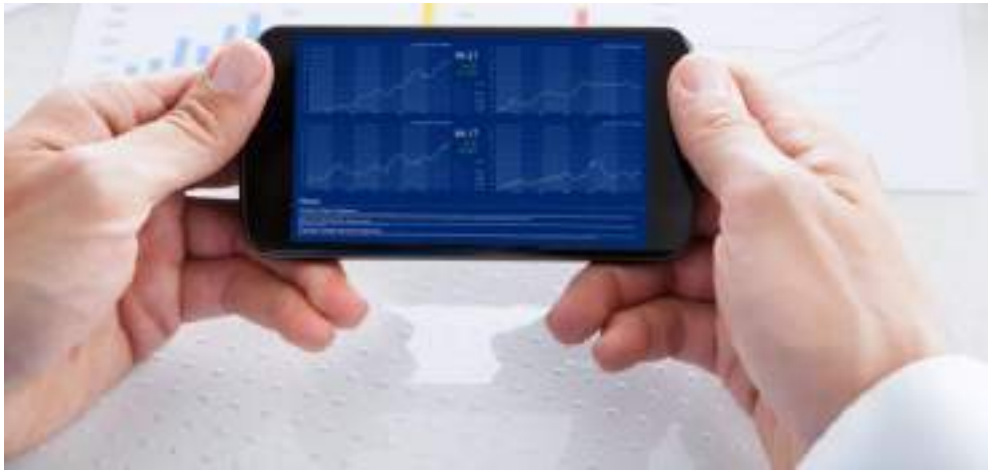
If the intake is carefully designed on the basis of dispute system design knowledge, the parties will also be stimulated to reflect on the problem, and be motivated to solve it themselves. For judges and other professionals involved, streamlining the intake reduces costs and frees up resources to deliver more valuable interventions. They can concentrate on the main issues and have more personal contact: online through video conferencing, on location or in the courthouse.

Empowering litigants
In Canada and the US, the trend towards online platforms rides on a wave of indignation about the fate of self-represented litigants. A very large proportion of users of courts cannot afford a lawyer. Others do not want to hire a lawyer, because they want to stay in control of the process themselves, needing guidance instead of directions. A well-received study by Julie MacFarlane also shows that court forms are complex, lengthy and difficult to understand, even for trained professionals. Most of these litigants end up being disillusioned about the court experience.

Supreme Court endorsement
Another incentive to develop excellent online interfaces comes from a 2011 decision of the US Supreme Court in the case Turner v. Rogers. The court points out the alternatives to providing assistance by a lawyer, stressing that courts can also provide clear information about the legal issues at stake, develop appropriate forms for submitting information on a claim, question the litigants triggered by responses to the form and set up help desk facilities.

This case, which was framed to force a decision on a (state-subsidised) right to assistance by a lawyer, has lead to a renewed, and lively debate on how to improve access to justice. The emerging consensus is that this should happen through a combination of changes in the services and roles of judges, courts, lawyers, social workers, paralegals and yes, online platforms.

Moving online, a daunting task
Meanwhile, the task of designing a website as the primary interface for access to justice is forbidding. Court staff might resist steps in digitisation when they are not so experienced in “doing things online”. If users do not like it, they turn away immediately, and this can be monitored very easily, so failure is as apparent as is success, and initially, there will be many failures. There is no way to avoid this task, though. Courts everywhere see that they have to move their services online and are committing funds for this. They also realise that a first version of a web-based procedure can still be more accessible than offline procedures with a maze of formalities.

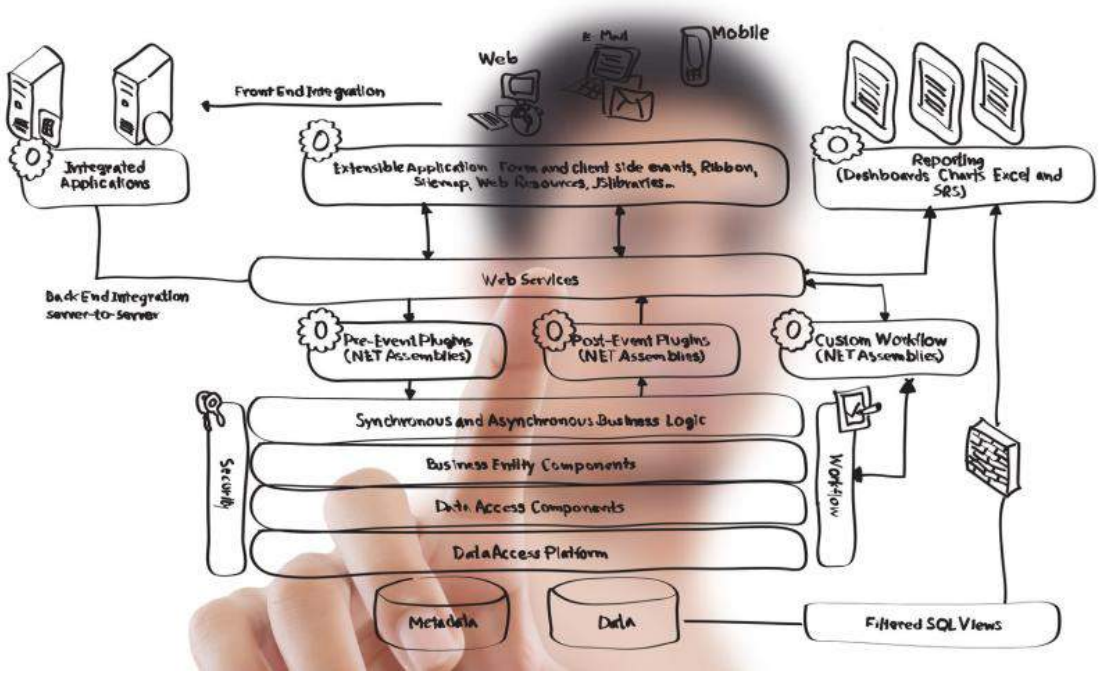


The challenge for courts is that they have to make the learning curve as steep as possible. This means they will need to invest resources in this, whereas the budgets for innovation are small, or non-existent. The good news is that courts across the world face the same challenges, so costs of developing new interfaces can be shared. Partnerships are possible.

Outsourcing design of civil and administrative procedure

The surest way to do this, is by outsourcing the design of such interfaces, or even of entire procedures, to specialised providers. Car builders all need braking systems, so they buy them from Robert Bosch and competing suppliers of car components, who are prepared to adapt their systems to specific customer needs. Courts already work like this as they do not design or produce their own courthouses, stationary, computers or make the sandwiches they serve in their canteen themselves. Recent decade showed many developments in online legal diagnosis and document drafting, organising online dialogues, etc that courts can learn from, build on and adopt. Such development is often undertaken by organisations that already developed a robust funding model that helps making these innovations sustainable.

Every organisation is at its best when it focuses on its core competencies, and is prepared to let other organisations excel in their own trade. Courts, in their current shape, are full of people with excellent legal and practical conflict resolution skills. But they are not that skilled at web design, user experience, conflict system design, providing legal information, fee and business model knowledge or programming skills.



The German situation is illustrative for what may happen if courts continue to develop their IT systems inhouse. At the EDV-Gerichtstag in September 2013, the yearly meeting of court officials and software houses in Saarbrücken, judges responsible for *Elektronische Daten Veranstaltung* at their courts, mingled with IBM, Oracle, HP and all other major IT services companies. Each senses the need to move online for the €4 billion German court business, combined with similar work for government agencies offering complicated procedures, which is now translating in 100s of millions worth of IT projects. Most courts are part of a coalition with other courts, buying custom built platforms from IT consultants, which are selected on the basis of a tendering process. Few of these coalitions will have the resources to develop next versions of these platforms. Interoperability will be a big issue and a major source of budget overruns.

More sadly, the gains from moving online in this fashion are likely to be low. Most systems displayed in Saarbrücken looked like traditional case management systems for courts, with the option to upload PDF files for lawyers and to search these documents for judges. Quite a few judges did not see the point of moving from a set of documents on a large table to miniature versions on a much smaller screen. One of the main worries seemed to be whether the authenticity of documents uploaded through the internet could be verified. But the biggest moneymaker for IT firms is probably going to be that each of these systems has to be safeguarded from the spying eyes of the US National Security Agency and their colleagues elsewhere.

The German judges may be forgiven for approaching online procedures in this way, because the German court procedures are already among the fastest, most transparent and most affordable in the world. A tradition of detailed lawmaking through a stream of precedents at Germany's highest courts, of fixed fees for lawyers and of conversational court hearings is likely to have contributed to these high standards. Their version of the rule of law, *Rechtsstaatlichkeit*, requires them to move forward only with the consent of the legislator.

But they are also a role model for other countries, and this form of bringing procedures online is unlikely to benefit their citizens and companies. Other choices are needed if courts want to move towards procedures that meet the challenges of vast demand, putting people first and greater accountability.

Team 2: The Architecture of Justice: *Designs for a legal issues court*

Members: Jan-Richard Kikkert (Architectenbureau K2) / Rozemarijn Koopmans (Multitude) / Nick Topp (Multitude) / David de Zwart (Multitude) / Robert Porter (HiiL)

Contemporary human beings are increasingly surrounded by a digital network of computers, drones and smartphones, in which Wi-Fi-connections, apps, location-based services and Google-glasses are in a constant state of information exchange.

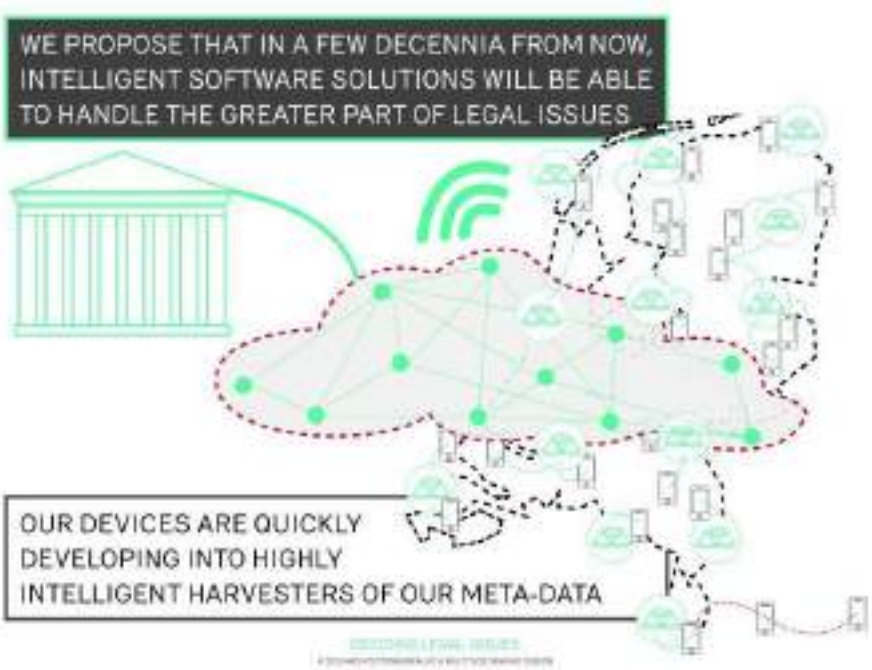
If these networks become more intertwined, they hold a great potential in providing necessary legal information. What if civilians could use this network to become in charge of their own legal environment?

When thinking about the court of the 21st century, we need to take the radical digitization of our personal data into account.

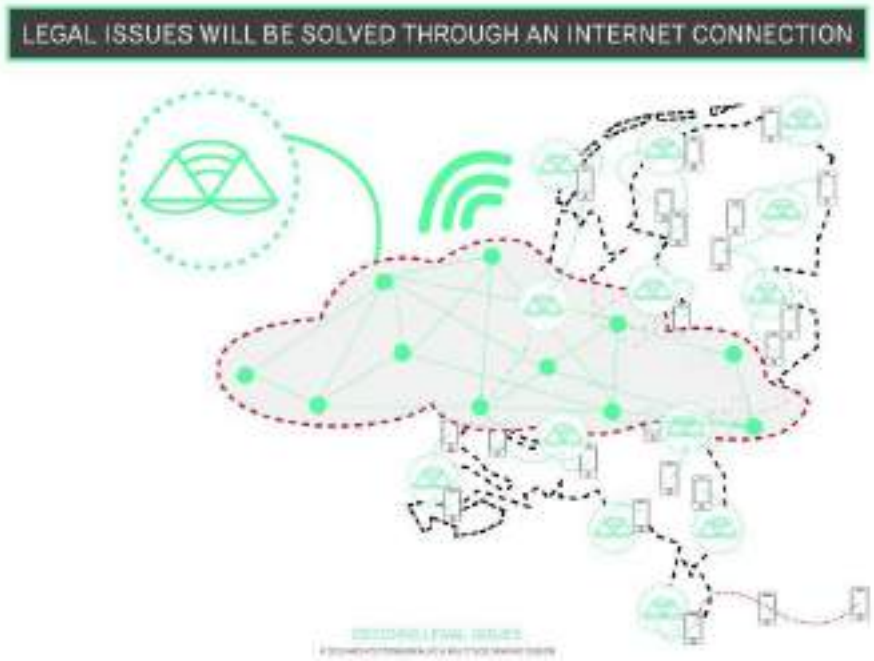
Our current inability to control our online existence (and its influence on so many levels) frustrates large bodies of internet users. Current courts (especially the international court) are superstructures, incapable of coping with fast procedures, local circumstances and the constant renewal of our digital environments. In our scenario, it's not a question of whether we will move towards a digital judicial system, but rather when and in what form it can be implemented. We thus assume that the greater part of the current judicial conflicts will be solved in an online environment.

By shifting the current bureaucracy to an online architecture, decisions on legal issues will be made through an Internet connection.

When the information already present within our personal devices is combined, it provides a huge information value. It will bridge the gap between the current instruments utilized by legal institutions (that often lack a clear-defined set of rules regarding cybercrime) and provide heaps of evidence that will speed-up the process of finding and trialing crime suspects.



On the other hand, it will give back agency to civilians who have no control over their own legal information at this point.



Law needs to give individuals agency to be in control over what's happening in an increasingly surveilled society. Law has simply not yet adapted to the shift of the physical interior to the digital interior; the NSA and Google have basically become the same thing. By restructuring the legal system completely, and by putting everyone with an internet connection in charge of their legal rights and privacy circumstances in an open-data cloud, we aim to re-design justice.

5. Courts at a crossroads

5.1 Can courts have a strategy?

Courts tend to be aware that they have to improve their services. We have found no country without some program for court reform. But it is hard to develop a clear vision of the future and a successful strategy for a court. We talked about the International Framework for Court Excellence as a key strategic document. While some courts also issue a document that is meant to inspire their organisation and to take the lead in developing a next generation of procedures, we do not find this on many court websites. Instead of an "About Us" with a mission statement, homepages of courts tend to be cluttered with recent judgments and scheduled hearings.

Chapter 4 told the story of many courts doing experiments and developing new working methods, but few of these innovations making it into a sustainable procedure that is applied as a countrywide standard. Overall, judges seem to wait for new rules before they feel empowered to innovate. So what can be done?

We meet leading judges who are overwhelmed by all conflicting demands, returning quickly to the job of facilitating their people to get the next cases done. At the other end of the scale we see comprehensive court reform programmes in developing countries, that aim to remedy every possible flaw of the court system. In a recent book, Reforming justice, A journey to fairness in Asia, Livingston Armytage evaluates these programmes. His data show that they aim primarily at the organisation of the courts. The focus is on training, improving access to precedents, reducing delay, improving leadership qualities, community participation, stakeholder coordination, capacity building and increasing independence. Often these programmes have dozens of items, reading like a long list of everything that is needed to let courts operate successfully.

Courts on the defensive

In Europe and the US, court leaders feel they are on the defensive against governments, who are cutting their budgets and making it less attractive for citizens to go to court. A 2012 report on Judicial Reform by the European Network of Councils for the Judiciary contains 18 recommendations. Most of these are addressed to governments, warning them not to reorganise court systems lightly, not to reduce the caseloads in a way that impedes access to justice and to provide courts with sufficient resources. Only one recommendation is about the need to simplify, modernise and digitise procedures. It calls on all judiciaries to adopt innovative programs to reach these goals.

Part II of the report, issued in 2013, follows up with 53 guidelines for what courts can do themselves, of which 20 are about the organisation of courts, 13 on alternative dispute resolution, 8 on appeals, 6 on case management within the current procedural framework, 4 on the need to develop digital access to courts. Only three guidelines really focus on developing and delivering better procedures. The first says that a detailed analysis is needed in order to simplify procedures. The other two present a dilemma: all information/evidence must be presented at the start of the trial, but courts are also told to set limits to the length of written and oral presentations by lawyers and self-representing citizens.

This report probably reflects how court leaders see themselves in 2013. They do seem to take their future into their own hands. They mostly tell themselves and governments to get organised. But court leaders also see that innovation of their core products is needed and try to mobilise their colleagues to that end. Courts with broad managerial responsibilities for the chief judge tend to have lower trial length.

Difficult to take the lead

It is notoriously difficult, though, to lead a court. Courts have multiple internal hierarchies, one from courts of first instance to appeals to supreme courts, one in the management of the organisation, and one within the section of the court where individual judges have to conform to standardised procedures. All three hierarchies have power over the core product. Because the final word of supreme courts is pretty unpredictable, it is very difficult to coordinate towards really excellent procedures.

The way judges tend to make decisions can also be an issue. Perhaps inevitably, court management practices are affected by the daily experiences of judges in the courtroom. We have seen many meetings between judges developing into debate or reaching quick decisions on the next step to take, based on consensus among everyone who could frustrate the outcome. Judges are not accustomed to formulating an underlying vision, and letting that grow over time.

To make things more complicated, most clients of courts are there for only one time in their life. So they do not tend to organise themselves as consumers with a clear voice that is difficult to ignore. In each individual court case, the judge is mediating between two opposing views, so he gets confusing signals of what the clients want. Courts are thus not disciplined by the market or by clear views from the population what they should do. They have to take responsibility themselves, which may be the biggest challenge of all.

If courts want to take the future into their own hands, they will have to look at the strategic positioning of the outcomes they deliver and the efficient, tried and tested, effective, affordable procedures they have to get to that outcome. When dealing with courts and studying the literature, it is easy to discover at least three central ideas about the positioning of court procedures. It helps to take these scenarios to extremes, and to look at their implications, in order to see their effects on courts and on justice needs. Each strategy reflects a possible future for courts. Each strategy implies possible benefits and risks. In the following, we show how these futures are supported by trends and innovations, and how each of them creates a different set of challenges.

5.2 An excellent court of last resort

Courts as the place to go when all else fails. That is a powerful idea about what courts should be and do. This view may be attractive for Ministries who have to fund courts, legitimising the story that people should stay away from courts as much as possible and solve their own problems instead. You can also hear it from senior judges, who have learned they can do little to relieve people's pain and that punishing crimes is only moderately effective.

Appeal courts and supreme courts are obvious examples of last resort adjudication, as are international criminal tribunals. But courts of first instance can have a similar attitude. In England, some family court judges let parents, experts and child care authorities work on solutions with endless patience. Their cases are adjourned whenever they see a remote probability of a consensual solution, on the assumption that everything is better than a decision by a judge. In many countries, insurers and victims are supposed to settle personal injury cases. Only if all else fails, and fails for many years, the court will take a decision. Administrative law is another field where judges tend to leave conflict resolution to others, only taking action when the authorities neglect fundamental rules of procedure, but not going into the problem in order to reach a solution.

At a distance
If courts are serious about being a last resort, there are consequences. Most likely, the courts will only deal with the most complicated cases that others cannot resolve. They will see problems three or even ten years after they became an issue, perhaps only checking whether other decision makers did an acceptable job. Procedural issues, not the substance of the conflict, are more likely to dominate the litigation process.

Trends in	From	More towards
Primary customers	Lawyers with clients	Lawyers + clients in very serious trouble
Client needs	Protecting rights	Remedies when all else fails
Audience	Legal community	Legal community and general public
Skills and knowledge	Legal, common sense and leading debate	Legal, selecting urgent problems, monitoring, setting guidelines, evaluating impact
Primary goal	Solve legal problems	Prevent future legal problems and correct outcomes that are manifestly unfair
Scope of procedure	General with some specialisation	General
Task/output	Decision	Information about the law and minimum standards, providing coherence
Procedure	Geared towards decision, with settlement as bycatch	Geared towards monitoring and providing guidelines
Approach	Every case is different	Standardisation and correcting manifest injustice
Dominant method	Establish facts and apply rules	Selecting issues that need a precedent and setting precedents
Reasoning	Based on precedents	Based on precedents, international comparative research and social sciences
Attitude judge	Referee and case-manager	Building law step by step
Delivery channel	Paper files and courthouse	Uploading case files online and courthouse
Rationing method	Waiting lists and complex procedures	Selection procedure
Revenues	Lump sum budget and user fees	Lump sum budget and remuneration for precedents
Fee structure	Fee per case filed	Supervision fee
Reference point procedure	Rules of procedure	Selection rules and rules of procedure
Performance criteria	Number of judgments, time to disposition	Quality of legal system under supervision
Accountability mechanism	Appeal and supreme courts	Appeal, supreme and international courts

Under this type of procedure, most decisions about crimes or problems between people will have to be solved by other institutions, either private arbitration and mediation, or public ombudsmen, prosecutors determining sanctions, mayors solving disputes and perhaps religious courts for family law.

Other adjudicators needed
Courts of last resort need a referral system to these other mechanisms, which will be needed to adjudicate and cope with most crimes/conflicts. This will perhaps be done through mandatory forms of mediation and adjudication by others than formal courts of law. Courts of last resort can only operate in a setting where the state spends money on, and is organising these alternative mechanisms.

For the population, this means courts cannot ensure the application of law to everyone. Courts may lose some of their legitimacy because they are not in close contact with people. They will tend to attract personnel that is more interested in rules and their application than in human needs and justiciable problems.

Courts following a strategy of being a last resort are not going to be big. They will probably diminish in size, employing less people as other institutions take over adjudication in areas such as divorce, commercial disputes, routine crimes, debt issues and consumer disputes with providers of goods and (financial) services.

Selection mechanisms are essential
Courts of last resort will need a good selection mechanism. They have to process a large number of applications, sifting the cases with people who need an urgent remedy because they have been treated badly by mechanisms to which access to justice has been delegated. Clear standards of review are necessary for this, otherwise the court will spend most of its time on selection.

Becoming a supervisor
To become really excellent, these courts need to develop the attitude and working methods of a supervisor or an ombudsman rather than a traditional court of law. In order to be effective, they have to obtain an overview of trends, being a guardian of other processes, measuring quality and issuing guidelines where needed.

Courts of last resort are unlikely to rely only on existing laws as a basis for their decisions. Although they may try to find a basis there, they will also have to develop novel solutions for situations that were not considered when rules were created in the first place.

Strategic thinking in these courts should focus on how best ensure the quality of the system through (last resort) adjudication. Judges should develop the capability to write actionable decisions and perhaps even an ability to evaluate the impact of the rules they develop on behaviour.

5.3 Deciding legal issues

A second view is that courts are there for solving legal issues. Whenever a litigant has a legal question to be resolved, the court will provide the answer. The court will not go into the conflict itself, but is the help desk for the legal problem or for establishing facts.

Trends in	From	More towards
Primary customers	Lawyers with clients	Lawyers with clients
Client needs	Protecting rights	Legal solutions that enable problemsolving
Audience	Legal community	Legal community
Skills and knowledge	Legal, common sense and leading debate	Legal, management of large amounts of data/evidence, managing complexity
Primary goal	Solve legal problems	Solve legal problems
Scope of procedure	General with some specialisation	Specialisation
Task/output	Decision	Decision on legal issues or settlement
Procedure	Geared towards decision, with settlement as bycatch	Hearing for case management is pivotal
Approach	Every case is different	Every case is different and equal treatment
Dominant method	Establish facts and apply rules	Listing issues, establish facts and apply rules
Reasoning	Based on precedents	Legal intelligence
Attitude judge	Referee and case-manager	Case-manager, giving interim opinions, final decisions
Delivery channel	Paper files and courthouse	Online interface, searchable pdf, courthouse, videoconference
Rationing method	Waiting lists and complex procedures	Timeslots, maximum size of documents
Revenues	Lump sum budget and user fees	User fees
Fee structure	Fee per case filed	Fees for court time used
Reference point procedure	Rules of procedure	Rules of procedure, court rules
Performance criteria	Number of judgments, time to disposition	Number of judgments, time to disposition, legal quality
Accountability mechanism	Appeal and supreme courts	Appeal and supreme courts, peer review

Promoting equal treatment and providing clear methods
The legal approach has clear advantages. It promotes equal treatment, because the rule based approach ensures similar cases to be treated in similar ways. It provides a transparent framework for selecting relevant facts and deciding on appropriate remedies.

This model matches the tradition of legal education, so it is easy to implement with the current skill set of lawyers. There is not much need for court personnel to master non-legal skills, although skills for case-management and managing large amounts of evidence will be required.

The model also reflects the idea of the law and the courts as a separate branch of government, to be distinguished from other types of interventions. It fits and enhances the professional values of people with a legal training.

Terms of reference for procedures for business disputes

What is the future of litigation for business disputes, such as:

- Conflicts between business stakeholders (shareholders, directors, workers, customers)
- Disputes about business contracts (supply, transport)
- Conflicts about intellectual property, unfair competition

An interesting starting point is capacity. Business disputes are expensive to deal with for courts, so they need a sound business model. A paper by Jens Dammann and Henry Hansmann gives an interesting take on that. Another source of what business disputants want comes from studies researching why arbitration might be preferred over litigation, where Christopher Drahozal is a leading author. And of course it is possible to ask business executives what they think about litigation, see the classic study by John Lande published in 1999.

Commercial litigation represents a major income stream for the legal profession. So every major law firm in the US seems to monitor trends in claiming behaviour, which show the number of antitrust cases and tort claims about toxic substances going down, whilst up are disputes about government tendering, patent claims filed by companies living of royalties over their patent portfolio, trade secrets, as well as criminal prosecution of executives involved in fraud (see a helpful report by Washington law firm Crowell and Moring).

It is not so easy to get views from corporate lawyers about what courts should deliver. They are good at developing smart litigation strategies in actual courts here and now, but hardly consider the design of the courts of the future. The following summary benefited from input by the participants to our workshop, from the academic literature and from a 2012 report from a Taskforce of the Commercial Division of the New York Supreme Court, which was charged by the Chief Judge "to explore - without limitation - the path to a world-class Commercial Division".

- Commercial courts should be focused on solving actual disputes, rather than being a referee on legal issues.
- A very high proportion of commercial disputes settles, but settlement often comes late and after too much money has been spent.
- Commercial litigation is seen as key to a well functioning economy, and in particular to restructuring of the financial services industry.

- Uncertainty about the value of claims and assets on balance sheets is a major barrier to economic growth, and effective, speedy litigation a way to overcome this barrier.
- Business method patents may have to be reconsidered in this light. Does the uncertainty they are currently creating outweigh the benefits of stimulating innovation?
- Specialised judges are highly appreciated. Panels of judges should know about the legal environment of business and knowledge about the business is needed as well. So commercial courts tend to include accountants or business people. The French ministry of justice is reconsidering the French commercial court system, which gives too much say to commercial people, however.
- Flexibility seems to be the key in any approach in dealing with business disputes. More options for dedicated, tailor made procedures
- Early case-management is necessary, and process hearings where parties determine the procedures along with the judge would help in leaving both parties satisfied.
- Leaving room for informality will also lead to better courts in dealing with business disputes.
- Giving parties a greater role in case management and more interaction with the opposing parties could also lead to quicker and more satisfactory settlements.
- Better immediate interaction with courts during litigation through e-mail, other media
- Use of English as (second) court language
- Level playing field, in particular in cross border disputes
- Some protection against unexpected claims and procedures with huge litigation costs
- Some protection against public allegations of unlawful conduct as a basis for claims, which have not (yet) been substantiated or are very one-sided

More legal, and still being human

As a consequence of this, the courts risk to be seen as "special" and not always close to real life. In the legal model, the judges will have more difficulty to relate to the emotions and underlying needs of victims, divorcees or company directors. Depending on the substantive rules and the attitude of the judges, there may be a tendency towards polarisation, right/wrong simplifications, or at least zero sum decisions. The legal method is disliked for this and is widely seen as inadequate for solving conflicts, causing alternatives to be developed. Courts will thus need to develop options for intermediate decisions and proportionality, and also to find a place for the emotions and problems as experienced by their users. Integrating all of this into effective approaches to settlement is challenging.

Mismatches between legal and other expertise (psychological, accounting, dispute resolution, technical) are likely to occur frequently. Courts will need sophisticated procedures to move back and forth between legal procedures and other interventions, such as ADR and technical expertise.

Effective referral to non-legal interventions

A court like this, and in many countries there are examples of judges who see their job in this way, will refer users to other professions for other types of help. There will be a fair amount of demand for mediation, and other non-legal methods to resolve conflicts. In criminal justice, therapeutic and medical interventions will be separated from the legal process. Clients will not experience a one stop shop and judges will feel that they are interventions are inadequate for many of their clients.

The referral system for 'non-legal' parts of problems must be very effective. Triage by non lawyers may be needed so that each problem gets an adequate mix of treatments. Governments may have to set up specialised agencies for this.

The need for new ways to manage complexity

The legal approach to conflicts is also associated with complexity. Many experts have noted that during the past decades, the number of procedural issues debated during litigation tended to increase. As the body of procedural law grows, and lawyers get easier access to it, they will raise more procedural issues per case. Lawyers feel that raising all possible legal points is their professional duty, and this fits their business model, in particular if they are paid by the hour.

In many countries, judges increasingly complain that their case files become loaded with ever more issues and evidence. Research confirms that they have to write more complex judgments. They need more time to hear arguments and to decide these issues, leading to a decline in productivity measured in judgments delivered per judge, and to complaints of being overburdened.

The main remedy proposed for complexity is managerial judging, where a judge decides early on which witnesses have to be heard, consults with the parties to plan the proceedings and requires them to disclose documents early on. However, empirical studies from the US tend to find that improved case management powers and efforts, increase costs and time to judgment, rather than decrease them. Professors.Maximo Langer and Josheph Doherty, who researched case management at the International Criminal Tribunal for the former Yugoslavia, suggest that the extra time for the additional managerial judging requirements, steps, and work outweighs the time savings from a more effective procedure. In their survey of the literature, which includes a series of studies from the RAND Institute, they report similar results for summary judgments throwing out cases early on for lack of credible evidence, for early disclosure of evidence to the other party and for pretrial hearings.

Enforcing time limits and coping with extra demand

In order to prevent the lawyers taking over the procedure, courts are likely to need timetables, time limits, limits to document size and a range of other methods to manage the size of case files. Besides alienating the legal profession, who may feel this as a restraint on their clients rights to a fair hearing, this may cause procedures to become more formal and bureaucratic, so a continuing deformalisation process is needed for these courts.

The drawback of enforcing strict time limits for judges is also that they tend to make courts more accessible. Judges shoot themselves in the foot if they attract more cases and see their workload per case increase as cases grow ever more complex.

Simplifying procedures, so that the number of procedural steps is reduced, is one way out of this dilemma. It is hard to implement, however, because the legal approach does not yet have a transparent way of prioritising issues. Moreover, the legal profession tends to lose income from simplification and is therefore likely to resist reforms, unless they also open up new ways to add more value for clients and thus new revenue streams.

Better funding models to accommodate higher costs for judiciary and legal assistance

Another way out is increasing the capacity of the judiciary, but this can only be sustainable if there is an increase in court fees supporting this growth.

Legal procedures will also be less easy to manage for clients, so they need legal assistance, which requires systems of legal aid or insurance, together with other mechanisms to ensure equality of arms.

In sum, the road to excellent legal procedures is long and complicated. Such a strategy requires a sustained innovation effort, in order to meet the many challenges, but there is also a rather clear pattern of what works and what does not work yet.

5.4 Resolving justiciable problems

A third approach is that courts provide THE service that adjudicates and tries to solve problems. Crimes and disputes as they are experienced by people in their personal lives, in business or in dealing with their government, will be solved, or at least be decided in such a way that there is a maximum probability of remedies imposed by the judge being effective.

This type of procedures are offered by many specialised courts around the world. Besides the paradigmatic problem-solving courts in the US, many countries have court procedures for divorce, termination of employment, land disputes, housing matters, consumer issues, business disputes, mass claims or social security matters. They tend to be the most successful courts in terms of number of cases and of user satisfaction. Although these procedures can also be strictly legal in character, the trend among these specialised courts is to provide a fair hearing and sustainable solutions for the actual problems experienced by the users.

An increasing number of countries (Canada, Australia, Kenya, numerous US states, Scotland, Thailand, Indonesia) have set up taskforces in recent years for improving access to justice. Almost invariably, these taskforces place solving justiciable problems at the core of their strategy. The Canadian and Australian strategies, for example, set out a detailed path towards court procedures geared towards resolving disputes as experienced by the users. When judges take the lead, and work on a strategy focused on solving justiciable problems, the associations of lawyers are likely to buy in to this strategy which benefits clients, negating the idea that the bar is only there to promote the interests of lawyers. The repositioning of the Canadian Bar Association, based on an innovative strategy to develop a broad range of new services, is a prime example of this trend.

The ambition for such procedures is to decide cases within a number of months, dealing with large volumes of cases in a standardised way. Because most problems can best be dealt with by the people involved, problem solving courts are likely to stimulate settlement, using mediation techniques integrated with case-management skills, and only deciding themselves when settlement efforts fail. Most cases will settle before the court becomes active, because decisions are predictable and the court offers guidelines how problems can be settled, and cooperates closely with stakeholders in the supply chain.

Such courts will perhaps have the greatest added value to society, which can count on courts to solve any serious issue just in time and in a more or less fair way. But there will be major challenges.

Specialised procedures fitting frequent justiciable problems
Procedures will have to be adapted and made less formalistic. If people can file disputes in their own words, perhaps going through a form with a number of standardised questions, they are more likely to communicate the issues that are at the core of their dispute. But the court also needs to acquire information as a sound basis for a decision, so the interfaces for communicating with clients need a careful design.

There will be strong incentives to offer specialised procedures for frequent types of problem, involving appropriate expertise. Not all judges will have the skills to let people settle and help them to grow towards a sustainable solution, though. Skills such as listening, asking questions, focusing on interests (needs, wishes, fears of disputants) need to be developed.

Courts will probably integrate non-legal expertise in their panels, in order to better equipped to tackle problems. So legally trained judges will work together with medical experts to assess injury from medical treatment, with accountants to address business conflicts or with family therapists for the hardest problems showing up in family courts.

Trends in	From	More towards
Primary customers	Lawyers with clients	People with justiciable problems
Client needs	Protecting rights	Fair solutions, procedural justice
Audience	Legal community	General public
Skills and knowledge	Legal, common sense and leading debate	Mediation, facilitation and growing towards decisions
Primary goal	Solve legal problems	Solve problem between people
Scope of procedure	General with some specialisation	Specialised for frequent problems of users
Task/output	Decision	Fair settlment with decision as a back up
Procedure	Geared towards decision, with settlement as bycatch	Hearing is pivotal
Approach	Every case is different	Standardisation, then adjusting to specific needs
Dominant method	Establish facts and apply rules	Effective interventions in relationships
Attitude judge	Referee and case-manager	Facilitator and adjudicator
Reasoning	Based on precedents	Based on comparison with schedules and best practices
Delivery channel	Paper files and courthouse	Online, local and at courthouse
Rationing method	Waiting lists and complex procedures	Fee and urgency problem for clients
Revenues	Lump sum budget and user fees	User fee
Fee structure	Fee per case filed	Pay as you go
Reference point procedure	Rules of procedure	Procedural justice
Performance criteria	Number of judgments, time to disposition	Number of problems solved, costs for parties
Accountability mechanism	Appeal and supreme courts	User satisfaction ratings

Funding models needed

Funding becomes an even more serious issue. Governments are unlikely to fund unlimited access to justice without substantial contributions to court costs by the users. Courts in this model need cooperative lawyers, so they will have a preference for lawyers working with business models that enhance cooperation (fixed fees), but many people will be able to go to court without a lawyer, because the procedure is adjusted to their needs and skills. This frees up funds that can be used to pay the court instead, taking into account that the costs of a judge deciding a case will generally be far less than the costs of a lawyer to handle the case in court.

Germany may be a country that provides inspiration, showing that it is possible to find funding models for speedy resolution of most disputes without encouraging professionals to extend litigation because of the promise of extreme revenues in a small number of cases.

Effective procedures for separation: cooperative, problem solving and online

Problems linked to couples splitting up show up in in the top ten legal problems of any legal needs study. In addition to the tremendous impact on people's emotional, social and economic live, a divorce can be a very complicated process. Divorcing people have many things to settle, like agreeing on child custody and child support, determining who can stay in the house, the division of assets, setting a reasonable amount of alimony, Such distributive issues are difficult to settle, especially when people are going through the emotional stress of resetting their lives (not only for spouses and children, but also of their extended families).

The financial burden that these crises pose on justice systems increases every year. In the Netherlands there are about 33 000 divorces per year. The annual costs for legal aid for divorcees is about 66 million euros, which is about 17% of the total legal aid costs. Courts spend about 35 - 45 million euros on divorce procedures, which is close to 5% of the total court costs. The numbers differ per country, but the general picture is that much of the money goes to divorces.

Divorce processes have been innovated over the years. As a result, they have become less burdensome for parties and for society as a whole. Many jurisdictions moved away from the adversarial system in divorce proceedings decades ago, so an estimated two third of separations now evolves without major conflicts. Most court systems have a specialised family court or family divisions staffed with judges experienced in dealing with the sensitivities around hearing a child, and emotional parties.

Although mediation did not manage to see the market share once expected, divorce mediation is rather common. Increasingly, divorce lawyers trained as mediators serve both divorcing parties (a practice referred to as collaborative divorce). In recent years, divorce has increasingly made good use of modern information technologies, mostly in the private sector. In the U.S., LegalZoom teamed up with Modria to experiment with online mediation as part of their divorce services. In The Netherlands, Juripax offers a similar platform.

Websites providing legal information, advice and self-help tools are also on the rise. The Dutch Legal Aid Board developed an online divorce and parenting plan. This platform supports people with structure, information, effective examples that help people come to a divorce settlement agreement. It is likely that such platforms will be linked to the court system in the near future, enabling judges to build on what the parties and mediators already achieved, and saving costs of a repeated intake of the problem.

These initiatives did not just copy the existing processes and move them online. Rather, they utilised the opportunities that new technologies offer and redesigned processes. To the extent that, gradually, the building blocks of a more integrated platform for divorce emerge.

Connecting to the public
Courts focusing on this strategy will need the capability to actually work with people, in less formal procedures, using different sets of skills. Judges in these courts should be able to stimulate settlement, and if they have to decide, ensure that their decision is accepted, letting litigants grow towards a decision in a gradual process. They need procedures which allow them to interact, so probably far less formal than the existing ones.

Problem-solving courts also need to closely cooperate with voluntary and professional legal services who participate in the supply chain, in particular those who have a cooperative, and not too adversarial attitude, ranging from online services, legal information services to legal aid and attorneys, to social workers and local government.

This can be risky as well. Such courts need a welcoming and open attitude to problems, which may be very hard to solve sometimes. Courts typically attract the most difficult issues of the most difficult people, so they also need a way to limit their involvement.

The need for sharing rules (schedules, formulas, rules of thumb)
Standardisation and equal treatment becomes an issue as well, because this approach has a risk of becoming too eclectic. Problem-solving courts deal with many similar cases, so they need to develop schedules, rules of thumb and guidelines in order to be consistent in how problems are solved.

This may bring them into competition with parliaments, supreme courts and other rulemaking authorities. So this is another outside relationship that has to be managed.

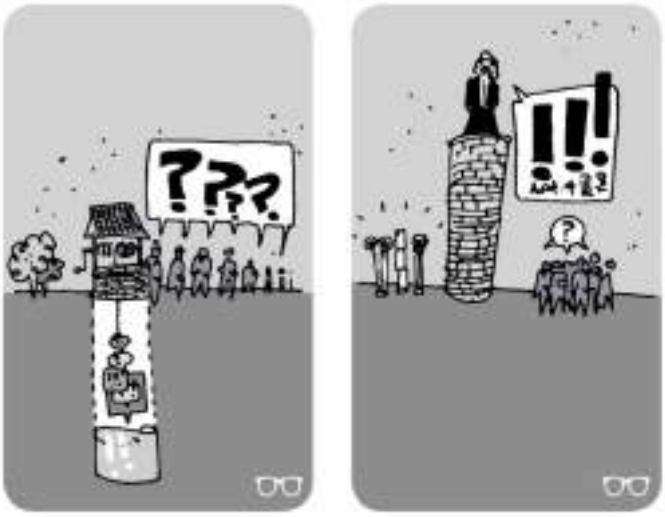
Overall, the reward can be that courts will be regarded positively because they really engage with the issues people care most about, but they can be vulnerable if their approaches are not successful.

Team 3: The Architecture of Justice: *Designs for a court of last resort*

Members: Daniel Leenders (6to9DESIGN) / Eelco Hoeke (In.Vorm.Eel) / Jurrian Knijtijzer (ByBali) / Geurt Holdijk (ByBali) / Jan Maas (ByBali) / Philomene van der Vliet (ByBali) / Narda Beunders (ByBali) / Sahar Khan (HiiL)

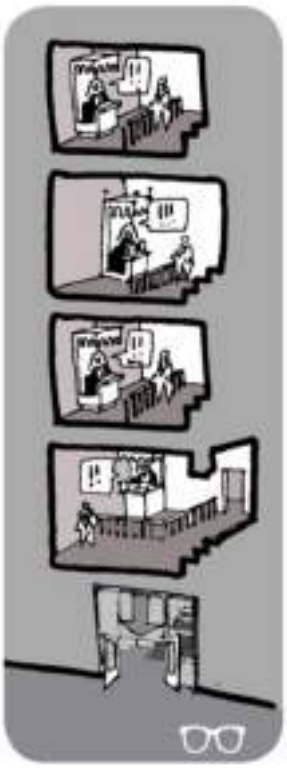
It is an individual decision for people to bring their problems, arguments and disputes to court. The courts as we know them now function as the famous Echoing Well. There is no selection mechanism and everybody stands in line to scream into the well, expecting a personal answer. They all think their quarrels are unique and expect to be treated that way...but the answer is often the same...

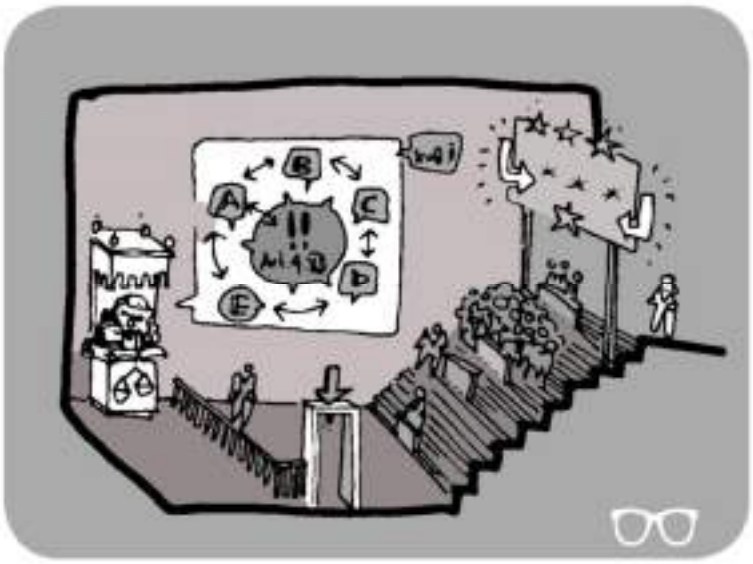
The court of last resort will therefore function as the complete opposite of the Well and will be an Oracle of Law.



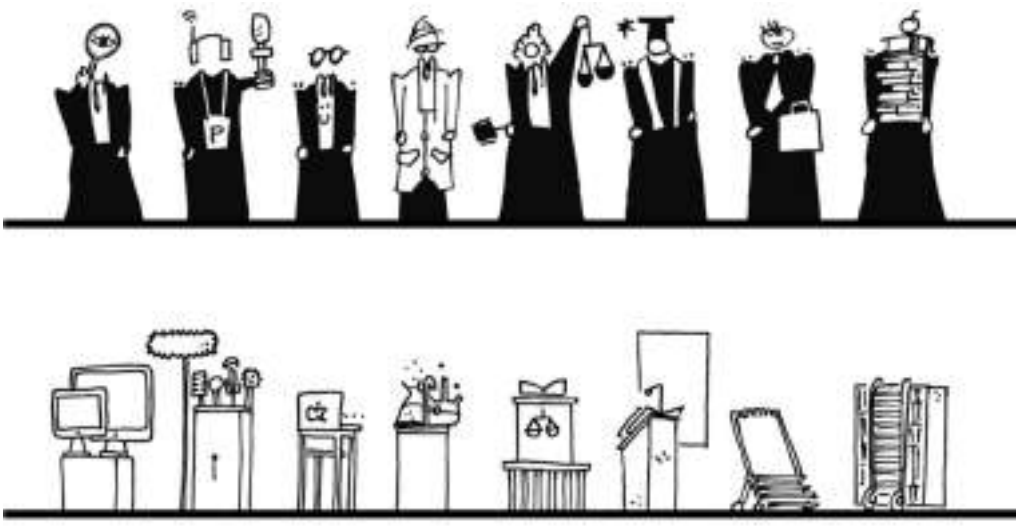
The court of last resort will not cope with all problems but will only deal with complicated and new cases that can set the standard for others. It is not about individual questions but more about the collective answers. This court can put new cases on the agenda if they find that necessary, in order to create new jurisprudence.

Courts following a strategy of being a last resort are not likely going to be big. They will probably diminish in size, employing less people as other institutions take over adjudication in areas such as divorce, commercial disputes, routine crimes, debt issues and consumer disputes with providers of goods and (financial) services.

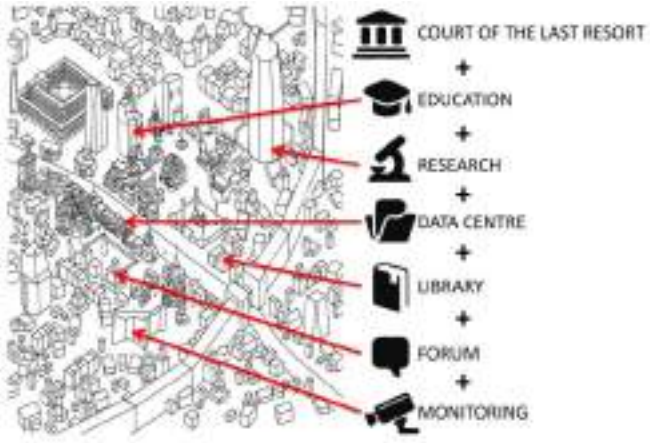


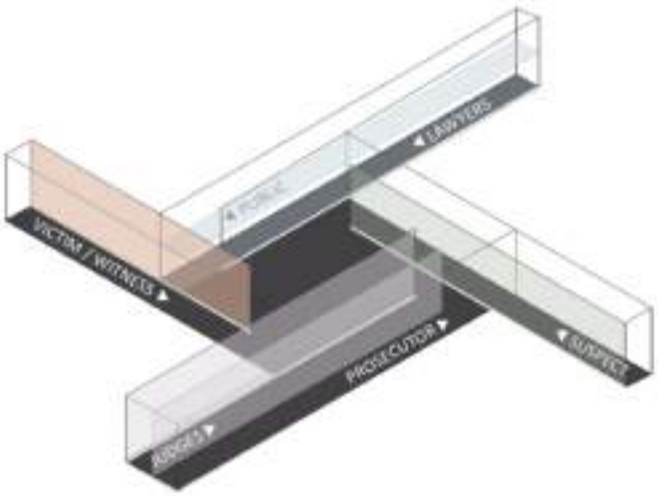


The court of last resort is a public building 2.0. It is not just a court of law, but also a university, library, research & development centre, laboratory, a datacenter and will act as an FORUM. As law in the courts of the last resort is becoming more collective, the building becomes more public...



The new program will nevertheless not necessarily increase the building size. The court of last resort will occupy the vacant spaces in the city and will benefit from the overplus of other mostly public buildings. The beating heart of the building will always be the courtroom, which is unique and iconic for the court of last resort.


COURT OF THE LAST RESORT
+
EDUCATION
+
RESEARCH
+
DATA CENTRE
+
LIBRARY
+
FORUM
+
MONITORING


LAWYERS
VICTIM / WITNESS
PROSECUTOR
SUSPECT

6. High value adjudication

There is no serious alternative to courts. Some countries have no president, others reject democracy and there are places where the language of human rights does not open doors. But every single country in the world, every city, and every other remote village, has adjudicators. When things go seriously wrong between people, adjudication by trustworthy third parties needs to be available and accessible, at least as a backup, when the people involved cannot work out a solution themselves. Courts deliver highly valued goods such as recognition, voice, respect, fairness, financial security and proportionate retribution. They contribute to finding peace of mind and sustainable relationships.

The task of courts seems to be straightforward. Good courts deliver these valuable goods through excellent procedures. All the way from the intake of the problem, through collecting evidence, onwards to facilitating dialogue and settlement, towards a final judgment, and then to implementation, the proceedings and processes have to be fair and effective. If court procedures are also affordable and accessible, judges can easily gain the trust of the population. The job of judges can then be unique and very fulfilling.

Courts are changing their ways

The challenge for court leaders is to get this done. Procedures have to cope with the vast demand for court interventions. Increasingly, judges are expected to put people and their justiciable problems first. Procedures also have to prompt adjudicators to remain neutral, need to acknowledge different moral points of view, and have to be accounted for; all of this in a way that is financially sustainable.

Courts are gradually improving their procedures. The preceding chapters identified the trends in procedural innovation we encountered. Some developments seem to be inevitable, such as the ones towards specialisation, standardisation and moving online. Others are very clear from the available data, such as the trend towards settlement as the most frequent and desirable way to achieve access to justice.

Trends are connected as well. When more people enter courts without representation by a lawyer, judges will be more inclined to work on their problems, rather than on formal legal issues. Many trends are just there, still needing explanation or even confirmation as being a trend at all.

What can court leaders do in order to strengthen courts and the procedures they deliver? Innovation in general, and innovation in court procedures in particular, will only happen if many things come together: clients, their needs, an open mind about how they best can be served, looking beyond the existing legal framework a diversity of views, knowledge and competencies, and much more. Partnerships are essential for this. Courts can design the best procedures but they need the cooperation of the legislator that has to adapt the rules of procedure to make it happen. They need to establish coalitions with some key partners. The support of the chief judge and a partner with financial clout are essential to make their innovations work. We see courts increasingly cooperate with partners from outside and organise systematic dialogues with stakeholders. Some courts now have committees of users and advisors that provide them systematic input and feedback. These coalitions can be the first step towards partnerships that help them

Innovation is happening in courts, but not as much as elsewhere, and it is not always leading to sustainable improvements. So court leaders are reflecting on what is needed to break through this glass ceiling. Here is what emerges from this report as three important things they could consider.

Courts have a choice: a vision of their role and the goals of their procedures

Courts, like all of us, cannot be everything at the same time. They need a vision of what their judges and procedures will do for the men, women, groups and companies addressing them. In Chapter 5, we discussed three possible strategic choices. Courts may aim at offering excellent procedures of last resort, excellent procedures aiming to solve legal issues or excellent processes to resolve disputes and problems associated with crime.

Many specialised courts, and even some country-wide courts systems, are already making these choices. Others still hesitate, perhaps to avoid the initial pain of going in one direction, excluding other possible avenues. In this way they also withhold their judges and their users the benefits of striving for true excellence, because these choices have huge implications. Choosing is risky, and these risks should not be taken lightly. But if courts do not choose, the choices will be made elsewhere, at ministries, at competing institutions, by new entrants on the scene for adjudication, or by chance.

We have shown that each type of procedure requires different skills, knowledge and competencies. It needs to be combined with different kinds of legal and adjacent services, to be created or sustained by governments in supplement to courts. The size of courts, their staffing and the requirements for online platforms are very different under each scenario. The relationships with users, legal professionals and with the general public within these procedures, they all range from close to rather distant. This proves the point that such a strategic choice matters and cannot really be avoided.

Financial independence: negotiating better funding models is feasible

Whatever their strategy, courts also need better funding models. Court systems struggle with a fundamental tension. When they deliver excellent, accessible procedures, more people will come to them with their justice needs.

The funding models for courts tend to be unsophisticated. They often rest on the assumption that court procedures have to be neutral and are unaffordable for people and thus have to be provided by government. Even the most recent models, paying courts for every intervention they deliver, can be a huge barrier to innovation. Court leaders risk financial disaster if their improved procedure provides more value and thus attracts more clients, whilst the gains from cost savings tend to be captured by governments. In most countries, courts do not get a fair share of the benefits of an extra legal or justiciable problem they solve with a valuable intervention.

The trends towards specialisation, standardisation, services to people without lawyers, settlement and moving online offer a way out, however. For many types of cases, the costs of excellent adjudication are dropping rapidly. Courts can deliver more value at lower litigation costs to the parties. In many categories of cases, courts can charge user fees to one or both of the parties that are quite reasonable. The proportion of court costs that is recovered from user fees is rapidly rising in many countries, and approaching full coverage with only a limited amount of subsidies in civil cases. So courts can become independent, financially.

A priority for courts should thus be to negotiate an arrangement with their governments, which allows them to set and collect their own fees, and specifies for which cases and for which persons the government will subsidise court services.

Such a system will necessarily have some complexity, because court procedures have multiple clients, and neutrality should be guaranteed. Moreover, financial independence for courts will never be unrestrained. It will have to be combined with increased monitoring and accountability. If courts set their fees for housing disputes or for product liability cases too high, they will have to explain to the public what are the costs of delivery, and may be forced eventually to adjust their fees by a parliament through legislation.

Courts can be trusted to develop and be fully responsible for their procedures
Another major issue is that courts currently have too little say over their procedures. Laws of procedure tend to be old, detailed and based on the idea that accountability of judges is a matter of monitoring how they follow the rules.

As we have seen, adjudication is a very complex service, needed for a broad variety of problems. Judges are creating complicated interventions, procedural rules and online interfaces tailored to youth crime, employment issues or patent cases. Every step in the procedure needs to be aligned with what happens next, and with the best practices in legal services. The quality of courts is improved by the sum of all these innovations, most of them developed bottom up.

The top down approach to designing court procedures needs to be abandoned, like it was abandoned long ago for most products and services. Imagine medical treatments would still be determined by a 19th century legal decree, instead of by doctors, university hospitals, pharmaceutical companies and providers of medical instruments.

Would we still be ordering doctors to apply bleeding as the remedy of choice? Would we accept that a change in remedies can only occur if it becomes a law and goes through a procedure taking many years before a parliament that knows little about these interventions?

In the current system, courts do not have to take much responsibility for the quality of their services. Formally, they are distributors of justice produced elsewhere. Formally, they have to apply the procedural rules developed far away and long ago by their ancestors in parliaments or at supreme courts. Formally, judges innovating procedures are often forced to twist or even break the law.

Designing excellent procedures is better left to, and become the responsibility of, the present generation of judges. They can work together with researchers, providers of online conflict resolution software and with the end-users of procedures.

Once they, or their suppliers, have developed a new process for justice needs, this can be tested and certified in a similar environment as has been created for medical treatments. Surely, accountability is needed. There will always be a legal framework of broad principles for fair procedures, leaving it to the courts to design the most effective ones, under supervision of the general public, an independent agency and/or parliament.

Citizens, as well as their governments, will benefit from leaving more to their courts as independent specialists. We have shown how this can lead to better services, cost savings, less crime, faster conflict resolution and more economic growth. Occasionally, a judgment will be disliked, or difficult to implement, but giving courts more responsibility will also increase the probability that such mistakes will be corrected.

The future of courts ...

The future of courts looks bright. Trends are favouring courts who want to deliver excellent procedures. When they gain more financial independence and can take full responsibility for the quality of their procedures, whilst increasing their accountability, they can add even more value to people's lives, bringing stability, peace and justice to people in their most difficult moments.

Work sessions held in the HiiL Justice Innovation Lab

23 Sep	The future of courts
16 Sep	Online dispute resolution
9 Sep	Courts and big data
2 Sep	Accountability of courts
26 Aug	Courts and power politics
19 Aug	Coping with backlogs
15 Jul	International criminal courts
8 Jul	Evidence-based procedures
1 Jul	Resolving business disputes
17 Jun	Court strategies
10 Jun	Courts and religion
3 Jun	ADR and problem-solving
27 May	Effective divorce courts
13 May	Generalists and specialists
6 May	Not just legal code
22 Apr	Cost-effective courts
15 Apr	Procedural reform
8 Apr	Effective labour courts
25 Mar	Challenges for courts
18 Mar	Great value of courts

The weekly posts from the work sessions are available on: www.futureofcourts.org

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HiiL is an advisory and research institute for the justice sector, based in The Hague, city of peace and justice. Our HiiL professionals are leading academics, from various cultural backgrounds, with many years of experience in places where justice is most needed.

Mission | HiiL is passionate about making justice work. The core of our work is to improve rulemaking and conflict resolution processes. In today's challenging environment that is impossible without innovation. We support clients and other stakeholders doing this together, across borders and based on the best available knowledge.

What we do | HiiL is a not-for-profit foundation. It is funded by income from the services we perform for our clients and by contributions from governments, philanthropic foundations and social entrepreneurs.

We provide our clients with:

- Justice strategy advice to make processes more accountable, efficient and attuned to justice needs
- Measuring and assessment to make progress visible, comparable, showing where more effort is needed
- A justice innovation lab for developing, testing and improving prototypes of new approaches

HiiL also facilitates the Innovating Justice Hub:

- A unique, world-class platform comprising a fast growing community of justice innovators, rule of law leaders, justice experts and potential funders. The platform is supported by an interactive website www.innovatingjustice.com, regular knowledge products, and opportunities to meet and connect.

HiiL has a joint venture with Tilburg University (Tisco research group on conflict resolution systems).

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