

Courts, Competition and Innovation

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Abstract:

In some situations, characterised by dependence and unexpected change, third parties are needed. They solve problems in relationships. Courts fulfil this need for trilateral governance, which is a fascinating but complex process. Third parties offer a miracle product, because they can solve most conflicts just by being there. Providing this miracle is difficult, though. Courts are notoriously difficult to manage. Courts compete among themselves and with countless other third parties, from informal tribunals to websites and television shows that mobilize the court of public opinion. Courts can learn from their competitors and in the process of competition. They have to, because their traditional procedures lose market share and legitimacy. In order to innovate, courts need a setting that provides stronger incentives and at the same time is a safe, open and nurturing environment. The view developed by Montesquieu in the 18th century, positioning courts as independent enforcers of laws enacted by parliaments, is still valuable. But it can also be a barrier to court innovation.

Rezumat:

Soluționarea unor diferende presupune uneori și implicarea unor terți precum instanțele de judecată. Funcționarea instanțelor este însă costisitoare iar acestea trebuie să concureze și cu alți terți specializați în aplanarea conflictelor. În acest context, instanțele trebuie să se adapteze, să învețe de la concurență și să inoveze pentru a deveni mai competitive. Deși viziunea clasică asupra instanțelor dezvoltată de Montesquieu în secolul al XVIII-lea este încă valabilă această poate constitui și o barieră în calea acestui proces de adaptare.

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Courts

There are two stories about courts. Both of them are good stories. Lawyers love the version that independent courts are among the greatest inventions of human history. During the 18th century, Montesquieu and his followers told us that independent courts are necessary next to the legislative and

the executive branches of government. In this view, courts should be there to apply the laws made by parliaments and to be a check and balance on government. No courts, no



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mature state. Looking at any object for many years from one angle can lead to an obsession. Montesquieu's enlightened view on courts is no exception. His view sometimes leads to an obsessive defence

of courts as being special, above outside criticism and well funded without much accountability. Or to an obsessive focus on laws and rules as the core business of courts.

The Third Party

- 'The triad, two disputants and a dispute resolver, is a universal, if undertheorized, phenomenon.
- It is a 'primal technique of organizing social authority and, therefore, of governing.
- Triads serve 'to perpetuate the dyad, given changes in the preferences or identities of the two parties.
- The triadic entity responds to, and is a crucial agent of, social change.'

1999



Alec Stone Sweet,
Political
Scientist at
Yale

Another, equally valid view is that there are moments in relationships where people need a third party. This view has been elaborated by scholars such as professor of political science Alec Stone Sweet¹³. A third party is the guarantor of good behavior at home, in communities in a rural area and between states that should pay their debts. According to Stone Sweet, third party dispute resolution always emerges. Just because people need protection and security in their relationships.

Economist Oliver Williamson¹⁴ studied the need for third party governance more precisely. He starts from how people build their lives. We all invest in families, land, houses and other assets together with other people. In our work, we build and learn things that are only useful for this particular job. Investing in assets and social capital is great, but it also tends to make you dependent. On your husband, your boss, your supplier of goods and services, your business partner or the people living around you.

¹³ Alec Stone Sweet, *Judicialization and the Construction of Governance*, *Comparative Political Studies* (1999), p. 147-184.

¹⁴ O. E. Williamson, *The economic institutions of capitalism*, 1987; O. E. Williamson, 'The Economics of Governance', *American Economic Review* (2005), p. 1-18.

Trilateral Governance

The third party is needed if:

- The relationship requires specific investments
- It is impossible to set precise rules because of uncertain future
- Opportunistic behavior (stealing, cheating and violence) is possible

Oliver Williamson,
Nobel Prize
Economics 2009



In these situations of dependence, third parties are needed. They can decide who gets compensation for which part of the investments if the relationship breaks down. They can tell what should happen in unexpected situations. They can decide what should be the remedies when somebody cheated, including punishment. This story makes court more than enforcers of law. Essentially, they become problem solvers in human relationships. If you take the point of view that we need third parties to make relationships work, you are likely to become obsessed by whether courts are effective problem solvers. This is my obsession. Courts are fascinating and often do wonderful jobs. They can intervene and help us to cope with the difficult moments of divorce, a business partnership not working as expected, land conflict, accident, fraud, violence and

genocide. The box gives an impression of the sheer volume of the good work courts can do in a country such as the Netherlands¹⁵.

The need for trilateral governance

Below you see the need for third parties in countries such as Congo, Palestine or Sierra Leone. Imagine you would be at school, with three class mates with a family member who has been tortured. Four out of the 30 children have stories how their home was looted and burnt down. Three have close relatives¹⁶ that have been killed. On top of this, your class also has the normal problems with divorced parents, accidents and theft.

Third parties cannot turn back the clock. They help to sort out what happened. They listen a lot. They broker and mediate solutions. If sanctions are

¹⁵ Selected issues. Sources: Geschilbeslechtsdelta 2009, Veiligheidmonitor 2010, Jaarverslag Vluchtelingenwerk 2010, 2008 statistics from courts made available for project (on

file with author), Factsheet Verkeersslachtoffers 2010.

¹⁶ At p. 59.

Problems in The Netherlands | yearly

30.000 new divorces; 100.000 terminations of employment by employer; 700 people killed in road traffic accident; 20.000 personal injuries in road traffic accidents; 1.000.000 unpaid debts for which enforcement is sought; 10.000 bankruptcies; 1.700.000 conflicts related to purchase of products or services;

15.000 asylum seekers; 180.000 building permits

200 homicides; 170.000 victims of violence; 150.000 instances of burglary



In countries torn by civil war

People reporting effects in immediate family;

- 20% someone displaced
- 15% imprisoned
- 10% tortured
- 15% home looted
- 10% deaths

Worldwide: 4 new civil wars each year and 50.000 – 200.000 battle deaths per year

Conflict, Security and Development,
World Development Report 2011

needed, they can decide. They determine how harm should be remedied. In this way, third parties contribute to the process of recovery from the most difficult moments in lives. They restore trust. So that people dare to rely on others again. Trilateral governance has fascinating

dynamics. The triangle between judge, plaintiff and defendant is unstable. It is hard to make it work. Imagine yourself at the top of the triangle. On one side you have a plaintiff who really needs the judge to intervene. All her hopes are invested in the judge. But the judge has to keep a

distance. He cannot give every plaintiff and victim what she needs.

Then there is the even more complicated relationship between judge and defendant. An accused person does not want to be there in the first place. He will be tempted to use delaying tactics and may do anything to prevent the court to decide. William Landes and Richard Posner have called this the submission problem.¹⁷ In order to solve this, the third party needs leverage to make the defendant to participate. A third party may create a safe environment, so the defendant can talk and may have something to gain from a good solution. He can also use negative incentives: a bad reputation. If you do not show up, you get a judgment by default against you. Sometimes detention is needed to force the defendant to cooperate. So you use your influence. At the same time, the defendant should be guaranteed a fair process and a fair outcome.

On the bottom side of the triangle, the judge oversees the process between the parties. How they make their points and contribute evidence. He lets the parties grow towards a decision, keeping them within the framework of the law. They may take part of the decisions themselves. Even in most criminal cases there is now an intensive negotiation between prosecution and accused, supervised by the court. Gradually, the triangle grows towards a decision. The judge decides the

remaining issues, on which the parties cannot decide for themselves. Courts work best if they really provide trilateral governance. Make the triangle work, not deciding about the two parties and imposing it on the parties. Solutions work much better and are much more appreciated if the parties participated in the process. The more they negotiate and the less the court decides, the better it is.

And that brings us to the miracle. Judges and other third parties supply an incredible product. Just by being there, they can solve 90% of the problems. They provide what has been called the shadow of the law. After a car accident, claims for damages are settled if the victim and the insurance company can predict what will be the outcome if the case reaches the court.

But this miracle is hard to bring about. It works if both parties believe that the other will spend the money and effort to go to court. That makes them reasonable in the negotiations. Courts must also put pressure on the negotiations. So good courts are a little patient but determined to decide the case quickly if needed. They are prepared to intervene just in time. They are accessible at reasonable costs for each of the parties.

Courts are also fascinating because they operate in kind of void. Economists and law and development specialists have shown that courts do not have many outside incentives to do their job well.¹⁸

¹⁷ W. M. Landes and R. A. Posner, 'Adjudication as a private good', *Journal of Legal Studies* (1979), p. 235.

¹⁸ Martin R. Schneider, 'Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal', *European Journal of Law and Economics* (2005), p. 127-144; Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation*, 2008; Richard Messick, 'Judicial Reform and Economic Development: A Survey of the Issues', *The World Bank Research Observer* (1999), p. 117; Juan

Carlos Botero, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Alexander Volokh, 'Judicial Reform', *The World Bank Research Observer* (2003), p. 61; L. A. Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America*, 2007; R. Islam, *Institutional Reform and the Judiciary: Which Way Forward?*, *World Bank Policy Research Working Paper* 2003; Ewa Wojkowska and Johanna Cunningham, Justice reform's new frontier: engaging with customary systems to legally empower the poor, in S. Golub (ed.), *Legal Empowerment: Practitioners' Perspectives*, 2010.

Judges have to motivate themselves and each other, and it is surprising how often they still succeed in delivering good services. Other mortals may have customers with clear needs, but a judge has at least two customers who usually want different things. Courts are also not disciplined top down. By making them independent, Montesquieu and his followers removed incentives on courts that could be provided by a big boss who wants to get things done. A minister of justice can give courts more or less money, but as soon as he asks something in return he will be accused of manipulating the independent judiciary. The press is only interested in high profile cases: whodunits, celebrities and the ones with ethical dilemmas. Appeal courts operate far away from the daily work of judges, only checking whether some rules have been observed, but not how the judge interacted in the court room or how they made life easy for users of procedures. In this open space, judges have the best job security that is around. As a result of this lack of direction, courts are difficult to manage, as many of you have experienced. Reviews of court reform programs and procedural reform continue to show that it is difficult to improve courts services.

In his recent book, Francis Fukuyama even tells us that of all the components of states, effective legal institutions are perhaps the most difficult to construct in developing countries.¹⁹ Courts in developed countries have overcome this stage, but struggle with delay, with complicated and costly procedures, with effectiveness, with errors in convictions and with legitimacy.

Court procedures do not always look like miracle products. For many conflicts in the world, there is still no miracle third

Create space for judges; give them 10% of time, 3% of budget, recognition, partnerships with customers and outsiders.

party available. Many conflicts that should be before courts are not still not reaching them. That is why we will now look at third parties and governance mechanisms.

We got started. These are my three points of departure:

- Third parties and thus courts will always be there in some form. Because we need them in our relationships.
- Courts are fascinating triads. With three rather complicated relationships at the sides of the triangle. By being there, they can provide miracles.
- Courts are difficult to run. Two parties each want something else. Judges are rather isolated from incentives. They have to motivate themselves and each other.

Competition

Now consider the following situations:

- Osama bin Laden is summarily executed by US marines. A trial in Washington, Islamabad or The Hague may or may not have been considered.
- Dominique Straus Kahn loses his job and his reputation within days after being arrested and indicted; the court of public opinion renders a judgment within a few days.
- Fines are commonly imposed by government agencies or public prosecutors in the form of an administrative sanction.

¹⁹ Francis Fukuyama, *The Origins of Political Order*, 2011, p. 247.

- TV shows dealing with consumer complaints have developed models for making sellers of products and services comply with laws that protect consumers.

- Separate employment tribunals have been set up to deal with employment disputes in the UK, as in many other countries. As of this year, their organization has been merged with that of the courts again.

- Mediators appointed by courts do not only facilitate settlement but regularly give (evaluative) opinions on how cases should settle in the US. In a way they become a court of first instance, with the court itself as an option of appeal. But recently, judges also started doing mediations themselves. In the UK and in Canada, judicial mediation is developing rapidly.

- In the US, only 2% of filed civil cases make it to trial. The number of trials went down 60% between the 1980s and 2004; summary judgments became much more frequent.

- Criminal trials before a jury are also extremely rare, the main avenue to criminal justice is plea bargaining: a negotiated sentence between prosecution and defense.

- In developing countries, an estimated 80 to 90% of disputes is decided by informal justice systems within communities.

- War crimes have been investigated by truth and reconciliation committees in South Africa and at least 19 other countries since the early 1990's.

- During the past 15 years, human rights lawyers in Egypt filed many dozens of cases involving human rights claims against the government at the Egyptian Supreme Court; including several cases arguing for lifting the state of emergency; decisions in these cases were postponed again and again by the court, until the Tahrir Square revolution made these cases moot.

If we look at courts from the point of view of Montesquieu, these situations seem to illustrate that the position of courts as a third branch of government is not respected. Courts are not used for what is their task in the state. They do not get enough funding. Informal courts are poor men's justice, necessary because governments do not spend enough on courts. Settlement bargaining and mediation are a kind of surrogate for litigation. In each of these examples, many legal rules have not been observed. From this perspective, killing Osama bin Laden and throwing his remains in the sea is a clear violation of the right to access to justice, guaranteed by constitutions and human rights treaties. Truth and reconciliation commissions may fulfil a need, but they are not really relevant for courts. Criminal courts have to continue to do what courts always did: work from an accusation towards a verdict establishing a number of years that the defendant should spend in jail.

If we switch to the perspective of courts as fulfilling a demand for third parties, we see more and different things. Courts loose territory to competitors. Consumers do not go to court for protection, when using the avenue of the television show is far more effective. People do not use courts if they can obtain access to remedies from informal tribunals in their local community. Whatever the precise reasons, President Obama did not choose to bring Bin Laden to trial.

These examples all suggest that customers who need third parties because they seek accountability vote with their feet. Alternative mechanisms for providing access to justice are gaining ground and traditional court procedures tend to lose market share.

This is not a one way process, however. The Hague's courts get more cases, now that more countries are more inclined to cooperate with indictments of

prominent dictators and generals from war zones. And courts are not passive. They develop new services themselves. English courts reintegrated the employment tribunals that were once set up separately.

Some judges and court administrators may be surprised to hear about this because they experience high workloads. But research confirms the trend of losing market share of judges presiding over traditional litigation in the US and elsewhere.

There is an increase in other ways to cope with disputes, including more simple interventions by judges.²⁰ High workloads are unlikely to be caused by a worldwide increase in conflicts between people.²¹ The number of divorces, road traffic accidents, thefts and people killed by others is more or less constant over the years, or decreasing. The number of claims about products and services is unlikely to grow faster than the growth of the economy. The most likely explanation for increasing workloads is that courts do more work per dispute. Indeed, in high stakes litigation, files now seem to contain more pages of documents (e-discovery), lawyers pleadings have become longer and court hearings take more time than 20 years ago.

There is much to learn from competitors and through the process of competition. My examples also suggest on what issues courts compete with other mechanisms for accountability. And what is the scope for improvement. If a court would have a ceo, and you would be the one in charge, you would probably let your research and development people work on the following challenges:

- **Timeliness.** The court of public opinion decides within a few days. It may wait a few weeks for a court decision that shows what is known and what is not yet known, but certainly not many years. How can court interventions be delivered just in time?

- **Focus on substantive justice** minimizing procedural and bureaucratic issues. Why did Presidents Obama and Bush not use courts? It might be that these men could not afford the risk that some procedural or legal nicety would lead to freeing of terrorists.

- **Costs.** If court procedures cost a lot of time and money, and the use of courts requires expensive lawyers and experts, they will lose market share. How can legal costs be limited?

- **Settlement and plea bargaining.** If that is now the main way in which people obtain access to justice, making these processes more fair could become a priority and a challenge.

- **Truth and reconciliation committees** show a need for processes where people get informational justice: they want to know what happened, listen to different perspectives and do this in a setting that is non adversarial. Why is that and what can be learned from this?

- **Impartiality and independence.** Sure, this is a big asset of courts. But plaintiffs and other users of courts seem prepared to trade impartiality and independence against costs and timeliness. When are they willing to trade, and to what extent?

Local justice, in the community, close to the relationships where the problems arose in the first place, seems to work.

- **Specific knowledge.** Courts compete with specialized tribunals who can deal

²⁰ Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', *Journal of Empirical Legal Studies* (2004), p. 459. showing a decline of 60% of the absolute number of civil trials from 1985 to 2002 and K. M. Clermont, 'Litigation Realities

Redux', *Notre Dame L. Rev.* (2008), p. 1919. showing this trend is similar in other countries.

²¹ Despite rumors of a claiming culture, there has been no confirmation of his in the number of tort claims filed with courts or insurers.

with large numbers of disputes efficiently and quickly.

Competition may be a word you do not like to hear in relation to courts. But for those seeking access to justice it generally is a blessing. For victims of large scale violence in Kenya it is good not to be dependent on the courts in Nairobi but to have the additional option of the ICC in The Hague taking action. Consumers would have gotten nowhere without being able to rely on courts, but also on television shows, on consumer authorities and on the odd member of parliament. They used these different forums to hold producers accountable for the quality of goods and services.

This is called forum shopping. It is frowned upon by some in legal academia.²² But empirical research by Theodore Eisenberg and Kevin Clermont has shown that it is a very normal part of the litigation game.²³ Plaintiffs go to the court that will help them best. Defendants try to convince courts not to take cases, because another court is more neutral or has more expertise. Opponents of forum shopping point to excesses such as Texas courts granting high amounts of damages in product liability class actions. Belgian or Spanish judges started to pursue heads of state for corruption and mass murder. Was that their business? These entrepreneurial judges certainly tried to meet a clear demand for justice. As did many of their predecessors. Courts like the Supreme Court of the US, the Conseil Constitutionnel in France and the European Court of Justice in Luxembourg all had moments in which they extended their jurisdiction by interpreting their powers broadly. They took more power, because they saw a need for their services.

What to think of this? During 2010 and 2011, Hiil developed a method for diagnosing the challenges for the legal ordering in the future. Three scenarios have been developed for the year 2030: Global Constitution, a Montesquieu kind of constitutional order on a global level, Legal Borders, a strong nation state scenario, and legal internet.²⁴ According to many speakers at the Law of the Future Conference, the most intriguing and scenario was the legal internet scenario. Here laws made by parliaments and courts compete with all kinds of rules and guidelines published by government agencies, by international standard setting bodies for banks, accountants, the medical profession and what have you, by NGO's and by informal networks such as the G20 and the Global Compact between companies that are serious about human rights and the environment.

The third party forums that provide accountability proliferate in a similar way. Even criminal courts feel the competition by the court of public opinion, by victims starting civil actions, by military tribunals during the war on terror, by truth and reconciliation commissions, by local arrangements in cities dealing with drug abuse, youth crime and prostitution and by special regimes for criminals with psychiatric disorders. For all practical purposes, it is now possible to appeal from a decision by a criminal court to specialized television shows that will help you to prove your innocence after all and to committees of scientists who will review the evidence again.

There is a need for rules and there is a need for accountability. In a world where many people want to do good and have money there are plenty of social

²² J. Pauwelyn and L. E. Salles, 'Forum Shopping Before International Tribunals:(Real) Concerns,(Im) Possible Solutions', *Cornell Int'l LJ* (2009), p. 77.

²³ Clermont, 'Litigation Realities Redux'; K. M. Clermont and T. Eisenberg, 'Litigation Realities', *Cornell L. Rev.* (2002), p. 119..

²⁴ See www.lawofthefuture.org

entrepreneurs who try to supply accountability.

During the years I worked on dispute resolution systems, I have met hundreds of people who try to set up court like institutions, where third parties help to solve conflicts and to create accountability. The International Criminal Court itself is perhaps the best example of this trend. A big group of NGO's spotted demand for accountability of leaders that played a key role in genocide and ethnic cleansing. A demand unsatisfied by local courts and existing tribunals. So a new third party mechanism emerged, serving clients in better ways. It is time to look into these innovation processes.

But let us first summarise where we are:

- Courts set up and run by the state compete with many other third parties.
- Courts can learn from this competition, which shows their strengths and their weaknesses.
- In the long run, individuals and groups seeking access to justice will vote with their feet. This forum shopping cannot be stopped. Where demand for access to justice and for accountability is not satisfied, new third party mechanisms will be created by social entrepreneurs. This should be welcomed.

Innovation

In the long run, third party mechanisms are thus likely to become more entrepreneurial and more innovative. Even government sponsored courts will have to. If they sit and wait until other mechanisms develop that serve the needs of citizens in a better way, they will gradually become less relevant. It is essential that courts find ways to cope with higher demand. If the International

Criminal Court would suddenly get 20 new cases per year, a big budget increase is not likely. At the Hague's cocktail parties, most diplomats expect that the current €100 million is probably more or less of a ceiling. What will the court do? Refuse the cases? Let the victims wait for years? Or develop an innovative way to handle these cases at half of the current costs?

All court leaders and ministers of justice face similar challenges. Let us look at two possible responses. Some leaders seem to be overwhelmed. If demand for court services increases, they see this as a threat. They may react in a command and control manner. They impose production targets on judges, without giving them a realistic option to improve and innovate procedures. They ask clients to stay away. But what will happen at the end of their planning cycles? Most likely their judges got more stressed, making more mistakes, the plaintiffs who needed them had to wait longer and the powerful defendants got a better deal. If courts are then criticized, their leaders may be still be tempted to urge politicians and the press to respect courts.

Another response is to see increased demand as a challenge that courts are needed. Court leaders can choose to innovate their way out. One of the most interesting findings from the literature on court reform is that courts perform better if they handle more cases.²⁵ In many countries, family courts, small claims courts and courts dealing with non-violent crime are flooded with cases. But they find a way to serve their clients well. More pressure makes them more efficient. Seeing more clients also gives courts more information about what is really needed. Court fees can increase, not as a barrier, but because clients will be happy to pay more for faster services and for solutions that work better.

²⁵ Botero, La Porta, Lopez-de-Silanes, Shleifer and Volokh, 'Judicial Reform'.

Innovating their way out is thus an option for court leaders. One interesting innovation making its way through courts worldwide is known as 'hot tubbing.' Often, in an adversarial trial, the experts from both sides are each cross-examined by the lawyers. This takes long and it is difficult for the neutral judge or jury to make sense of the expert evidence in this way. So Australian courts (lead by Australian Trade Practices, then the court for competition matters) developed the concurrent evidence procedure as of 1998, when it became part of the rules of procedure. Both experts make a report.

The reports are exchanged and the experts meet. Together, the experts make a bullet-point document with a list of matters upon which they agree and matters upon which they disagree. Both experts appear in court together and are sworn in. The judge makes an agenda together with the lawyers for a point by point discussion, chaired by the judge, of the issues in disagreement. The experts can submit their views, but are also encouraged to ask and answer questions of each other. The lawyers also may ask questions. In this way, the expert's opinions are fully articulated and tested against a contrary opinion.²⁶ Time and money is saved for courts and for the parties.

There are many more of such innovations. In The Hague, we are setting up an innovation platform for the justice sector. Supported by the City of The Hague and the Ministry of Economic Affairs, we aim to identify the demand for innovation and to showcase the most promising solutions. On our website innovatingjustice.com we already collected some interesting experiences of innovators.

From the experience of innovators, from the literature on public sector innovation, combined with the literature on court reform, it is possible to deduce some key points that make courts successful innovators (see below, Data sources). Basically, successful innovation requires a bunch of good ideas, selection of the most promising ones and dedicated hard work to make a model or prototype, implementing and scaling up, and then learning. Let me illustrate some of these points briefly.

One issue stands out, because it is a big dilemma for judges. Space for breaking rules is necessary. Innovation implies change. Existing norms and practices stand in the way. Getting around rules is really difficult in the setting of a court. The core of what a judge is trained to do, is to look for the rules. Even if the challenge is that decisions have to be taken faster, judges tend to reflect on the rules on quick decisions which their colleagues have formulated before. Then they look for a new rule: my fellow judges should decide every case they have on their desk within 6 weeks. Or should it be 12 weeks? I have seen this happen hundreds of times. Courts think rules and make decisions. They do not have formats for gradually improving, experimenting and agreeing on new working methods.

First, all these rules have to be pushed aside. Is this dangerous? I would suggest that breaking the rules when innovating is not more dangerous for judges than it is for architects, doctors or builders of websites. Good professionals know what they do.

They use their intuition. They test their ideas rigorously before they apply them. And at the end of the innovation process, they design new rules and procedures.

²⁶ Peter McClellan, *New Method With Experts – Concurrent Evidence*, *Journal of Court Innovation* (2010), p. 259

Generating possibilities

1. **Vision** and commitment from government
2. **Focus on users**, frontline staff and middle managers
3. **Diversity**
4. Scanning of horizons and margins: a process need
5. Developing capacity for creative thinking
6. Working backwards from outcome goals: **terms of reference**
7. Creating time and space
8. Allow breaking the rules
9. Competition: the submission problem and regulation of legal services

The first Innovating Justice Award was granted in the Peace Palace last June 2011, during the Law of the Future conference. A jury headed by Hassane Cisse, deputy general counsel of the World Bank, chose a scheme originating from Nicaragua. Here a local judge supervises 'facilitadores judiciales' in villages that are two travel hours away from his court house. The facilitators, elected by the community, mediate disputes between neighbours about land, problems between husband and wife and fights between young men. They help the judge and the police to deal with bigger crimes. This fascinating scheme brings the shadow of the law to local communities. It also diminishes the work load of the judge. So he now has time to educate the facilitators and to visit the villages on a regular basis.

This program builds on the needs of users and on existing conflict resolution mechanisms in villages. Bottom up innovation is more likely to be effective. It is the customers and the front line of judges and court personnel dealing with them who know most.

So this scheme has not been developed at the court headquarters, but deep in the countryside. It combined ideas from peace-building, mediation techniques and good practices of local governance. Lawyers were involved. But in courts, there may be an overdose of people with legal training. For innovation, diversity of ideas, backgrounds, perspectives and disciplines is necessary.

The judicial facilitators took 10 years of hard work to develop. But now facilitators have been introduced in Guatemala, Paraguay and Panama as well. They are an interesting option for any country that faces the challenge of access to justice in neighbourhoods. Even in the Netherlands, I know some parts of cities where they could make a difference.

The innovation literature recommends working backwards from a clear challenge, an outcome goal. Apple wanted a computer screen that you can control with your fingers. That became the i-phone. For courts a clear goal could be a process for homicide cases with 99% accuracy in establishing who committed the crime + high satisfaction with

participation in the process for both victims and accused + high trust in the way the crime is handled by the public. Inspiring goals always sound a bit impossible.

Codifying a new practice too quickly is mentioned in the innovation literature as something to avoid. Interviews with judges and countless informal conver-

sations confirm that this is a big bottleneck. Judges can be very creative, but they do not let it flow. Discussions on better working methods get stuck early on, because a group of judges is inclined to codify them immediately. They forget innovation is a matter of trial and error, of learning by doing rather than of deciding, of fine-tuning many small things.

Developing innovations

10. Appropriate selection of fruitful ideas: **simplifying procedures**
11. Adequate risk management
12. Fostering **innovation champions**
13. Creating incubating space
14. Involving incubators and public-private partnerships
15. Introduce modeling, build prototypes
16. Better funding for early development
17. Involving end users at all stages

Selecting the good ideas to work on is essential. The literature on judicial reform provides guidance here. It recommends simplifying procedures, specialization and involving end users. So plans for specialized drug courts should have priority over general reform of criminal law. If employment tribunals can be developed together with employers and trade unions, this is more likely to succeed than working with lawyers to redesign the procedures at the supreme court. Behind almost all the innovations on our website there is a clear innovation champion. A person who is very determined to make it happen. Who gets the exposure and the credits if he or she succeeds. Are we sure innovators in courts are rewarded sufficiently?

Other innovations described on our website show what the future of courts may look like. eBay and PayPal have

constructed an online platform for solving disputes between buyers and sellers. Complaints about payments and about the quality of goods are discussed between the buyer and seller on line. They are guided by online formats. The forms where they can enter their contribution on line are designed in such a way that they stick to facts and that escalation is prevented. On their path through the system, the parties see suggestions how others solved similar issues and which rules of the game eBay has provided for trade on its platform. Buyers and sellers have powerful incentives to solve the issue, because an unresolved issue is shown on their profile. Sellers with many unresolved issues with their customers will have a harder time to sell their goods. It is interesting to note that eBay needed such a forum. Without a credible dispute resolution mechanism, its platform would

attract less users. So there were many incentives to get this done quickly and effectively. Talking about scaling up: this

online platform now deals with 60 million issues between buyers and sellers each year. Across many borders.

Replicating and scaling up

18. Improved incentives for individuals and teams
19. **Improved incentives for organisations: a sound model for financing and monitoring courts**
20. **Scaling up** and disruptive innovation
21. Specialise and beware of early standardisation
22. Change management

If we do workshops in which we let a diverse group of people brainstorm about a court of the future, they do not design a building with a court room anymore. They tend to end up with a website, on which the parties can exchange their views, add evidence, answer questions, find relevant information and interact. When they get stuck, a third party comes forward. A judge then helps them to communicate, organizes a meeting and collects more evidence. Gradually, the parties and the judge grow towards an outcome. Most issues are decided by the parties. But the judge is there to decide the remaining issues, typing his decision in a dedicated part of the website.

One of the major challenges is probably to improve the incentives for

courts to invest in innovation. A major step to achieve this can be the development of a sound model for financing and monitoring the performance of courts. Courts perform better if they are paid for specific interventions and by the ones who use their services ('pay as you go'). Both complainants and defendants can contribute to their costs, although there will be situations where the parties will need a subsidy in order to cover the costs of litigation. But financing courts is more complicated, because courts also produce guidelines and rules (precedents) which can be helpful in order to settle future cases. They should be rewarded for this as well. For being there, creating a shadow of the law. For performing miracles.

Analysing and learning

23. Metrics for success
24. Real time learning: **change immediately if something does not work**
25. Peer and user involvement in feed-back
26. Double loop learning
27. Test from variety of perspectives

Innovation is a continuing process, where learning takes place real time. So if a procedure does not work, it should be within the power of the court to adjust it the next day. This assumes that it is possible to establish what works better and what works not so well. In the context of courts, that is a complicated issue. Judges lack feed-back about their interventions. This is starting to change. Courts now survey customers. Hiil and my research group Tisco jointly developed a method according to which it is possible to measure whether the users of courts perceived procedures and outcomes as fair, letting them give ratings on 7 dimensions of justice and 3 dimensions of costs. It is an innovation in itself, that can be found on innovatingjustice.com

This list of 27 factors that contribute to innovation may seem too long, too intimidating to work on. But this is what research says. There are no magic bullets for improving how courts work. It is a matter of doing many things better.

Is there a bottom line in these 27 factors? It may be that judges need a climate for innovation with incentives, where they are exposed to competition, where they are bombarded with high impact ideas from many different directions and where they are closely connected to what users really need. But innovation also requires a setting where potential innovators feel welcome. A place where their ideas will be nurtured and fed. They need a place with time, incubating space, the possibility to break the rules, the option to develop a prototype, some initial funding and personal recognition for the hard work of developing a high impact innovation.

With our Innovating Justice platform we try to contribute to such a setting, which is both challenging and safe. We also believe that The Hague can be a

prominent place where innovation in the court sector and the broader sector of third party dispute resolution justice can be stimulated. An inspiring vision for courts, serving the needs of citizens and governments in an innovative way, can be formulated in The Hague with appropriate authority. In The Hague, judges from many cultures and countries provide a diversity of views. Dutch universities rank high in interdisciplinary legal research, so a broad range of perspectives is available. New courts have been set up on a regular basis. Incubating space can be created. A lab for court innovation does not require expensive machinery or materials. The practice of working with models and prototypes can be learned. New approaches can be tested in moot courts and in other experimental settings before they are implemented.

Conclusion

It is time to conclude. What can a minister of justice or an entrepreneurial CEO of court do? If he or she wants to create a setting for great courts?

- Remember people need trilateral governance in their most difficult moments. Judges are professionals, relationship doctors and miracle providers rather than production workers.

- Allow, no push judges, to break rules and to develop new working methods. Let them focus on what works and what is fair, informed by rules, not bound by rules.

- Provide more incentives and a sound system for financing courts. Create competition and choice, terms of reference, use surveys of participants, monitoring whether interventions work.

- Create space for judges; give them 10% of time, 3% of budget, recognition, partnerships with customers and outsiders.

- Invite judges to an open, nurturing, knowledgeable, competitive environment, fascinated by courts. Such as The Hague!

Maurits Barendrecht
27 September 2011

Data Sources and Further Reading

In this essay, I did not substantiate every claim made with extensive references in footnotes, but only the most salient ones. The data on which I relied are the following:

- Empirical research on court performance, on the way they deal with disputes as reported in legal needs studies and on justice experiences of users of courts.²⁷
- Literature on court reform and dispute system design.²⁸

- The challenges identified through scenario analysis at the Hiil's Law of the future forum²⁹

- Innovations that described on the innovating justice platform and analysis of this type of innovation through the lense of the literature on public sector innovation.³⁰

- Interviews with a selected group of court leaders and hundreds of interactions with judges during many projects.

- My own experience as a lawyer at the Dutch Supreme Court, followed by one book and many articles on this particular court.³¹

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²⁷ Courts now increasingly publish the results of user satisfaction surveys. Since the 1970's, legal need surveys have been conducted in over 40 countries. Since Dame Hazel Genn and Sarah Beinart, *Paths to Justice. What people do and think about going to law?*, 1999. they are becoming a routine way to assess the landscape of legal problems and the way they are processed. Hiil and Tisco jointly developed a method to assess the experiences of users of dispute resolution procedures, see Martin Gramatikov, Maurits Barendrecht & Jin Ho Verdonshot, *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, Special Issue: *Measuring Rule of Law* (ed. Juan Botero et. al.), Hague Journal on the

Rule of Law, 2011, p. 349-379 and other research papers listed at

www.measuringaccesstojustice.com

²⁸ See note 5 and my own research papers at <http://ssrn.com/author=74344>

²⁹ See www.lawofthefuture.org

³⁰ See the innovations at www.innovatingjustice.com and my research paper *Innovation in The Justice Sector: What Makes it Happen?*, presented at the 2011 conference of the International Legal Aid Group, see <http://www.ilagnet.org/images/docs/helsinki/Session4Paper1.pdf>

³¹ See my book *De Hoge Raad op de hei*, 2000 and articles on my website at www.uvt.nl