Extending Court-Protected Legal Person Status to Non-Human Entities
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From the Executive Editor:

Extending Court-Protected Legal Person Status to Non-Human Entities
By Markus Zimmer

On 3 November 2016, in response to a writ of habeas corpus case filed by the New York-based Non-human Rights Project (NhRP), the New York Supreme Court in the U.S. granted the writ and ordered the transfer of Cecilia to the Maori Otorohanga Sanctuary in New Zealand. In their decision, the court acknowledged that an animal is an individual with rights, and therefore non-human individuals (animals) are possessors of rights, such that they are protected according to the appropriate measures.

In recent years, formal advocacy to establish legal rights justiciable in courts of law for non-human entities has breached the confines of the animal world. In 2014, passage of the Te Urewera Act by the parliament of New Zealand, following negotiations with indigenous Maori groups, ceded the government’s formal ownership of an 821-square-mile national park and granted via statute the corresponding land the status of a legal entity with “all the rights, powers, duties and liabilities of a legal person.” The outcome deferred to the Maori worldview in which human beings identify themselves as coextensive with nature, in this instance the land comprising the park. At the time, the minister of Maori affairs described the settlement as “a profound alternative to the human presumption of sovereignty over the natural world.”

On 30 August 2012, the government of New Zealand and a representative of the Whanganui River iwi, an indigenous Maori group, signed a preliminary agreement, the final version of which was passed into law on 15 March 2017. Under the terms of the treaty settlement, the Whanganui River, New Zealand’s third longest, is granted under the Maori name, Te Awa Tutua, the legal status of a person with all the rights, duties and liabilities that attach to that status, including the right to have a court of law review claims brought on its behalf by two legal guardians tasked in the new law with representing the river. Final passage into law of the agreement concluded the lengthiest litigation in New Zealand’s history; the Whanganui River, New Zealand’s third longest, is granted under the Maori name, Te Awa Tutua, the legal status of a person with all the rights, duties and liabilities that attach to that status, including the right to have a court of law review claims brought on its behalf by two legal guardians tasked in the new law with representing the river.
Within a few days on a separate continent, a decision issued by the High Court of Uttarakhand at Nainital and signed by Indian judges Rajiv Sharma and Alok Singh ordered as follows in paragraph 19 of Writ Petition (PIL) No. 126 of 204:

Accordingly, while exercising the parens patriae jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared persons in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.

Several weeks after issuing this decision, the two judges extended equivalent status to the Gangotri and Yamunotri glaciers that source the two rivers.

These several designations by judicial and legislative powers on separate continents may be the genesis of a fledging movement; court systems on all continents may be well advised to remain alert as to the prospective impact on their workloads where such status is declared and the commensurate rights adjudged to be actionable. The reactive momentum spawning such campaigns is building. Evidence of the progressively corrosive impact on the non-human world by the burgeoning propagation of Homo sapiens continues to intensify and mushroom concern with the environment generally and with at-risk animal and marine populations in particular. Where reliance for protective relief on behalf of the non-human world has traditionally generated demand for politicians and law enforcement to intercede, the feeble success record of their intercession efforts continues to reflect halting progress. Indeed, research into the level of successful intercession in illegal cross-border wildlife and marine life trafficking yields statistical results that are equivalent to cosmetic window dressing – roughly estimated at ten percent. Groundbreakers in the global animal and marine life rights and protection sectors are weary of legislative inaction, marginally competent enforcement, slap-on-the-wrist fines and punishments, and widespread tolerance of corruption. Particularly egregious are the legal and regulatory frameworks drafted with international assistance and passed by local law-making bodies but whose execution is grimly underfunded and violations of whose provisions are routinely ignored.

Some now view the extension and recognition in law of legal-person status with the attendant justiciable rights, duties and liabilities to non-human species of animal and marine life as a more powerful tool for coercing meaningful protection and sanctuary for them.

The need for a more powerful arsenal of criminal deterrence and punishment tools has reached significant levels in recent decades as the scope, geography and business of illegal wildlife trafficking has evolved. Long before the passage of laws restricting or prohibiting trade in protected and endangered species and their body parts, rulers of ancient kingdoms and dynasties routinely honored their counterparts with exotic fauna and marine life. In 179 BCE, King Zhao Tuô in today’s northern Vietnam dispatched to the Han court a tribute that included ten rhinoceros horns, 500 purple-striped cowries, 40 pairs of live kingfishers and two pairs of peacocks. Such official gifts over succeeding centuries frequently included, in addition to rhino horns, elephant tusks, tortoise shells, reptile skins and tiger parts, to name a few.

Traditional day-to-day trafficking then occurred primarily locally in developing Southeast Asian and sub-Saharan African countries among indigenous populations as a means of earning subsistence income. Those traditions now are in decline. They have been succeeded in recent decades by the business interests of regional and transnational crime consortia already traditionally engaged in illegal trafficking of human beings, organs, drugs, cultural artifacts, diamonds and precious gemstones, oil and gold. Their newly found illicit wildlife and marine trafficking interests were sparked by two incentives.

First is yield; the increasingly disproportionate distribution of personal wealth among populations and the exorbitant growth in discretionary income among the affluent have stimulated enhanced competition in restricted markets for exotic goods, possession and display of which are publicly arrayed to flaunt social status and exclusivity. The resulting competition for acquisition has spawned over time significant inflation in the cost of such goods, creating the potential for enormous profits. This inflation is exacerbated by the decline in species populations, some of which are approaching extinction. In 2014, the price per pound of rhino horn approached US$16,000. The profits such pricing represents attracts criminal enterprises.

Second is risk; passengers arriving at international airports in Singapore, Indonesia, Saudi Arabia, the Republic of China, and other venues are warned that transporting illicit drugs into the country carries the death penalty. By comparison, transporting wildlife parts may or may not trigger arrest and criminal charges, depending on whether laws prohibiting them exist and the extent to which they are enforced. Where they do exist and criminal charges are triggered, couriers may forfeit their goods and pay token fines; rarely does prosecution of such illicit trafficking result in incarceration. The comparative punishments grid for the content of what is trafficked varies considerably. The criminal justice severity index of trafficking in illicit drugs, production and distribution of which may, in extreme cases, result in overdoses that prove fatal, far surpasses that of trafficking in rhino horns or elephant ivory or tiger bones, genitals or organs which allegedly can be freely purchased, for example, at Noi Bai International Airport in Hanoi among other venues. This lopsided severity index persists even though harvesting such wildlife parts almost always entails slaughtering the subject animals as if they were simple commodities intended for indiscriminate use by human beings – commodities to which the concept of inherent rights to life and limb does not apply and cannot legally be established.

Even where elements of wildlife and marine trafficking have meaningful criminal sanctions attached to them, effective enforcement, particularly in developing countries, is compromised by, among other factors, inadequate resources and corruption. Although UNODC, USAID, INL, DFID and other organizations and NGOs work cooperatively with local enforcement and wildlife protection agencies in developing countries, the proportion of those arrested and charged with wildlife and marine trafficking crimes is much higher than the relatively few successfully tried and convicted in courts of law. A primary cause is want of effective investigations and credible forensic evidence. Moreover, transnational criminal enterprises invest heavily in creating sophisticated networks organized to thwart and elude anti-trafficking initiatives. These enterprises also exploit front-line enforcement agents, supervisors and managing officials at key illicit trade
source, transit and destination points by offering to supplement modest government salaries with covert payments for engaging in a variety of activities and oversight that evade established controls and safeguards.

There is broad general agreement that demand for illegal wildlife rests largely with wealthy consumers in China, the United States and the European Union. Effectively responding to their appetites for a constellation of trafficked goods and services anticipates global transportation, economic and distribution networks that extend from the least- to the most-developed countries. The success of these illicit trade networks depends on the ability of their facilitators to engage and reward dishonest and unethical government officials who accept bribes or other favors to lubricate the production, transit and delivery of these controlled products and services. Their corruption progressively infests agency administration and operations at multiple levels, anchoring itself in a variety of basic functions and services that prey on and undermine government integrity and functionality.

Left unattended, the corrosive effects of trafficking-related corruption have the potential to incrementally erode and eventually destroy the very foundations of legitimate and effective government and the rule of law. We see its fruits manifest worldwide to varying degrees in numerous governments. If this fledgling movement to extend to non-Homo sapiens the status of legal persons with all corresponding rights, duties and liabilities of a living person catches on and that status is institutionalized as justiciable in national and international court systems, it may transform how modern societies value and protect their non-human wildlife and marine resources. The time for such transformation is long overdue.
From The Editor:

The Impact of Technology on Courts

By Professor Anne Wallace

The impact of technology on the courts is a topic that has been receiving attention in judicial administration circles – both professional and academic – for nearly three decades now. The National Centre for State Courts has run a specialised conference on court technology since the mid-1990s, together with a range of ancillary events on particular aspects of technology in relation to court processes (e.g. eCourts, eFiling). Similar conferences, workshops and symposia have been held in other parts of the world, including Australia and Singapore. From an academic standpoint, researchers have been examining various aspects of the impact of technology on courts for a similar period of time and there is now a substantial repository of published literature in the field.

However, there has been a noticeable shift in the direction of some of the discussions and investigations about the impact of technology on courts over the past few years. In the past, the discussion has largely been dominated by the impact of technology on the way that courts carry out their role. Topics related to courtroom technology, such as the use of technology to create efficiencies in processing and enhance litigant access to the courts. While these are still obviously important applications, greater attention is now being paid to the way that technology may affect the nature of the work that the legal profession and the courts undertake in the future, the changes that may result, and their implications.

This development was highlighted at a conference run in Melbourne, Australia between 8-9 November last year, by the Sir Zelman Cowan Centre at Victoria University. The conference, entitled 'Law and Courts in an Online World' was designed to explore the ways in which disruptive change and emerging business models are reshaping law and legal institutions, including courts. It was inspired by an address given by the British legal technology futurist, Dr Richard Susskind to a packed audience in Melbourne earlier in the year, and was designed to examine some of the predictions made by both Richard and Daniel Susskind in their 2015 book The Future of the Professions: How Technology Will Transform the Work of Human Experts (2015) Oxford University Press.

This edition of the journal includes two papers delivered at that conference that examined particularly significant developments that have the potential to transform the work of legal professionals and courts in coming years. The first is the continued growth in Online Dispute Resolution (ODR), a topic that is examined by Dutch Judge, judicial reform and technology expert, Dr Dory Reiling (author of Technology for Justice). Her article provides a useful introduction to the concept of ODR, discussion of a case study in the Netherlands courts, and identifies a series of important issues related to court use of ODR that would benefit from investigation by socio-legal researchers.

The exponential growth in Artificial Intelligence (AI) was another topic that received significant attention at the conference, in terms of its impact on legal work and dispute resolution. In the second article, John Zeleznikow from Victoria University investigates the use of AI in family law disputes in a particularly interesting discussion that focusses on the potential to incorporate advice and facilitate online communication into AI decision-marking systems.

It is hoped to incorporate some further contributions from the conference in future editions of the journal.
Beyond Court Digitalization With Online Dispute Resolution

Dory Reiling Mag. Iur. Ph.D.¹

Abstract:

“I felt so sorry for you; such a lovely tool and then you have no users!” I heard this comment during a lunch break at ODR 2016. I presented the eKantonrechter there, a digital procedure for small value disputes; a nice tool, but unfortunately with few users. ODR2016 was the 15th ODR conference in the Peace Palace in The Hague, organized by The Hague Institute for internationalization of Law (HIIL).

The conference, in May 2016, was a platform for people involved with all kinds of online dispute resolution (ODR). I also presented the eKantonrechter at the ‘Law and Courts’ in an online world conference by the Sir Zelman Cowen Center in Melbourne, Australia in November 2016. This article is both a summary of the presentations and discussions at both those conferences, and a reworked version of an article for the Netherlands Society for Sociolegal Research periodical. Its theme is ODR and its users.

Keywords: ODR, courts, court users, dispute resolution, digital court

1. ODR: A Panacea or a Tool in Search of a User?

ODR: a panacea against all court weaknesses? A reader of the 4th Trend report by HIIL on ODR² can hardly believe her eyes: ODR will end all administrative frustrations of courts as well as the disappointment of their citizens. It can help to standardize, simplify and humanize judicial procedures and it can help people who need access to courts to negotiate, settle and put unresolved matters before the court. Moreover, it can reduce the cost of dispute resolution.

ODR: technology looking for a user? The reader of Arno Lodder’s weblog for SOLV Lawyers in Amsterdam³ in which he writes about the 15th ODR conference is less confident. In 2002, ODR enthusiasts believed ODR had a future full of promise. However, that did not happen. Why? Was the technology not user-friendly enough and geared too much to small e-commerce disputes where users just want to complain but they do not want to resolve the dispute? ODR and its users are an interesting and useful subject for research. Below, I will explain why. But first: what are we talking about when we talk about ODR?

1.1 What is ODR?

Online dispute resolution (ODR), according to Wikipedia, utilises the use of information and communication technologies to help resolve disputes between parties. The technology particularly supports negotiation, mediation and arbitration, or a combination of all three. It can be regarded as a form of alternative dispute resolution. ODR can also improve traditional dispute resolution methods with innovative techniques and online technology. In the past, ODR was used mainly for disputes in e-commerce. That is only natural, since the disputes also arose online. Now communication increasingly takes place online, as a consequence it is generally more obvious that disputes are resolved using online communication. A few

¹ Dory Reiling, mag. Iur. Ph.D., is a senior judge in the first instance court in Amsterdam, The Netherlands. She was the first information manager for The Netherlands’ Judiciary, and a senior judicial reform expert at The World Bank. She wrote ‘Technology for Justice, how information technology can support judicial reform’ (Leiden University Press). She is currently on secondment as the product owner of the digital civil procedure for the courts in the Netherlands. She is a member of the editorial board of The Hague Journal on the Rule of Law, the Springer Law, Governance and Technology Series, and Computerrecht. She has a weblog in Dutch, an occasional weblog in English, and can be followed on Twitter at @doryontour.

dory@doryreiling.com
+31 6 20364309 (mob)
+31 23 5252826 (fax)
Madoerastraat 1, NL 2022ZL Haarlem, The Netherlands

² ODR and the Courts: 100% Access to Justice?

³ 2 ODR is Dead! Long live ODR! 15th ODR Conference: Targeting the courts.
examples.

CyberSettle is a tool that has been around since 1998. It supports negotiation processes through double blind offers by the parties. It helps parties therefore to agree on an amount of money. It also has facilitators who can help the parties to achieve a solution. According to information on the site, 250,000 disputes have been settled since 1998.

Rechtwijzer uit elkaar (legal guidance on separation) helps couples wanting to separate or divorce make a plan for the separation, and with the separation itself. At the end of June 2016, according to information on the site, more than 1,000 couples had started making a separation plan. The tool includes online forms, chat functionality, calculation tools, and the ability to get help from an expert.

DemanderJustice (DemandingJustice, DJ) is a French site where people can try, for approximately €40, to resolve a dispute online. If they are not successful, the DJ tool can also help them to bring the case to court by sending the introductory document to court in an email. This costs an additional €70. DJ can only deal with disputes under €10,000, the limit for submitting a case to court without a lawyer in France. DJ says it handled more than 250,000 cases in the course of this year. About half were resolved; the plaintiff won more than 80% of the cases that went to court.

Magontslag (Dismissal allowed) is a site where the user - usually the employee - who considers resigning from a job, can get an estimate of the chances and consequences for dismissal by answering a list of questions. The tool produces a summary of the reasons, and these reasons form the basis for a resignation letter to be sent to the employer. It can also produce a defense in court and a letter to the social security agency.

Civil Resolution Tribunal (CRT) is a digital tribunal set up to decide disputes about strata, subsidized housing in British Columbia, Canada. It provides assistance with exploring solutions to a problem, with producing documents, and if necessary, access to a tribunal hearing.

These ODR tools, therefore, do many different things. Cyber Settle supports two parties, but only to negotiate a monetary amount. DJ helps two parties negotiate and bring the case to court.

Rechtwijzer helps two parties with information, tools and a guided process to achieve a final result. Magontslag helps one party with information, tools and a final product. CRT helps with exploring solutions and with a procedure to decide the dispute.

2. Digitization in Courts: The eKantonrechter

In courts, opportunities to digitally resolve a dispute also emerge. The eKantonrechter, the example from the introduction above, is a case in point. The Netherlands judiciary completed this digital procedure for everyday disputes in 2014. This section explains how eKantonrechter was developed and implemented with a focus on a user-friendly interface.

The legal procedure is based on an existing provision, article 96 of the Code of Civil Procedure, giving court access to parties who together want to put a dispute before a judge. The procedure is consensual in the sense that parties together agree to put the dispute before the judge. They can do this themselves, no legal representation is required. A judgment is guaranteed within eight weeks of filing. The disputes can be small claims of up to €25,000, or labor, consumer or housing problems.

There is usually an oral hearing, but the fixed, limited disposition time does not allow for hearing witnesses or otherwise thorough examination of the facts.

Digital access. In part four of Technology for Justice, my book on improving justice with information technology, I have set out some guidelines for web access to justice and the courts\(^4\) Communication should be:

- based on understanding the information needs people have, given that they have a problem that needs to be resolved;
- understandable to people with an average level of education, and
- making people confident that if they follow the instructions, they will achieve results.

Earlier experiment. There was an earlier experiment, at least twenty years ago, to give citizens direct access to court. It involved a paper form that could be bought in a stationery shop, filled out, and sent to the court to file a claim. The court

then summoned the other party, which was the beginning of a civil procedure. Judges struggled with the information people put in the form. Parties struggled with the complex procedural rules of an adversarial civil procedure, that were hard to explain and even harder to understand.

The new procedure. This time, the procedure was designed to start with a digital form. The parties, after agreeing to put their dispute before the court, each fill out a part of the form. Because the procedure is consensual and not adversarial, the rules are less complex. The procedure itself is conducted entirely over the internet, except for the hearing which is face to face in court. For authentication, parties log into the judiciary’s kiosk with DigiD, the Dutch government digital ID. For extra security, they get a text message with an access code. For firms, authentication works with eHerkenning, the government ID for legal entities. Lawyers log in with their Bar ID, a smart card provided by the Dutch Bar Association. One party takes the initiative, logs in to the judiciary's digital kiosk, and fills out the first part of the application form. The system then provides a code with which the other party can log in to this particular case. The other party then fills out the other half of the form, and submits the entire form to court. The court then reviews the information for admissibility. As there is only one court hearing and the disposition time is limited, only simple cases can be admitted. After the dispute is admitted, parties can provide additional information and upload documents they want to present as evidence. The court fee is paid electronically as part of the submission process. Parties are also presented with optional time slots for the oral hearing. They can indicate those slots for which they are not available. The information from the forms is fed into the court’s case registration system and into the digital case file. The oral hearing is then set by the court. After the hearing, the judgment is uploaded into the digital case file.

Building digital access. My team, charged with designing and then building the new digital procedure, was determined to do better than the paper form. It was particularly important to get the digital forms right. We started with a workshop for the judges to indicate what information they need to determine the merits of the case: what is the problem, what happened, did they attempt to resolve the dispute amicably, what is the claim, what evidence is available. We then designed different methods of asking questions: yes/no, drop down lists, radio buttons. This information is unequivocal, and can be stored and handled easily. However, it is rather poor in content. Asking for the story: what happened, what makes you think so, what is the background, provides much richer information, but this information is not quite so manageable. We tested the different methods, on paper, with a test panel provided by the Dutch Consumers Union. We had devised fictional disputes, cases our panelists could use to fill out our forms: a contract case about a fading couch, another one about a labor dispute, and a tort case involving physical injury. This enabled us to check whether users can describe different types of problems adequately. With lots of feedback from the panel, we designed a digital form combining structured and unstructured questions. The panel came back, tested this form, and told us they needed more context and help in answering the questions. We then added explanations and help information. For those who feel they cannot fill out the forms themselves, we added a link to the legal aid kiosk, the Juridisch Loket. The panel then came back to test the final product. They told us they could use the form easily. The eKanton procedure for citizens went live at the end of May 2014.

What comes next? Devising a procedure is one thing, whether it meets the needs of those who seek justice is a different matter. Whether or how digital access to court is an improvement that will enhance access to justice is one of the major themes in the access to justice debate. It remained to be seen if the eKanton procedure will be used by citizens. For the Dutch judiciary’s digitalization program, it was an opportunity to take a simple, existing procedure, digitalize it and learn about the process. This experience now feeds into the digitalization program for all other court procedures. It turned out that creating and implementing a digital process is quite viable. During the development, there was much enthusiasm for the idea that professionals and ordinary citizens themselves could also take a case to court digitally. The procedure, however, is not used much. In fact, in 2016 it was not used at all. We held a small evaluation interviewing the legal aid insurers and applicants whose initiative for the procedure was not taken up by the defending party. From this evaluation, we found that a number of conditions make the eKantonrechter unattractive, such as high court fees, no investigation as to the facts (witness hearings, for instance) and no possibility for appeal. The condition of consensuality of art. 96, that the parties submit their dispute together5, was also identified as problematic. It is important to keep in mind that parties do not submit a document. They submit information collected in a form. I will discuss the issue of consensuality in more detail below.

3. Quality and Innovation in the Law
Digitizing existing procedures, however, is only the beginning. Information and communication technologies not only make access to justice easier, they also open the door to other ways of resolving disputes. We know there are still many people for whom obtaining justice is difficult. But what will that look like in practice? The participants of the ODR conference in

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5 How we designed this condition into the digital procedure is described in the section on the new procedure above.
The Hague in late May 2016 were asked what they preferred: ODR and court procedures separately so that competition will raise quality, ODR only in the preliminary phase, or integration of ODR and court procedures. The vast majority opted for integration. What I am particularly interested in is, how the possibilities of ODR can be integrated into the court procedures. Can the courts reduce deficiencies in access to justice, and resolve disputes better with it? Better, that is: fair, fast, accessible and sustainable. That is only possible if the users needs get enough attention.

4. Sociolegal Research

4.1 Technology, or: What Do The Users Want?
The subject of this article is not a tool searching for a user. I want to inspire researchers who are looking for a research topic to investigate ODR and its users. ODR harbors enough interesting, relevant problems that demand solutions. From the small survey into the use of the eKantonrechter we can understand that parties to a dispute often do not want to take their case to court together. And again, Arno Lodder’s question, whether the types of ODR we now know are equipped to meet the needs of the user. There are many more questions, but that user perspective seems an attractive subject. I will explain why.

Ten years ago, our main concern was what information technology can do. Today, the technology can provide almost anything: access to information, interactive tools to negotiate, documents, experience sharing models. The focus is shifting to the domain of the user. What does the user want to do, and what technology does she need to achieve it? In my experience, in building new digital procedures, this has proved to be by far the most important question. So how can the courts offer, what the user wants to do?

The pitfall is that we tend to think we already know what the user wants. In practice, users want something quite different. The eKantonrechter presents a striking example. All stakeholders in the development, such as legal aid insurers and the Consumers Union found the idea that people want to submit their dispute to court together an attractive idea. However, when asked, users tell us they do not want to submit a dispute to court together at all. The applicant believes that he is right, and the court should make that clear to the other party. I once had an inspiring conversation with Law and Society professor Leny de Groot-van Leeuwen. She recalled how she and her students had interviewed people about their "justice moment". That was a time when they had come into contact with the law or the legal system, and how they had experienced it. Such moments can be important for designing procedures.

All kinds of issues came up in this article that could be of interest to sociolegal scholars: the experience of the eKantonrechter, people's justice moment, the opportunities ODR offers to courts. Thus, the scholars can make a substantial contribution to the development of online dispute resolution to support effective legal protection. Here are some examples of issues that may be of interest in this regard.

4.2 Problem Solving: a Line, Network or Cloud?
We tend to think of problem solving as a linear process. Someone with a problem goes through a process in steps coming one after the other, always in the same order. Reality may be very different, though. Maybe problem solving looks more like a cloud or a network. The problem solver in search of a resolution may take very different turns, depending on a variety of changing circumstances. What routes do people follow when they try to solve their problems?

4.2.1 How Can We Give the Parties Ownership of their Problem?
In ODR2016, the CEO of a legal assistance insurer said his customers want to be more actively involved in their procedures. They are knowledgeable, they get all the information from the Internet and want to control what happens in their case. In the online world, it is important that users have a clear understanding of what they can do, and that they are confident that their actions will have the intended result. We know maximum ownership in resolving conflicts is key to the success of an ADR procedure. How can this principle be operationalized for court procedures?

4.2.2 How can we Involve the Defendant in the Proceedings?
Voluntary, consensual dispute resolution was never very popular, as emerges from the investigation into the use of eKantonrechter. The applicant believes that he is right, and that the court had better make that quite clear to the other party. Has this phenomenon ever been researched? Is voluntary dispute resolution actually a romantic idea? That brings up the question how the defendant may or must be involved in a procedure. Resolving a dispute amicably, together, does not always work; the plaintiff then has no choice but to go to court. Sometimes, but not often, the defendant will participate voluntarily. How can the defending part be involved in the procedure? How can the defendant be induced to participate constructively in the resolution of the conflict? What is needed?
4.2.3 Problems are Different; How About the Solutions?

How can courts, with ODR, adapt themselves better to the fact that there are many different kinds of conflicts? The examples of ODR, above all, offer various solutions for different problems. Which solutions are most suitable, and for which problems? In most court procedures, legal representation is not mandatory. Legal aid is greatly reduced. People will often need to take their case to court themselves. From the research into people’s legal needs⁶, we already know a lot about what people do when they have a problem. We know the type of problem determines the kind of solution. Short term problems are quite different from problems in a long-term relationship, like a family relationship, a neighborly relationship or employment. Courts are organized along the lines of legal categories: labor law is judged by the small claims judge, divorce by the family court and disputes with the government by the administrative court. Disputes with the government prove especially hard to resolve. They are, each in their own way, all part of the cloud or the network. Is it possible to set up courts so they are better suited for the problems they have to solve? What is needed?

5. Conclusion

From the eKantonrechter example, we can learn that designing a user friendly, effective dispute resolution procedure requires more than just a user-friendly interface. Even a well-designed mechanism will not be used if it does not meet the users’ needs. Those needs are determined by the type of problem, by the way people attempt to resolve their problem and probably many other factors we do not yet know. I imagine many socio-legal scholars would like to explore such topical issues. People and the law, theory and reality, they are all there. Going digital means experimentation, which involves research in itself. Trying out ODR methodologies to better help people to resolve their disputes and go to court if necessary, in the light of the issues outlined here, may help people get the justice they are entitled to.

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Abstract:

The courts are the jewel of any state governed by the rule of law. Yet even the judicial system must modernize its methods of organization and management if it is to guarantee sustainable jurisdiction. But how much management is sustainable within the judicial system? And what is the right way towards an optimized judicial system and well performing courts?

An interdisciplinary research team from six universities under the lead of the Centre of Competence for Public Management at the University of Bern has considered this question in several dissertations and studies as part of a project funded by the Swiss National Science Foundation.

This paper will provide a summary and a reflection of the research work and future fields of research.

Keywords:

1. Introduction

1.1 Aims of the Research Project

The long-term aim of the research project was to devise a general, integrated management model for the judiciary that incorporates good practices and good governance. It should ultimately be possible to create a management model which – like the St. Gallen management model1 – has as its object integrated control and management of and within courts and, in doing so, takes equal account of the special position of the judiciary as the third branch of the state, the complex environment surrounding judicial activity and the complex internal structure of judicial authorities. Account must also be taken of the fact that the judiciary, as the third branch of the state, is embedded in the politico-administrative apparatus and that a management model of this type for the judiciary must take the context of state control into consideration.

In Switzerland, little empirical and theoretical research has been carried out so far into how courts operate. Another objective of the research project was therefore to acquire basic knowledge about the Swiss judicial system as a sub-system of democratic society and as an organization.

1.2 Research Questions and Methodology

The research question overarching the entire project is: what is the best organization of the judiciary in order to guarantee sustainable adjudication? In various sub-projects and one cross-sectional project, more specific issues are identified accordingly.

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1 This paper is a condensed summary of the results from the project “Basic research into Court Management in Switzerland”. It is based on Lienhard, Andreas/Kettiger, Daniel (eds.) (2016): The Judiciary between Management and the Rule of Law, Results of the Research Project “Basic Research into Court Management in Switzerland”. Schriftenreihe zur Justizforschung, Band 6. Bern/Baden-Baden/Wien: Stämpfli/Nomos/Jan Sramek Verlag (with its references; also available as an ebook: www.staempfliverlag.com/detail/ISBN-9783727276767//The-Judiciary-between-Management-and-the-Rule-of-Law [Status: 01.03.2017]), and on other published and non-published documents of the research project "Basis research into court management in Switzerland" (www.justizforschung.ch [Status: 01.03.2017]). The project and this paper were supported by the Swiss National Science Foundation (SNSF). The authors work at the Kompetenzzentrum für Public Management der Universität Bern, Switzerland, and can be contacted via andreas.lienhard@kpm.unibe.ch

1 Details see further on II./3.
The intention was to take an interdisciplinary approach to any questions that arose. The project relates to issues from the fields of legal science, business studies, administrative science, (legal) sociology, psychology (in particular occupational psychology and the psychology of decision-making) as well as issues of political and media science.

The methodology used in the research project follows the particularities of the various disciplines involved. It is therefore based inter alia on analyses of literature and documents, comparative analyses, legal comparisons, interpretation and on empirical studies (surveys, interviews) in Switzerland and abroad.

1.3 The Structure and Organization of the Research Project
The research project was conducted in six interdisciplinary sub-projects, each of which considered specific issues. The structure of the research project followed a subdivision into a study of the internal organization of the judiciary on the one hand and a study of its environment on the other. The study of the internal organization follows the elements inherent in all the common management models (a distinction is made between them to an extent): resources, processes, organization (structure) and culture. The general political and administrative issues that arose were dealt with in a cross-sectional project. Internal coherency was ensured by an overall project management committee as well as regular administrative and content-related coordination meetings and workshops.

1.4 Basic Research Assumptions
The project was based on the following fundamental hypotheses, and the aim in the course of the project was to verify or falsify these, explicitly or by implication:

- The demands placed by society on the judiciary differ considerably in Switzerland depending on the geographical context (urban-rural, language regions, etc.).
- The general organization, internal organization and the culture in the judicial authorities in Switzerland have developed over the course of history and differ considerably depending on the geographical context (urban-rural, language regions, etc.).
- Even within identical judicial authorities, there is no uniform judicial image.
- Coping with the constantly growing demands that the judiciary faces means that a court management system must be put in place in the medium term.
- If it is to be accepted and successful, the management of courts and other judicial authorities must take account of the special social functions and general constitutional conditions that apply to the judiciary (the third branch of the state) as well as the special working methods and professional characteristics of its members.
- Although the work of the judiciary is shaped by procedural law and has fixed processes, there is potential for optimizing the efficiency and quality of judicial work by optimizing processes in the business management sense.
- By optimizing the deployment of resources, the output and the quality of the judiciary can be increased.

2. Main Research Findings

2.1 Court Management in a Constitutional Context
The requirements that apply in court management can essentially be derived at federal level (i.e. for the federal courts) from the three provisions of the Federal Constitution discussed below. For the requirements for court management in the cantonal courts, there are similar provisions in the cantonal constitutions and in the cantonal laws on the organization of courts.

The first provision that should be mentioned is the courts’ right of self-administration, as outlined for the Federal Supreme Court in Article 188 paragraph 3 of the Federal Constitution. This right of self-administration, an essential element of the institutional independence of the judiciary, is both a right and an obligation for effective court management. Furthermore, an essential precondition that applies in court management is the constitutional requirement that public funds must be used economically. This efficiency requirement, laid down at federal level in Article 126 paragraph 1 of the Federal Constitution, not only applies in public administration, but also applies to the courts.

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2 For more information on the organization of the project see Lienhard/Kettiger (2016), p. 10-12, and www.justizforschung.ch (Status: 01.03.2017).
3 Details see further on II.3.
4 This section closely follows LIENHARD (2009), para. 27-30.
5 See e.g. TSCHANNEN (2016), § 40, para. 19.
resources to meet their ideals of quality; they are under constant pressure to be more efficient. A crucial – ultimately in fact the most crucial – guideline lies in the constitutional requirement imposed in Article 170 of the Federal Constitution to fulfil public tasks effectively. Court management should therefore make it possible for courts to actually fulfil their tasks - guaranteeing the protection of legal rights, applying the law in a uniform manner, developing the law – while at the same time taking account of the procedural guarantees (Art. 29 ff. Federal Constitution) such as the requirement that justice be dispensed speedily. In other words, good court management is an essential requirement for guaranteeing that justice is dispensed correctly and efficiently.

2.2 From Judicial Administration to Court Management

The term “judicial administration” (Justizverwaltung) has been defined in German-language specialist literature for decades in a largely uniform manner as follows: “[J]udicial administration is the governmental regulatory activity that encompasses neither legislating nor the dispensing of justice but which is carried on for the purpose of providing the material and personal basis for adjudicating, understood as the dispensing of justice by the judges responsible, in individual court systems.” More loosely (leaving out the idea of excluding legislating and dispensing justice), judicial administration can also be defined as “the administrative activity which provides and maintains the material and personal basis for adjudicating.” This more open formulation takes account of the fact that the preparatory procedure for legislating can also be an administrative activity. This definition also corresponds to that used in more recent German specialist literature (which also employs the term “court administration” (Gerichtsverwaltung) due to the close relationship with the courts). This formulation focuses on the function. Judicial administration in this material or more specifically functional sense is thus administration carried out in the service of the judiciary. Administrative activity for the benefit of the judiciary may theoretically be the responsibility of any state organ. The independence of the courts in their institutional form assumes that courts are self-governing, i.e. that the courts carry out the tasks of court management largely on their own, with their own resources, and separately from the central administration. With regard to tangible resources, judicial administration involves, for example, providing and maintaining the required buildings or rooms, furnishings and fittings, as well as providing, maintaining and operating the telecommunications and computer systems. With regard to staff resources, it involves staff management, staff supervision, the organization of court operations and continuing and advanced professional education and training; finally, interaction with other public administration agencies (e.g. legislative consultation proceedings) and with the public (e.g. media and public relations) are also part of judicial administration.

The judiciary – like all state organs – is coming under increasing pressure to engage in reforms: on the one hand the workload, complexity of the material and the procedural requirements are steadily increasing, while on the other hardly any additional resources are being made available. In addition, in Switzerland a trend towards ever larger court organizations can be detected. This puts pressure on the judiciary to raise its efficiency levels, and this can ultimately only be achieved through smoothly functioning court management. Merely “administration” of the courts no longer suffices. The former president of the Zurich Cantonal Court of Appeal, Judge Rainer Klopfer (2005), explained the importance of court management in the following manner: “If a court is to be a major service provider and important supervisory body, it needs professional, efficient administration. That is impossible without management, but this in no

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8 See also Lienhard (2005), p. 468 f.
9 This section closely follows Lienhard/Kettiger (2013), para. 13 ff.
10 Eichenberger (1986), p. 32, with further references [translated from the original German text].
12 See Wittreck (2006), p. 16, with references: “… in this work, ‘Gerichtsverwaltung’ should be understood as all tasks that must be carried out to provide the human and material resources the activities of the courts in terms of adjudication and the administration of the justice system.” [translated from the original German text]; see also Eichenberger (1986), p. 34.
13 See Kiss (1993), p. 85; Kiss/Koller (2008), Art. 188, para. 28.
14 On the difference between administration in the functional and organisational sense, see Tschentscher/Lienhard (2011), para. 343.
16 See instead of many Lienhard/Kettiger (2013), para. 16 ff.
19 In most cases, this is the result of reorganisation processes. The size of the courts in Switzerland is nevertheless below average in comparison with other countries. For example the Dutch Regional Court has around 100 judges.
21 For more detail on the court management, see Lienhard (2009), para. 25 ff.; Lienhard/Kettiger (2009), p. 415 f.
way compromises judicial independence; on the contrary, it means that the judges can carry out their core task, i.e. judging, better”.

When understood from this management standpoint, the concept of court management corresponds in the narrower sense to the concept of judicial administration defined above and encompasses management within the judiciary. If the judiciary is regarded as the third branch of the state and thus as part of the politico-administrative apparatus, this also gives rise to the question of managing the judiciary as part of the task of managing the state. When considered from the standpoint of control, court management also includes in a broader sense the management of the judiciary. In this publication, the concept of court management is normally understood in the narrow as well as in the broad sense.

2.3 How Court Management has Developed

First approaches of court management in Switzerland can be traced back to the 19th century. In the 1960s and 1970s, research in the field of economics concentrated on management, i.e. the question of how to control and manage businesses. The aim was to develop theoretical concepts of management which take account of both the complex internal structure of companies and their setting in a multi-layered environment. This research led not only to findings being made in relation to individual issues but also gave rise to practical management models. The best known management model – at least in continental Europe – that emerged from this work is the St. Gallen Management Model, first published in 1972. As these scientifically-based, integral management models established themselves, the University of St Gallen fine-tuned its model to develop the New St. Gallen Management Model, one of the essential pillars of business management today. Further well-known management models include the 7-P model (McKinsey 7-P Framework) and the 5-P model (Purpose, Principles, Processes, People and Performance).

In the course of the debate that arose around New Public Management (NPM), in the second half of the 1980s specific management models for public administration were developed in Switzerland. These management models were developed when it was recognized that, although integral control and management was also a necessity in modern public administration, the models developed for private-sector companies were not suitable for the specific requirements and tasks of public administration and could not therefore simply be imported, unmodified, into the public sector. There was also a need for a specific management model for non-governmental organizations (NGOs) and non-profit organizations (NPOs) owing to their special status and tasks in society.

Around the same time as this debate on management models for public administration, a discussion also arose about management in the judiciary. In Germany, this debate, which covered a broad academic spectrum and was at times rather heated, originated in part from a book written by a former judge in the German Federal Constitutional Court, Prof. Dr. Wolfgang Hoffmann-Riem. However, it did not result in any management model being developed – or even in any groundwork for such a model. Whether specific projects in this field were successfully implemented in certain German Länder remains unclear. In Switzerland, the discussion on court management was conducted primarily in the context of NPM projects in the cantons, but was often limited to the question of whether the judiciary should be included in the new NPM model concerned and thus to the question of management of the judiciary. The publishers of this report (the Cantons Bern and Aargau) were among those involved in this work. As a result, the courts in certain cantons (e.g. Bern, Lucerne, Solothurn) are nowadays integrated into a system of new public management. The issue of court management was only raised sporadically, for example at a symposium given by the Swiss Society of Administrative Sciences (SSAS) in Olten in 2003. In more recent times, the topic has been taken up again, and elements of good court management have been sketched out.

22 KLOPFER (2005) [translated from the original German text].
23 See also II./5 and II./6.
24 See ULRICH/KRIEG (1972).
25 St. Gallen Management Model 3rd generation, see RÜEGG-STÜRM (2002); since replaced by the St. Gallen Management Model 4th generation, see RÜEGG-STÜRM/GRAND (2015).
29 A substantial volume of literature has originated relation to this see e.g. SCHWARZ (1984); TIEBEL (2006); LICHTSTEINER/GMÜR/GIROUD/SCHAUER (2015).
31 For more detail on the definition of court management and on this difference, see Section II./2 and II./3.
At an international level, in particular in the Anglo-American world, a longer tradition of scientific interest in court management exists. In Australia, for example, the Australasian Institute of Judicial Administration (AIJA)\(^{34}\) has been in existence for decades and deals with general issues of court management. In the USA, research and education on the matter of court management was institutionalized in 1971 with the creation of both the Federal Judicial Center to serve the federal judicial system and the National Center for State Courts (NCSC)\(^{35}\) and the Institute for Court Management (ICM) to serve the state judicial systems.\(^{36}\) In Europe, a working group, the European Commission for the Efficiency of Justice (CEPEJ), considers issues of court management as part of the activities of the Council of Europe.\(^{37}\) The fact that court management is increasingly becoming a topical issue in Europe is shown by the launch in 2008 of a new professional journal focusing on court management, the *International Journal for Court Administration* (IJCA).\(^{38}\)

To date, however despite these various activities, there is still no integral management model for the judiciary.

A study from May 2012 illustrates the *state of management in Swiss courts*.\(^{39}\) Overall, it may be concluded from the survey of the higher cantonal and the federal courts that various elements of court management have already infiltrated the management and organization of the Swiss judiciary. The level of implementation is however markedly heterogeneous. This heterogeneity relates not only to the selection of the individual elements of court management, but also to content-related structure (e.g. objectives).\(^{40}\)

### 2.4 Court Management in the Context of the Judiciary’s Pluralistic Organization

The investigations indicate from several perspectives and disciplines the various rationales (or “worlds”) in the judiciary: the legal rationale, management rationale and commercial-bureaucratic rationale (industrial world, social world, market world, domestic/family world). The largest divergences exist between those carrying out judicial activities and those responsible for court management.\(^{41}\) Persons involved in judicial activities tend to take a rather critical view of court management instruments. However, the study carried out in relation to the Federal Supreme Court revealed that the judges recognize the importance of management in the Federal Supreme Court and accept management concerns and reforms that aim to improve adjudication processes. A mutual social acclimation within the court organization is possible; a hybridization can be observed. This can be encouraged through social activities (e.g. informal meetings) and social exchange (e.g. forums). It can also lead logically to the requirement that lawyers entrusted with court management tasks should have received training in (public) management.

If specialist lay judges are to be involved in the adjudication process, then various constitutional requirements must be met. The subject and extent of these requirements essentially depend on the role intended for these specialists lay judges. Thus when it comes to using such judges, a distinction can be made between their expert witness role, advisory role, intermediary role, mediator role and legitimating role.

### 2.5 Court Management in the Context of a State Concept Involving the Separation of Powers

Rather unusually (though a similar system exists in some states of the USA), Switzerland has an election and re-election process for judges (generally election by parliament or by the people); only in the canton of Fribourg is re-election not possible. Several studies have shown this process to be problematic in view of the principle of judicial independence. A different system with fixed terms of office and removal mechanisms based on the rule of law (adequate protection of legal rights) could be an alternative. In addition, it has been found that the professionalism and expertise of parliamentary committees are factors that favor the appointment of judges by parliaments, while election by the people has a positive influence on the assessment of the courts’ independence from political influence.

Judicial councils (in the sense of independent bodies\(^{42}\)) are a possible way to organize the supervision of the courts, but are not essential, especially as there is parliamentary oversight anyway. A depoliticization with regard to the election of judges can therefore be combined with a constitutional gain with regard to the removal of judges. On the other hand judicial councils are in principle not necessary, in particular with regard to the budgetary and reporting processes at the interface between the judiciary and parliament.\(^{43}\)

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37. See http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp (Status: 01.03.2017); see in particular CEPEJ (2008).
38. See for the latest on this issue also LANGBROEK/MAHONEY (2008), p. 1 f.
43. See Frey Haesler (2017).
With little change since the start of the 19th century, statistics have been vitally important for court management not only as an instrument of comparison, supervision and management, but also as a basis for trust and legitimacy. It is assumed that management personnel in the judiciary rely on certain quantitative information. Parliaments – in particular at times when there are crises of confidence or resources – demand increasingly detailed statistics from the courts. The studies however also show that statistical surveys take too little account of the deliberative legal factors in judicial work. The over-prioritization of a quantitative approach leads to a limited perspective of what the courts achieve. Resistance from the judiciary is frequently observed as a response to such prioritization. Court statistics are subject to restrictions with regard to personalized data on judges; these essentially result from the need to protect personal privacy (data protection) and in certain circumstances (where judicial activities could be influenced by factors that should have no relevance) from judicial independence. Since as far back as the mid-19th century, however, efforts have been made to standardize court statistics and thus make them more readily comparable.

In relation to the principle of legality, the following new findings have been made with regard to court management:

- The principles governing how judicial panels are composed must have an adequate basis in legislation. On the one hand, the allocation of cases to a specific panel of judges must be regulated in abstract and comprehensible terms (principle of the judge prescribed by law); on the other, any deviation from the rules on allocation – this requires objective grounds – must also be clearly regulated.
- The content of the courts’ annual reports – in particular the mandatory minimum content – should be set out in a legal provision.

2.6 Court Management as an Aid in Judges’ Work

The prevailing opinion is that court management should primarily or exclusively serve to ensure (i) the effective protection of legal rights (in particular the right to a timely and objective decision based on a fair procedure) and (ii) the efficient expenditure of public funds. This opinion can be dated back to the 19th century. Here the speed of proceedings is of crucial importance. To this extent, there is no fundamental conflict between court management and the protection of legal rights. With regard to certain elements of the situation, however, there are contradictions:

- Court management operates in the institutional dichotomy between accountability and independence. The optimum level of effective protection of legal rights is achieved if the two principles are in equilibrium. Court management and judicial independence are, therefore, not mutually exclusive in principle.
- Court management operates in the dichotomy between the quantity and quality of judicial performance. Rapid judgments (in line with the requirement that justice be dispensed speedily) and many judgments (in line with the requirement of efficiency) are not necessarily good judgments in formal respects (in terms of procedural guarantees) or in substantive respects (in terms of material accuracy). Here again, management must be used to find a balance between the diverging constitutional requirements.

Systematic caseload management is constitutionally required as an element in court management (based on the right to the protection of legal rights, the requirement of speedy justice, and the principle of equality before the law); especially in larger judicial authorities with several divisions.44 However, the personal privacy (data protection) of individual judges must be protected and it must be ensured that judicial independence is not compromised. For caseload studies, three methods have been identified as expedient: measurement by means of time recording, estimation by means of a written survey or Delphi questioning, or a combination of methods. The quantitative surveys of the workload require supplementary qualitative analyses, ideally combined with an organization analysis.45 The values recorded in respect of the workload must be periodically updated if they are not already being routinely recorded. In caseload studies and as part of caseload management, sufficient attention must also be paid to the quality of adjudication (procedural quality and quality of judgments).

Members of the judicial profession are basically in favor of good judicial work in qualitative terms and thus quality development in the judicial field. On the other hand, they take a skeptical view of traditional business quality management systems (in particular Total Quality Management, TQM). Quality development and assurance systems for courts must therefore take account of the requirements and idiosyncrasies of the judiciary. The personal initiative shown by the judiciary is an important factor here. With this in mind, quality development systems with a qualitative approach such as quality circles or status meetings have been developed.

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44 On the constitutional aspects of caseload management, see MÜLLER (2016).
Knowledge management generally and the knowledge exchange among judges in particular are vitally important to achieving consistency in judicial decisions – and thus to ensuring trust in the judiciary.46 Contrary to expectations, information and communications technology (ICT) is only assigned a support function as a knowledge management instrument if the judges are already prepared to share their knowledge. The decisive factors for successful knowledge exchange are exclusively social, in particular, the existence of a social network and mutual trust within the court.

2.7 Court Management in the Context of (Media) Society
As far as the self-concept of the judiciary is concerned, in Switzerland there are few differences between the linguistic regions, and these are not pronounced. In the French-speaking region, for example, there is less openness towards court management than in German-speaking Switzerland. However, in the French-speaking cantons, judicial independence is accorded greater importance. It is interesting to note in this connection that it is only in the French-speaking cantons that the supervisory model involving judicial councils is found.

Overall, public trust in the courts, both federal and cantonal, is high. In estimating the level of trust and even more so in estimating the degree of equal treatment by the courts and in assessing the independence of the courts, clear differences in the average assessments can be identified depending on the canton.

A distinction should be made between transparency in relation to judicial activities based on statistics and transparency in relation to court activities achieved by publishing judgments. The latter is not only required by the Constitution, but also seems to increase the legitimacy of and trust in the judiciary.

The research confirms that communication by the courts is vitally important in two respects:
• Professional communication with the outside world in relation not only to judicial activities but also to organizational matters increases transparency and thus reinforces trust in the judiciary. Proactive communication can in some cases serve to counter negative reports on court activities in the media and so prevent the undermining of confidence.
• Adequate internal communication can strengthen trust within the courts and thus contribute to a hybridization of rationales and to more extensive knowledge exchange.

3. Reflection

3.1 The Results in the Light of the Basic Assumptions
At the start of the project, certain fundamental assumptions were made (and are reproduced below in italics).47 The aim now is to reflect on the research results in the light of these basic assumptions.

Fundamental assumption: the demands placed by society on the judiciary differ considerably in Switzerland depending on the geographical and anthropological contexts (urban-rural, language regions, etc.).

When interviewing people outside the judiciary, the questions related primarily to trust in the judiciary and views on the independence of the courts and equal treatment by the courts. The demands that society or different social groups make of the judiciary were only occasionally and indirectly surveyed. As a result, no conclusive statement can be made about this fundamental assumption. There is a need for further research into the demands and claims made by society on the judiciary.

In addition, there are indications that – at least in relation to the Federal Supreme Court – the requirements for a good judiciary have not changed over the course of time. There are also indications that actors outside the court system (e.g. lawyers, accredited journalists) see potential for optimization with regard to the services provided by the courts, and in particular in relation to transparency and communication.

The results clearly showed that there are differences in the frequency with which the Swiss make use of the courts across the country. Whereas in Geneva, 44 per cent of people say that they have had dealings with a court, this value in the canton Zug is as low as 14 per cent; people clearly make more use of court services in the French-speaking cantons than in the German-speaking cantons, while Italian-speaking Switzerland lies somewhere in-between.48

46 On knowledge management in the judiciary, see TAAL (2016).
47 See I.4.
Fundamental assumption: general organization, internal organization and the culture in the judicial authorities in Switzerland have developed over the course of history and differ considerably depending on the geographical context (urban-rural, language regions, etc.).

Contrary to the fundamental assumptions, in Switzerland there is in general little difference between the linguistic regions with regard to the self-concept of the judiciary.49 These research results must still be verified in more detailed studies. One exception are judicial councils as supervisory bodies. One will only find this organizational model in French-speaking cantons.

A further finding is that the historical dimension with regard to judicial culture and court management has been given too little attention thus far. It was possible to demonstrate that the efficiency-oriented thinking and the statistical bias of the accountability reports ("legitimacy through figures") have their roots in the 19th century and have been characterized by the mechanics and the culture of the Swiss political system.50 Research is still needed into the question of which major theoretical and historical movements have influenced the Swiss judiciary and whether linguistic regional differences exist.

Fundamental assumption: even within identical judicial authorities, there is no uniform judicial image.

The investigations show that within and between the groups of persons carrying out judicial activities in the courts (judges, law clerks) largely uniform rationales predominate, the same fundamental values are shared, and thus a uniform self-image exists. On the other hand, persons involved in the adjudication process display recognizably different rationales from those involved in court management and apply different fundamental values with regard to what is a "good judiciary".51 The internal court culture is therefore often hybrid, and this will probably become more pronounced (permeation of cultures).

There are indications that subcultures form in larger courts based on their divisions or locations.

Fundamental assumption: coping with the constantly growing demands that the judiciary faces means that a court management system must be put in place in the medium term.

There were repeated indications that the judiciary requires a system of management and that certain management instruments can support the courts’ adjudication process, the “core business” of the judiciary.52 At the same time, the prevailing opinion is that court management should primarily or even exclusively serve to secure the effective protection of legal rights.53 The finding that certain issues relating to court management already existed in the 20th century gave rise to the question of whether the call for more court management is solely due to the current rapid changes in society and technology54 and the major reorganizations of the Swiss judiciary in recent years, or whether in the judiciary, as in any other organization, a certain degree of adequate management is not a basic organizational requirement.

Certain elements or instruments of court management – for example caseload management – are not only objectively desirable but constitutionally required.

Fundamental assumption: to be accepted and useful, the management of courts and other judicial authorities must take account of the special social functions and general constitutional requirements of the judiciary (the third branch of the state) and the special working methods and professional characteristics of its members if it is to be accepted and successful.

This fundamental assumption was confirmed on various occasions and based on the viewpoints of various scientific disciplines; for the sake of accuracy, it should be noted that the assumption relates not only to the management of courts but also to management within courts.55

Fundamental assumption: although the work of the judiciary is shaped by procedural law and has fixed processes, there is potential for improving the efficiency and quality of judicial work by optimizing processes in a business management sense.

49 For more detail, see above Section II./7.
50 For more detail, see above II./5.
51 For more detail, see above II./4.
52 For more detail, see above II./6.
53 See II./6.
55 With regard to the two dimensions of court management, see II./2.
The research work focused in different ways on concepts and instruments that can serve to improve the core, management and support processes in the courts and thus achieve the greatest degree of justice possible – from caseload management to quality systems. The work, however, restricted itself largely to identifying the theoretical potential and the adjustments that have to be made to business management instruments to adapt them to the specific requirements of the judiciary. The effectiveness of court management instruments in relation to process optimization was not investigated. This fundamental assumption must accordingly be verified or falsified ex post in the near future by means of evaluations. For such research to be possible, in projects to reform the judiciary it is vital to survey and establish the state of the system before new court management instruments are introduced.

Fundamental assumption: by optimizing the deployment of resources, the output and the quality of the judiciary can be increased.

From a theoretical viewpoint, this fundamental assumption might be correct; here again it will be necessary to verify the fundamental assumption ex post by conducting evaluations of the management instruments.

3.2 Relevance of the Findings in an International Context

The principles of good court management in Switzerland – as identified in the present research project – are based to a large extent on international sources, as the individual sub-projects and the present summary of the findings show. Convincing proof of this is already provided by the literature list for this publication summarizing the research results and the bibliography on research into judiciaries compiled in the course of this project. The fact that the subject matter of the investigation, the objective and issues raised in this research project, which focus on the core of the Swiss judiciary, have international relevance is also shown in other areas. In the following remarks, a few examples of these connections are highlighted.

At a pan-European level, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe deals with issues of court management. In particular, the CEPEJ examines questions relating to the organization of the judiciary, the quality of the judiciary, the timely issuing of judgments, performance assessment and evaluation of judicial systems – areas similar to those that were the object of the present research project. With Georg Stawa (CEPEJ President), Jacques Bühler (President of the Working Group on judicial time management at the CEPEJ) and François Paychère (President the Working Group on quality of justice at the CEPEJ), three contributors to this research project at the same time work for this international organization. The knowledge exchange that resulted from this collaboration was a significant success factor in our research work.

The European Group for Public Administration (EGPA) is one of the most important research networks in Europe for administrative theory and the management of public institutions. As part of the present research project, the new permanent study group on “Justice and Court Administration” was established within the EGPA. At the annual conferences of the EGPA in various cities in Europe (Bergen, Edinburgh, Speyer, Toulouse), the research group held events on various aspects of court management, such as quality management, caseload management, alternative dispute resolution mechanisms (ADR), social media or information and communications technology (ICT). Researchers, judges and members of judicial administrations from various countries – including non-European countries such as the USA, Canada and Australia – presented their findings and took part in the debate. The study group will focus in the coming years on other topics such as access to justice (taking account of aspects such as legal aid and gender), consistency of judicial decisions, performance management, responsive justice, eJustice and judicial cooperation.

The aim of the International Association for Court Administration (IACA) is to facilitate research, knowledge transfer and practical experience on court and judicial systems around the world. Around 250 representatives of the judiciary, administration and academia attended its conference held in Sydney in 2014, representing around 40 countries. Topics included the judiciary in a changing environment, court organization and management, performance and evaluation, eJustice and access to courts and alternative dispute resolution. It was found that judiciaries around the world face very similar challenges and that international institutions are therefore an ideal forum for exchanging knowledge and

57  http://www.iiias-iisa.org/egpa/groups/permanent-study-groups/psg-xviii-justice-and-court-administration/ (Status: 01.03.2017).
58  The reports to the conferences by doctoral candidates involved in this research project can be found in the Swiss judges’ journal “Justice – Justiz – Giustizia” at: www.justizforschung.ch/index.php/homepage/egpa-study-group (Status: 01.03.2017).
59  http://www.iaca.ws/ (Status: 01.03.2017).
60  See LIENHARD (2014).
developing judicial administration. An important organ in this respect is the *International Journal for Court Administration (IJCA)*, which is available online and generally accessible.  

In an effort to constantly optimize court management, the International Consortium for Court Excellence has developed the *International Framework for Court Excellence*. It focuses on key areas of court management such as organization and management, management processes, resources, planning, access and satisfaction, and trust. The Consortium plans to regularly optimize the Framework. A delegation from the present research project has also been invited to contribute to this work. Even if this management tool cannot be introduced into the Swiss judiciary in its present form, there are considerable similarities between the Framework and the subject areas considered in this research project.

The research project on “Basic Research into Court Management in Switzerland” has not only brought findings of relevance to the Swiss judiciary but has also attracted widespread attention and established links with the international research community and international practitioners. The subject areas of court management investigated in the course of the research project are also of international relevance—they are in a certain sense ubiquitous. Future research into systems of justice will be carried out by international networks—the existing gaps in the research and the needs of the judiciary are simply too similar for them to be filled in one after the other in successive projects.

### 4. Need for Further Research

#### 4.1 Special Issues in the Organization of the Judiciary

**Structure of the cantonal court organization:** A specific analysis of how the cantonal courts are organized and the supervision and principles derived therefrom for the harmonization of best practices could be beneficial to informing the development of court management approaches and methods.

**Judicial councils:** Judicial councils are a relatively new institution in Switzerland and little experience has been gained with regard to their mechanisms and impacts. In particular, the question arises of whether the legitimacy of the courts can be optimized through judicial councils. The mechanisms of judicial councils in the Swiss judicial system therefore require evaluating once additional experience with them has accumulated.

**Caseflow management:** The research so far has concentrated on the structural organization of the courts. Knowledge of procedures (core processes, management processes, support processes) is still fairly modest. What could be of interest is research in the field of case (flow) management or justice chains (for example: police investigation > cantonal prosecutor > courts). It would also be interesting in this connection to conduct research into relations between organizations, their procedures and the quality results they achieve.

#### 4.2 Use of Special Categories of Court Members

**Specialist lay judges:** So far there has been very little research into the benefits of using specialist lay judges and what impact their use has, if any, on the quality of adjudication.

**Part-time judges:** So far there has been very little research into the benefits of using part-time judges as far as the quality of adjudication is concerned.

**Single judges:** There is a growing trend towards using a single judge rather than a panel of judges. There is a lack of knowledge as to the effects of using only one judge, in particular with regard to the consistency of judicial decisions. Clarification is also needed as to whether and, if so, to what extent efficiency can be increased by using only one judge.

**Law clerks:** A large portion of the workload of the courts is handled by law clerks. This gives rise to various legal and administrative questions relating to the organization and division of work, and also to the question of the optimum ratio of law clerks to judges.

#### 4.3 Dealing with Different Rationales

**Hybridisation of rationales:** It would be interesting in a longitudinal comparison to demonstrate how the hybridization of bureaucracy and management rationales revealed in this study will develop.

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61 [http://www.iacajournal.org](http://www.iacajournal.org) (Status: 01.03.2017).

62 [www.courtexcellence.com](http://www.courtexcellence.com) (Status: 01.03.2017).

63 As an example, see the Swiss criminal justice chain as described by KETTIGER/LIENHARD (2016), p. 53 f.

64 See BIERI (2016).
Educational research into persons working in the court system: persons working in the judiciary find themselves facing not only different rationales (worlds), but also special professional requirements. This raises the question of what minimum qualifications this requires and what significance this has for the basic and continuing professional education and training of court staff.

4.4 Quality and the Question of Its Measurability

Legitimacy through figures: more detailed research would be required into the reasons for the proven high level of trust in figures as a basis for legitimacy.

Performance measurement and assessment: the question of whether and if so how the performance of the courts and of their staff can be measured and assessed has only been covered to a limited extent. Whereas certain ideas on quantitative indicators exist, there is a lack of clarity, in particular as to what key elements comprise a “good judgment” in qualitative terms.

Effects of various approaches to quality assurance and development: there are virtually no comparative academic studies into the effectiveness of quality assurance and quality development systems; in particular in the judiciary. A study could be conceived that compares the effectiveness of management approaches and “soft” approaches to improving quality.

4.5 Justice and Its Interdependencies with Other Systems

Effects of judicial activity on the economy and society: little is yet known about the relationship between court management and good justice on the one hand and economic and social development on the other. This field of research poses special challenges, both with regard to data sources and with regard to methodology.

The judiciary and the legal profession: both the job profile for court staff and the job profile for lawyers are undergoing change. In Switzerland, little research to date has examined the interaction between the legal profession and court staff. From the point of view of quality, the level of acceptance of the judiciary by the legal profession is of interest. Taking a broader view of court management, it could be interesting to examine whether a general increase in quality and efficiency could be achieved by better organizing interactive processes, for example with regard to eJustice.

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Measuring The Judicial Performance Of The European Court Of Human Rights
By Elizabeth Lambert Abdelgawad

Abstract:

Faced with a sharp rise in the number of individual applications, the European Court of Human Rights has been forced to provide greater accountability to governments eager to downsize its budget and staff. This has resulted in the introduction of quantitative criteria, to the detriment of quality and of the service rendered to individual victims. These new management policies have admittedly reduced the number of pending cases, but they have also considerably eroded the right of individual application. The new managerial policy has definitely shaped a new Court.

Keywords: Results-Based Management; quality of justice; European Court of Human Rights; productivity; audits.

1. Introduction

The evaluation of judicial performance has become a matter of concern for economists, sociologists, political scientists and more rarely jurists. It is the consequence of the extension of the market model to the justice system in the form of New Public Management. The latter has been abundantly documented, and while the justice system does have its specificities, it has not been immune from this policy trend. The obligation for European states to comply with the requirements of Article 6 of the European Convention on Human Rights (whose procedural guarantees include the notion of ‘reasonable time’) has been alternatively analyzed as ‘the best remaining safeguard against the disciplinary instrumentalization of ethics and the excesses of managerial rationality’ and as a typical illustration of the prevailing new management doctrine.

What limited amount of research has been done on the measurement of the performance of supranational justice has mainly focused on international criminal justice. Yet, the new management trend has also resulted in sweeping changes in other courts, such as the European Court of Human Rights (hereafter ECtHR), which experienced both new management reforms and a ‘modernization’ effort in the early 2000s and after 2010, under the impetus of a few highly influential actors.

The ECtHR was set up by the European Convention on Human Rights in order to sanction the most serious violations (the ones politicians had in mind just after WW2) and has progressively become victim of its own success, being overwhelmed by an increasing number of individual applications (brought by individuals or groups of individuals against State Parties). Yet there was a common belief at the time of enacting the convention that the Court would receive very few applications, and nearly only interstate applications (brought by States to denounce the non-respect of the convention by another Member State). The original purpose has evolved in the seventies with the enlargement of the Council of Europe and the
increasing number of individual applications. Yet the new spirit, emanating from Protocols 9 and 11, inspired by a desire to facilitate the access to justice by citizens in Europe, has been subverted by budget pressures as the most powerful governments have refused to increase resources necessary to fulfil this ambitious challenge since the mid-nineties. While in the terms of the Brighton declaration adopted in 2012, ‘The States Parties also reaffirm their attachment to the right of individual application to the European Court of Human Rights (“the Court”) as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention,’ this masks an entirely different reality. The numbers – ironically – speak for themselves. What other Court has such a high rate of inadmissibility (95%)? And what other Court declares 90% of the above 95% of cases inadmissible through a non-contradictory, non-public and non-reasoned single-judge process? Thus there exists an attempt to come back to the initial purpose (only address the most serious violations) in name of austerity. The report enacted in December 2015 by the CDDH on the long-term reform of the system often refers to the budgetary constraints, and while it ‘recalls that the Committee of Ministers needs to examine the possibility of allocating a temporary extraordinary budget of a total of 30 million euros to be used over a period of eight years’, it notes once more that it ‘is nevertheless aware of the continuing financial difficulties and budgetary constraints faced by many member States’.

While this author clearly supports the view that measuring court performance is a necessary element of transparency and accountability and that some elements of judicial innovation are required, the aims of this paper are to point out that the focus of the current debate is too much on the Court’s efficiency, in its disposal of cases, and so to argue that the parameters used to assess the Court’s performance should be enlarged to cover qualitative and not only quantitative factors. The scope of this paper is thus limited to a critical analysis of the criteria used to assess whether the ECtHR is performant or not (where do they come from, which actors have impacted them?), and not so much to address the impacts of such a shift (notably the Court’s distancing itself from certain categories of applications and the increasing role of the Registrar), as this has been covered by previous publications.

A voluminous academic literature has analyzed the many reforms of the Court and their impact: some academics have notably already shown how admissibility requirements have been used by the ECtHR for strategic and substantive reasons; yet the issue of the measurement of its judicial performance has not been covered. Thus this paper studies the evaluation of judicial performance at the ECtHR in two successive stages. First, it looks into the sources and origins of the application of the ‘performance’ concept to the ECtHR. Second, it focuses on the measurement of performance, especially when it comes to the quality of justice. For the purposes of this paper, I adopt the definitions used in the Qualijus study conducted by a French academic team. The more comprehensive term is ‘performance’, which comprises effectiveness, efficiency and quality. Effectiveness is understood as ‘the ratio between the goals set and the results expected’; efficiency is ‘the ratio between the resources allocated and the results obtained’ and quality is defined as the ‘ability of an entity to meet the needs it is designed to fulfil’. The latter includes the quality expected by recipients, the quality experienced by users and the quality intended by the institution and effectively delivered. According to the same study, quality ‘ultimately depends on the recipient’s present or future assessment of the services provided’.

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8 According to President Costa in a speech given on 25 January 2008 (p. 4), the proportion of 94% of inadmissible cases ‘reveals an anomaly’.
9 According to an interviewee’s confidential statements, the Brussels Conference adopted in 2015 has introduced a minimal degree of reasoning, deviating very little from previous practice. The source explained that reasoning for single-judge decisions would fall under two groups: A-list (most reasoned decisions) and B-list (comprising non-compliance with the six-month time limit and with the exhaustion of domestic remedies). [http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf](http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf).
13 This concept is sometimes more broadly defined: for Stefan Voigt and Nora El-Bialy (Stefan Voigt & Nora El-Bialy, ‘Identifying the determinants of aggregate judicial performance: taxpayers’ money well spent’?, Eur. J. Law Econ, 11.12.2014, Springer, online), performance includes the dimensions of ‘judicial independence’, ‘judicial accountability’, ‘judicial effectiveness’ and ‘judicial output’. The latter criterion is the only one mentioned in their 2014 paper.
This research is based on rigorous analysis of the Council of Europe’s program and budget documents, the ECtHR’s internal and external audits, and the many studies produced ahead of ECtHR reforms. About ten interviews were also conducted. In conclusion we will briefly consider the impact of the introduction of these managerial policies to suggest adding new indicators.

2. The Origins of the Concept of Performance Applied to the European Court of Human Rights

The first landmark in the history of the Council of Europe and of the Convention system was in 1994, when under the impetus of the main contributing states and with the aid of successive secretaries-general, a zero-growth policy was established for the budget of the Council – at the very time when the successive integration of the Central and Eastern European countries was going to turn it into a large pan-European institution. The second landmark was in 1999-2000, with the decision to change the organization’s budgetary management by implementing the Results-Based-Budgeting (RBB) strategy, as the increasing number of Member States put a strong strain on the budget, with pressure from the German, Italian and British governments to cut down on costs. The new policy was clearly results-based, with no concern for the processes leading to the results. These two landmarks were followed by numerous concrete reforms notably the introduction of IT tools to speed up the management of certain cases (notably repetitive cases under the Well-Established Case-Law mechanism), of a priority policy to give priority to the most serious cases, of Rule 47 with stricter requirements for an application to be considered as valid and the set-up of specialized hubs at the Registry aiming for more standardized and consistent drafting on thematic issues such as asylum and migration.

In the ECtHR, the managerial revolution took place in several steps, with an internal audit in 2001, another internal audit in 2004 in response to requests for additional resources, Lord Woolff’s 2005 report on the ECtHR’s working methods, the 2006 Report of the Group of Wise Persons in 2006 and an external audit in 2012. The same protagonist was involved in the 2005 and 2006 reports (he presided and drafted the former in the first person): Lord Woolff. Lord Woolff was the former head of the British judiciary, the president of the Bank of England’s Financial Markets Law Committee and a steadfast advocate of alternative dispute resolution methods – having also chaired the network of the Presidents of the Supreme Judicial Courts of the European Union’s Working Group on mediation. His considerable legacy includes the expansion of friendly settlements and the introduction of unilateral declarations in Strasbourg in 2001. The reform process was steered by Erik Fribergh, the Section Registrar (2002-2005) and then Registrar of the Court (November 2005- November 2015). A judge in his native country, Sweden, he began working in 1978 for his government as deputy secretary of the Governmental Commission on Unnecessary Bureaucracy and for the Ministry of Justice (1979-1983). The Court’s Presidents also played an important role in implementing the managerial reforms; particularly the Swiss ex-President Luzius Wildhaber, who claimed that ‘the effectiveness of the system is the goal of any change’. In his 2000 speech,
Wildhaber already spoke of ‘productivity’; since then, his opening speeches have been peppered with words such as ‘production’, ‘effectiveness’ and ‘productivity’. The reforms were also inspired by other models of internal justice (the German and Spanish constitutional courts and the US Supreme Court). Curiously, and perhaps crucially, the work done by the CEPEJ (European Commission for the Efficiency of Justice) established by Resolution (2002)1231 in the Council of Europe to ‘promote the efficiency and quality of judicial systems at the service of European citizens’ have been all but ignored in the ECtHR's output. Explanation given by interviewees on this point were obscure and unconvincing: they claimed to be unaware of the CEPEJ,33 made sure to respect the Court’s independence or said the ECtHR is an atypical tribunal.

Meanwhile the number of individual applications had grown exponentially, with roughly 151,000 pending cases as of 1 June 2011, while States have been increasingly reluctant to increase the Court's budget and expand its staff. Regarding human resources at the Registrar, after two reinforcement program in the early and mid-2000s, the number of available positions was capped in 2009, 2010 and 2011 and began decreasing in 2012, even as the number of pending cases reached a peak in 2011. At the same time, the Court’s budget, which has been increasing slightly for many years, will begin decreasing in 2017. The Court is evidently under-funded; this was acknowledged even by the first internal audit and by the external auditor in 2012. Most importantly, the latter report concluded that despite the Court’s increase in ‘productivity’, efforts in this area alone cannot suffice and the reform process should be pursued so as to guarantee the sustainability of the Court's work and the quality of the Convention system in the longer term. Even President Wildhaber claimed in January 2005 that the productivity of the ECtHR was not at fault, calling the Court, ‘without a shadow of a doubt, the most productive of all international tribunals’. The same speech marked the first time that a President publicly expressed concern about the impact of the obsession for productivity. Clearly, the rhetoric promoting efficiency and the better use of resources prevailed not only to boost productivity as resources increased very marginally; it was also used to provide the Committee of Ministers and the Secretariat General of the Council of Europe with the means and legitimacy to better control the Strasbourg Court, whose role has grown over the years. Actually these audits and the internal reports have paved the way for the intergovernmental Conferences and Declarations (from Interlaken in 2010 to Brussels in 2015) which have clearly indicated to the Court the ways this latter should manage its case-law. By setting the criteria for the measurement of performance, the executives have built a new ECtHR.

3. Measuring the Court’s Performance: Why and How?
Measuring the performance of any Court requires first examining its original purpose and the analysis on this aspect is quite instructive. In budgetary documents, the ECtHR's mission is invariably phrased as 'ensuring the observance of human rights at the service of European citizens' have been all but ignored. The main aim of the Convention is not to have as many applications as possible declared inadmissible, but rather to secure effective protection of human rights in the member States. Driving up the statistics of terminated cases every year can only be achieved by concentrating on the easier, more numerous inadmissible applications, which will inevitably be at the expense of the more complex, meritorious ones.' The Court is said to perform a "public service" whose "clients" are both the

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29 Speech given on 19 January 2007, 2; Speech given on 29 January 2010, 6 & 7; Speech given on 27 January 2012, 4.
30 Two interviews cited the proceedings before the German constitutional court as a model.
31 Resolution of 18.9.2002. A member of the World Bank has observer status in the CEPEJ.
33 Yet there is an observer from the Court in the CEPEJ and there are ongoing collaborations between the CEPEJ Secretariat and the Department for the Execution of Judgments regarding lengths of proceedings and national appeals.
35 The budget increased from 44,425,411 euros in 2006, to 58,588,600 in 2010, and 71,438,400 in 2016. It will begin decreasing in 2017 (71,405,800 euros).
40 Speech given on 21 January 2005, p. 7: ‘the main aim of the Convention is not to have as many applications as possible declared inadmissible, but rather to secure effective protection of human rights in the member States. Driving up the statistics of terminated cases every year can only be achieved by concentrating on the easier, more numerous inadmissible applications, which will inevitably be at the expense of the more complex, meritorious ones.’
41 CM(2006)146 vol1, titre IV.
public at large and the governments. The *pro victima* approach of 2004-2007 then gave way to a new approach: in 2010, the Court’s purpose was very vaguely defined: ‘maintaining and strengthening democracy and the rule of law founded on fundamental rights and freedoms throughout the Council of Europe Member States’. In 2014, the definition of the Court’s mission was buried in a magma of numbers, aimed at driving home the idea that the Court’s procedural choices were inevitable, useful and efficient: accelerated filtering with the introduction of a single judge, hierarchization policy, ‘deter[ing] manifestly ill-founded applications through an appropriate communication policy’… This shift rings out strongly with the idea of default judgments and the already statements of the Court that its ‘principal task is to secure the respect for human rights, rather than compensate applicants’ losses minutely and exhaustively’ and that the emphasis of its activity is ‘on passing public judgments that set human-rights standards across Europe’.

Regarding the measurement of performance, examination of the Council of Europe’s program and budget documents beginning in 2003 shows that highly detailed log frames were devised, thoroughly describing expected results and performance indicators. Criteria generally fall within two categories: quantitative performance and quality of justice.

### 3.1 The Quantitative Measurement of the ECtHR’s Performance

The vast majority of ‘expected results’ and ‘performance indicators’ are quantitative. Yet, they differ significantly from the criteria usually selected to evaluate judicial work. Indicators used to assess the efficiency of justice in the EU comprise three qualitative criteria, namely length of proceedings, clearance rate (the ratio of the number of resolved cases over the number of incoming cases) and number of pending cases. These are meant to assess the system’s ability to handle the backlog and flow of incoming cases. The average length for resolving a case is a common measurement tool, but while there are some statistics on that in Strasbourg, reducing the duration of proceedings has only been very recently included among the expected results. Another similar criterion has been used – *the number of cases a judge has decided*. It is however considered ‘problematic, because it might lead to false incentives’; distinctions would need to be made according to the complexity of the cases. *Clearance rate* has curiously not been among the criteria used by the Court’s Registry, even though it is mentioned in the Brighton Declaration and used extensively by the CEPEJ. On the other hand, the number of pending cases has been largely publicized over the years to call attention to the ECtHR’s unmanageable situation.

The successive program and budget documents include changing and varied criteria. Their presentation itself has changed: expected results are now far more detailed than in the early years, which were marked by a tendency towards the overlap of expected results and performance indicators. The latter only reproduced the former with more precise numbers. In 2005, the three main expected results pertaining to the Court’s performance in terms of ‘production’ were first to decide 20,000 cases (18,000 Committee cases and 2,000 Chamber or Grand Chamber cases), second to reduce the backlog (by 40% for cases pending for over three years after being allocated to a decision-making body), and third to fully comply with the backlog criteria (meaning a maximum one-year duration for each stage in the proceedings). Other results were set in the ‘judicial administration’ section, including the introduction of a pilot procedure. In 2007, the document added the rise of ‘productivity’, measured as ‘the average number of finally disposed applications of per case-processing lawyer’. A new approach was adopted in 2011 as the Court was expected to focus on priority cases and as the single judge procedure was to be ‘optimized’.

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43 Programme and Budget 2014-2015, p.20.

44 Kharuk and others v Ukraine, n703/05 et al., merits and just satisfaction, 26.07.2012, para.23. Lize R. Glas, ‘Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be drawn’, Human Rights Law Review (2014)14, 671-669, 680: ‘Again, this approach clearly equips the Court to process these applications efficiently, yet the expedited and simplified process also means that individual cases are not addressed on their own merits in each and every case’.

45 The Council of Europe’s website does not give access to budget documents prior to that date.


47 According to the available figures, productivity increased on average from 105 to 145 cases per lawyer per year.

48 CCJE(2014)2, 24.10.2014, para.34.

49 Declaration 19 & 20 April 2012, para.5.


51 Idem, P.53.


54 Since June 2009 the Court has adopted a priority policy: see http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf. Category 1 refers to “urgent applications”, category II notably to applications raising an important question of general interest, category III concerns “core rights” (Articles 2, 3, 4 or 5 § 1 of the Convention).
In the above documents the two key criteria are 'production' – i.e., the increase in the number of cases decided according to court formation (with a focus on single-judge and priority cases in recent years) – and the decrease of pending cases. In terms of number of judgments, the ECtHR’s productivity has dropped significantly, from 1625 judgments delivered in 2009 (an unequalled peak) to 823 in 2015, i.e., roughly the level of 2002. The sharpest decrease occurred between 2010 and 2011 (1499 to 1157 judgments). The year 2011 saw the entry into force of Protocol 14, which placed emphasis on eliminating manifestly inadmissible applications through the newly established single-judge system. We share the view that by moving in this direction, the Court increasingly distances itself from certain applications in order to protect the efficient working of the system. Undoubtedly, focusing on quantitative factors has progressively lead to reforms which have reduced the individual right of petition to the Court as already analyzed in our previous analysis. Will the next step consist in replacing judges by electronic predictive models for a certain number of cases (well-established and repetitive cases)?

Thus these quantitative criteria are clearly questionable. Former Registrar Erik Fribergh himself acknowledged that they cannot properly assess the extent to which the Court has fulfilled its mission of ensuring observance with the rights and freedoms set forth in the ECHR (which is its raison d’être according to Article 19), which depends on the nature of the cases and the quality of the decision. He nevertheless argued that the focus on priority applications introduced a qualitative dimension, as the Court concentrates on the cases deemed to be most important. This is why criteria on the quality of justice are particularly important.

3.2 Uncertain Qualitative Criteria

'The rigor of numbers has its limitations: each quantitative data must be interpreted and complemented by qualitative appreciations', even if such evaluation is more difficult. For the ECtHR, quality criteria have taken a back seat to numbers and have changed considerably over the years, giving the impression of fumbling and short-term vision or even lack of vision dependent on the States' desires and diktat.

Yet, numerous studies could have helped in establishing and strengthening a clear approach. Three main forms of quality criteria can be broadly distinguished: those assessing the quality of the functioning of justice as a whole (including the independence and impartiality of the courts, but also the quality of the service provided to users of the justice system, as the ECtHR fulfils a public service), the quality of the judiciary process (compliance with procedural safeguards, etc.) and the quality of the court decisions delivered (whether they are clear, reasoned, etc.).

Benoit Frydman proposed the highly pertinent hypothesis of a “progressive shift in contemporary theory and practice from a substantial conception to a procedural and now managerial conception of the quality of court decisions. Where control is concerned, this goes hand in hand with the multiplication of criteria and bodies piling up on top of each other”. The procedural conception, based on Articles 6 and 13 of the ECHR, emphasizes compliance with the right to a fair trial as the condition for producing a quality decision. This criterion, developed by the ECtHR for national courts, does not seem to apply to the Court itself due to the specifics of its procedure (which is for the most part written). However, it has directly inspired a managerial conception, as 'considering that the quality of justice depends on the conduct of proceedings, it is as a rule indispensable to carefully examine the conditions in which justice is administered and delivered.' Even though

55 ECIHR, The Interlaken process and the Court (2016 Report), 1.9.2016, 3: ‘In the past few years, roughly three quarters of new cases were allocated to the single-judge formation, and so could be dealt with quickly’.
60 E. Fribergh, RBB(2012)8, 26.09.2012, 2: ‘In short, the quality of the Court’s work is more important than the number of applications dealt with’.
66 Idem, 25.
the shift from the procedural to the managerial approach is understandable (as the backlog of cases may have a negative impact on the right to a fair trial), as Benoit Frydman writes, the managerial approach requires a ‘fundamentally different conception of quality control’. The latter is no longer a judicial control, but ‘relies on techniques borrowed from management’, including ‘the setting up of reference standards and quantitative indicators (…), periodic assessment procedures (…), the definition of performance targets, (…) which can be very strict in terms of regulating behaviors’. 67

In Strasbourg as in many national courts – to varying extents – the challenge of quality has been to do well, if not better, with resources that do not match the increased workload. Yet the ECtHR differs from other national and supranational courts in several respects: it overrides 47 national justice systems; there is no possibility of appealing its decisions; victims see it as their ultimate hope of justice; additionally, as it is a human rights court, it sanctions at the national level violations of procedural safeguards, insufficient substantions of court decisions, the courts’ partiality or lack of independence – precisely criteria for measuring the quality of justice. In light of its role in enforcing these criteria, the ECtHR must be beyond reproach on these questions; failing that it could lose its legitimacy and authority. For the ECtHR, the burden/tension relating to the balance that needs to be found between the quality of decisions and ever more pressing management incentives is a much more crucial issue than in national courts and other international courts that do not have to assess these aspects themselves. Additionally, without being a fourth level of jurisdiction, the Court acts as an extension of domestic justice in accordance with the subsidiarity principle. Therefore, there is no reason to exempt it from compliance with at least some of the criteria routinely applied to domestic courts.

All the successive presidents have without fail discussed the Court’s challenge: increasing productivity without harming the ‘quality’ of its work. In 2001, President Wildhaber appeared to define quality as the refusal to weaken the standards and to adopt a two-tiered justice system in the wake of the accession of numerous states from the former Soviet bloc. The dynamic and evolutive interpretation of the Convention is another component of the ‘quality’ of judicial activities. Two important aspects remain: the reasoning and consistency of the decisions delivered. In 2008, the Consultative Committee of the Council of Europe has developed a ‘Handbook for the European Court of Human Rights’ 68. This approach ‘reflects a concept of justice focused more on the users of a service than on the internal performance of the judicial system’. 71 Classically, even if different questionnaires have been developed for different categories of users (victims, lawyers, etc.), there are shared criteria: general perception of the functioning of justice, access to information, quality of decisions, relations with the court or service, and preparation and conduct of hearings. 72 These criteria could be very well adapted to the ECtHR, which can receive applications from any individual complaining of a violation of the ECHR who has exhausted available domestic remedies. At least, in scholarly literature, some proposals have been made to translate such standards to the ECtHR.

The EU uses a diverse set of criteria, pertaining both to the institution itself and to its relations with the outside world. Indicators include monitoring and evaluation of court activities (which comprises satisfaction surveys, access to justice, availability of electronic submission of claims), the training of judges, the availability of Information and Communication Technology, budget, human resources, and the availability of alternative dispute resolution methods. Within the Council of Europe, the CEPEJ has adopted a chiefly pragmatic and empirical approach attempting to define the foundations of a quality system. It has been, and still is a user-oriented approach; satisfaction surveys are the heart of the evaluation of the quality of justice, with a focus on the perceptions and expectations of users. In 2010 it adopted a ‘Handbook for conducting satisfaction surveys aimed at Court users in Council of Europe's member States’, based in particular on the experience of certain member states and relevant best practices to be highlighted. This approach ‘reflects a concept of justice focused more on the users of a service than on the internal performance of the judicial system’. 71 Classically, even if different questionnaires have been developed for different categories of users (victims, lawyers, etc.), there are shared criteria: general perception of the functioning of justice, access to information, quality of decisions, relations with the court or service, and preparation and conduct of hearings. These criteria could be very well adapted to the ECtHR, which can receive applications from any individual complaining of a violation of the ECHR who has exhausted available domestic remedies. At least, in scholarly literature, some proposals have been made to translate such standards to the ECtHR.

67 Idem, 27.
69 CEPEJ(2010), according to a report by Jean-Paul Jean and Hélène Jorry.
70 Idem, 2.
71 Idem, 2.
72 Idem 16-30.
76 T. Barkhuysen & M. van Emmerik, ‘Legitimacy of European Court of Human Rights Judgments: procedural aspects’, chap.27, in N. Huls, M. Adams & J. Bomhoff (eds), The Legitimacy of Highest Courts’ Rulings (2009), 437-449, who strongly oppose the shift towards a pick-and-choose policy and the restrictions to the right of individual application. These authors conclude that the States should increase the budget of the Court and that at the same time ‘it is therefore necessary to invest considerably in improving the quality of the Court’s procedure’ (p.449) in order to prevent a ‘legitimacy crisis’.
77 Speech 25th January 2000, 2.
78 Speech 23th January 2003, 5.
Council of European Judges issued an opinion that emphasized the need for ‘proper reasoning […] which should not be neglected in the name of speed’. Indeed, ‘the purpose of a judicial decision is not only to resolve a given dispute providing the parties with legal certainty, but often also to establish case law which may prevent the emergence of other disputes and ensure social harmony’. As the ECtHR’s approach consists in balancing the interests and moral values at stake, the fundamental criterion, following Perelman and Dworkin, is the quality of the argument underpinning the decision. Judgments must be understood by the applicants, or at least by their lawyers who are in charge of explaining the reasons for the decision to their clients. This concern has been recently addressed by the ECtHR as the decision was taken at the end of 2016 to replace the letter from the Registry by a formal judicial decision to be sent to the applicant when the issue has been dealt with by a single judge. In addition to reasoning, the criterion of consistency has been regularly invoked, and described as essential with regard to the rules governing the content of persuasive discourse as defined by the Rhetoric. The introduction of the Jurisconsult following the adoption of Protocol no. 11 was clearly in response to the objective of ensuring ‘the necessary consistency of the Court’s case-law’. This is an important criterion to assess the quality of the decisions which has been regularly emphasized by Presidents, especially in the face of the increasing number of decisions.

Regarding the quality of the Court’s overall functioning, the actual users of the ECtHR, 99 per cent of whom are individuals, expect an independent, impartial justice that they can trust. They also expect information on the steps in the proceedings, on the date when the decision will be delivered and/or the hearing will take place, as well as on the access to the Registry and the Court, including by phone and email. Additionally, they ‘also want a justice that they can understand, that listens to them, where they have a place’.

In the ECtHR’s program and budget documents, both the paucity and the weakness of the qualitative criteria are striking, as is the total absence of references to the quality expected and experienced by individual users. The lack of more user-centered criteria is problematic, unless one argues that the only users are governments, but this reasoning does not make sense as long as the bulk of the Court’s control still pertains to the right of individual application. More than for quantitative criteria, there is a clear lack of consistency in the expected results and performance indicators, which are constantly readjusted, revealing a lack of vision. Additionally, a sharp break occurred in the late 2000s. The 2003 document includes fairly detailed qualitative objectives, including the consistency and uniformity of the case-law. In 2004, there is a mention of a public judicial procedure for all decisions on admissibility and judgments on the merits. From 2007, a new criterion was added, that is the electronic access to the decisions the day they are delivered. 2010 saw a break: consistency is no longer one of the six ‘expected results’. New criteria were set, such as ‘training in the Court’s application becomes systematic’, ‘workflows are being developed for the most complex chamber cases’, and ‘awareness of the Court’s activities is increased’, measured on the basis of the number of visits to the website. In 2014-2015, the budget sets the objective of better informing applicants ‘about the admissibility criteria so that the inflow of manifestly ill-founded applications is reduced’. It should also be noted that the extension or greater transparency of legal aid, which is known to be weak at the ECtHR, has never been among the qualitative criteria across the years.

80 Idem, para.7.
81 ECtHR, The Interlaken process and the Court (2016 Report), 1.9.2016, 5, para.15. A request had been made in the Brussels Declaration (27.03.2015), in that regard ‘welcomes the intention expressed by the Court to provide brief reasons for the inadmissibility decisions of a single judge, and invites it to do so as from January 2016’, http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf, 5). See also J. Gerards, ‘Inadmissibility decisions of the European Court of Human Rights: a critique of the lack of reasoning’, Human Rights Law Review (2014)148-158.
87 CM(2004)155, vol.1, title IV: ‘activities’: ‘The Court responds to such applications by decisions (on admissibility) or judgments (on the merits and just satisfaction) following a judicial procedure which is public’.
89 Budget 2010, 57.
Undoubtedly the intergovernmental conferences held between 2010 and 2015 had a strong impact on this evolving policy. The ECtHR has been attentive, if not submissive, to governments’ expectations: as President Costa announced during the second Conference in Izmir: ‘the Court has already taken measures to implement the recommendations addressed to it.’

In an apparent paradox, while statistics show that the productivity of the ECtHR has increased, the perception of the Court’s work by applicants and especially by governments (who asked for these management-oriented reforms) has certainly not improved. Regarding applicants and their representatives, the only indications we have (in the absence of satisfaction surveys) have to do with the lawyers’ dissatisfaction on aspects such as lack of transparency in the proceedings, the very low level of legal aid granted, and the lack of reasoning of the grounds of inadmissibility of applications. Regarding respondent states, strong criticisms and refusals to implement some judgments have been voiced in the past five years. Overall the new management approach has tended to overshadow the fundamental issue of the quality of reasoning, and most of the criticisms now voiced against the Court are currently in relation to this problem.

The Court is in need not only of compliance but also of acceptance by States. In this regard the procedural justice approach has shown how important the sense of procedural fairness is. The ECtHR’s backlog has been misguidedly interpreted as a result of the Court’s inability to handle incoming cases, whereas in fact its main cause was the inability of Member States to implement and ensure compliance with the ECHR domestically. This statement could be easily illustrated by the numerous repetitive cases (for instance regarding the bad conditions of detentions) which are a consequence of the incapacity of the States to fully comply with previous cases (leading judgments) on these issues; yet, as the violation is of a structural nature, the number and complexity of measures expected from the States are particularly terrible. Insufficient conditions of detention often call for reforms of the penal code itself to reduce the length of imprisonment penalties. The Court itself acknowledged that case-management tools cannot solve the issue of repetitive applications, as the source of the problem lies in the non-compliance by States of previous judgments. Moreover, the reasoning of decisions and the satisfaction of users have been neglected, now resulting in much more challenging criticisms of the decisions themselves and of the Court’s legitimacy, requiring quite different remedies.

4. Conclusion

Faced with the increasing number of states parties to the ECHR and the enormous backlog of individual cases in Strasbourg, the ECtHR has been forced to provide greater accountability to governments eager to downsize the Court's budget and staff. This has resulted in the introduction of quantitative criteria, to the detriment of quality and of the service rendered to individual victims. These new management policies have almost exclusively been devised in the interests of states, in order to reassure them. It is uncertain whether that objective has even been fulfilled; never has the Court been criticized as much as now. Evaluation, a core feature of NPM, has further weakened its independence and made it increasingly subject to the states’ impulses. 'Focusing on the concept of speed can become counter-productive and harm the very administration of justice', raising the risk of 'introducing a 'two-tier justice system'. Yet, other reforms were possible. For instance, the states that contribute the bulk of the cases examined by the Court (citizens from four states send around 60% of the applications received by Strasbourg) could have set up Information Offices following the model...
of the one opened in Warsaw (which was undeniably successful but short-lived), to improve the preparation of applications (and to discourage some of them). This has never been done for unclear reasons. Ultimately this paper has attempted to demonstrate that the introduction of managerial policies with quantitative criteria did have a positive impact in terms of reducing the Court’s backlog. However, at the same time, as we have shown in another article, it has also deeply transformed the Court’s function and progressively gnawed away at the right of individual application. The new management approach shaped a different Court; it is no accident that its objectives have been changed. Protocol 14 and all the reforms introduced since 2010 have marked shifts away from the spirit of Protocol 11. Yet case management is not only a technical matter; it is also a matter of access to justice. All the successive reforms introduced after 2010 had the objective of discouraging individual applications and clear the backlog as fast as possible. As others starting with the Court’s former British president, I am firmly convinced that they have addressed the symptoms of the disease, but not the cause. Several reforms have also contributed to reinforcing the Court’s Registry, in the name of the search for a greater efficiency and rationality of available tools. The one that received the most exposure is the introduction of single-judge cases; the second is the support to friendly settlements and unilateral declarations. This article has thus attempted to demonstrate how fundamental it would be to add qualitative criteria (such as the access to the Court, the quality of reasoning and the degree of transparency of the procedure measured through satisfaction surveys) when we come to measure the Court’s performance as the quality of justice delivered to individuals must remain, from our point of view, the goal to achieve.

The pressing question today lies no longer in establishing whether the ECtHR is effective or efficient; it is rather about the extent to which fundamental rights are going to be sacrificed for the sake of meeting quantitative targets. One of the members of Lord Woolf’s review team wrote that these reforms ‘could enable to stem the tide until a fundamental review of the Convention can take place’. That review would consist in withdrawing the right of individual application and officializing the pick and choose policy. The Court blindly acts as if already its only clients were states, with individuals downplayed as mere whistleblowers. According to this author, the European Court of Human Rights cannot work in isolation and should primarily be accountable to European citizens, as they are the only ones holding the rights enshrined in the Convention (and as they indirectly fund this public service).

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100 H. Machinska, ‘Pilot lawyer project developed by the Council of Europe to make direct access to the European Court of Human Rights easier and more effective for individuals’, in E. Lambert Abdelgawad (ed.) Preventing and sanctioning hindrances to the right of individual petition before the European Court of Human Rights, Intersentia, 2011, 165-168. M. M. McKenzie, ‘Review of the working methods of the European Court of Human Rights’, in Reforming the European Convention on Human Rights: A Work in Progress, Council of Europe Publishing, pp.147 ff., notes that ‘the project had been endorsed by the External Auditor to the Secretary General and also at the Oslo Seminar in October 2004’ (p. 149).


105 Between 2011 and 2014, single judges declared 287,828 applications inadmissible.

106 M. McKenzie, ‘Review of the working methods of the European Court of Human Rights’, in Reforming the European Convention on Human Rights: A Work in Progress, Council of Europe Publishing, pp.147 ff.: ‘Second [the review team’s recommendation] will provide a test bed for one way of achieving a long-term solution, that is having regional centres providing courts of first instance and allowing the existing Court to play a different role. A role whereby it ceases to be accessible as of right, but can instead select and control its own caseload’ (151).
Can Artificial Intelligence And Online Dispute Resolution Enhance Efficiency And Effectiveness In Courts
By John Zeleznikow¹

Abstract:

The growing rise in the number of self-represented litigants has negative implications for both the court system and access to justice. The expanding use of Artificial Intelligence and the World Wide Web has led to the development and use of Online Dispute Resolution. In this article, we investigate a number of systems in Australian Family Law that enhance Alternative Dispute Resolution and Access to Justice. We discuss how a hybrid system that incorporates advice about Best Alternatives to Negotiated Agreements (BATNAs) and potential trade-offs as well as allowing online communication can enhance access to justice.

Keywords: Self-Represented Litigants, Access to Justice, Online Dispute Resolution, Artificial Intelligence

1. Introduction

The growing rise in the number of litigants who represent themselves in court has undesirable consequences for the administration of justice (Zeleznikow 2002). As early as 1999, a study conducted for the American Bar Association in the Supreme Court of Maricopa County, Arizona, USA indicated that at least one of the parties were self-represented in over 88% of domestic relations cases and both parties were self-represented in 52% of the cases. Meachem (1999) reports that 24,416 of the 54,693 cases opened in the US Court of Appeals in 1999 were filed by pro se appellants². Many pro se appellants have neither the financial resources nor the legal skills to conduct their own appeals. Quatrevaux (1996) notes that there is a shortfall in legal systems for poor persons residing in the United States.

In Washington State, for example, a 2003 study found that more than three-quarters of all low-income households experience at least one civil (not criminal) legal problem each year. In the aggregate, low-income people experience more than one million important civil legal problems annually; low-income people face more than 85% of their legal problems without help from an attorney. The United States Courts are overwhelmed with a flood of Self Represented litigants, who represent as much as eighty percent of the caseloads in certain jurisdictions, and millions of others who don't get to court at all (Almeida 2013).

Branting (2001) claims that domestic abuse victims are particularly likely to have few resources and little opportunity to obtain the services of a lawyer. He states that the growth of the consumer movement has increased the trend for pro se litigation. The growing availability of books, document kits and computerized forms—together with the increasing availability of legal materials on the World Wide Web—has increased the opportunities for Self Represented litigants to organize their own litigation.

Grecen (2014) notes that in USA:

(1) most self-represented litigants do not choose to represent themselves, instead they have no alternative;

(2) judges who follow recognized best practices for dealing with self-represented litigants encounter no unusual ethical issues;

¹ Sir Zelman Cowen Centre, Victoria University, 295 Queen Street, Melbourne, Victoria, 3000, AUSTRALIA
mailto: mJohn.Zeleznikow@vu.edu.au
² Also known as Self Represented Litigants
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(3) self-represented litigants, when given appropriate accommodation, are able to obtain fair outcomes reflecting the facts and law applicable to their cases;
(4) cases involving self-represented litigants consume far less court and judicial resources than cases in which both sides are represented; and

(5) self-represented litigants constitute a potentially lucrative market for the delivery of limited-scope representation by the private bar.

Tata (2000) said: The idea of the legal academic (let alone a judge) using a computer was even 15 years ago considered quirky but is now increasingly commonplace. As the unrelenting belief in the necessity for computers at every level of work gathers pace the notion that the issues facing judicial decision-making can be in some way, if not solved, alleviated by the production of systems to support judgement-making seems commonsensical.

In the same issue of the journal, Scholberg (2000) said: The Internet is rapidly converging information and communication technology and will also be the future basis for the court technology, both in the individual countries and on the international level. It provides the opportunity for Supreme Courts around the world to serve the global legal communities as a global database, and the integration of Judicial Decision Support Systems on the Internet is an important challenge.

More recently, Schild and Kannai (2009) claimed that: We have in the past been involved in building Decision Support Systems for sentencing of various kinds. All were favorably received by the judiciary, legal practitioners and the police. None of these systems are in actual use.

But finally, in 2017, Sir Henry Brooke observed that he saw evidence that the future had at last, at very long last, arrived (Brooke 2016). It involved the development of the e Bundles and Digital Court System3.

Thus, it is important for us to investigate how the use of technology, especially artificial intelligence, the internet and Online Dispute Resolution can help the functioning of courts and provide better support for pro se litigants. Conducting such research will provide self-represented litigants with important knowledge as well as providing useable systems. We shall discuss these issues in this article.

2. Self-Represented Litigants

Many legal processes within the Australian civil justice system operate with an implicit assumption that the parties have legal representation. This is also true in other Common law countries such as England and Wales and the United States of America. Increasingly, this is not the case, with self-represented litigants (‘SRLs’) accounting for between 17 and 93 per cent of parties in Commonwealth courts and tribunals, depending on the nature of the case and informality of the forum (Richardson et al 2012). A ‘SRL’ is defined as ‘anyone who is attempting to resolve any component of a legal problem for which they do not have legal counsel, whether or not the matter actually goes before a court or tribunal’ (Richardson and

3 In paying tribute to Justice John Tanzer, lately a Circuit Judge based at Croydon Crown Court, England, UK, Brooke claimed that Tanzer has played a leading role in two developments which will greatly enhance the lives of every working judge.

A. judiciary

Its fundamental concepts were, and still are, that it should be a judicial IT system which was:
1. Independent from that of the civil service;
2. Accessible from any internet connected device irrespective of the nature of the device or the physical location of the user;
3. Usable either through a web browser by simply typing in [the URL] or capable of being integrated into desktop and mobile applications;
4. Capable of operating as a One Stop Shop for all the resources needed by a judge;
5. Built on existing proven off the shelf technology;
6. A subscription service subject to constant automatic updating and therefore not ossified by expensive requests for services; and, finally
7. The provider to full time judges of up to five copies of the latest version of Microsoft Office software.

B. eBundles and the Digital Court System which incorporates:
A. A bundling side where all case papers can be aggregated;
B. Papers given Information Rights (IRM);
C. A User Interface so that the data can be deployed in the court room.
See https://sirhenrybrooke.me/2016/08/01/judge-john-tanzer-retires-his-massive-contribution-to-judicial-i-t/ last viewed 2 February 2017
Sourdin 2013). While limited legal aid and rising legal costs compel some parties to self-represent, others choose to do so.

Navigating the legal system can be stressful for SRLs and involve significant personal and financial costs (Richardson and Sourdin 2013). While various process changes have been made to assist them, SRLs pose challenges for legal practitioners, court staff and the judiciary (Zorza 2009). SRLs often lack knowledge of legal issues or procedures and have difficulty negotiating good outcomes or presenting their case to a court or tribunal. These factors can also impact on opposing litigants and raise issues of actual and perceived fairness (Zorza, 2009).

The swelling tide of self-represented litigants constitutes a growing burden not only on the judiciary but also on the entire legal process. Typically, unrepresented litigants (Branting 2001):

(1) Extend the time taken for litigation—due to their lack of understanding of the process.

(2) Place them at a disadvantage compared to their opponent(s).

(3) Place the judicial decision-maker in the difficult position of deciding how much support and forbearance the decision-maker should offer to the Self Represented litigant.

Self-representation has ramifications for a key principle underpinning civil society – fair and equal access to justice for all citizens and the effective operation of the civil justice system.

While SRLs are often portrayed as placing additional burdens on an already strained legal system (Stewart 2011), some tribunals are accustomed to SRLs and view legal representation as unusual and/or unnecessary (ACJI. 2012).

There is evidence that suggests there are different types of SRLs (Stratton 2007) who will have different education and skill levels, motivations and reasons for self-representation – and therefore different needs. Despite assumptions that cost is a driving force in self-representation, this is not always the case. SRLs may have received no legal advice, a little or a lot.

Earlier research conducted in the Australian Family Court shows that there are a range of reasons why people self-represent, such as funding cuts and changes in eligibility for legal aid (Hilbert 2009). Other contributing factors include changes in technology, cultural shifts towards self-help and self-representation, and changes in legislation (Hunter et al. 2003). Economic conditions such as the global economic crisis have also lead to increases in self-representation (Zorza 2009).

Australian law has generally accepted that SRLs are at a disadvantage in legal proceedings and their experience of the legal system may indeed be negative (Re F: Litigants in Person Guidelines (2001) 161 FLR 189). SRLs’ lack of legal knowledge and skills means that some are not able to access fair and equal justice in a system often geared towards legal representation. Some evidence suggests that SRLs take up more court time and demand more staff and judicial attention than represented litigants; in turn they may become stressed and emotional dealing with registry and court staff (Zorza 2009). Court staff and judicial officers also experience stress and frustration in dealing with SRLs (Zorza 2009), which, logically, could extend to opposing parties and their legal representatives. While some SRLs can present their case competently, most research suggests that SRLs struggle with substantive law and procedure (Genn and Genn 1989).

Self-representation can have an impact on settlement rates, case outcomes and case duration (Hilbert 2009), but this impact varies significantly according to case complexity and the forum. Recent randomized controlled trials in the US, investigating the impact of representation have produced mixed results, showing the impact to be highly forum specific (Greiner and Pattanayak 2012).

3. Self-Represented Litigants and Information Technology

Tata (2000) claimed:

One obvious benefit of JDSS centres around the productivity gains which computer technology promises. Of course, when one talks of productivity in a judicial context the obvious question is: ‘productive’–in what sense? What does judicial decision-making produce? If judicial decision-making aims or should aim to widen ‘access to (legal) justice’, then decision support systems hold the promise to achieve this increased access.
It is vital to understand what support and assistance SRLs need as they navigate the legal system. There have been programmatic and policy responses that seek to improve access to justice for SRLs (Hilbert 2009), including written information in plain language and practice guides, and training for the judiciary on supporting SRLs with procedural advice, and formalized pro bono schemes. Increasingly, the trend, particularly in the US, is towards self-help centers or clinics, and providing a triage approach (Hilbert 2009). Other approaches include task assistance programs or technological support via websites that help potential litigants assess whether or not they have the capacity and skills to self-represent, or help SRLs assess the strength of their case (Zeleznikow 2002).

Branting presented a four-component model for pro-se litigants. The model was implemented in the Protection Order Advisory System an advisory system for pro se Protection Order applicants. It was constructed in conjunction with the Idaho Supreme Court because the inability to offer advice to pro se protection order applicants was distressing to staff in Idaho courts. The system permits protection order applicants to obtain answers to many of their questions about whether they satisfy the requirements for a protection order. If so, the system helps them draft the appropriate application (Branting 2001).

The opening session of the Third International Symposium on Judicial Support Systems held at Chicago Kent College of Law, in 1999, had as its theme ‘What can judicial decision support systems do to improve access to justice?’ John Zeleznikow presented an article at the symposium with the title ‘Legal Aid and Unrepresented Litigants: Building Legal Decision Support Systems for Victoria Legal Aid’. In Zeleznikow (2002) he discussed the demands that the rise of pro se litigation poses for the judicial system and how community legal services can help meet these challenges through the development of web-based decision support systems.

According to Staudt (2005) discussing the Illinois Legal Needs Study the justice system failed to meet the legal needs of the state’s neediest justice customers. The Access to Justice: Meeting the Needs of Self-Represented Litigants: A Consumer Based Approach project (Meeting the Needs Project) successfully identified the major barriers to access to justice for self-represented litigants including barriers to Web-based document preparation. A key insight was that users need to be guided through processes that are foreign to them. The simple act of filling out forms raises unique challenges that the many self-represented litigants have trouble overcoming. Without a very simple front end, a user unfamiliar with web conventions would be unable to use online form systems. To be effective, guided interviews for self-represented litigants must be very simple.

Staudt and Madeiros (2013) argue that the technology changes triggered by the global economic crisis of 2008 have changed the tools that lawyers use to deliver legal services. New lawyers entering the profession must be ready to practise in today’s more efficient and more technology-driven workplace. They argue that the following issues must be addressed:

1. E Discovery;
2. Legal Process Management;

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4 Meeting the Needs of Self-Represented Litigants: a Consumer Based Approach was a study completed by the National Center for State Courts and The Illinois Institute of Technology’s Chicago-Kent College of Law and the Institute of Design at the Illinois Institute of Technology. http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2i-author . Last viewed 19 November 2016

5 http://www.ncsc.org/~/media/Microsites/Files/Future%20Trends/Author%20PDFs/Dixon.ashx last viewed February 2 2017
3. Personalized Legal Services; and
4. Legal needs of low income people.

Recently, such needs are finally being addressed. According to an American Bar Association study, at least 40% of low and moderate-income households experience a legal problem each year. Yet studies show that the collective civil legal aid effort is meeting only about 20% of the legal needs of low-income people. In December 2013, The US Legal Services Corporation (LSC), the USA's largest funder of civil legal aid programs for low-income people, published a report, The Summit on the Use of Technology to Expand Access to Justice. Their Vision of an Integrated Service-Delivery System Technology can and must play a vital role in transforming service delivery so that all poor people in USA with an essential civil legal need obtain some form of effective assistance. Their strategy for implementing this vision has five main components:

1. Creating in each state a unified "legal portal" which, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process;

2. Deploying sophisticated document assembly applications to support the creation of legal documents by service providers and by litigants themselves and linking the document creation process to the delivery of legal information and limited scope legal representation;

3. Taking advantage of mobile technologies to reach more persons more effectively;

4. Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable; and

5. Developing "expert systems" to assist lawyers and other services providers.

In April, 2016 LSC announced the development of online, state-wide "legal portals" to direct individuals with civil legal needs to the most appropriate forms of assistance. LSC are partnering with Microsoft Corporation and Pro Bono Net to develop portals for up to two state-wide pilots intended to demonstrate how this approach can be replicated as widely as possible in an economic fashion. The portals are intended to help the legal aid community, courts and other state justice partners to provide some form of effective assistance to everyone with a civil legal problem.

The 17th annual Technology Initiative Grants (TIG) Conference was held January 11-13, 2017 in San Antonio, TX. The program highlighted a special initiative focused on improving the quality of legal aid websites. Through support from the Ford Foundation, LSC has worked closely with EY Intuitive, a digital consulting firm with expertise in user-centered design and non-profit evaluation, to conduct a comprehensive assessment of all of the state-wide legal aid websites. At the conference, representatives from EY Intuitive shared the results of this assessment, including practical findings and recommendations that will help steer the community towards creating content-rich sites that provide high-quality user experiences.

Zeleznikow (2002) argues that the development of legal decision support systems should lead to:

1. Consistencies — by replicating the manner in which decisions are made, decision support systems are encouraging the spread of consistency in legal decision making.
2. Transparency — by demonstrating how legal decisions are made, legal decision support systems are leading to better community understanding of legal domains. This has the desired benefit of decreasing the level of public criticism of judicial decision making.  
3. Efficiency — one of the major benefits of decision support systems is to make courts and law firms more efficient.
4. Enhanced support for dispute resolution — users of legal decision support systems are aware of the likely outcome of litigation (their BATNA) and are thus encouraged to avoid the costs and emotional stress of legal proceedings.

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6 https://www.probono.net/ Last viewed 2 February 2017
10 Judges of the Family Court of Australia are worried about criticism of the court, which has led to the death of judges and physical attacks on courtrooms. They believe enhanced community understanding of the decision-making process in Australian Family Law will lead to reduced conflict.
Whilst Zeleznikow (2002) did not claim that the construction of legal decision support systems will have a drastic effect on improving access to justice, he did believe that the construction of such systems for community legal centers will improve their efficiency and increase the volume of advice they can offer. Fourteen years later the courts and legal community are expressing an interest in using Artificial Intelligence and Online Dispute Resolution to provide advice for disputants and especially SLR’s. It is interesting to reflect on why such changes have occurred.

Basically, I believe there are two reasons for this change:

a) Efficiency - the legal community and the courts have moved away from the taxi meter approach to charging and have become concerned with providing efficient advice.

b) Acceptance of the use of the World Wide Web - legal professionals finally accept that the internet can be a safe way of conducting transactions and can be used to provide important advice and collect useful data.

The pioneering work of Kahneman and Tversky (Kahneman 2011) claims that human beings are hardly rational economical agents, at least they do not formulate utility functions, the pursuit of which they are expected to conduct with relentlessness and consistency. However, the development of intelligent systems is finally being recognized as being capable of providing useful advice despite issues of bias and law in legal domains.

4. Online Dispute Resolution

Online Dispute Resolution (ODR) is a concept developed circa 1996. At that time the focus was upon the resolution of disputes that originated online. The prevailing belief was that those whose disputes that originated on the internet would find little difficulty in attempting to resolve these disputes via the World Wide Web. For most of the past twenty years, ODR research has focused upon electronic commerce disputes. Only recently, has ODR focused upon non-financial disputes and disputes that do not originate online.

For example, The 15TH ODR Conference, held in the Hague, Netherlands, 23-24 May 2016, had as its focus Can ODR really help courts and enhance access to justice 12 Issues that were considered include:

a) The collection of information online;

b) The provision of online advice; and

c) The ability to request judicial intervention online, e.g. obtaining domestic violence intervention orders online.

After two decades, the legal community is finally realizing the potential for Online Dispute Resolution to enhance Access to Justice. Chicago Kent College of Law teaches an Access to Justice and Technology subject in its JD program 13. Issues of ethics and governance are finally being considered (Ebner and Zeleznikow 2016) indicating that the field has become mature. Casanovas and Zeleznikow (2014) discuss how relational law, relational justice and regulatory systems be linked to the newer versions of Online Dispute Resolution Whilst there is a recently found interest in this topic amongst the legal community, academic discussions and research in this discipline first occurred at the birth of the internet – two decades ago – such as the third Annual Forum on Online Dispute Resolution held at the University of Melbourne Law School in 2004.

5. Artificial Intelligence and Online Dispute Resolution

5.1 Artificial Intelligence and Law

(Zeleznikow 2002) states that when considering decision making as a knowledge-manufacturing process, the purpose of a decision support system is to help the user manage knowledge. A decision support system fulfils this purpose by enhancing the user’s competence in representing and processing knowledge. It supplements human knowledge management skills with computer-based means for managing knowledge. A decision support system accepts, stores, uses, receives and presents knowledge pertinent to the decisions being made. Its capabilities are defined by the types of

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11 Fisher and Ury (1981) introduced the idea of a BATNA as one’s best alternative to a negotiated agreement. The reason you negotiate with someone is to produce better results than would otherwise occur. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering into an agreement that you would be better off rejecting; or rejecting an agreement you would be better off entering into.

12 See https://20160dr.wordpress.com/ last accessed September 13 2016

knowledge with which it can work, the ways in which it can represent these various types of knowledge, and its capabilities for processing these representations.

It should be stressed there is a major difference between decision support and decision making. Decision support tools help decision-makers improve their performance. Decision-making tools automate the process, leaving a minimal role for the user.

Artificial Intelligence is a field of study and application concerned with identifying and using tools and techniques that allow machines to exhibit behavior that would be considered intelligent if it were observed in humans (Holsapple and Whinston 1996).

Tools that have been used to develop intelligent negotiation support systems include:

**Rule-based reasoning** - In the rule-based approach, the knowledge of a specific legal domain is represented as a collection of rules of the form IF <condition(s)> THEN action/conclusion.

For example, consider the domain of driving offences in Victoria, Australia. Drivers can lose their license either by being drunk whilst driving, or exceeding a specified number of points in a given time. More specifically, probationary drivers (those who have held a driver's license for less than three years) are not permitted to have even a trace of any alcohol in their blood. Other drivers must have a blood alcohol level not exceeding 0.05%. This knowledge can be modeled by the following rules: (a) IF drive(X) & (blood_alcohol(X) > .05) & (license(X) >= 36) THEN licence_loss(X); (b) IF drive(X) & (blood_alcohol(X) > .00) & (license(X)< 36) THEN licence_loss(X).

**Case-based reasoning** – Case-based reasoning is the process of using previous experience to analyze or solve a new problem, explain why previous experiences are or are not similar to the present problem and adapting past solutions to meet the requirements. Precedents play a more central role in Common law than they do in Civil Law and are therefore the most obvious application of adversarial case-based reasoning in the legal domain. However, partly due to the electronic availability of case law, in particular via the internet, the role of precedents seems to become at least informally more important in Civil Law countries. Using the principle of stare decisis, to make a decision in a new case, legal decision-makers search for the most similar case decided at the same or higher level in the hierarchy. A comprehensive discussion of the application of this approach to the legal domain is provided in Ashley (1992).

**Machine learning** – Machine learning is that subsection of learning in which the artificial intelligence system attempts to learn automatically. Knowledge Discovery from Databases is the 'non-trivial extraction of implicit, previously unknown and potentially useful information from data.' Data mining is a problem-solving methodology that finds a logical or mathematical description, eventually of a complex nature, of patterns and regularities in a set of data (Fayyad et al 1996). An in-depth discussion of Knowledge Discovery from Legal Databases can be found in Stranieri and Zeleznikow (2005). 

Whilst artificial intelligence can provide useful and innovative solutions to complex problems, check lists and template systems can be very useful to support decision-making, rather than make decisions. The Sixth Judicial Circuit of Florida provides a useful checklist for Representing Yourself in Court.

Kannai et al (2007) examine different levels of legal discretion. They consider issues of binary nature of decisions (versus a continuum), open texture and boundedness for distinguishing what techniques should be used in a given legal domain. Much of the seminal work in Artificial Intelligence and Law came from law professors Kevin Ashley (1991), Thorne McCarty (1977) and Richard Susskind (1987). An excellent discussion of such work can be found in Zeleznikow and Hunter (1994).

For the past thirty years, Artificial Intelligence, Expert System, Case Based Reasoning and Machine Learning have been used by the legal profession, often in court related circumstances ((Zeleznikow and Hunter 1994), Stranieri and Zeleznikow (2005) and Lodder and Zeleznikow (2010)). Zeleznikow and his research group at the Donald Berman Laboratory, Latrobe University, Melbourne, Australia, used a number of inferencing techniques in legal domains, including: association rules, case-based reasoning, machine learning, neural networks and rule induction. Domains investigated include: Workers Compensation (IKBALS), Credit Law (CAAS), Family Law Property Distribution (Split Up), Family Law Mediation (Asset Divider), Refugee Law (Embrace), Eligibility for Legal Aid (GetAid), Copyright Law (RightCopy), Eye-Witness Identification (ADVOKATE), Examining the causes of death (natural causes, suicide or homicide), Sentencing and the Building Industry. Examples of such systems that we shall examine include GetAid, Split Up and Asset Divider.

5.2 The Get Aid System
In 2002, when an applicant approached Victoria Legal Aid (VLA), her application was assessed to determine whether she should receive legal aid. At that time the task chewed up 60% of VLA’s operating budget, yet provided no services to its clients. After passing a financial test, applicants for legal aid needed to pass a merit test. The merit test involved a prediction about the likely outcome of the case if it were to be decided by a Court. VLA grants officers, who have extensive experience in the practices of Victorian Courts, assessed the merit test. This assessment involved the integration of procedural knowledge found in regulatory guidelines with expert lawyer knowledge that involved a considerable degree of discretion.

Decision Trees\(^\text{15}\), which can be turned into Rule-based systems were used to determine whether an applicant for legal aid, who is scheduled to appear in a minor (Magistrates) court, has met statutory guidelines. Since experts could not readily represent knowledge about an applicant’s prospects for acquittal as a decision tree, they decided to model the process as a tree of Toulmin arguments\(^\text{16}\).

An argument tree for acquittal prospects is

\[\text{A user consults the GetAid system via web pages as indicated in the following figure}\]

\(^{15}\) A decision tree is an explicit representation of all scenarios that can result from a given decision. The root of the tree represents the initial situation, whilst each path from the root corresponds to one possible scenario (Stranieri and Zeleznikow 2002).

\(^{16}\) Toulmin (1958) stated that all arguments, regardless of the domain, have a structure that consists of four basic invariants: claim, data, warrant and backing. Every Toulmin argument makes an assertion. The assertion of an argument stands as the claim of the argument. A mechanism is required to act as a justification for the claim, given the data. This justification is known as the warrant. The backing supports the warrant and in a legal argument is typically a reference to a statute or precedent case.
Advice is given in the figure below.

The GetAid system was tested by VLA experts and developed in conjunction with web-based lodgment of applications for legal aid (Hall et al. 2002). It was expected that commencing the middle of 2003, VLA clients would use the GetAid system. This never occurred. The system was used in house for five years before being discarded.

As with the development of all decision support systems, the outcome is far more important than merely giving advice. It provides important information, allowing users to understand processes in modelling the domain and hence increases the likelihood of users engaging in Alternative Dispute Resolution.
5.2 An Artificial Intelligence Model for Online Dispute Resolution

Lodder and Zeleznikow (2012) conducted a detailed investigation of Artificial Intelligence in Online Dispute Resolution. Lodder and Zeleznikow (2005) advocate a three-step process in the development of Online Dispute Resolution systems. Their proposed three-step conforms to the following sequencing.

1. First, the negotiation support tool should provide feedback on the likely outcome(s) of the dispute if the negotiation were to fail -- i.e., the "best alternative to a negotiated agreement" (BATNA).

2. The tool should attempt to resolve any existing conflicts using argumentation or dialogue techniques.

3. For those issues not resolved in step two, the tool should employ decision analysis techniques and compensation/trade-off strategies in order to facilitate resolution of the dispute.

Finally, if the result from step three is not acceptable to the parties, the tool should allow the parties to return to step two and repeat the process recursively until either the dispute is resolved or a stalemate occurs. A stalemate occurs when no progress is made when moving from step two to step three or vice versa. Even if a stalemate occurs, suitable forms of ADR (such as blind bidding or arbitration) can be used on a smaller set of issues.

By narrowing the issues, time and money can be saved. Further, the disputants may feel it is no longer worth the pain of trying to achieve their initially desired goals.

Much of our research has been dedicated to help Self Represented Litigants in the domain of Australian Family Law understand the processes and potential outcomes of their disputes. In particular, our work encourages such litigants to engage in Alternative Dispute Resolution. In the following sections, we shall provide examples of three systems we have developed in Australian Family Law which accord to the Lodder-Zeleznikow process.

Developing BATNAs and the Split Up system

As Lodder and Zeleznikow (2005) noted, it is important that disputants be aware of the likely outcome of a dispute if a judicial decision is made. Split-Up provides advice on property distribution following divorce (Zeleznikow 2004). In developing Split-Up, Australian Family Law experts were used to identify factors pertinent to a property distribution following divorce. A data set of past cases was then fed to machine-learning programs. Thus, Split-Up learned the way in which judges weighed factors in past cases, without resorting to developing rules.

In the Split-Up system, the relevant variables were structured as data and claim items in 35 separate arguments. The claim items of some arguments were the data items of others, resulting in a tree that culminated in the ultimate claim that indicated the percentage split of assets a judge would likely to award the husband. The tree of variables is illustrated in the following figure.

\[\text{Family Dispute Resolution is now essentially compulsory in Australian Family Law. People who wish to resolve parenting matters are required to attend Family Dispute Resolution and make a genuine effort to resolve issues, before they progress through the court system. Situations involving family violence, child abuse or extremely urgent matters are exempt from Family Dispute Resolution.}\]
In 15 of the 35 arguments, claim values were inferred from data items with the use of heuristics, whereas machine learning (in the form of neural networks) was used to infer claim values in the remaining 20 arguments. The neural networks were trained with data from only 103 commonplace cases.

In consultation with domain experts, 94 variables were identified as relevant for the determination of a percentage split of the common pool. The way the factors combine was not elicited from experts as rules or complex formulas. Rather, values on the 94 variables were extracted from cases previously decided, so that a neural network could learn to mimic the way in which judges had combined variables. The relevant variables were structured as separate arguments following the argument structure advanced by Toulmin (1958).

Split-Up can be used to determine one’s BATNA. It first shows both litigants what they would be expected to be awarded by a court if their relative claims were accepted. It gives them relevant advice as to what would happen if some or all of their claims were rejected. Users are able to have dialogues with the Split-Up system about hypothetical situations and learn about the strengths and weakness of their claims.

Suppose the disputants’ goals are entered into the system to determine the asset distributions for both W and H in a hypothetical example. For the example taken from Bellucci and Zeleznikow (2001), the Split-Up system provided the following answers as to the percentages of the marital assets received by each party:

<table>
<thead>
<tr>
<th>Given one accepts W’s beliefs</th>
<th>W’s %</th>
<th>H’s %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Given one accepts H’s beliefs</td>
<td>65</td>
<td>35</td>
</tr>
<tr>
<td>Given one accepts H’s beliefs except for giving W primary care of the children</td>
<td>42</td>
<td>58</td>
</tr>
</tbody>
</table>

18 A commonplace case is one that does not provide any lessons by itself (as opposed to landmark cases), but together with numerous like cases can be used to derive conclusions.
Clearly primary care of the children is very significant in determining the husband’s property distribution. If he were unlikely to win this issue, the husband would be well advised to accept 40% of the common pool (otherwise he would also risk paying large legal fees and having ongoing conflict).

**Developing Trade-offs - the Asset Divider system**

Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals. Such advice is often based on Nash’s principles of optimal negotiation or bargaining (Nash 1953). Family_Winner (Bellucci and Zeleznikow 2006) takes a common pool of items and distributes them between two parties based on the value of associated ratings.

Each item is listed with two ratings (a rating is posted by each party), which signify the item’s importance to the party. The algorithm to determine which items are allocated to whom works on the premise that each parties’ ratings sum to 100; thereby forcing parties to set priorities. The basic premise of the system is that it allocates items based on whoever values them more.

Originally, the system was developed to meet clients’ interests, with no concern for legal obligations. But as noted below, in Zeleznikow (2014), we incorporated principles of justice into the Asset-Divider system.

Walton and Mckersie (1965) propose that negotiation processes can be classified as distributive or integrative. In distributive approaches, the problems are seen as zero sum and resources are imagined as fixed: divide the pie. In integrative approaches, problems are seen as having more potential solutions than are immediately obvious and the goal is to expand the pie before dividing it. Parties attempt to accommodate as many interests of each of the parties as possible, leading to the so-called win-win or all gain approach.

Walton and McKersie’s work and the game theory research of John Nash led to a significant use of game theory to support negotiation in industrial relations. Game theory is particularly applicable in countries were employers and employees can bargain with very few restrictions.

When evaluating the Family_Winner system, Bellucci and Zeleznikow (2006) were made aware of the limitations of using integrative negotiation for providing family mediation decision support. While both the evaluating solicitors and mediators were very impressed with the way Family_Winner suggested trade-offs and compromises, they had one major concern — that in focusing upon negotiation, the system had ignored the issues of justice. For example, Australian Family Law is based upon the paramount needs of the children rather than the interests of the parents. Thus, a fair decision meets the needs of the children.

The AssetDivider system (Abrahams et al 2012) incorporates the basis of Family_Winner’s allocation and trade-off strategy to decide upon the allocation of assets based on interests and an item’s monetary value. In a family property dispute one party may have a high emotional attachment to a record collection which has a minimal financial value.

AssetDivider accepts a list of items together with ratings (two per item) to indicate the item’s importance to a party. In addition, it also accepts the current monetary value of each item in dispute. It is assumed that this dollar value has been negotiated (if necessary) before AssetDivider is used. Hence, only one-dollar value is entered per item. The proposed percentage split is also entered; this reflects what percentage of the common pool each party is likely to receive in the settlement.

AssetDivider’s output consists of a list of items allocated to each party. All of the items (except one) on the allocation lists are provided in the intake screen by the disputants. The additional item is a “payout” item, which reflects the amount of money a disputant would need to pay the other party for the items they have been allocated. AssetDivider’s allocation strategy works by allocating an item to the party whose rating is the highest i.e. to parties according to whoever values them the most. It then checks the dollar value of items it has been allocated previously (that is, their current list of items), the dollar value of the item presently allocated and the dollar amount permitted under the percentage split rule given by mediators. If by allocating the item in question the party exceeds its permitted amount, the item is removed from its allocation list and placed back into negotiation. In this case, the item has not been allocated to a party. If the dollar value of the item was within the limits of the amount permitted under the percentage split rule, then the allocation proceeds.

Once an item has been allocated to a party, the remaining ratings (of items still in dispute) are modified by trade-off equations. These modifications try to mimic the effect losing or gaining an item will have on the rest of the items still in dispute.
The equations directly modify ratings by comparing each one against that of the item recently lost or won (each party’s set of ratings are modified as a result of an allocation). The equations update ratings based on a number of variables—whether the item allocated was lost or gained, the value of the allocated item in relation to items still in dispute and the value of the item whose rating will change as a result. Only the ‘losing party’ in AssetDivider is compensated by the trade-off equations modifying.

An example of Asset Divider’s output (Zeleznikow 2014) is:

![Asset Divider's example output](image)

By supporting parties to engage in trade-offs, the system helps resolve complex conflicts.

**Providing Communication – The Australian Online Family Dispute Resolution System**

The third part of an online dispute resolution process is supporting parties to communicate with each other, often via video conferencing.

Much ODR has tried to emulate face-to-face ADR (Bellucci et al 2010) rather than use the additional facilities offered by the development of the World Wide Web. For example, Thomson (2011) explains how the Australian Online Family Dispute Resolution emulates the services provided by Dispute Resolution practitioners based at 65 Family Relationship Centres. The designers assumed that traditional face-to-face mediation would work best in the online environment.

Features successfully integrated into the technology include:

- video streaming so that each participant can safely see and communicate with the other;
- screen features including small windows (pods) which can be scaled, resized and repositioned and hold a variety of information;
- visual sharing of information, including document sharing, online demonstration and whiteboard feature;
- ability to record notes which can subsequently be emailed to the Family Dispute Resolution Practitioner (FDRP); and
- secure access to functionalities via FDRP authorization.

Prior to commencement of the service, a toolkit was developed to help determine user (FDRP) competence and site (technical) readiness, and this informed further training and site preparation. Training in the use of the technology and in the development of practice skills required to successfully deliver the service was provided to individuals and to staff in group settings. However, little thought was given to when and where users would interact with the system. Because of this
and even though there are substantial delays in receiving a mediation at a Family Relationship Centre, and no delay using the online system, there has been minimal uptake of the online system.

As well as advice upon trade-offs and optimal solution and systems that calculate BATNAs, important background information can be offered via the internet. These might include textbooks and videos outlining the mediation process. In family disputes, there might be background information on child psychology and the welfare of children as well as model parenting plans.

6. Conclusion
In this article, we have examined the issue as to whether potential litigants can receive useful support from intelligent online dispute resolutions. We have seen that such systems can be particularly useful for self-represented litigants. The SRLs benefit not only from obtaining useful advice, but also becoming better educated about the procedures and potential outcomes for issues in dispute. We note that most ODR systems provide exactly one of either BATNA advice, support for trade-offs and facilitated communication. A truly useful Online Dispute Resolution system should be a hybrid of all three approaches.

Further, Online Dispute Resolution should not be fully automated. As well as providing opportunities for communication, such systems should advise users of the relevant law, potential solutions and relevant trade-offs. Useful tools might be videos, relevant papers and books, past cases and links to useful websites. They can also be very useful in triaging disputes (e.g. immediately sending a case of domestic violence to court rather than allowing the parties to prolong physically acrimonious disputes) and act as a source of information collection (there is no need to expend court official’s time recording demographic data).

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Book Review: Failings of the International Court of Justice
By Otto Spijkers

Mark A. Weisburd, Failings of the International Court of Justice, Oxford University Press 2016

Failings of the International Court of Justice begins with a typical quote from a typical textbook, International Law by Lori Damrosch. Damrosch explains that formally, the judgments of the International Court of Justice (ICJ or Court) are binding only on the parties to the dispute, and only with respect to that particular dispute; by contrast, informally, the judgments of the ICJ have great influence on the development of international law.

I looked at the other textbooks and handbooks on international law in my collection and indeed found many similar remarks. Take, for example, Brownlie’s principles of public international law by James Crawford:

“In theory the Court applies the law and does not make it […] Yet a decision, especially if unanimous or almost unanimous, may play a catalytic role in the development of the law” (p. 40).

Or International law by Malcolm Shaw: “The decisions and advisory opinions of the ICJ […] have played a vital part in the evolution of international law” (p. 808). Or Public international law by Alina Kaczorowska-Ireland:

“The Court has greatly contributed to the development and clarification of international law. In its judgments the Court has always paid attention to the evolving nature of international law and has itself contributed to the evolution of that law.” (p. 674)

International law by Jan Klabbers is more explicit:

“It has long been a matter of debate whether the ICJ can be expected to be more than a settler of disputes. Many observers feel that the ICJ should not limit itself to settling disputes, but also has a certain responsibility when it comes to developing international law. After all, its judgments can be highly authoritative and in the absence of an international legislature, what better organ to help develop the law than the world’s leading court? Others may point out, though, that this would give the Court a political task, for which it is perhaps not particularly well equipped.” (p.164)

In Weisburd’s opinion, these textbooks give the student the impression that, despite the fact that the ICJ’s Statute explicitly states that “the decision of the Court has no binding force except between the parties and in respect of that particular case” (Article 59), the Court in fact “plays a crucial role in creating international law, to the point that its decisions ought to be taken extremely seriously” (p.2). The main message of Weisburd’s Failings is that the ICJ should take its Statute more seriously. In his view, the Court “lacks the formal authority to determine the content of international law”. And the Court “has not performed well enough to have earned that type of authority [de facto]” (p. 4). Weisburd asserts that the main clients of the Court – the states – appear to agree with him, as they have been very reluctant to bring before the Court disputes that involve general issues of international law that are in need of further development. In other words, Weisburd believes it is time to re-evaluate the Court’s track-record and its future role in the development and clarification of international law.

In arguing his case, Weisburd first looks at the travaux préparatoires of the ICJ Statute, to show that the founding fathers never intended the Court to play a law-making role (Chapter 1). Chapter 2 explains where the Court looks and ought to

1 Lecturer Public International Law at Utrecht University
look to determine the law. Chapters 3 and 4 list a long series of errors made by the Court, both of a procedural (Chapter 3) and substantive nature (Chapter 4). Chapter 5 adds some statistics, and then Weisburd concludes. Of course, we already know what the conclusions will be, as they already have been set-out in the introduction: the Court is not doing a good job. Because the book argues towards a pre-set conclusion, the book reads more like a memorial than an objective academic work.

Chapter 1 is about the *travaux*. The ICJ Statute is very similar to that of its predecessor, the Permanent Court of International Justice (PCIJ), and thus Weisburd focuses his analysis of the *travaux préparatoires* on the PCIJ’s Statute. This makes much sense, but Weisburd does seem to have overlooked certain very interesting debates on the role of the Court, which took place at the San Francisco Conference of 1945, at which the UN Charter and ICJ Statute were drafted. In his view, “the functioning of the Court was not given much attention in San Francisco” (p.23), but one might conclude differently.

In fact, the role of the Court in settling international disputes was discussed extensively at the San Francisco Conference. It is worth looking briefly at this discussion. The Australian delegate at some point suggested that “in general the Security Council shall avail itself to the maximum extent of the services of the Court in the settlement of disputes of a legal character, in obtaining advice on legal questions connected with other disputes, and in the ascertainment of disputed facts” (Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia, published in *The United Nations conference on international organization* (UNCIO), vol. 3, p. 551). Some states believed all disputes should obligatorily be brought before the ICJ. For example, the Uruguayan delegation proposed that “any difference, opposition or conflict between nations, of any character whatever, ought obligatorily to be submitted to the International Court of Justice, if it should not first have been settled by good offices or arbitral procedure” (Uruguayan Amendments, UNCIO, vol. 3, p. 29).

To make this possible, Belgium proposed that all states “should recognize the obligatory jurisdiction of the Permanent Court of International Justice as regards any question of law for which they have not made use of another method of peaceful settlement”, and that “they should acknowledge themselves bound by the decisions of the Court” (Suggestions of the Belgian Government, UNCIO, vol. 3, p. 334). The role of the Council would then be to monitor compliance of the Court’s judgments. This is what Venezuela suggested: “the ideal […] would be to entrust the solution of international controversies to the International Court or an independent arbitration agency, and entrust to the Security Council the mission of executing such decisions and of imposing on any States in conflict the intervention of the agency mentioned” (Venezuelan Amendments, UNCIO, vol. 3, p. 208).

Weisburd does not refer to this discussion. He concludes that the ICJ was intended, by the founding fathers, to be “a relatively weak institution” (p. 23). In light of the many proposals put to the table – referred to above – the evidence does not appear to support his conclusion.

Chapter 2 mainly serves to set the stage: it introduces the reader to the sources of international law that the Court is authorized to apply when settling the disputes brought before it and when answering the questions put to it. The Chapter is, however, not as innocent as might appear. Especially in the section on customary law, Weisburd already shares his criticism of the Court’s approach to identifying customary norms. He objects to the approach that derives custom from legally non-binding documents, such as General Assembly resolutions or treaties that are not yet in force. He believes there is no convincing theory to support this approach and that it is in any case driven too much by a belief in globally shared values (p. 77-78).

Chapters 3 and 4 take the reader through the case law of the Court. Weisburd identifies all sorts of mistakes the Court supposedly has made, and he categorizes them under various headings. If you desperately want to find errors in the work of human beings, you will always find them. And judges are, of course, human beings. At the end of Chapter 3 (on procedural errors), Weisburd claims to have shown that “the Court has, since 1945, made numerous procedural errors” (p. 244). In fact, “the Court’s judgments include so many analytical errors that any recapitulation would be as long as the initial discussion” (p. 244). On issues of substance (Chapter 4), the Court does not do much better. The Court’s track record is referred to by Weisburd as of “highly questionable” quality (p. 336). This is especially so for the way the Court has identified and then applied norms of customary law. In a way, this conclusion cannot come as a surprise because in Chapter 2, Weisburd already expressed his disagreement with the general method used by the Court to identify and apply custom.

At the beginning of Chapter 5, Weisburd claims that the preceding chapters have “establish[ed] that a significant fraction of the judgments produced by the ICJ […] include seriously questionable elements” (p.340). The Chapter then builds on that “established fact”; however, if the reader is not convinced by the arguments made in previous Chapters, it will be difficult to go along with what follows. In Chapter 5, Weisburd offers all kinds of statistics, apparently in an attempt to
demonstrate the gravity of the problem. Of the 94 inter-State disputes, he claims 34 contentious cases and 3 advisory opinions contained “problematic” assessment of the facts and/or legal reasoning (p. 350).

The introduction and Chapters 1 and 2 of the book basically outline what the Court ought to have done and how exactly it ought to have done it. Chapters 3, 4 and 5 purport to show that the Court has not done what it should have done; at the least, what is has done is not good enough. The book is very much written towards a particular conclusion – the Court is not doing a good job. Some readers might not appreciate this subjective writing style very much. They might prefer to draw their own conclusions, based on an objective presentation of all arguments from both sides. If you are one of these readers, then you may find the book is at times a little difficult to get through.