Extending Court-Protected Legal Person Status to Non-Human Entities

The Retreat of the Rule of Law in Transnational Migration

The Official Publication of the International Association For Court Administration
www.iaca.ws
The International Journal For Court Administration is an initiative of IACA's Executive Board and its diverse membership. The Journal is an effective communications vehicle for the international exchange of experiences, ideas and information on court management, and contributes to improving the administration of justice in all countries. The collective international experience of its Executive Board and Editors has been that every judicial system, even in countries in the earlier stages of the administration of justice in all countries. The collective international experience of its Executive Board and Editors has been that every judicial system, even in countries in the earlier stages of development, can benefit from the exchange of experiences, ideas and information on court management.

The Editors welcome submissions from court officials, judges, justice ministry officials, academics and others whose professional work and interests lie in the practical aspects of the effective administration of justice. To view the Editorial Policy and Procedures for Submission of Manuscript and Guidelines for Authors, visit the IACA website (www.iaca.ws) and chose IACA Journal.

The Journal accepts advertising from businesses, organizations, and others relating to court and justice systems by way of services, equipment, conferences, etc. For rates, standards, and formats, please contact one of the editors.

Shagarab Camp refugee school in Eastern Sudan. Photograph by Maram Mazen used with permission.

The International Journal For Court Administration is an initiative of IACA's Executive Board and its diverse membership. The Journal is an effective communications vehicle for the international exchange of experiences, ideas and information on court management, and contributes to improving the administration of justice in all countries. The collective international experience of its Executive Board and Editors has been that every judicial system, even in countries in the earlier stages of development, can benefit from the exchange of experiences, ideas and information on court management.

The Editors welcome submissions from court officials, judges, justice ministry officials, academics and others whose professional work and interests lie in the practical aspects of the effective administration of justice. To view the Editorial Policy and Procedures for Submission of Manuscript and Guidelines for Authors, visit the IACA website (www.iaca.ws) and chose IACA Journal.

The Journal accepts advertising from businesses, organizations, and others relating to court and justice systems by way of services, equipment, conferences, etc. For rates, standards, and formats, please contact one of the editors.

Shagarab Camp refugee school in Eastern Sudan. Photograph by Maram Mazen used with permission.
In this Issue:

From the Executive Editor:
The Retreat of the Rule of Law in Transnational Migration
By Markus Zimmer

Professional Articles:

The Curious Case of Court Manager in India: From its Creation to its Desertion
By Geeta Oberoi

Coaching in the Judiciary: An Inside Look.
By Ana Cristina Monteiro de Andrade Silva

EU’s ‘Victims’ Directive’ – a legal act for a cultural change?
By Bernt Bahr and Jenny Melum

Academic Articles

By Rick Verschoof and Yedan Li

Book Review

By Niels Graaf

In 1651, the English philosopher Thomas Hobbes published his seminal work, Leviathan, or the matter, forme, and power of a commonwealth, ecclesiasticall and civil. In the absence of political institutions organized to maintain order and administer justice, human beings are consigned to an existence he described as “…a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength…and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.”

Nearly four centuries later, the world’s geography is framed by political boundaries that define 195 states of which all but two, the State of Palestine and the Holy See, comprise the United Nations, and all of which are founded on political institutions. Lamentably, the viability and legitimacy of those institutions fluctuate wildly from one state to another. Citizens of some enjoy the benefits and protections of rule-of-law-based justice institutions; others languish in uncertainty where the institutional framework of government either has not advanced beyond embryonic political infancy or has deteriorated into dysfunction as a consequence of public-sector corruption, ideological fractures and intransigence, a coup d’etat, descent into violence, sheer ineptitude or any combination thereof. The narratives of political corrosion and dysfunction are myriad. Those states deemed incapable of providing even the most basic public services function as failed states where the conditions described by Hobbes thrive.

Many individuals, for reasons based variously on despair and fear, hope and dreams, opt to abandon their states of origin, risking the treacherous status of transnational migrants or refugees. Most have neither wealth nor political connections; knowingly or not, they forfeit expectations of state-sponsored support and assistance once they cross borders. Residents of preferred destination states are increasingly disinclined to assimilate an endless succession of desperate migrants, even when their own genealogy leaks family origins in far-off lands. They legislate constraints to minimize the number granted access and benefits.

For a contracted price or commitment to indenture, these migrants entrust their transit to smugglers and traffickers who operate outside of diplomatic frameworks and who either contemptuously defy or pay off incompetent and/or corrupt border control, criminal justice, and judicial/court system officials. Use of transnational smugglers is a high-risk venture. Desperate for a better life, migrants and refugees commit themselves to exploitative contracts that consign family resources or conscript them to lengthy terms of indentured service or crime in exchange for presumptively safe passage. There are no guarantees. The destination may entail transit through multiple states; a typical route worms its way from states such as Nigeria in sub-Saharan Africa through Niger into Libya to the lawless shores of Tripoli. From there, they are jam-packed into inflatable or other often unseaworthy vessels to cross the perilous Mediterranean to Messina in northeastern Sicily, a gateway to Italy and other European countries.

The stakes are grim. Cities along transit routes are strewn with squalid brothels in which sub-Saharan girls and young women and, to a lesser extent, boys and young men, languish, their passage interrupted. Beaten, starved, drugged and raped into
submission, they have little recourse. Some purchase passage on trucks across expanses of harsh desert between cities en route, only to be preyed upon by gangs of bandits who ransack valuables and siphon gasoline, before being abandoned by their drivers. Corrupted and compromised local criminal-justice sector officials supplement meager public-sector salaries with illicit payments that shield slavers, brothel owners, chain-gang enforcers, and other exploiters from any criminal sanctions provided for in the law. Indeed, the vast majority of these hapless and innocent victims of circumstance, of the banality of human evil, never cast a shadow in the entrance to a court of law.

Circa 150,000 migrants and refugees traversed the Mediterranean from Libya to Europe in 2015; nearly three thousand others drowned en route. For those fortunate enough to elude drowning and to complete their transit into Southern Europe, the battle continues to the next phase. Although the Mediterranean and Adriatic states may have more advanced political institutions than their northern African counterparts, all are plagued by public-sector corruption that compromises efforts to absorb and assist these migrants and refugees. Other aggravating factors that adversely affect their treatment are public-assistance resource constraints on what can be provided for these wretched souls, epidemic levels of compassion fatigue among governours, and the resurgence of nationalism, bigotry, xenophobia and intolerance among many locals. Clearly there are humane and caring locals who shelter and feed them but they, too, are overwhelmed by the need.

These waves of African refugees and migrants identify western European states as their ideal final destination, but shifting public attitudes toward them in those states are spawning new laws that suffocate migration and the confluence of refugee status. European governments exerting diplomatic pressure and deploying surveillance along the Mediterranean Africa coastline are stemming transnational migrant and refugee smuggling, culminating in a build up at point Libya in the transit pipeline, spawning ad hoc detention camps where migrants subsist under grossly inhumane conditions. The International Organization for Migration reported in March 2017 the re-emergence of slave markets in Libya, distantly evocative of the North African Barbary slave trade in the 16th through the 18th centuries. Pirates repeatedly raided and looted coastal European towns from the northern Mediterranean and western European coastlines as far north as Scandinavia, kidnapping impoverished Europeans and marketing them in northern African coastal city slave markets. The same fate awaited persons aboard ships captured by the pirates, much of it in collusion with leaders of the North African Ottoman provinces and Morocco’s Sultanate, which authorized the kidnapping of Christians. Even the distant United States was coerced into payment of tribute to guarantee safe passage of its ships, crews and passengers in the region.

As the trucks transporting prepaid migrants complete their cross-desert passage into cities such as Sebha in Libya, drivers may demand payment, claiming smugglers did not pay them. They deliver their destitute human payloads to parking-lot slave markets where they are auctioned off to Libyans who take them into custody, detain them in “connection houses,” and coerce them to contact their families by mobile phone to arrange for payment by Western Union or Money Gram to secure their release, often beating them while in contact to heighten the drama. Upon payment, they may or may not be released. Some are utilized for manual labor and subsequently resold. Those unable to pay are returned to the market and re-auctioned; families may require weeks or months to arrange for payment while the victims struggle to survive on a single daily meal, their detention laced with frequent beatings. Some die in captivity; others who are uncooperative or troublesome simply disappear. Women are frequently purchased by wealthy Libyans and kept as sex slaves. Prices for them start at the equivalent of €2,000 – more than double what the slavers pay for men. The absence of credible institutions of justice and the dysfunctional rule of law contribute to a milieu of lawlessness of the sort described by Hobbes.

Those who manage to beat the odds and surreptitiously enter Southern European states without diplomatic authorizaton live in constant fear and anxiety of apprehension as they struggle to survive. Women and pubescent girls raped by their abusers may arrive penniless, pregnant and traumatized. Targeted by unscrupulous predators who warn these migrants and refugees against alerting law enforcement where a worse fate looms, they are further victimized and exploited, without recourse to institutions that administer justice. Access to justice remains a chimera, often reinforced by threats that failure to cooperate will result in referrals to immigration police. For a sense of the numbers, the European Union’s Frontex border agency reported that 23,000 migrants transited through Libya in the first quarter of 2017.

Migrant enslavement is not confined to Northern Africa. In October 2017, The Independent reported that following demolition of the Calais shantytown, near the French entrance to the underground Eurotunnel, which connects to England and serves as a conduit to the UK for human smuggling and trafficking, thousands of desperate families now subsist in the nearby woods between Calais and Dunkirk. Having negotiated with smugglers for passage through the Chunnel at exorbitant rates, their wait is laced with fear and anxiety. More desperate are the destitute and unaccompanied children and teens preyed upon by criminal trafficking and smuggling networks, which offer them free passage in exchange for extended terms of forced labor or criminal activity, such as illicit drug distribution and prostitution equivalent in labor value to thousands of dollars. Here again, their access to justice is precluded out of fear of being deported, fear that their criminal handlers routinely refresh and stoke. These immigration trafficking networks are proliferating and adopting increasingly brazen recruiting tactics. Reuters reported on 30 October 2017 that traffickers in Britain now prowl the environs around soup kitchens, homeless shelters, and charitable organizations serving street people, stalking hapless and vulnerable undocumented migrant and other recruits for domestic servitude, forced labor and sexual exploitation.

In the Americas, burgeoning homicidal violence in the developing states of the northern triangle of Central America (NTCA), higher than in any other country including those engaged in armed conflict or war, has fueled equivalent transnational migration northward into Mexico, the United States and Canada. Open gang violence against innocent civilians in the NTCA countries has reached epic proportions, attributable in part to the forced repatriation of gang members apprehended and charged with violent crimes in the United States to their home countries, typically small and impoverished developing states ill-equipped to engage them in constructive rehabilitation, education and employment training programs. The paradigm is one of these states as dumping grounds for vicious criminals spawned in the streets of U.S. cities. Deprived of legitimate opportunity, many resume their lives of violent crime in a much less restrictive setting where they prey on innocent civilians and perpetuate a culture of fear, insecurity and domestic terror. That culture manifests itself in sexual violence as an instrument to foster intimidation and subordination, the forced conscription of youth into gang ranks, illicit drug trafficking, blatant kidnapping for ransom, and homicide. The violence also is attributable to the illicit flow of firearms easily acquired in the U.S. and trafficked by U.S.-based criminal networks into Mexico and states south that sustains the reign of terror.

Because government law-enforcement institutions operate within a public-sector framework that is under-resourced, corrupted, and ill-equipped to constructively respond, the gangs organize themselves into powerful criminal networks that fill the vacuum left in the wake of the ineffective, overburdened and compromised public sector. Fearful of losing their children to those networks, desperate parents negotiate
with smugglers for passage for their youngsters to the north into Mexico and from there to the U.S. The number of NTCA minors detained in 2011 exploded tenfold from 4,129 to 40,542 in 2016. Of children 11 years or younger, nearly 13% were registered as unaccompanied. Notwithstanding increasingly stringent enforcement of anti-immigration laws on the Mexican and U.S. borders and the risks posed by a variety of predators and organized crime networks, including human traffickers, lying in wait along the migration routes, many parents feel they have no recourse other than to dispatch them on the perilous journey northward. A Médecins Sans Frontières survey in 2015-2016 of migrants and refugees who managed to reach Mexico revealed that 68.3% had been victims of violence while underway; 38.7% reported more than one violent encounter. Frequently, the violence was of a sexual nature. Byproducts of the violence among these vulnerable populations are sustained emotional and psychological trauma, depression, anxiety and post-traumatic stress syndrome.

The violence, sexual abuse, and mental health trauma notwithstanding, these victims have limited access to the effective administration of justice and constructive medical treatment. Although the governments of Mexico and other Central and Latin American countries have cooperated with the Office of the High Commissioner for Refugees to implement conventions, declarations, laws, and other provisions intended to protect migrants, effective on-the-ground law enforcement along the migrant routes turns out to be more miss than hit. Not infrequently, sexual and other forms of violence are perpetrated by border control officers, local police, and other government officials whose jurisdictions oversee the perilous migration routes.

Moreover, for the vast majority of those apprehended by Mexican immigration control authorities, hopes are dashed. Of 152,231 NTCA migrants and refugees detained and processed in 2017 by government migration officials, 141,990 or 93% were deported, many within 36 hours, back to their states of origin and their cultures of violence. The head of the current political administration in the United States has made clear his priorities by repeatedly confirming his intent to finance construction with taxpayer-generated revenue of an enormous impenetrable wall along the entire length of the U.S./Mexico border. Such a wall is unlikely to impede human smugglers and traffickers. And in early November 2017, the Acting Secretary of Homeland Security announced cancellation of the legal authority effective January 2019 that enabled over 5,000 Nicaraguan immigrants who have lived and worked in the U.S. for two decades. The next round of cancellations is likely to affect 86,000 Hondurans, resulting in the potential deportation of nearly 100,000 back to their NTCA states of origin. And that is only the beginning.

Arguably, the role and function of court systems worldwide entail contributing to the discussion to determine practical ways in which to address improved access to justice for these wretched innocent victims driven by the desperate gamble for a better shot at life, the promise of a more profound future for their children, the hope for a life unencumbered by crime and violence, and the opportunity to access public institutions committed to protecting the innocent from Hobbes’ succinct description of the state of nature.
The Curious Case of Court Manager in India: From its Creation to its Desertion

Prof. dr. Geeta Oberoi

Abstract

The initiative to employ Court Manager in the courts was taken to relieve judges from their administrative tasks in field of human resource management, communication, protocol, finance management, computerization, digitalization and infrastructure development of the courts. But most judges in India view their responsibility as their power-cum-jurisdiction over things and people. Therefore subtracting any assignment from them, even if trivial or administrative, is viewed as deduction in their power-cum-jurisdiction over things and people. This mindset poses major challenge to any outsider who wants to enter in the business of the court administration at par with judges. Judges are strong believers in the hierarchy business and therefore any kind of subordinate help is welcomed but any kind of equal position – even if it is meant to reduce their burden – is resisted and even failed. The court managers appointed to experiment were not treated well by the system and they were removed from many courts. This shunning happened as the court managers did not get its promoters in the higher echelon of the judicial system like other reforms got their proponents within the system be it court computerization project or mediation project. Due to heavy backlog of cases, judges need to concentrate on their primary professional duty of judging and shift their administration burden to the court manager. But leadership from the highest court – the Supreme Court of India is awaited to reduce resistance and suspicion against the court managers. Leadership can cut down unfounded fear amongst judges against involvement of management experts in the courts and insist on performance of judicial work by judges. Till that leadership comes, the court managers will have to wait to make an impact and get work suited to their stature in the courts.

Keywords: court manager, court management, judicial leadership, non-judicial functions

1. What led to the creation of the post of CM for India?

Advanced jurisdictions have benefited by engaging services of management experts in internal organizational tasks relating to operations of courts. There are now reports available on tremendous improvement brought about by such engagement of management expert known as the court manager (CM) in those jurisdictions. As criticism against the courts in India for huge pendency of cases became vociferous, judicial reform experts began to explore west to import solutions for the system ailing from delay, arrears and pendency. This led to the idea of having a CM for performing non-judicial tasks.

Further, during the judicial education discourse at the NJA it emerged that judges at all levels, right from magistracy to the level of judge of the Supreme Court of India, are engaged in numerous organizational administrative tasks concerning engagement of human resources in the courts, development of court infrastructure, managing functions related to finance, communication, protocol etc. These tasks consume more than 40 to 60 % of time of each judge be at any level in the judicial hierarchy, and therefore each judge in his/her tenure of judgeship can only devote remaining time to the files crying for justice from the courts.

Also non-judicial functions involve risk of compromising judicial independence and judicial ethics. Many non-judicial functions...
even lead to litigation.\(^8\) The NJA therefore suggested the government to create a post of CM for courts in India to carry out non-judicial functions to provide judges more time for deciding pending cases seeking justice from their courts. This request was accepted, and the government vide circular F.NO.32(30).FCD/2010 issued by the Ministry of Finance in the year 2010, allocated funds to create position of the CM.\(^9\) The relevant extract of F.NO.32(30).FCD/2010 reads:

12.1 With a view to enhancing the efficiency of court management, and resultant improvement in case disposal, Rupees 3 Billion is allocated for employment of professionally qualified Court Manager to assist judges. The Court Manager, with MBA degrees [Master in Business Administration], will support the judges to perform their administrative duties, thereby enabling the judges to devote more time to their judicial functions. The post of a Court Manager would be created in each judicial district to assist Principal District Judge. Two posts of Court Manager may be created for each High Court, and one for each Bench of the High Court.

2. Functions outlined in the circular F.NO.32(30).FCD/2010:

Annexure III of circular F.NO.32(30).FCD/2010 identified ten areas of functions for the CM: (i) Policies and Standards; (ii) Planning; (iii) Information and statistics; (iv) Court management; (v) Case management; (vi) Responsiveness management; (vii) Quality management; (viii) Human resource management; (ix) Core system management; (x) IT System management.

Relating to policies and standards, the CM was expected to establish performance standards applicable to the court on timeliness, efficiency, quality of court performance, infrastructure and human resources, access to justice, for systems of court management and case management and evaluate compliance of individual courts with those standards.

Relating to planning, the CM was expected to consult stakeholders (the bar, ministerial staff, executive agencies supporting judicial functions such as prosecutors/police/process serving agencies and court users), to prepare and update Court Development Plan (CDP) and monitor this CDP and report for its compliance.

For information and statistics, the CM was asked to ensure that statistics on all aspects of the functioning of the court are compiled and reported accurately and promptly in accordance with systems established by the high court and provide them as required.

Relating to court management, the CM was asked to check compliance of processes and procedures of the court (for filing, scheduling, conduct of adjudication, access to information and documents and grievance redressal) with the policies and standards established by the high court for court management to safeguard quality, efficiency and timeliness, and minimize costs to litigants.

Relating to case management, the CM was asked to check compliance of case management system developed by the high court with the policies and standards established by the high court and if they met legitimate needs of litigant in terms of quality, efficiency and timeliness, costs to litigants.

Further, the CM was asked to ensure compliance with standards established by the high court (i) on access to justice, legal aid and user friendliness for responsiveness management, (ii) on quality of adjudication standards for quality management, (iii) on Human Resource Management standards for human resource management.

For core systems management, the CM was asked to ensure that the core systems of the court are established and function effectively (documentation management, utilities management, infrastructure and facilities management, financial systems management like audit, accounts, payments). Further, for Information and Technology systems management, the CM was asked to check compliance of IT systems of the court with standards established by the high court and feed the proposed national arrears grid as and when it is set up.

3. Ground level realities in courts did not allow CM to contribute effectively

Though high courts adopted functions specified in circular F.NO.32(30).FCD/2010 as job description for engaging the CM in their jurisdiction, in practice, no one particular from the judiciary was delegated the task of developing details on such engagement. Loose discussions in administrative meetings led to formulation of rules which adopted the circular as it was and also adopted suggested qualification of engaging management graduates as the CM. No one from the judiciary paid attention to broad parameters like number of CMs to be engaged, their placement in existing hierarchy of staff, their remuneration and conditions of service, their team and staff, their source of information and autonomy in performance of tasks etc.

---

8 Tej Prakash Pathak and Ors. v. Rajasthan High Court and Ors. (2013)4SCC540 where litigation started because after the examination was conducted, the Chief Justice ordered that the examination be treated as a Competitive Examination and only those candidates who secured a minimum of 75% marks be selected to fill up the posts of Translators. In view of the decision of the Chief Justice, only 3 candidates were found suitable for appointment. This triggered the litigation by those who could not secure minimum 75%.

However, under the urgency to utilize the government grant for which time was running out\textsuperscript{10}, the high courts engaged CMs on contractual basis with inferior salary package. As there was no institution where persons were being trained to become the CM, most jurisdictions decided to offer the position to management graduates and some jurisdictions asked also for law degree apart from degree in management discipline. However, none of the jurisdictions, which engaged the CM, gave the CM the status comparable to that of regular court staff and judges.

Due to their insignificant status within the court system, CM could not contribute in policy making as spelt in circular F.NO.32(30). FCD/2010. It was naturally difficult for the CM who was not legally qualified to find applicable directives of the superior courts on timeliness, efficiency, quality of court performance, infrastructure, human resources, access to justice, as well as for systems of court management and case management. Even if the CM was provided these directives\textsuperscript{11}, questions still remained as to (i) how could the CM develop the performance standards for judges based on these directives and check for their compliance with the directives? (ii) For whom these performance standards were to be established - for the judges or for the staff of the court other than judges or for the registry officials who are staff to the high court deputed from judges? (iii) How will the CM know which directives are latest and which are old ones or which one are to be applied and which one to be discarded when there are conflicting judgments and directions on all these aspects from different high courts and the Supreme Court?\textsuperscript{12}

Similar problems were faced by the CM while contributing to the tasks outlines under the planning head by the circular F.NO.32(30). FCD/2010. It was almost impossible to expect preparation of CDP from the CM considering their new entry into the system, which is functioning from past more than 100 years. Only the CM retained in the system for a long period by virtue of their experience in the system will know nuances and loopholes of the system and would be in a position to develop the CDP. At present, there is no CM in any jurisdiction in India who has completed even 4 years at the job as a CM. Also, to develop the CDP, the CMs were not provided access to resources by the system. They were hardly allowed access by registry of the high court to superior court judges in consultation with whom the CDP needs to be prepared.\textsuperscript{13}

Concerning compiling and preparation of judicial statistics, both the government circular and the high court rules on engagement of the CM forgot to note that management degree course in India does not cover subject of statistics.\textsuperscript{14} From the curriculum of leading universities, it is evident that statistics component is not offered to the management graduates, and therefore, they are not proficient in statistics. Though the CMs help in preparation statistical data in jurisdictions which asked them to do so, courts need to take help of professionals in this area. Alternatively, persons holding graduation, post graduation and doctoral degree in Statistics could also be engaged as the CM for that limited purpose.

It was unrealistic to expect from newly appointed CM that they should learn about all the process and procedures of the court and evaluate these processes and procedures to see if they are being complied with the standards developed by the high court. It takes years for even law practitioners to learn about all processes and procedures of regular trial court and even senior law practitioners rely heavily on court clerks and chamber clerks. The CM could not at short notice learn intricacies and complexities of court processes and procedures. They could not therefore, ask for compliance from the district courts on standards developed by the high court. Even those CM who had both management degree and law degree would not find it easy to learn all procedures and processes from the court and chamber clerks who make their living out of these processes and procedures operating in the courts and are unwilling to share the secrets of their trade and livelihood. Traditional court staff in all likelihood will not share knowledge with the CM and may even misinform newly recruited CMs about actual process and procedures prevailing under the criminal and civil manuals and different circulars notified by the high court from time to time.

Case management implies establishment of uniform case management procedures: the establishment of time limits to ensure that a case will proceed or move expeditiously; the court monitoring of pleadings and established time limits; and the enforcement of time limits to ensure that a court’s management and control over its docket is effective.\textsuperscript{15} Even in advanced jurisdictions, there is considerable reluctance to delegate case management functions to the CM. There are many studies in the US that indicate that few trial judges effectively utilized their CMs in case flow management.\textsuperscript{16} Therefore, for India, where the concept of the CM was just introduced, involvement of the CM in existing practices followed for case management was beyond imagination.

Though in common law world, the executive handles Access to Justice area, the judiciary in India continues to hold dear to this function as it feels that it was because of their initiative and efforts, the government was forced to establish machinery for administering legal aid.\textsuperscript{17} Judges at the constitutional courts therefore are keen to retain their hold over legal aid distribution.

\textsuperscript{10} See details at \url{http://doi.gov.in/sites/default/files/Annexure_A-Part-I.pdf}

\textsuperscript{11} Most of these directives from the high court to the staff or to the judges are in the form of internal circulars. Only staff members of the high court dealing with circulation of such directives and judges as recipients of those directives have access to them.

\textsuperscript{12} Each year the Chief Justices’ Conference is organized and chaired by the Chief Justice of India. Every year different directions are given. See \url{http://supremeCourtofIndia.nic.in/FilesServer/2016-05-06_1462510021.pdf}

\textsuperscript{13} Registry comprises career judiciary members who take transfer to work on administrative side of the judiciary.

\textsuperscript{14} \url{http://www.cbmr.com/cms/new-syllabus.html}

\textsuperscript{15} Edward D. Re, \textit{The Administration of Justice and The Courts} 18(1) Suffolk U. L. Rev. 1984, p. 1-12


\textsuperscript{17} See text of article on this at \url{http://www.commonlii.org/in/journals/NALSARlawRw/2013/13.pdf}
Till the composition of the courts is changed to judges who believe in disassociating judiciary from legal aid management and distribution functions, which may take some more decades, involvement of the CM in various legal aid related functions seems to be only option to reduce non-judicial burden imposed on trial courts. Some jurisdictions like Andhra Pradesh, Madhya Pradesh and Karnataka took help of the CM in these functions.

Quality of adjudication is an area where the CM can only provide the court support services, in the context of the goal of efficiency. To improve the quality of adjudication, judges have to be given an opportunity to enhance their professional skills, and to use those skills in an interesting way. For this, the CM will need status and recognition within the system to have any say in training matters especially with respect to nomination of judges at different training institutions. Only few high courts in India, delegated training related responsibility to the CM, and that too, for ministerial staff. Thus the CM could not contribute effectively to the goal of achieving quality of adjudication.

At present, the CM are delegated only small portion of human resource management functions like preparing for exams for recruitment or checking attendance of employees. At the trial court level, the principal district judge in every district is responsible for the court business like controlling the staff, recruitment, promotion and transfer of the staff. He/she is responsible for court administration in all courts falling under his/her jurisdiction. He/she has to prepare a policy for recruitment, promotion, writing confidential reports, inspection of courts etc. for his/her district.

Due to increased public demand for accountability and transparency from courts in practices and procedures adopted for engaging human resources in courts, judges have to work in partnership with the CM to bring reform in identifying, attracting, recruiting, selecting human resources for court positions, as the CM are trained in critical Human Resources Management fundamentals in which judges are not. There is need felt to curtail involvement of judges in recruitment process as it has been often found that their involvement may bring them disrepute or even present conflict of interest. However, judges will have to be provided discourse to rise above their suspicious of non-judges like the CM. Only then one can hope that the CM would be given free hand in human resource management for courts.

What the Chief justice Burger of the United States Supreme Court observed in 1969 on the record management in the trial courts of the United States, hold true for the Indian court system of 2017 which is “in terms of methods, machinery and equipment… most courts have changed very little fundamentally in a hundred years or more….As litigation has grown and multiple-judge courts have steadily enlarged, the continued use of the old equipment and old methods has brought about a virtual breakdown in many places and a slow-down everywhere in the efficiency and functioning of courts. …”

Under the core system management, the court record management must be the first task to be delegated to the CMs for overhauling the paper system that exists now. Virtually every court in the country handles records at least 100 years old, and many have in their custody records of the colonial period. Problems in the management of these records range from physical deterioration to high volumes of paper, as well as timely and accurate reference. Also, in recent years, regular ministerial staff has been found compromising security and privacy of court records. The CM can help the courts in establishing a system for storing these records at minimum cost with high accessibility and retrieval. However, till date no CM has been given free hand in the court records management because of temporary nature of their employment.

Concerning the tasks outlined for IT system management, remuneration of the CM is not attractive enough to get for courts the services of management graduate with specialization in information and technology. Secondly, under the E-Court project, all high courts have created the position of Registrar (IT) who is technically qualified person engaged for managing information technology issues for the high court and district courts functioning under the high courts. Therefore, there is no point in dragging the CM in highly technical field which is still evolving and making progress every day. Third, the CMs cannot be wasted by utilizing them for data entry work. For such jobs, there is a position of DEO (Data Entry Operator) in every government department and the courts too can hire these DEOs either directly or on deputation to work under the directions of Registrar (IT). Last but not the least, the CM and the Computer System Analyst (CSA) are two different posts with different educational backgrounds. Whereas the CM is a management graduate, the CSA is an engineering graduate with hardware or software or network engineering specialization. It would be more helpful to get the services of the CSA in the E-Court Project than the services of the CM.

19 See text at http://www.garph.co.uk/JAR/MS/Jan2014/1-2.pdf
21 HRM report by NACM available at https://nacmnet.org/CCGG/hr-management.html
22 ABA Journal May 1971, p. 425-430
23 Naranjan Singh v. Punjab and Haryana High Court through its Registrar and Another in CWP No. 14849 of 2006 decided on 17/04/2009 provides how principal district judge in CWP No. 14849 of 2006 decided on 17/04/2009 provides how
24 Matadin Mour v. Prahlad Kaur Mour (1998)2GLR221 - The record of the copying section made some shocking revelations. There was tampering with record, full of interpolations at places mentioning date and these interpolations, were made solely with a view to gain time, as appeal was filed beyond period of limitation.
25 See Kerala High Court notification for employment of CSA at http://www.hckrecruitment.nic.in/app_notif.php#
4. Additional functions of the CMs under the high court framed Rules

There are 24 high courts in India. These are constitutional courts for 29 states. Any judicial reform initiative has to be implemented by these high courts. Out of 24 high courts, 3 high courts did not create the post of CM for their jurisdiction (Delhi, Sikkim and Jammu and Kashmir) and 2 high courts abandoned the project citing lack of funds (Andhra Pradesh and Punjab and Haryana).

Those high courts which created the post of CM, adopted functions outlined in the circular F.NO.32(30).FCD/201026 for their CMs. Some also made specific Rules on functions of the CM. These Rules further increased tasks of the CM. For instance, the Allahabad high court Rules27 expected the CM to implement and manage data entry initiation, monitor the e-court project at the court posted and perform any other job as determined by high court or district judge or nodal officer.

A report from CMs working under jurisdiction of Andhra Pradesh high court revealed that their responsibilities were not fixed but prescribed from time to time by the high court. In their one-year tenure, they had: (i) submitted month wise biometric attendance reports and daily attendance report of all sections to the registrar general; (ii) physically inspected every evening functioning of biometric attendance machines to resolve minor technical issues for reporting faults found in normal functioning of the machines; (iii) co-ordinated with the budget section of the high court, State Judicial Academy, State Legal Service Authority to collect their proposals to be submitted for budget demands from the state government and participated in budget meetings; (iv) developed a software package for reducing maintenance of manual registers and developed file tracking system to prevent loss of files from its origin in the new filing section till the record rooms where finalized cases are stored; (v) prepared agenda notes for national conferences held on direction of the registrar general; (vi) supervised staff training programmes, recruitment of administrative staff; (vii) monitored copy application sections to make copies available to parties without delay; (viii) gave feedback to the High Court on status of installation of software and hardware in various mofussil courts.

Under jurisdiction of Bombay high court where more than 2000 trial court judges and 94 high court justices preside over different levels of courts, only 45 positions of CMs are created on contractual basis. The Maharashtra Court Manager Recruitment and Conditions of Service Rules, 201128 prescribed functions for the CM, mostly beyond their intellectual or physical capacity.

The report29 from CMs working under Karnataka high court revealed that they were asked to speed up the recruitment process, enhance and develop employee skills, improve employee motivation, manage space crunch, improve inter and intra office communication, assist in access to justice services and e-court project, index record rooms, prepare backlog statements, ensure safety and health hygiene of court premises, help in financial management and in training and event management.

Gauhati high court rules, Rajasthan high court rules30, Himachal Pradesh high court rules directed the CM to perform any work as assigned to them.31 The Jharkhand high court rules directed the CM to (i) assist registry in preparation of statistical data relating to institution, disposal and stay matter of all categories of cases pending in the trial courts across districts; (ii) promptly act upon the instructions received from the CM of Jharkhand high court who will be instructed by Joint Registrar (Judicial) / Central Project Coordinator; (iii) help district judiciary in preparation of statistical report on institution, disposal, pendency; (iv) suggest judge of each district court ideas for improving the working in the courts with special reference to “20 year old cases” Scheme as well as Mission Mode Programme; (v) monitor and to ensure that all kinds of summons, notices and processes issued are delivered timely and promptly; (vi) involve in the field of e-Courts Project.32

Kerala high court rules asked the CM to (i) prepare notes in connection with the conference of chief justices organized by the supreme court and joint chief justice–chief minister conference; (ii) prepare item-wise progress and action taken report in connection with the resolutions adopted in the aforesaid Conferences; (iii) prepare replies to the queries received from the Supreme Court and various high courts; (iv) liaison with the registry section and route those files / papers through the identified registry officials from the high court.33

Madhya Pradesh high court rules and report on impact of deployment of the CM in Madhya Pradesh34 mention that the CM assisted the district judge in - supervising monthly inspection reports and statements of different courts; in evaluation of judicial officer; in handling and disposal of cases, in monitoring of old cases pending for 5 years or more; prepared database of pending cases, supervised e-court entries and assessed implementation of e-courts project; improved working of different sections of district courts; helped disposal/ elimination of cases in record room, disposal of copying applications and disposal of properties

26 See website http://ecourts.gov.in/krishnagiri/court-manager-responsibilities
27 Available at http://www.allahabadhighcourt.in/rules/court_manager_16-04-12.pdf
28 Available at http://bombayhighcourt.nic.in/recruitment/PDF/recruitbom20111021100050.pdf
29 See http://karnatakajudiciary.kar.nic.in/recruitmentNotifications/cm-appointment-12062014.pdf , http://hckrecruitment.nic.in/pdf/COURT_MANAGER_FUNCTIONS.pdf and report submitted to the National Judicial Academy, Bhopal by the High Court of Karnataka
30 http://hcraj.nic.in/notificationcourtmanager.pdf
31 http://highcourtnc.rj.nic.in/pdf/CondCourtManagers21072013.pdf
32 Dated 2/2/2012 and further Registrar General order dated 7/11/2012
34 Sent to the State Government vide Memo No. C/752 dated 23/02/2015
in court warehouse; monitored disposal of cases as per the targets set by national and state legal service authorities; assisted access to justice machinery, helped in recruitment of clerical staff at the district court level.

For Manipur, which created 3 posts of CMs, the high court rules asked the CM to assist judges, registrars and officers to enhance the efficiency of the court management; prepare statistics on all aspects of the functioning of courts; prepare employee database for courts; prepare case status in all courts; involve in preparation of budget, supervise the proper utilization of budget allocations received for different purposes from the State and the Central Government, assist in Gender Budgeting, gather requirement for implementation of e-Courts Project which includes digitization of record rooms, library software implementation, co-ordinate functions and trainings for all judicial officers and staff of high court and subordinate courts, help in designing and reviewing calendar and newsletter for publication, involve in issuing, receiving and screening of application forms for recruitment to various posts in all courts, prepare database to identify vacant posts and for monitoring the status of under trial prisoners, procure appropriate and quality products for IT infrastructure development, etc.

Orissa high court Rules asked the CM to (i) look after the infrastructural requirements of the high court, (ii) work out requirement of staff, get government approval from time to time as per necessity and initiate the recruitment process in co-ordination with the Establishment Section and the Recruitment Cell of the high court, (iii) plan, prepare and process the budget proposals in co-ordination with the accounts section, (iv) ensure proper functioning of the IT section in co-ordination with the computer technicians.

Punjab and Haryana high court rules asked the CM to (i) manage and co-ordinate the processes involved in case flow which includes managing the filling of cases, their listing, disposal, keeping track of the old cases and creating and maintaining data to help in proper distribution of work amongst the judges in each district, including consignment of files to the judicial record. (ii) Deploy proper staff as per their educational qualifications and work experience and timely submit requirement of new staff to the authorities having regard to retirements of old staff, establishment of new courts and increased workload. (iii) Facilitate administrative work for the staff like pay fixation, grant of increments, redressal of grievances of employees, organising induction training, timely submission of pension papers, etc. (iv) Visit court complex to ensure cleanliness, regular attendance of staff and liaison with authorities like Public Works Department, Public Health Department, etc. for repair and maintenance work, for infrastructure development of court complexes and for awarding contract under the guidance of the district judge for cleanliness of the court complexes. (v) Assist judges on training/functions and inaugurations. (vi) Assist accounts department in preparation of budget, supervise proper utilization of the budget allocations received for different purposes. (vi) Implement and manage requirements under the e-Courts project which includes data entry initiation as well as managing the service roll out under e-Courts project, preparing report regarding the LAN, switches, power point, internet points installation in the court complexes for Computerization, feed data into National Judicial Data Grid and take up computerization of provident fund accounts of court employees. (vii) Provide training to the court staff regarding daily uploading of cause list / interim orders and judgments on website for ensuring delivery of Citizen Centric Services. (viii) Coordination with other departments on IT issues. (ix) Remove bottlenecks in the working of copying agency for ensuring timely delivery of certified copies of the judgments/orders to the general public by monitoring the performance of copying agency periodically. (x) Supervise preparation of inventory of all the articles in the courts and ensure timely supply of stationery, computer peripherals like printers, printer toners and its annual maintenance. (xi) compile statistics on functioning of the courts and timely submit returns to the High Court.

5. Diagnosis on failure of the CM project under Indian set up

First reason: The Government Funding and the Government Support?
The Government of India provided one time support of rupees 50 Billion to the judiciary through the 13th Finance Commission Grant, to utilize the same in period from March 2010 to March 2015. In this grant itself, some high courts were supported while others were not, for the creation of the post of CM. Further, the government, out of 3 billion rupees earmarked for the CM project, could release only rupees 1 billion to different states as the high courts could not submit utilization certificates for grants released to them in time to the department of justice.

Whereas Uttar Pradesh (380 million), Madhya Pradesh and Maharashtra (266 million each), Rajasthan (184 million), Tamil Nadu, Orissa and Bihar (163 million each), Karnataka (157.5 million), Gujarat (141.3 million), Andhra Pradesh (125 million), Jammu & Kashmir and Jharkhand (119.8 million each), Assam (114.1 million), West Bengal (103.3 million), Chattisgarh (87 million), Haryana (97.8 million) received substantial funds to create the post of CM for their courts, the north-east states like Arunachal Pradesh and Nagaland and union territories like Delhi did not get any fund at all and some other states received an insignificant amount.

35 http://hcmimphal.nic.in/Documents/recruitment_rules_CM.pdf
36 Vide office order No.4944 dated 28/06/2012
37 Due to complaints made to the Prime Minister of India by the CMs, the high court dispensed services of CM from 31/3/2015, i.e. on completion of the 13th FC scheme.
Once the period of 13th Finance Commission got over, the government in its next finance plan, the 14th Finance Commission, asked the high courts to draw the funds from the state governments if they were keen to continue with the CM positions. This detachment to the CM project from the government side was also because of fact that the Government of India received written representation from the CMs working in Jharkhand and Punjab states related to their role and treatment. Therefore, for the period (2015-2019), high courts have to take their own call on whether to retain or abolish the positions of CMs. Many high courts have abolished these positions citing reasons that no funds are allocated in the 14th Finance Commission by the government to continue these positions. This fact itself shows disinterest in the CMs.

Second: Were CMs adequate in number to make any difference?

There are 24 high courts supervising 600 district courts in India. Further, each district court has its own judicial hierarchy. At the top end of this hierarchy is the Principal District and Sessions Judge and below this position, there are several district judges, additional district judges, civil judges senior and junior division to decide civil matters, magistrate and chief judicial magistrate for conducting criminal trials. The total sanctioned strength of these judges working below 24 high courts for different jurisdictions of India is 20,502 but only 16,513 courtrooms have been established.

Out of 700 CM positions that were to be created in period between 2010-2015, the judiciary could create only 462 posts of CMs. The CMs were appointed in the states of Haryana (88), Tamil Nadu (70), Punjab (46), Rajasthan (39), Odisha (32), Bihar (32), Andhra Pradesh (27), Jharkhand (24), Assam (23), Maharashtra (22), Karnataka (21), Gujarat (14), Madhya Pradesh and Chhattisgarh (12 each).

Now assuming that there are say 12,000 to 15,000 trial judges operating in different districts across India, who all apart from their judicial work have large number of non-judicial tasks to be performed, would it be practically possible for even 400 CMs to really make any impact? How could 400 to 500 CMs serve 15,000 courts? Their insignificant strength too added to much confusion amongst everyone as to what work had to be allocated to them.38

Third: Nature of employment offered to the CM in different jurisdictions

The gulf in the status between judge and CM in India is much wider than that prevailing in any other country where the position of the CM is created. No doubt in many jurisdictions of the world, the CM is denied participation in decision making related to core fundamentals concerning courts and is not treated equal to judge in most jurisdictions with exclusion in judges’ meetings, social occasions, method of addressing etc.39, but in India, things are further worse because of nature of employment offered, poor compensation package, absence of all allowances given to regular court staff, poor service conditions and disrespect.

The salary and status of the CM in most jurisdiction in India is inferior even to a magistrate who is junior most entrant in the judiciary. Further, salary scales lag behind the private sector, and those in other government agencies. Further, there is no consensus amongst jurisdictions as to what should be compensation offered to the CM, or what should be qualifications for appointment of the CM or what work should be allocated to the CM. Different qualifications were prescribed in the whole country for appointment of the CM. A great variance exists in compensation offered to the CM from rupees 30,000 per month contract in the state of Himachal Pradesh to the pay scale of rupees 37400- 67000 with grade pay of rupees 8700 as offered by the Patna High Court which recently appointed the CMs.

Offering no fringe benefits for the CM position, not addressing the cost of living issues at the place of posting and at the same time asking the CM to meet diverse needs of local courts is unjustified and will in the long run make the CM join the court system only for gaining experience in the system rather than making any substantive contribution to the system.40

Though employment conditions for the CM are better in the southern region of India than the northern region of India – still these conditions cannot by any standard matched to service conditions of even junior most court employees. This made CM more vulnerable even in front of very less educated junior most staff of the courts who feel more confident due to their secure regular job, which cannot be as easily terminated as compared to the post of CM.

The nature of employment offered to the CMs - contractual appointment - was on yearly contract basis, which could be renewed if appointing authority was satisfied with the performance of the CM. This made both the staff of the court as well as the CM operate in atmosphere of distrust, suspicion and fear of each other. The regular court staff who is skilled in court practices and procedures after knowing that the CM is appointed on one year contract showed reluctance to transfer any knowledge about the system to the CM based on uncertainty of the CM and on the other hand, even the CM who is not fully assured of continuance and the growth within the system, is reluctant to go extra mile to learn about the system.

---

38 See http://www.nia.nic.in/TOC_and_PS/P-897%20PR.pdf for report from different states.
The CMs employed by Jharkhand High Court collectively made a representation to the Prime Minister of India in the year 2014 complaining about their service conditions, their functions not being as per appointment order, how some of them were not given any work, how some of them got some unusual work with no clear guidelines regarding authority for the post, how their ideas and suggestions were turned down, that they were not even given a proper office, minimum infrastructure and minimum staff to assist them. The CMs complained about the distrust placed on them due to contractual nature of their employment and how they were assigned superfluous work like liaising with the forest department to get some plants for the garden of the Court or of the residence of the Judges/ or getting telephone lines repaired, or liaising with the police officials to conduct meetings and to order refreshments for the meetings. The CMs also complained about the work assigned to them to check the correctness of the statistical data and that no suggestions were entertained to improve that data. They also pointed out to issue of not allowed to sit in the monthly meetings held on distribution of work and caseload. Further, the CMs also brought to the fore issue of not being paid their salaries in time. The CMs from Punjab and Haryana high court also filed similar complaint to the Prime Minister of India regarding their inferior status, salary, nature of works allocated, etc.

Fourth: Professionally trained CM?

When the Chief Justice Warren Burger of the United States Supreme Court called for a professional field of Court Management, based on his call, the Institute of Court Management was created in the year 1970 in the United States. This programme created CMs suited to work in the court environment in the United States. In India, only one law school NALSAR is offering combined LLB and MBA course to produce graduates professionally trained in court management principles. However, as salary and fringe benefits offered are not attractive enough to employ these graduates as the CMs for courts in India, there are reports that this programme too would be closed.

Fifth: Relationship between CM and judges?

The CM project was undertaken to relieve judges from their administrative jobs/tasks. But most judges in India equate their administrative responsibility as their power-cum-jurisdiction over things and people. Therefore, subtracting any assignment from them, even if trivial or administrative, is viewed as deduction in their power-cum-jurisdiction over things and people. This mindset poses a major challenge to any outsider who wants to enter in the business of the courts at par with judges. Judges are strong believers in the hierarchy business and therefore, any kind of subordinate help is welcomed but any kind of equal position – even if it is meant to reduce their burden – is resisted. Many judges openly criticized the idea of having CMs. They even suggested for training judges in management principles rather than involving management persons in the courts. Some very senior judges have also shown open dislike for the management principles.

6. Conclusion: How to create acceptability for the CM in India?

The management of courts has features in common with that of all other organizations. Key management concerns involve planning, human resources, budget and finances, use of information technology, creating facilities and other assets, and day-to-day operations. To do well, organizations need certain basic management conditions—leadership, commitment to a shared vision, effective communications, and (especially in a fast-changing world) a learning environment. Organizational success also requires that leaders and managers set goals and objectives, monitor actual performance, and ensure accountability. In these respects, managing a court is no different from managing any other organization. Therefore, involving judges in managerial roles for which they have not been trained is imposing heavy burden on them and it is right time to take a leaf from other jurisdictions and free district judges and other trial court judges from non-judicial tasks. These could be entrusted to the CMs who can be provided some basic training on court processes and procedures and court cultures.

However this role delegation will not take place unless it is so endorsed by the senior most judges of high courts and the supreme court. The roles, responsibilities, and authority of the CMs will depend on how constitutional court judges value their contribution in court management. The more knowledgeable and comfortable judges are about the CM, the more power would be given to the CMs. Therefore, the need of the hour, in India, is to get senior supreme court and high court justices exposed to jurisdictions in the west wherein judges are operating courts in comfortable partnership with the CMs. We have regular visits by political and executive branches to other jurisdictions to learn operational realities on administration and governance, which could be emulated for India. Similar educational visits should also be arranged by the department of justice of the government to provide exposure to judges so as to help them to come out of their biases against involvement of non-judicial personnel in managing the courts and registry. Such exposure will also create leadership in the higher echelon of the judicial system necessary to reduce resistance of fellow judges who harbor feeling that CMs would in some way impinge on judicial independence. Leadership can cut down this

41 This letter was forwarded by the Prime Minister’s Office to the Department of Justice. Letter on file with NJA.
43 See David Steelman, John Goerdt, and James McMillan, Caseflow Management: The Heart of Court Management in the New Millennium (Williamsburg, Va.: National Center for State Courts, 2000), chapters IV and V (pp. 87–124), where authors argue that most of the essential elements of successful caseflow management in a court are the very same ones that are also critical for managing courts in general, and indeed for managing any organization well.
44 Ibid.
unfounded fear and encourage courts across the country to hire the CM in the same way they hire skilled secretaries and court reporters who do for the judge what they cannot do for themselves.

Further such practical exposure must be continuous and a routine affair rather than one time travel opportunity for judges because senior judges are neither trained for their leadership role nor given adequate time to accomplish its duties. They get leadership by virtue of their seniority in terms of taking an oath to the office. At both high court and the supreme court level chief justices being administrative head within their courts install their own leadership agenda, which differ significantly from that of their predecessor and is non-binding on their successor. This structure makes it difficult for any court to implement and sustain significant change over time. Therefore, regular exchange programmes for all senior judges to create positive mindset and acceptance for the role of CMs becomes an inevitable and necessary tool till the time enough judicial leaders rise to lobby the executive to fund administrative/managerial positions in the courts at a level that will attract suitably qualified individuals.

Also, court being highly constrained environment where judges are unquestionably key figures, their level of receptivity to the CM will spell success or failure of the CM. Unless judge acknowledges the role of the CM in enhancing judicial operations, the CM will continue to face tremendous disaffection from the court staff members. The Chief Administrative officers and Sheristadar in the district courts being unsure about what will happen to them if they lose the trappings of the office to the CM, will continue to escalate differences and conflicts between them and the CM. There is a perception that there would be a war game.

The complicated nature and dynamics of the courts and the temptation of individuals in the courts to use power inappropriately or ineffectively coalesce in such a way that the task of CM will be a constant challenge. In such challenging scenario, adequate support of senior judges can turn around the table in favour of CM. Therefore it is right time to press the government for allocation of exclusive funds to sponsor exchange programmes for senior judges from India to jurisdictions where the CM are comfortably accepted and doing well.

46 Senior clerks in the district courts. For their duties and place in the hierarchy of administration visit http://ecourts.gov.in/namakkal/duties-responsibilities
47 Traits of CM in challenging environment @ http://www.lawyersclubindia.com/articles/Traits-of-court-managers--5385.asp
48 Ibid.
BRAZIL: Coaching in the Judiciary: An Inside Look
Ana Cristina Monteiro de Andrade Silva

Abstract
We have, as Judiciary Power, tried to win our challenges by investing in courses for the juridical field. We should go beyond our system and look for training in self-development for our judges and servants. Coaching is a tool that is much used by companies to train its leaders, and the Judiciary Power can, as well, extract benefits from their experiences. The Regional Federal Court of the 4th Region has a pioneering experience in this direction. We realized that the judges are special learners and learn easily if the teaching comes from a peers who are magistrates, and face the same routine problems. Coaching of judges can contribute to keep them motivated, while maintaining awareness of our moral duty to deliver justice to society.

Keywords: Coaching, Judicial Power, Regional Federal Court of the 4th Region.

1. Introduction
I have been working in the Judiciary for twenty-four years, seven years as an officer and seventeen as a federal judge. I have always been very enthusiastic about the noble task that we have, to deliver to society this supreme value called Justice. However, for some years now I have noticed a growing lack of motivation among judges and employees, because of high workloads, remuneration issues, among others. The highest court sets the goals and demands periodic reports. We have to render our service to claimants, lawyers, prosecutors and the higher courts, always efficiently and expeditiously, in compliance with Article 37 of the Magna Carta. Those who work here have a high technical professional level; appointment contests get to choose only the most qualified. The institution, in turn, is providing numerous qualification processes and training courses in the legal field. However, is that enough? Shall we overcome our challenges only by means of legal knowledge?

I think there is the need of something else. Private companies have discovered this and have invested heavily in their human resources, with intensive courses and coaching for all superiors. Coaching, in fact, has been the most used tool in terms of human resources development today.

I intend to explain here what the process of coaching really is and how the judiciary can benefit from this process. Still, I will relate the pioneering experience of the Regional Federal Court of the 4th Region and I will outline some future prospects.

2. What Coaching is
The term coaching comes from the verb in English to coach, which means training, representing the person of the team coach, the person whose role it is to encourage and help the athlete to develop skills to increase his performance. Therefore, coaching is the process itself, coach is the professional who leads the process and coachee is the person who is the target of the process.

Coaching is based on a series of sessions or meaningful conversations with powerful questions, following the Socratic Maieutic method, which guides us to build the life we desire. According to Marcia Luz, “coaching is a structured process in which the coach has a mission to help his coachee to achieve goals that are agreed upon at the beginning of the process”. As a rule, at the beginning there is a longer session, in which an assessment is made of the current situation, the goal to be achieved is defined and the steps needed to get there are decided upon. Weekly meetings are scheduled to execute the plan. We assume that the coachee has all the personal (mental and intellectual) resources he needs to achieve his goals. It is up to the coach to give the coachee the infrastructure necessary for him to unearth these potentials and to progress. ²

² LUZ, Márcia. Coach Palestrante: torne-se um profissional 5 estrelas, p. 08.
It is a training and communication process based on a productive dialogue and on a relationship between coach and coachee, aiming to guide and support him to develop his true potential, in order to achieve his goals and, if necessary, to make important changes in his life. Coaching, with its powerful questions, begins with self-analysis by the coachee and seeks to motivate us to find the responsibility, which generates commitment; therefore, we can choose the best or most productive option or action reorienting us to the right direction. 3

The so-called powerful questions try to impact on our neuronal system, so that the solution is found. According to Anthony Robbins4, the questions result in three specific things: they cause changes to what we focus on and, consequently, how we feel; they change what we suppress and they change the resources at our disposal. So, if we ask the coachee: “How can you be so depressed?” or “Why does nobody like you?” he will certainly look for references to feel depressed and rejected. On the other hand, if the coach asks “How can you change your state in order to feel happy and be loved?” the coachee will focus on solutions. Even if the brain responds, at first, that there is nothing that can be done, if the coach insists with these questions he will get the answers the coachee needs, and make him feel better, changing his emotional state. The questions, rather than just cheering him up, provide concrete reasons to trigger emotions, as we can influence how we feel by changing the focus. Through coaching, it is possible to make the coachee become aware of what he wants and discover his former limiting standards.

To modify this pattern it would be interesting to ask the coachee “If you do not change it, what is the final price? What will it cost you in the long term? How would your life be transformed if you did that now?” In order to make the coachee improve his status, the following empowering questions can be asked: “What is wonderful in your life today? What makes you feel sincerely grateful for?” The questions, on the other hand, also change what a person suppresses, that is, if he feels sad it is because he is suppressing the reasons that might make him feel good and if he feels good, it is because he is removing all the bad things he could be focusing on.

Therefore, it is important that the coach asks the coachee “How can you learn from this problem to ensure that it will never happen again?” This question resolves the current problem and finds resources that can prevent the coachee from feeling the repetition of that pain in the future. Likewise, the questions may have the power to change the resources at our disposal. If the coachee faces a problem that appears to be difficult to solve, the coach can ask: “How can you change the situation?” or “How can you add even more value and help more people with your work?” The questions thus can shape our perception of who we are, what we can do and what we are willing to do to achieve our dreams.

It is important to differentiate guided coaching from unguided coaching. In unguided coaching, unlike the consultant and mentor, the coach does not need to have knowledge of the client’s profession, business or area, using as his main tool the powerful questions. Guided coaching combines the role of a coach and a mentor. Here, the professional, in addition to mastering the techniques of coaching, can also give suggestions on attitudes and skills to be developed, considering he has been for the longest time with the company and knows exactly what is required in the workplace or in specific professional circumstances.5 We think of the concept of the trainer judge, who has the longest tenure and accompanies the newly appointed judge, adopted by our Regional Federal Court of the 4th Region, as far as I know is very similar to the guided coaching process.

It is precisely this model —guided coaching— that we believe is best suited for the Judiciary. The senior judge or officer with coaching knowledge becomes a coach leader and plays the roles of:

– strategic partner, providing what is missing for their peers to achieve their goals and offering solutions to complex problems, his being the mission of removing barriers, so his team can show all its potential;
– paradigm transformer, as the leader is someone who helps his team to get out of monotonous routine and to stop being a victim of self-restricting views;
– stimulator of interpersonal development, because high-potential people who do not progress in their career have as an obstacle more often the lack of interpersonal competence rather than the lack of technical professional knowledge. The mission, however, is not simple. The leader suffers the pressures of the institution, which demands results and answers to challenges and which includes people who are not always willing to offer their best. 6

The main coaching tool is questioning. The coach asks: “What do you want? How can you achieve this? What can stop you? How will you know you already got it?” On the other hand, the coachee will ask himself: “What can I learn? What have I done that has not worked out? What could I do better next time? What have I done right?”

It is important for the coach to develop certain communication skills, such as great sensitivity or ability to observe, listen, understand, learn and guide.7 The ability to listen, by the way, is often reported by many coachees as an acquired skill after the coaching sessions.

3 SOLAR, Suryavan. Coaching Express, p. 33.
The one who leads the coaching process should base his confidence on good intentions, in the progress of humanity, in the ability of human beings to be supportive, peaceful, loving and compassionate. Although the human being is full of defects, difficulties and limits, it is necessary to make an alliance with his best and most enlightened portion. The coach must believe in the ability of his coachee to extract the best parts of himself.

One of the most valuable states that the head of an organization can achieve with the assistants is trust and harmony. If they know they are cared for, they will work harder and better. However, if the bond of trust has not been formed, there will be no effort by the employees. A means of establishing such trust is to be attentive to the different needs of various people.

It is necessary to take an attentive and respectful look at others. Dulce Magalhães claims the following about our employees and coaches:

Looking is the opposite of alienating. Looking is being there and not alienating. The word respect comes from respicere in Latin, which means look again or intently, staring. Respect comes from a deep look at the other, their aspirations, their fears, their desires. It is about recognizing this universe that is face to face with us.

The coach often assists the coachee to learn how to see his reality with a new vision, to understand who he is, what he wants and what he needs. The coach helps to define and organize clearly the coachee’s dream, his projects and his objectives, to discover and to define his priorities, to eliminate distractions, to concentrate and focus on the positive, motivating him to do what he loves most without excuses or delay. Also, the coach helps the coachee to learn how to grow personally and professionally, improving in the areas of prosperity, happiness, culture and freedom, to learn to listen more to people, to have more self-esteem, confidence and trust, identifying and respecting his values in life and to understand his immense strength, reaching his goals based on a model of action, learning to measure progress and to celebrate advances.

Coaching currently has several branches, best known are the Life Coaching or Personal Coaching, Sports Coaching, Business Coaching. There is not, so far, to our knowledge, any news about the application of coaching specifically for the Judiciary. Given this gap and being aware of the growing demand regarding management of human resources in the judiciary, this is what we propose.

### 3. How the Judiciary can extract benefits from this process.

We propose here the application of coaching to the Judiciary with a twist: the inner look. That is, the coach is not someone from outside the institution, but a judge or officer who combines knowledge of the coaching process with his own experience of the reality experienced by his coachees. In this respect, there will be more empathy and more understanding regarding the unique challenges faced by those who work in the judiciary.

We understand that coaching can be introduced as one of the tools of judicial education focused on staff management in the judiciary. In this sense, Professor Livingston Armytage, a jurist with experience of over 25 years directing or acting as a consultant in judicial education programs, in both systems, Common Law and Civil Law, confirms this idea that judges are special learners and learn better with their own peers. According to Armytage, the judge represents the adult learner, he is characterized by his autonomy and self-direction; by his preference for acquiring knowledge based on his own experience; by his expectation to realize the importance of learning for its immediate applicability; by his objective nature, by his orientation focused on troubleshooting. Empathy between a coach judge and a coachee judge can be a facilitator of learning. This is because, as explained by the jurist above, members of a particular professional class share the same basic human processes such as motivation, cognition and emotions. Like other adults, they belong to a professional class but, as no other group, belong to a particular category. In tracing the first two guiding principles of judicial education, Armytage states:

1. Judicial ownership - There is a doctrinal imperative for judicial education to be judge-led and court-owned, if it is to be successful in strengthening an independent and professional judicial system. This is best attained by securing the endorsement and support of the Chief Justice and Supreme Court from the outset.

2. Faculty development–Training of judges should wherever possible be by judges themselves to ensure authenticity. This will require an ongoing program of faculty development and train-the-trainer.”

This way, the judge receiving coaching from another judge will have his learning process facilitated, transmitted more efficiently, and applicable to the reality of the fellow judge rather than if the coaching were transmitted by another professional from outside the judiciary, such as a psychologist or administrative professional.

---

8 Magalhães, Dulce. O foco define a sorte: a forma como enxergamos o mundo faz o mundo que enxergamos, p. 99.
9 ANTHONY, Robbins. Poder sem limites: o caminho do sucesso pessoal pela programação neurolinguística.
10 Magalhães, Dulce. O foco define a sorte: a forma como enxergamos o mundo faz o mundo que enxergamos, p. 99.
4. Experiences of the Regional Federal Court of the 4th Region

With the encouragement of the Federal Regional Court of the 4th Region, after seeking training in coaching during the year 2014, we began the process with officers and judges of the Federal Court of Santa Catarina.

The program included 10 sessions of one hour each, by video conference or live, whenever possible. Initially the process was carried on by only two officers: one who officially holds the position of Director of Secretariat (management of Judicial Services and the staff) and another who is his immediate substitute. During these pre-scheduled meetings, instruments filled by the coachee were applied, such as the wheel of life, which aims to determine the degree of individual satisfaction related to various areas of life (personal, physical, family, professional). The coachee also filled in some questionnaires and form 360 has been applied, which aims to determine how the individual is seen by the team (in this case it is the very team that provides answers to the questionnaire without identifying themselves. Basically, five points are covered over these 10 meetings: I. Who am I?; II. How do others see me?; III. Accept myself fully; IV. Show my best and V. Help others.

Firstly, the coachee is invited by the coach to make a dive in himself, in his history, in his virtues and his flaws. Not always, the way we see ourselves coincides with the way others see us. Therefore, in this search for a team feedback we become aware of which skills are not fully developed in the coachee. In order to improve, it is urgent that we know what we are not so good at. From that point, the focus of work is on increasing these skills that need to be improved. The coachee outlines goals related to each of these skills and answers the coach’s questions.

By developing these skills that are currently least developed, the coach leads his coachee to an increase of his excellence. Strengthening his skills will have direct impact on his relationship with his staff, being extremely useful especially in cases where the individual holds a position of leadership, as he will be able to better motivate staff and achieve better results. However, also his personal and family sphere will benefit from coaching, as someone who knows more and strives to improve will be more balanced, tolerant and happier in family relationships.

Considering we are not having a bright side, coachees are encouraged also to accept their shadow side, as self-esteem exists only if one understands and accepts all his facets. The coachee is invited to complete the shadow questionnaire, to assess his degree of self-acceptance.

After each consultation session, the coachee writes his goal and gets the task of a concrete action within the staff or family, which can show the overcoming of his difficulties. For example, if the difficulty is communication, he gets a mission to try to express his ideas better to team members; if he is not an open person, he should try to greet colleagues of the court every day; if he is impatient, he shall seek to increase his limits of tolerance to daily-unforeseen issues.

Throughout the process, the mission of Santa Catarina Federal Justice “to ensure society a fast, affordable and effective jurisdictional service under the Federal Court of the 4th Region” is highlighted. Thus, the individual mission must always be in line with the mission of the institution, so that the human development of the judge or the officer happens in harmony with the institution.

Ramon Garcia, Director Secretariat who has gone through the coaching process, gave the following statement:

The experience of participating in this new activity, as a coachee was extremely productive and meaningful, both personally and professionally. The chance to hear and be heard on issues related to our life, our desires and anxieties, as well as the reflection of this in our professional life, proved to be of great value, particularly because we need to know ourselves better so we can understand who we are and what we really want. The big difference observed in this course / training lies mainly in the fact that the coach held theoretical knowledge and technical background to discuss the topics covered, but on the other hand, he was also a person who was aware of the reality of the professional environment in which we operate. Talking about yourself and about your practice with someone who understands, in theory and in practice, what afflicts, excites and motivates us most, constitutes a unique opportunity to feel understood - Ramon Paulo Garcia - Director of Secretariat of the 1st Federal Jurisdiction of Joaçaba, Santa Catarina State.

Daniela De Bortoli Carli de Sa, Director of Substitute Secretariat of the 1st Federal Court from Joaçaba, assessed the coaching process:

For many people, delegating tasks can be a bigger challenge than running them. I had the opportunity to participate, in 2014, in the coaching program developed in the 1st Federal Court of Joaçaba, an experience that brought a big gain in quality of life, satisfaction, health, happiness and professional fulfillment. The realization of coaching by the judge of the Court contributed significantly to the success achieved. Being a person from inside the Court, my coach knew the internal dynamics of the work, system and culture of Judiciary, making it much easier to understand the difficulties and goals, in addition to ensuring effective feedback. The public sector has a very different institutional environment than the private sector, so that the coach’s internal look facilitated the implementation of dynamics specifically related to my
institutional environment. I have worked on sector supervision for over 15 years and coaching helped develop a more receptive attitude to dialogue, flexibility and cooperation. Learning how to best use my potential assured me greater independence and confidence which by the way has already been reflected in my professional performance. In addition, I feel more motivated and confident in working with goals and doing self-analysis whenever necessary, focusing on what is most important.

With the judges, we applied, in addition to 10 sessions, a visualization technique with songs, recalling all the common experiences of us judges, from our childhood when we dreamed to be judges, through preparation for the contest and taking office as federal judges. This technique has also proved very effective; it is based on neurolinguistics, seeking to reach the visual, auditory and kinesthetic individuals. The judges felt more motivated and proud of the fabulous role they play to bring the high value of Justice to society.

Judge Claudia Dadico, after completing the 10 coaching sessions, put it this way:

The coaching process with colleague Ana Cristina Monteiro was a very rich and rewarding experience. Initially because she’s a colleague, who feels the difficulties and dilemmas that surround the day-to-day of a judge, both regarding to the judicial activity and the managerial activity of the judicial unit for which she is responsible for. The experience of life of colleague Ana Cristina, combined with her competence and sensitivity, allowed the development of a keen and discerning view towards shaping the coaching tools for the specific field of the Judiciary, making this process more sincere, authentic and true, which would undoubtedly be less useful if applied by a professional from outside the ranks of the Judiciary. The benefits were observed not only in improving the management of people in the workplace, but also in the field of family relationships and personal development. The results were very positive. I strongly recommend the continuation of the project, with the expansion of the number of coaches and coachees. (Claudia Maria Dadico, Federal Judge of the Criminal Court of Florianópolis)

I also had the opportunity to be trainer judge of the colleague Tiago Fontoura, who took office in 2013. At request of the Justice Inspector of the Regional Federal Court of the 4th Region, I am also assisting him in coaching, and the experience is enriching and very rewarding. I often remember the teachings by the French judges to prioritize the active method. Judge Tiago Fontoura expressed his opinion:

Despite the high load of work that a judge has, Ana Cristina found time to introduce me in the practice of coaching. We have weekly meetings by video conference, at which she sets out the purpose of coaching, applies the dynamic for self-knowledge and recognition skills. I answered some questionnaires, seeking in myself the best I can offer to the institution. I am currently waiting for the team feedback, in order to improve my attitudes and working methods. I understand that coaching is an excellent tool for motivation of judges and officers, increasing the level of excellence of the public service provided by the Federal Court. And this should be recommended to other colleagues, multiplying this initiative within the Judiciary.

The truth is that we dedicate ourselves deeply to the juridical knowledge, but we don’t know ourselves. What coaching aims at is precisely to fill this gap, by providing a greater understanding of ourselves, making us reflect on our acting as leaders of our teams, strengthening our more ethical and human side.

In my job as a tutor of the distance-learning course of Personnel Management in the Judiciary, I also successfully used this coaching tool. The course was developed asynchronously, i.e. tutor and participants do not need to be logged in at the same time. For each unit, a lecture on the topic of the week was offered: Leadership, Delegation, Communication and Performance. Leadership, according to Hunter,13 is “the ability to influence people to work enthusiastically aimed at achieving common goals, inspiring confidence through the power of character”. Palma14 adds that the judge’s leadership implies a particular ability to lead, organize and compromise. This ability must be exerted by the one with the power of decision. In fact, the leader encourages the team members in the task of changing, by listening to their proposals and promoting their initiatives. Over the course, some practical tasks are suggested to the students as, for example, leading an efficient meeting or receiving feedback from a collaborator about the way the judge has exerted the leadership in the group. There is also the encouragement of the exercise of the active listening (characterized by truly listening to the other, trying to see the world as the other sees it, silencing our inner voice), replacing nervous listening (behavior of interrupting the other’s talk and listening while always thinking about something to reply). That way, we want students to reflect on their role as managers of their units and seek the best way to lead their teams.

We also provided excerpts of videos on the subject, in each unit, and after that, the student was asked to participate in the discussion forum. At this point, the student brought his/her experience related to the topic at stake, his/her problems and challenges, connecting them with the theoretical part of the unit. As a tutor, I answered each posting, always with new questions.

13 Hunter, James C. Como se tornar um líder servidor. Os princípios de liderança de O monge e o executivo, p. 18.
and provocations, to encourage the student to leave his/her comfort zone using a transformative approach in order to improve his/her performance. I used, on this occasion, the technique of the “powerful questions”. If the student, for example, referred in the forum that he/she had difficulty exerting leadership with the team, I asked: “What strategy could you use to improve your leadership?”; “What could prevent you from achieving this new form of leading?”; “What are the consequences, for the judiciary and its team, of a human and productive leadership?” With those questions, the student begins to reflect from his/her own condition and reality, therefore making a critical judgment of himself and seeking the best solution. It is not following the tutor's advice, for the advice is given from the daily experience of the one who gives it, without regarding the specific reality of the one who receives it. We could realize that the coaching technique of the powerful questions can, thus, be widely used in Judicial Training courses – either in face to face or distance-learning - always as a way of offering self-reflection and seeking new alternatives for the problems experienced by judges in terms of Personnel Management.

4. Future prospects

The coaching initiative with an inner look pioneered the Brazilian judiciary, as far as we know. The involvement of officers and judges, as well as the results achieved, were the highlight. The difficulties were to reconcile the agendas of coach and coachees and, at times, these difficulties arise from the formation, still basic, of the coach. However, I think that our Court and the whole judiciary can greatly benefit from adopting the coaching process that could also be extended to officers, with primacy of active methods.

The Brazilian Judiciary is seeking a deeper understanding of human resources management. We have all realized that technical legal knowledge is no longer enough to leverage the changes we desire, making our judiciary more human and more efficient. Many initiatives are being taken in this direction. Our courts have sought to meet this demand also from abroad, with people who have successful experiences. An example is the exchange with the French National Judiciary School, an institution recognized worldwide for training with excellence of their judges. We had the great opportunity to participate in both courses offered (basic and advanced). The experiences and lessons learned were the impetus for a change of culture in the judiciary, which is already ongoing and we are certain that it will have great results.

Indeed, people are our greatest resources. We need to have a sense of respect and recognition for them, because there is no lasting success without a good relationship among people, and the way to be successful is to form an experienced team working together. For one man alone, as brilliant as he may be, it will be very difficult to match the gathered talents of an effective team.¹⁵

5. Conclusion

1. Coaching is an excellent tool in human resources management and has been used in much of the private sector.

2. In the Judiciary, there is a significant demand of knowledge on management of people that can be met by the coaching process.

3. We propose a coaching process with an inner look, in other words, a process coordinated by members of the judiciary who already are aware of the institution’s problems and who command knowledge of the coaching process. Therefore, it is crucial that our judges and officers are ready to receive and multiply this knowledge and that the courts are sensitive to the importance of this initiative.

Bibliography


EU’s ‘Victims’ Directive’ – a legal act for a cultural change?

Bernt Bahr and Jenny Melum

Jeny Melum is Senior Adviser, Norwegian Courts Administration. Address: Norwegian Courts Administration, Box 5678 Torgarden, 7485 Trondheim, Norway. Email: jenny.melum@domstol.no. Tel: +47 456 00 473. Bernt Bahr is Chief Judge, Nedre Romerike District Court. Address: Nedre Romerike District Court, Box 393, 2001 Lillestrøm, Norway

Abstract

The article looks at safeguarding points in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and if and how some European countries have implemented the Directive. The article discusses what might be success factors to fulfil the Directive’s safeguarding intentions in the light of securing access to justice. We observe that focus on and measures for the victim often lead to a new conscience about the needs of all witnesses. The article addresses the need for cultural changes in the judicial system in order to fulfil the Directive’s intentions, and what might be a drive to such changes.

Key words: EU Victims’ Directive, safeguarding, witnesses, access to justice, cultural changes in the judicial system

1. The EU’s ‘Victims’ Directive’

Many EU member countries have made amendments to or established new measures and services for victims as a result of EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012. The Directive established minimum standards on the rights, support and protection of victims of crime.

In this article we look at safeguarding points in the Directive, and how some European countries have implemented the Directive. We discuss what might be success factors to fulfil the Directive’s safeguarding intentions.


The purpose of the Directive is to ensure that victims of crime:

1. Are recognised and treated in a respectful, sensitive and professional manner in the judicial system and the society;
2. Are protected from secondary and repeat victimisation, from intimidation and from retaliation within the context of criminal proceedings;
3. Receive appropriate support to facilitate their recovery and are provided with sufficient access to justice;
4. Have appropriate access to financial compensation and damages for non-economic losses from the State or the offender.

The deadline for incorporating the Directive into national law was set at 15 November 2015. The Directive imposes the member states to report data showing how and to what extent the victims have exercised the rights provided for in this Directive no later than 16 November 2017, and then every 3 years.

Special attention is given to support and protection of victims of certain crimes, including victims of gender-based violence, mainly women. This is due to the risk of secondary and repeat victimisation, from intimidation and from retaliation. The Directive also focuses on a child-friendly approach, where the main focus is on what will best serve children who have become victims.

1 Jeny Melum is Senior Adviser, Norwegian Courts Administration. Address: Norwegian Courts Administration, Box 5678 Torgarden, 7485 Trondheim, Norway. Email: jenny.melum@domstol.no. Tel: +47 456 00 473. Bernt Bahr is Chief Judge, Nedre Romerike District Court. Address: Nedre Romerike District Court, Box 393, 2001 Lillestrøm, Norway
The essence of the Directive is that the needs of victims must be addressed in an individual manner, based on an individual assessment, and using a dedicated and participatory approach regarding provision of information, support, protection and procedural rights.

The Directive is furthermore based on the key principle of the role assigned to the victim in the judicial system. The formal role of the victim in the various national systems will determine the appropriate approach for implementation of some of the most important rights addressed in the Directive. Since the formal role of a victim in a criminal case varies considerably among the member states, the realisation of these provisions will vary to some extent; cf. DG JUSTICE GUIDANCE DOCUMENT, European Commission, DG Justice, December 2013, p. 4. Services for victims have been established without being matched with procedural rights (Doak, 2011).

Incorporation of an EU directive into national law does not necessarily require transposition of the exact wording of the provisions of said directive into explicit and specific legal provisions. The key is that the national law must provide for a legal framework that will make it possible to ensure that the Directive will apply in full.

The Directive assumes investments in new or further development of existing, services, and this entails that financial issues are of prime importance for the implementation of the Directive.

2. Safeguarding measures. The victim: a new actor

A comparative study among the EU member countries from 2009 (the study was partly to serve as a zero-point survey to determine the subsequent effects of the Directive) showed that the victim is considered a new actor in the judicial system of most countries. The judicial systems are mainly structured around the defendant and his/her rights.

It is still a considerable challenge in many countries to clarify the procedural role of the victims of crime, cf. The “Victims” Directive, Centre for European Constitutional Law and Institute for Advanced Legal Studies of the University of London, undated, pg. 3.

A challenge associated with the Directive is that there is to be an individual evaluation of the needs, as well as provision of individually appropriate, and at the same time unified, safeguarding services throughout the criminal proceedings. An approach adapted to each individual in combination with unified safeguarding measures does not appear to be linked to the status as a victim of crime. The Centre for European Constitutional Law and Institute for Advanced Legal Studies of the University of London maintains that such a link must be established in order to facilitate efficient implementation of the Directive.

As the victim is still seen as a new actor in the judicial systems in many countries and the victim’s procedural role differs and is sometimes unclear, means that the Directive will work differently in different countries. The considerable differences between the countries make it seem nearly impossible to establish a common European standard. Thus, the Directive must be regarded as a starting point and a signal to the member countries that they will have to work with a long-term perspective on the safeguarding of victims.

In our opinion psychological and physical measures will together contribute to good safeguarding of victims. The Directive stipulates that the EU’s member countries must ensure appropriate training regarding the needs of victims for officials who are likely to come into personal contact with victims, e.g. in the police services, prosecuting authorities or the courts.

The Directive addresses shielding of witnesses from the defendant or other parties in recital 53. It is emphasised that the practitioners must co-operate in order to avoid contact between victims and defendants at the court premises. The Directive points to alternative solutions such as video-recording the taking of evidence with playback in court. Recital 53 states furthermore that the member countries should facilitate victims having no direct contact with the defendant and/or his/her family, acquaintances and the audience by using appropriate facilities for courts and the police, with separate entrances and waiting areas for victims.

Some countries, like Denmark and England and Wales, allow new court buildings to have special entrances and waiting areas for victims and witnesses. In Norway actors in court, such as the prosecuting authority, judges and Witness Support Service, confirm that there is an increasing need and demand for shielding measures. In the 2012 Witness Survey in Norway, the witnesses stated that they did not want to see the defendant or anybody else from the other party in the waiting area in the court house, and many did not want to testify with the defendant present.
We are of the opinion that it is important in terms of due process of law that most cases are handled in accordance with the basic assumption behind the law; that the evidence is presented directly to the court passing judgement. The courts must facilitate this taking place. On the other hand, in Norway we have traditionally focused on having the victim testify with the defendant present in the courtroom. It is a key principle that the defendant must be able to hear the witnesses, and that he/she is entitled to comment on the evidence presented. Perhaps our focus on this one element has been too strong? The courts in some European countries we have visited are more open to having the victim testify in another room with video transmission to the courtroom. This will safeguard the right of contradiction.

3. Formal implementation of the Directive

‘The Victims’ Directive’ has been adopted by the EU, and it applies to the member countries. It is our understanding that the implementation of the Directive varies, however. We have looked at how the Directive has been implemented in some countries.

In Germany and Austria, the Directive has resulted in changes in legislation and increased funding to private organisations that give support to victims. Danish authorities are of the opinion that victims of crime are already safeguarded in practice in accordance with the EU’s ‘Victims’ Directive’, and it is our understanding that the Directive has therefore not been incorporated into Danish law.

March 2017, the Directive was implemented by law in the Netherlands. Since the rights of victims were strengthened by law in 2011, implementation of the Directive did not require any amendments. A national project leader has been appointed to organise the implementation in the Netherlands. One of the objectives is to use appropriate language for informing witnesses under the age of 18 of their rights. Victims will be informed when defendants are released from custody or have completed their sentence of imprisonment if found guilty. Vulnerable witnesses will be contacted by the police at an early stage to determine any special needs, for example whether they would like to testify anonymously.

In Sweden, the authorities have assumed that Swedish law is in conformity with the Directive.7

English authorities report that they have updated their standards in accordance with the ‘Victims’ Directive’. «The Victims Code» describes the victims’ right to information in the judicial system, and the various institutions in the criminal justice system are obliged to apply certain minimum standards for witnesses based on the so-called «Witness Charter».8 9

Lithuania has prepared a training programme (80 academic hours) for judges, employees of the courts and NGOs. The purpose of the training is to provide the participants with knowledge regarding how crime affects the victim and witnesses, to introduce measures that are required to provide psychological and physical protection of victims and witnesses in court, and training in appropriate communication with these vulnerable groups in court. One of two main topics of the training is a new approach to law enforcement where the EU Directive and what this approach entails for the courts and NGOs are covered, while the second one is the psychological effects of crime on the victim and any witnesses. Lithuanian authorities have established witness support schemes at the courts and prepared various types of information for witnesses.

In 2015, Polish authorities adopted a law that will provide protection for and support of victims of crime, both before, during and after the trial process. To start off, the victims will have access to police protection during the court case. In certain cases, victims and witnesses may be provided with personal police protection, including at home. In addition, victims, witnesses and their families will have access to psychological support. The police decide who will receive such support.

4. What will make the Directive work as intended - in practice? Success factors for safeguarding measures

As we have seen several countries have established new measures or services or made amendments to existing ones because of the ‘Victims’ Directive’.

In our opinion safeguarding of victims and witnesses contributes to due process of law, and ensures access to justice. Thus safeguarding must be addressed. It represents the judicial system’s social responsibility.

The greatest challenge associated with the Directive’s safeguarding issues is, in our opinion, probably making safeguarding of victims function in practice; to have the practitioners within the system of criminal justice make safeguarding of victims a part of their everyday practice. Provision of cost effective and satisfactory services will require a common culture as regards providing such services on the part of all public and private actors and practitioners, and a culture to coordinate the services. It is no secret that services for victims traditionally have not been considered as part of the core tasks for police, prosecution or courts. More

7 At the same time as certain changes were proposed as regards the right of the victim to an interpreter and information on the time and location of the court hearing, cf. Ds 2014:14 Genomförande av brottsstofferdirektivet (Implementation of the Victims’ Directive). In Proposition 2014/24:57 (with proposed entry into force on 1 November 2015), it is proposed that the statutory rules regarding the right of the victim to an interpreter and translations be amended. It was proposed in the proposition that the right to information should be strengthened by granting the victim the right to be informed of the time and location of the main proceedings.


services for victims and better coordination of services will require a cultural change and a new mind-set. The question is what may promote such changes?

Measurement of safeguarding services and their effectiveness may be required to provide motivation. User surveys are good indicators. A driving force to ensure focus on safeguarding of victims is to credit the actors’ achievements. This means that police and prosecution authorities, judges and courts should also be measured by other quality indicators than number of cases completed or hours in court. Quality measured by spent time is the most used measure for most actors in European courts. A recent survey amongst judges and administrative employees in Norwegian courts shows that there are great awareness of treating the users of the court with respect and dignity. This might indicate that courts see safeguarding as part of the court’s work. Quality may be measured by how the actors safeguard victims and witnesses and their ability to coordinate their services.

A cultural change will probably require having to change procedures, preferably by establishing standards, to ensure that the actors and practitioners prioritise safeguarding services in their daily work. The making of such standards itself will draw safeguarding to the actors’ attention.

Another driver for this cultural change is training. The Directive stipulates that the EU’s member countries must ensure appropriate training regarding the needs of victims for officials who are likely to come into personal contact with victims, e.g. in the police services, prosecuting authorities or the courts. Several of the countries we have mentioned here are improving their trainings for actors in court on how to safeguard victims and witnesses.

Even though Norwegian witness support volunteers in court have received training on victims’ and witnesses’ needs for years, communication with victims and witnesses have just recently been put on the agenda in trainings for Norwegian judges. In previous years there have been courses for new judges in ‘witness psychology’, focusing on knowledge about witnesses’ memory and on how to evaluate a witness statement. This approach focuses at the witness as evidence — and not so much at making the best out of a witness statement through good communication. Psychologists and victim support organisations have advocated the importance of good and proper communication with victims and witnesses for decades, without the craftsmen of law enforcement have been able to receive these advice. This seems to be changing for the better.

Another intention is that the Directive shall contribute to coordination of the services provided. Coordinated services are essential for the victim, and this is in our opinion a challenging issue that might require a coordinating initiative from each country’s government. Using strategic interaction as a tool in coordinating services, focusing on benefits for all stakeholders, might be a useful approach.

Our experience is that England and Wales are particularly good at coordinating their services to victims and witnesses, and have written standards to offer victims and witness a holistic treatment.

Witness Support Service in Norwegian courts makes efforts to coordinate their services with police, prosecution service and the courts. One good example of a coordinating initiative in Norway is a pilot project established in 2015 in Oslo, ‘Project November’[11], that offers coordinated services through interdisciplinary collaboration, at one location. The project delivers services to victims of domestic violence, their families and abusers. The project might be compared to ‘Children’s House’[10] and is collaboration between several ministries. This project may be a model fit for the purpose in the Directive; an individual evaluation of the needs, as well as provision of individually appropriate, and at the same time unified, safeguarding services – that are coordinated. The project is a pilot during the period 2016-2018.

5. Conclusion

In our opinion the establishment of the ‘Victims’ Directive’ is itself an important driver for change. As we have seen here several European countries have established new services or measures or made amendments to existing ones. We have observed that focus on and measures for the victim often lead to a new conscience about the needs of all witnesses as some countries have even established services for witnesses at the same time as they established measures for victims. This means increased access to justice.

It is our opinion that the success factor for the ‘Victims’ Directive’s’ safeguarding effects is to promote a cultural change. The Advocacy Training Council, Raising the Bar, 2011, calls for a cultural change where advocates must both learn to recognize and address vulnerabilities in an individual manner. Acknowledging safeguarding measures and services as quality indicators might be a valuable driver to contribute to this cultural change. Trainings, establishment of standards, implementing user surveys and coordination services will be crucial factors.

It is all about having a user perspective.

10 Strategic interaction as the process of several parties reaching a common goal, with emphasis on communication.
11 For more information on this project: https://blogg.hioa.no/voldsprogrammet/om-prosjektet/prosjekt-november/
12 For information about Children’s House (i.e. ‘Barnehus’): https://www.statensbarnehus.no/
References


Centre for European Constitutional Law, Newsletter undated, *The Victims’ Directive*.


Bernt Bahr (date of birth 31 July 1953) is Chief Judge and Court President at Nedre Romerike District Court. Bahr has work experience from the police and prosecuting authority, has served as a prison governor and worked several years in the Ministry of Justice. Bahr was appointed judge in 1997, and has served in this capacity since. He has also served for a period as a Witness Support Coordinator in the Witness Service in Norwegian courts, and has been involved in several projects to strengthen the justice and court sector abroad.

Jenny Melum (date of birth 6 April 1971) is a Senior Adviser at the Norwegian Courts Administration. She serves as a manager of the Witness Service in Norwegian courts and works with service development in the courts. The user perspective is a key focus in the work carried out by her unit. She has previously held administrative positions in various fields and has experience from several service companies in the private sector. She has experience in international work on the safeguarding of witnesses.
Mediating Judges in China and the Netherlands: An Empirical Comparison

By Yedan Li and Rick Verschoof

Abstract:

This article compares the judicial mediation practices in the Netherlands and in China. It analyzes original and rich data obtained through in-depth fieldwork in courts in both China and in the Netherlands. Through comparison, we find Dutch and Chinese judges share similar mediation skills and techniques in judicial mediation. However, the interviewed litigants give contrasting evaluative opinions to the judicial mediation and to the on-going litigation procedure: the Dutch litigants are generally satisfied while the Chinese litigants are less so. This paper seeks to explain what caused the opposite outcomes. We attribute the cause to different judicial environment, judges’ motivation promoting mediation, and how mediation is conducted. The article concludes by challenging the ideas of promoting the “settlement judge” in a developing legal context.

Key words: mediation; judicial mediation; court; judges encouraging settlement; empirical legal studies, China, the Netherlands

1. Introduction

The matter of judges mediating cases assigned to them for trial is a source of controversy among scholars and sitting benches around the world. Theoretically, the combination of being a judge and a mediator drifts away from the debates on the literature of contemporary mediation, as judges as mediators easily have a negative impact on the due process experience of the litigation. Chinese trial judges are traditionally well-known as the combination of adjudicators and mediators, but owing to the reasons set out above, this combination is often negatively evaluated by the Chinese and international scholarship. However, Chinese judges are not unique in engaging in various forms of judicial dispute resolution during the on-going litigation processes. Many civil law countries have a conciliation tradition of requiring judges to settle disputes during the litigation processes, despite that those countries prefer to use the word “encouraging settlement” rather than “mediation”. The Netherlands, for example, is one of those countries.

Traditionally, those civil law countries “encouraging settlement” is incomparable to the Chinese trial judge “mediation”, as they are two extreme scenarios. The civil law trial judges traditionally abide by their role of being adjudicators: they see themselves as judges rather than - as they sometimes scoldingly say - “some sort of psychologist”. Even if the judges are required by law to encourage settlement, studies have shown those attempts are “very legalistic and interventionist”, and the judges are required to lead parties towards a solution consistent with the relevant legal norms. On the contrary, Chinese judges used to rely completely

1 Dr. Yedan Li is a postdoctoral researcher at Bielefeld University, Faculty of Sociology. She has a doctoral degree in law from the University of Amsterdam. Professor Rick Verschoof is the Professor of Court Studies at Utrecht University Law School and a senior judge in the Netherlands. The authors would like to thank Dr. Wibo van Rossum, associate professor at Erasmus University Rotterdam Law School for his contribution to the outline and structure of this paper.
5 For example, Section 278 (1) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) requires the court to make an amicable resolution of the dispute.
6 Freek Bruinsma, Kadirechtspraak in postmodern Nederland, 1995, Oratie Utrecht. This study shows that judicial mediation was apparent in the practice of the civil judge, but only in a minority of cases. The study distinguishes between three types of judges. One of them is ‘the kadi’ (active and focussed on a settlement). The two other types of judges were much more common: ‘the sphinx’ (passive and focussed on the verdict) and ‘the active judge’ (active and focussed on the verdict).
7 Global Trends in Mediation (Nadja Alexander ed. 2006), ibid., p. 22.
on mediation to solve civil disputes. The Chinese tradition of using mediation derives from a combination of Confucianism and Communist ideology. Mediation achieved its full potential as an inevitable choice in the legal vacuum for civil dispute resolution before 1978.

However, caused by the judicial reforms in the past 30 years, there seems to be a high degree of convergence between Dutch and Chinese judges’ involvement in mediation. Dutch judges are striding from “judgment-making judges” to “multi-tasking judges”, while Chinese judges are transforming from “mediators” into “multi-tasking judges”. From a Dutch perspective, the actual practice of judicial mediation began to get the attention of the judiciary and others in the Netherlands during the 1990s. The revision of the Dutch Code of Civil Procedure in 2002 led to an increase in oral hearings in Dutch civil court proceedings and thus of the direct interaction of the civil law judge with the parties themselves, a situation in which judges have to investigate whether a settlement between the parties is feasible. Existing studies have shown, many Dutch judges have somehow become more actively involved in the settlement process. Some of them consciously apply mediation techniques. A study conducted in 2014 shows that settlement percentages vary between the courts from roughly 30 to 50%. Meanwhile, China, which used to be an enriching example of relying solely on mediation, has established and continues to enhance a formal litigation procedure, even if mediation still infiltrates the court proceedings. As the formal legal channels are established, a Chinese judge can choose whether to close a case through a mediation agreement or through a dichotomous judgement. The official statistics show that nationally 63.1% of first instance civil cases were closed through the mediation agreement in 2013.

Those judicial reforms grant judges much leeway in how to solve a civil case. Both Chinese and Dutch judges are in the tension of being formal as judges, and being helpful as dispute resolvers. This convergence both challenges on our understanding about what judges really do in court, and paves the way for our comparison. Given the different background, it is questionable whether the Dutch judges and the Chinese judges are conducting the same practice, if not what the differences are. Furthermore, under what conditions the judges’ activities could pose questions on their neutrality and their role under the rule of law.

To answer these questions, we compare the judicial mediation on two aspects: what do judges actually do, and how is that evaluated by litigants. Through intensive empirical work in both countries, we find that even though the judges in two countries share similar judicial mediation techniques, but the evaluation of the disputants is opposite. The interviewed Dutch litigants are generally satisfied with judicial mediation, and the mediation does not have a negative impact on the procedural justice of the litigation procedure; while Chinese litigants are not so satisfied and the mediation has a negative impact on the Chinese litigants’ perception of the justice of the on-going litigation process. Based on the comparison, we aim at understanding what caused the interviewed Chinese disputants’ mistrust of judicial mediation, and their mistrust of the fairness of the litigation procedure should mediation fail.

After the introduction, we first introduce the legal framework of the judicial mediation in the Netherlands and in China respectively. Then we describe the methodology for the in-depth empirical data collection in the two countries. In section four, we compare the judges’ strategies and techniques in judicial mediation in both countries, and the comparison shows that the judges’ strategies and techniques in two countries show great resemblance, while the litigants’ reaction shows divergence. Section five explains why there is a divergence in litigants’ reactions, and section six concludes.

2. Legal Framework: Judicial Mediation in the Netherlands and in China

This study compares the Dutch judges “encouraging settlement” with the Chinese judges “mediating” activities. Inspired by Tania Sourdin and Archie Zariski’s definition of ”judicial dispute resolution”, the two types of activates hereafter are both referred to as ”judicial mediation”, to refer to the work undertaken by judges to encourage, direct or engage in settlement processes for the cases assigned to them for trial.

Court hearing plays an important role in the Dutch civil procedure. After a subpoena and a written reaction of the defendant, a court hearing will follow in most Dutch civil court cases. Both parties have to be present. The goals (from the judge’s perspective) of this hearing are: (1) obtaining all the information possible needed to write a thoroughly motivated written court ruling later on,

---

12 S. Dijkstra, ‘De rechter nieuwe stijl; De achterliggende filosofie en enkele kritische kanttekeningen’, 2014 Nederlands Juristenblad, 674, pp. 841-847.
(2) exploring if a settlement is expedient and possible.\textsuperscript{17} In theory it's possible scheduling a court hearing for only one of these two goals, but in practice these goals are always combined in one hearing.

The judicial mediation is scheduled during the court hearing, after the facts-finding phase. One of the most relevant procedural principles of law applies fully to judicial mediation: audi et alteram partem. All the actions and interventions of the judge can only be done in the presence of both parties. The usage of caucus is out of the question, indeed any contact with one of the parties without the other being present is a deadly sin. This principle also applies to judicial mediation, since court hearing is the only arena in which judicial mediation takes place. In most court hearings the information phase is followed by the settlement phase. Usually the court sessions are adjourned for a relatively short time (in practice between 5 to 90 minutes, but there are no official time limits) in order to give the parties and their lawyers the opportunity to negotiate without the judge being present. After this break the court session is resumed. If an agreement “in the hallway of the courthouse” is reached, it will be recorded officially in the courtroom, formulated by the judge and undersigned by the parties. The case is immediately closed. If there is no agreement the conclusion after resuming the court hearing can be that no results are to be expected. Then the court hearing will end and the court case will go on, mostly by giving a written court ruling a few weeks later. If the conclusion is, after resuming the court hearing, that further negotiating could be fruitful, the judge probably will resume his/her judicial mediation, beginning with the question how far the parties have come in their settlement talks ‘in the hallway’.

In a relatively short time (mostly 1 to 3 hours) the case itself is discussed (facts and legal aspects), as is the possibility of a settlement. It is very well possible that during this court hearing the two goals, obtaining information in order to give a court ruling later on and exploring the possibilities to settle, are interwoven. For instance judges can provisionally give their opinion about a certain aspect of the debate during or at the end of the information phase, which helps the parties to determine their positions in the settlement negotiations later on during the court session (and ‘in the hallway’).\textsuperscript{18}

A settlement is a form of agreement, which cannot be reached without the mutual consent of the parties involved. Although there are no specific rules guiding the way trial judges try to reach a settlement between the parties, the ground rule is that both parties ought to enter voluntarily into a settlement. They should not be coerced by the judge. There are no specific regulations in case a party states he/she is coerced into a settlement by the judge. If the settlement is actually reached it is binding. The coerced party can only try in a new proceeding against the same opponent to annull the court settlement on grounds of coercion by the judge. We do not know of any published court rulings in such a proceeding. If coercion is experienced - and the party involved nevertheless did not settle the case - the court has to rule about the original claim of the plaintiff. It is possible that the party that felt coerced goes for a recusal of the judge. But then it will be necessary that the experienced coercion can more or less objectively be established and gives reason to assume the judge is no longer impartial. Only if the recusal is granted, there will be a retrial before another judge.

Compared with Dutch judicial mediation, Chinese judicial mediation is more flexible and does not follow a certain model. Chinese judges have more autonomy in deciding the timing and methods they use in mediation. Pursuant to Article 94 of the Chinese Civil Procedure Law, Chinese trial judges can legitimately claim that they can “mediate” the case. Regarding the timing, mediation permeates the entire trial process. According to the Chinese Civil Procedure law, trial judges can mediate a case any time prior to the rendering of a judgment.\textsuperscript{19} In practice, a judge’s words illustrate how mediation and adjudication intertwine in trial judges’ work: “I think the processes run through each other. They are like two ropes; they are twisted, and develop in spirals. In the end, the two processes end up in one: the end of the case. It doesn’t matter which rope leads to the end. The processes are interwoven: mediation, adjudication, mediation again… However, at the beginning, without knowing which rope will work, I have to proceed with them both and get myself prepared for them both.”\textsuperscript{20} Even if the Supreme People’s Court (the SPC) issued that “where the parties … make use of mediation to postpone the litigation, a timely judgment should be made according to law”,\textsuperscript{21} judges have full discretion.

There is no concrete regulation guiding what judges can or cannot do in the mediation process. Generally speaking, protecting “parties’ voluntariness” is the guiding principle for judges’ self-regulation.\textsuperscript{22} According to Article 201 of the Chinese Civil Procedure

\textsuperscript{17} These two goals are laid down in the articles 87 and 88 of the Dutch civil procedural law. If a settlement is not reached, the judge must decide what is the best way in moving on with the proceedings. Mostly this will be a written court ruling a few weeks later. But there are more possibilities, for instance a second round of written statements of both parties, because the case is too complex to be argued in only one written round, or a second court hearing because the first one was too short to discuss all the relevant aspects of the case, or a second court hearing combined with a judicial inspection of the site the parties (such as neighbors) are arguing about.

\textsuperscript{18} Dutch judges use more types of interventions, see Janneke van der Linden, Zitten, luisteren en schikken, Research Memoranda, nr. 5, 2008, Den Haag.

\textsuperscript{19} Civil Procedural Law, article 133 states “Where mediation may be conducted before trial, mediation shall be conducted to timely solve the dispute.” Civil Procedural Law, article 142 states: “Where mediation is possible prior to the rendering of a judgment, a session of mediation may be conducted.”

\textsuperscript{20} Chinese Interview L2013.

\textsuperscript{21} The Notice of the Supreme People’s Court on Issuing Several Opinions on Further Implementing the Work Principle of “Giving Priority to Mediation and Combining Mediation with Judgment” (The SPC opinion), Article 17.

\textsuperscript{22} Civil Procedural Law Article 9, the people’s courts may mediate the disputes according to the principles of voluntariness and lawfulness. In practice, the mediation agreement breaching the interests of third parties is often the ground for a retrial.
law, the violation of the principle of parties’ voluntariness is one of the grounds for litigants to apply for retrial.\textsuperscript{23} The breach of parties’ voluntariness can only stand when litigants can prove that they are threatened or deceived in the mediation process. However, in courts’ mediation record, disputants’ willingness will be confirmed in written form (nowadays video recorded) when they sign the mediation agreement,\textsuperscript{24} thus in practice almost no mediation agreement was revoked through retrial on the grounds of the breach of the parties’ voluntariness.

3. Methodology

The above comparison of the legal framework points to the importance of the practice. Judicial mediation, as both countries’ law regulates, allows much leeway in the judges’ discretion, and the practices are mainly self-regulatory by the judges. In this way, empirical data play a key role in understanding the practices.

This study collected its original data in an intensive way. The data were collected by the authors respectively in China and in the Netherlands in two parallel empirical studies. In the data collecting processes, the researchers shared similar methods. They did participant observation when judges were doing judicial mediation either during or after the hearing. After the participant observation, the researchers interviewed the participants involved, such as lawyers, disputants, judges, and mediators. We have 49 cases collected for the Chinese part and 100 cases for the Dutch part.

For the Dutch part, two researchers (the names are anonymized here) worked with five master students of the (the name is anonymized here) University master in Legal Research. The students were trained in observational and interview techniques. All 100 cases covered a broad range of civil cases, but not about family law. Those cases were analyzed individually and furthermore a substantial number of characteristics of each case were assembled in order to discover the threads on a level above the individual case. In each case in our research we used a questionnaire for the judge, the two parties\textsuperscript{25} and their lawyers. Then we observed the court session. Afterwards the same persons filled in another questionnaire and then we interviewed the judge and each party.\textsuperscript{26} We observed and analyzed each case with two researchers in order to insure a more objective and precise description.

The collected cases cover 37 different judges, appointed in 5 different courts of first instance around the country. Each judge was interviewed up to 3 times. We asked them why they became judges, what is pivotal in their work, what are their primary goals and what do they think is relevant to aim at during the court hearing, if their responsibilities include the exploration of the underlying interests, needs and wishes of the parties in connection with the legal standpoints, etc.

For the Chinese part, the data were collected by (the name is anonymized here), who did participant observation in 49 judicial mediation cases in 2 local Chinese courts in 6 months (2011 and 2013 respectively). The cases collected are all routine labor cases without clear political significance. For this type of cases, the Chinese judges have full autonomy over the dispute resolution process, so they are comparable with the collected Dutch civil cases. As mentioned in the legal framework, Chinese judges’ mediation work is not limited to the trial time. Therefore, the researcher also took notice of the contact judges made with the disputants outside the trial (for example, making calls from the office), if the purpose was to promote mediation.

Following the participant observation, she conducted 96 semi-structured interviews. 35 interviews were with litigants, 27 interviews with lawyers and 34 with judges, court staff and officials. As the fieldwork was conducted on a daily basis, the researcher often did several semi-structured interviews with one judge on different occasions. Most interviews with disputants and lawyers took place directly after the mediation sessions. If the parties changed their minds and reached an agreement a few days later, the researcher conducted a follow-up interview. The interview time scales varied: with judges, the interviews lasted on average 3 hours or more. With lawyers, the interviews were shorter, but still about 40 minutes to 2 hours; with workers and company representatives, the interviews lasted approximately 20 minutes. All of the notes were taken during the interviews while the informants were answering the questions. Since litigants are not obligated to attend the court hearing in China, the researcher could not interview those litigants.

4. Comparing Dutch and Chinese Judicial Mediation in Practice

The Similar Strategies and Techniques in Judicial Mediation

Judges’ strategies and techniques in judicial mediation we observed in China and The Netherlands show great resemblance.

\textsuperscript{23} Pursuant to Articles 15 and Article 16 of the SPC opinion, the judges should conduct mediation upon the parties’ own free will. The SPC’s Code of Conduct for Judges (2010) Article 39 (2) also expressly prohibits mediation against the will of the parties.

\textsuperscript{24} Chinese Interview F2016.

\textsuperscript{25} Upfront we asked both parties for cooperation, but we included also cases if only one of them did (43% of all cases). Mostly the lawyers cooperated if their client did.

\textsuperscript{26} These were semi-structured interviews. So the judge was interviewed after each court session we observed. And also we conducted an interview with each party cooperating with our research (so depending the cooperation one or two interviews more). In total 257 interviews after the hearing, sometimes immediately afterwards (live), sometimes one day or a few days later (by phone). The time scale of the interviews varied from almost 20 minutes to more than one hour. We recorded all interviews. Of course all interviews were held separately. For budgetary reasons we did not interview the lawyers.
Facilitating Negotiation

In this type, judges simply intended to allow the parties to communicate with and understand one another. They (implicitly) assume that the parties are intelligent, able to work with their counterparts, and capable of solve the dispute by themselves. Since mediation is considered as part of the trial process, we observed judges facilitating negotiation in almost every single Chinese and Dutch trial. In the Dutch research we counted and recorded every such attempt the judges made. In some cases, we observed up to 25 or more of those actions in one single trial.

The intensity of the facilitation differs from case to case. It can start and finish by no more than giving a platform to the parties to negotiate. For example, after hearing, one Chinese judge said, “Do you still have any intention to settle?” When one party expressed reluctance in settling the case, the judge said, “Since one plaintiff does not want to, the trial is adjourned.” In another case, the Chinese Judge said: “Both parties, would you like to settle?” Worker’s lawyer answered: “We want to, but the company seems to be applying the litigation strategy and trying to delay the process.” The judge asked: “Defendant, would you like to mediate?” The defendant’s lawyer said: “So far, the company doesn’t intend to settle the case. It’s not just about the plaintiff, it’s not just about money…” Then the judge announced: “Ok, ok, you go back and ask for the company’s offer for mediation.”

Comparing with Chinese judges, some Dutch judges are more reluctant to put pressure on the process of judicial mediation and tend to limit their interventions to a minimum. Especially if the judges do not yet know what the outcome of the case in terms of a court ruling will be or, the opposite, if they are very much aware of what the outcome will be and are convinced that one of the litigants is fully and totally right.

Other than providing the platform, judges also clarify and enhance communication between the parties in order to help them decide what to do. For example, we observed that the Dutch judges asked whether the parties were willing to continue the negotiations, if they negotiated before the trial; what was needed for the disputants to get the discussions back on track; whether the disputants were sure everything necessary within their negotiation discussions had been said and done; what hinders their wishes to settle; whether the judge could be sure that there was not a single chance left for settlement. Facilitating negotiation is very common in the trials. In these court sessions, if the judges had reason to assume the parties were still willing to settle, but had not been not successful yet, the judges would leave the disputants continuing their negotiation. In short, when judges facilitate, they aim at initiating the negotiation between parties, encouraging the continuance of such communication, and closing the negotiation properly.

Narrow Intervention

The “narrow” intervention means that the judges mainly focus on the litigation related issues. Unlike facilitating negotiation, the judges here assume that the participants want and need their help and guidance to ground settlement. As judges, they are more than qualified to do so. The practices may be discerned into three types, the judges (1) propose compromise agreements, (2) assess the strengths and weaknesses of the litigation and the alternative, and (3) inform the litigants the outcome of the litigation.

Judges sometimes propose compromise agreements. When the disputants come very close to a settlement, many judges propose, with various degrees of directives, a figure or a range upon which they think a reasonable settlement could be reached. A Dutch judge for instance carried out a judicial mediation in three stages. First he said: “You have heard what was said in the first part of this court session gathering information about the facts of the case. This information may shed light on the case and may influence your views about your positions. Do you, given all these possibilities, want to make an effort to settle?” The parties were willing to give it a try, but after the discussions in the hallway the litigants came back without an agreement. Then the judge himself explicitly evaluated the parties’ positions and offered to ‘call a spade a spade’ if the parties still could not settle. Then the parties tried to settle again in the hallway, yet still without success. Then the judge entered the third stage: on the spot he calculated the total amount, including the interest, and said: “I end up at about € 2.660,- or something”. At exactly this figure the case was settled a minute later in the courtroom. A similar scenario happened in Chinese courts. After the two parties were going back and forth for a long time, the judge said: “Now, you 8000 yuan, you 10,000 yuan. I make a decision for both of you: 9000 yuan. How do you like it? Both parties, you have spent the whole afternoon dealing with the dispute, don’t let just 1000 yuan

27 Leonard L. Riskin, Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negot. L. Rev. 7 (1996);
28 In Dutch case Leeuwarden 26 we even counted 30 procedural actions.
29 The judge mentioned “the trial is adjourned”, since the mediation is considered as part of the trial process. Chinese Case 40(O).
30 Chinese case 19.
31 Dutch case Amsterdam 12. The explanation is that judges cannot steer effectively if they do not know (yet) in what direction to steer. If the judge does not yet know who has the strongest case, it would be a guess to say to one of the litigants to consider a settlement because his/her case is not very strong.
32 Dutch case Zwolle 07. The explanation is that judges do not want to cause the litigant who is in the right making concessions. These judges believe it is better to give a court ruling than to steer towards a compromise. Other judges prefer to give their provisional view on the matter - in order to steer a possible settlement, so as a part of their judicial mediation - even if this is strongly in favor of one of the parties, for instance in Dutch case Amsterdam 13.
33 Dutch case Leeuwarden 04.
get in your way... I mean if you can solve the dispute soon, you’d better do it.”

It appears sometimes that the judges themselves are negotiating with one of the parties, just to keep this party moving in the direction of the last bid of the other. For instance, in a Dutch case the defendant offered to pay off the debt to the plaintiff with € 50 a month. The judge proposed to lower the total amount and to increase the monthly payment. The judge said to the defendant: “If you make it a 100 euro per month, I think that would probably convince the plaintiff to make a deal with you.”

Next, owing to their legal training, many judges assess the strengths and weaknesses of the litigation and the alternative. The information first covers the uncertainty of the litigation proceeding and what litigants should expect from the coming procedures. For example, when it is necessary to give (further) proof, or to ask an expert opinion about a relevant aspect of the case, the parties should be aware of the time and costs the rest of the proceedings will take. The personal circumstances of the parties can also be relevant for the choice to make, for example, a Chinese judge pointed out a Chinese worker’s extremely limited capacity for litigation, and the judge provided information on likely consequences of non-settlement, as well as the costs of litigation which include expenses, delay, and inconvenience. The judge also can point out that the on-going proceeding could be a psychological burden for both parties. For example, the judge said to the plaintiff, after a bid of € 7.500 of the defendant: “If you think that this judge is steering too much towards a settlement, then you can go for a verdict. But the next question then is: are you going to collect the money? (...) A verdict of € 14.000 may be more, but can you actually collect this amount?”

Similar scenario happened in Chinese court when a Chinese judge said to the plaintiff: “If the judgment comes to enforcement, it’s highly likely that you cannot collect anything. It doesn’t matter whether you prefer a judgement, but what really matters is what is in your best interests.”

Thirdly, the judges can also provide (provisional) judicial opinion on the litigation. The opinions can be on the final judgement, or a key legal issue within the case. A Chinese judge spoke of the legal features of how the parties were related: “I tell you, your relationship is a labor relationship. (...) I think your evidence is not strong enough to overthrow this labor relationship (then the judge talked for 3 hours about why the legal relationship is a labor one).” In one Chinese case, after failing to mediate the case several times, to enhance his authority, the trial judge asked the company to come to court and showed them the draft judgment without the official stamp and said, “If you are not going to settle, this is how I’m going to rule.” Then the company accepted the proposal, and the case was closed through a settlement. In a Dutch case the judge gave her provisional view during the court hearing on the principle claim: “This is a written agreement between the parties about the amount that was actually paid. This agreement is signed by the former chief executive officer of the defending company, who was in charge then. That is hard proof and the plaintiff may rightly rely on this written agreement.”

Of course we also observed the judges combined the all strategies mentioned above, sometimes within a few lines. For example, in a Chinese case the judge proposed an amount he thought was reasonable and at the same time gave an insight of the court ruling ahead, pointing at similar cases: “I’m the judge who just had the trial with you. I feel 8000 yuan is fine, you can accept it, can’t you?” Actually, we have been dealing with a large number of cases similar to yours. If you are not going to mediate now, it will be more difficult when the judgment is made.

All these (provisional) views of the judges, be it broad and specific or smaller and with more space for interpretation, can be relevant for the parties to determine their position in the negotiations about a settlement, so expressing these views in relation to this negotiations comes down to actions and interventions of the judge in the context of judicial mediation.

**Broad intervention**

“Broad intervention” means the judges’ focus is on interests broader than the litigation, but which might be influenced by the resolving of disputes. As discussed by Prein and by Giebels & Euwema, when two or more parties feel dependent on each other, there is a conflict if these parties have aims, aspirations, interests or values that cannot be unified. With this type of interventions the judges are searching for possible underlying broader issues, which lie outside the legal dispute and block a settlement. The

34 Chinese Case 28.
35 Dutch case Leeuwarden 22.
36 What caused the ships motor to fail: a default in the design or insufficient maintenance? Does the ventilation of the house meet modern professional standards?
37 Chinese Case 10 (O) (Then the judge explained how the plaintiff should present the case in litigation, i.e., how to explain the legal grounds, how to make an argument in court.)
38 Dutch case Leeuwarden 05.
39 Chinese Case 8(O).
40 Chinese Case 11(O).
41 Chinese Case 45(l).
42 Dutch case Amsterdam 13. A settlement was not reached in this case, by the way, for reasons unknown to the researchers.
43 Chinese Case 24(O).
44 See H.C.M. Prein, ‘Conflict’, in A.F.M. Breninkmeijer et al., Handboek Mediation, 2013, p. 69 and see also E. Giebels & M. Euwema, ‘Conflict, belangen, (de)escalatie en partijen in de rechtszaal: een psychologisch perspectief’, in M. Pel & J.H. Emaus (eds.), Het belang van belangen, 2007, p. 22. A shorter definition is the following; there is a conflict when someone feels obstructed or frustrated by another, see M. Pel, ‘Belangen in de strijd en de tijd, belangenhantering in de dagelijkse praktijk’, in M. Pel & J.H. Emaus (eds.), Het belang van belangen, 2007, p. 96. In her definition of ‘conflict’ personal and/or affectional aspects play a role, besides aspects of content and cognition.
underlying issues can be a simple need of one party for recognition by the other, the need to be trusted again, the need for an apology, or the need of restoring open communication.

In both countries, judges do pay attention to the underlying issues. For example, in a Dutch neighborly dispute, although the litigants’ two claims were only limited to a couple of overhanging branches and a wrongly placed fence, the judge gave space to the wish of both parties to talk about the giant oak tree, too much neighborly noise and first and foremost about what the neighbors/parties were irritated about in their relation. The judge helped the litigants expand the discussion to all neighboring conflicts, instead of merely focusing on the submitted claims. In a case about a domain name of an internet site, the judge brought into the discussion if the defendant would be interested to give up his domain name if the plaintiff would arrange a professional upgrade of the defendant’s internet site. This upgrade was not a part of the case of claims as formulated in the legal case, but could have served the underlying interest of the defendant.

However, this broad intervention did not always work, since the litigants might not be willing to address the underlying issues to a judge. The following dialogue demonstrates such a scenario. The judge: “What would a settlement mean to you?” Plaintiff: “Nothing.” Judge: “What would you rather have?” Plaintiff: “A verdict.” His lawyer explains that his client feels first tricked and then abandoned by the defendant. Judge: “Would it be possible to restore the relationship?” Plaintiff: “The defendant left it all to sort it out for myself. That is the reason we are sitting here [in the courtroom]. I still cannot cope with that, so to say.” Needless to say to say a settlement was not reached in this court case. A similar scenario also appeared in China. A plaintiff was suing the company to terminate the labor contract, claiming that the social insurance as a mandatory clause for a labor contract was missing. However, during the judicial mediation, the judge found out the real reason for him terminating the contract was that he felt pushed aside by other managers of the company, and he was using the suit as a leverage for bargaining with the firm. Since he was still bargaining with the firm, there was no way that he would make a compromise in the present case. By expanding issues under discussion beyond the litigation related issues, those judges do more than adjudicators, but tend to show inclination to play more active role in dispute resolution.

5. The Difference in Litigants’ Reaction to Judicial mediation

Although the practices and interventions observed in the two countries show convergence, the interviewed litigants show divergent evaluative remarks to those practices. The interviewed Chinese litigants tend to form a less positive opinion to judges’ roles in the judicial mediation and in the litigation process than the Dutch litigants.

First, in the mediation process, the interviewed Chinese litigants tend not to trust the judges’ evaluative words said in the judicial mediation. Among 12 lay interviewees who all experienced the narrow intervention, three of them trusted the judges’ words, whereas nine told the researcher that they doubted what the judge had said about the result of the case. All of the disputants mentioned that they trusted other evaluative opinions more than the opinions from the adjudicators. The “other” evaluative opinions included, for example, an earlier labor arbitral award and their own understanding about law. Some of the disputants said “I don’t think the judge has a solid legal ground for his interpretation”, or said “The judge can say anything he wants in mediation. I don’t believe what he says”. The lawyers seemed to trust the judges’ words even less: “The judge would say anything to make me settle. That’s it.”

Next, the interviewed Chinese disputants and lawyers also showed some signs of mistrust of the ongoing litigation process. Even if the judge gives the exact result of the judgment, the lawyers cannot trust it fully because “the judges could be bluffing”. The lawyers have their own perception of cases, “We cannot tell whether the judge invented a story or told the truth, so we can only count on ourselves in the dispute resolution process.” When the lawyers were asked to guess whether the judges would adjudicate in the way that they said during mediation if the mediation fails, the lawyers said, “Not necessarily. We need to judge

45 Dutch case Utrecht 03.
46 Dutch case Den Bosch 11.
47 Dutch case Utrecht 18.
48 Chinese case 14.
49 In Dutch civil court proceedings the litigation and the settlement are not different processes, but combined at the same court session, as is explained above in this paper, see the section about the legal framework.
50 Chinese Case 9(F); Chinese Case 10(F); Chinese Case 24(W).
51 Chinese Case 1(F1); Chinese Case 1(F2); Chinese Case 11(W); Chinese Case 3(W); Chinese Case 6(W); Chinese Case 48(F); Chinese Case 11(F); Chinese Case 28(W); Chinese Case 43(W).
52 Chinese Case 1(F1); Chinese Case 28(W).
53 Chinese Case 11(W).
54 Chinese Case 1(F1).
55 Chinese Case 6(W).
56 Chinese Case 42(WL).
57 Chinese Case 37(F).
58 Chinese Case 24(L); Chinese Case 20 (L); Chinese Case 10 (L).
59 Chinese Case 44(L).
60 Chinese Case 4(L).
for ourselves."61 Another example is the case that ended up in a fierce physical collision, the worker thought that she had given up a great amount of money based on the judge's opinion, and the judge promised to settle the case on that day. But the other party did not accept the proposed settlement result by the judge in the end. With the failure of mediation, the worker thought the judge was corrupted, and she believed that the coming judgment would be against her interests, so she got physical to get what she thought was fair.62 In fact, as far as the researcher knows, the judge was not bribed at all, but only wanted to close the case as soon as possible.

These results were not found in the Dutch research; on the contrary. Overall there is a positive and interconnected evaluation of litigants of the interventions of the judge both in the litigation phase as in the judicial settlement phase of the court session. More specific, the (provisional) view of the judge on the case is one of the most important incentives for disputants to settle. This means that the litigants and their lawyers trust that the provisional opinion is sincere and that, if it should come to that, this opinion will also be given in the written verdict later on. In other words, everybody expects that the provisional opinion will stand. In only one case, the plaintiff mentioned the doubt in the interview: “Yes, this (the opinion of the judge on the matter) was the determining factor (to settle). Stupidly enough, in hindsight. [The researcher: Why?] Because there is not a 100% certainty that the judge will indeed rule the same in his verdict. He could have ruled that further proof (by the defendant) was necessary. In hindsight I have not used my last chance (on a better result).” However, later in the interview the plaintiff had overcome his doubt: “Of course then the judge has to stick to this opinion. Otherwise you risk damaging the interest of people. I assume that the verdict would have been precisely the same as was the basis of our settlement, that is the opinion the judge gave now.”63

6. Analysis of the Comparison

Given the similarities in practices and the differences in feedback, the question is why similar judicial mediation leads to different evaluation of the disputants. Apparently there are differences in handling cases by the judges in these two countries that are more determining in this respect than the similarities. In this section, we try to understand why in the observed procedures, Chinese judges' evaluative words were not completely trusted both during the mediation process and during the litigation process.

Why Some Chinese Disputants Stop Trusting Judges as Judicial Mediators

Procedural justice is a key to keep the satisfaction of the litigants.64 An important way to do that is to convince the other party (particularly the losing one) that the neutral third is not working together with the winning one.65 As Shapiro mentioned, the logic of the courts' role in dispute resolution of “preventing the triad breaking down into two against one”.66 There are many reasons why the neutral third could be working together with one party: the neutral third can develop his/her own interest or he/she was bribed by one party. If the neutral third was not bribed, his/her own interests must be related to his job such as “cleaning dockets” or that the judge finds it inconvenient to deliver a judgement.

Compared with the Dutch judges, the neutrality of the observed Chinese judges is damaged in two ways. First of all, with some Chinese courts/judges' interests of promoting mediation, those judges do become interested thirds instead of neutral thirds in dispute resolution, which creates mistrust in the social context. Second, this mistrust is magnified in the eyes of litigants through two different mediation settings in China compared with the Netherlands, namely (1) the repetitive mediation sessions that happen at every stage of litigation; and (2) caucuses.

The Interests Embedded in Mediation

Judges in both countries believe that mediation can solve disputes better than adjudication for litigants, for example, the compliance rate of the mediation agreement is higher comparing with that of the judgements.67 However, it is undeniable that mediation also benefits courts' interests. Mediation helps to clear dockets and accelerates the speed of case solving. As an American empirical study has found, courts' institutional interests help explain why appellate courts impose ADR participation notwithstanding mixed results on ADR efficacy.68 In the Netherlands, Dutch courts' budget depends on the yearly output number of cases, and party-settlement during the hearing is the most efficient way to solve the court cases.69 The realization of courts' interest counts for a reason of the global surge of judicial mediation.

However, Chinese courts and judges' interests regarding mediation are more profound and complicated. First, some Chinese judges also use mediation to avoid some of their judgments being held accountable, or they use mediation to avoid making

61 Chinese Case 4(L).
62 Chinese Case 21(O).
63 Dutch Case Leeuwarden 04.
65 Niklas Luhmann, Lob Der Routine, in Politische Planung 113 (Anonymous 1971)
67 For The Netherlands after 3 months 55,5% of the verdicts were fully complied with against 72,4% of the settlements. After 36 months the percentages are 73,9% and 89,1%. The research included only cases ended in the second half of 2004. See R.J.J. Eshuis, De daad bij het woord, Het naleven van rechterlijke uitspraken en schikkingaspraken, Research Memoranda 2009/1, p. 45.
69 See the end of the above section.
difficult judgments. As one judge said, “If you see a judge trying hard for mediation, he must be faced with a difficult case.” The tendency of avoidance comes from the quality of judges and the accountability of judges derived from the bureaucratic control of the judiciary. Chinese judges’ work is not only evaluated through legal channels, such as case appeal, but also through a bureaucratic evaluation to show if their cases reached certain measurements, such as the time they spend on solving the case; how many cases were overruled by higher level courts; how many cases’ litigants went petition to higher authority etc.. The result of such an evaluation has a direct impact on grassroots courts’ operation and on the career path of the judges, and the bureaucratic evaluation determines the promotion of judges, the disparity among judges’ payment scales, personal honors and other social benefits. This is clearly different from the Dutch judges who are internally independent from their courts, and whose work is only evaluated by the legal channels.

In this context, some Chinese lawyers feel that concluding the case through mediation means “taking care of the relationship with the court and doing the judge a personal favor”. As one lawyer said, “The judges have their evaluation system, and making some verdicts are not beneficial for them. If the law is ambiguous, then it is logical that they prefer not to take risks. … since they are under great pressure to deal with cases.” The lawyers believe that in order to uphold sustainable relationships with the judges, agreeing to mediation is one of the favors that have to be done.

Secondly, personal relationships (also known as guanxi, its extreme form is corruption) also motivates some judges into mediating some cases. If a disputant has some personal relationship with the judge, then the judge is biased for this party. If, during the trial, the judge feels like the coming judgment is not in this party’s interests, the judge is more likely to persuade the other party to settle or to spend more time on mediating. This is confirmed by two cases: case 20 and case 27. In case 20, the judge told the researcher that if it were not for he had some guanxi, he would not have spent up to 60 minutes on mediation. The other example is case 27, in which the defendant had some informal contact with an official in court. After the mediation, the plaintiff’s lawyer told the researcher, he felt it was clear that the other party had guanxi with the judge, he said “The judge cannot adjudicate in a way that is significantly biased towards the other party, because even if they do, the intermediate court will overrule the judgement in an appeal. But if it’s mediation, then it’s disguised by the disputants’ consent to the result. In my case, the law and facts are clear, so the judge tries to mediate the case.” The mediation result was more in the interest of the party with a personal relationship with the judge.

The Timing of Mediation Sessions

The above-mentioned interests influenced judicial mediation through different mediation settings in the two countries. In the Netherlands judicial mediation only takes place at a court hearing. Although it is possible to order such a hearing with the attempt of a settlement as its only purpose, in practice these court sessions are only convoked with a second purpose at the same time: gathering further information in order to come to a written verdict later on. This combination almost spontaneously leads to the practical order that in the first part of the court session the case itself is discussed (gathering information), followed by the second part which is about a possible settlement. The content of the information gathering part is of course connected with the settlement part: the parties hear each other’s arguments and reactions, their lawyers can judicially interpret what the parties are saying as can the judge, the judge could probably give a (provisional) opinion about the case, based on an evaluation of all the information, which opinion helps the parties positioning themselves in possible negotiations.

China is another case. Since the Chinese Civil Procedural Law allows mediation at any stage of the litigation process, many cases have already been mediated by independent mediators at the court-annexed mediation, or by judicial clerks before they meet the trial judge. During those mediation sessions, the litigants have already received many evaluation opinions from everyone involved (as in China, evaluative mediation is common).

After the case reaches the trial-division, some judges started contacting the litigants for mediating from the moment they received the files, without knowing too much about the case at stake yet. The judges’ mediation intervention techniques can change as they gather more information about the dispute. This brings the issue that judges began with vague and indefinite opinions to the files, without knowing too much about the case at stake yet. This is confirmed by two cases: case 20 and case 27. In case 20, the judge changed his suggested settlement amount to the disputants a couple of times during the two trial sessions. So the

---

70 Chinese Interview X2013.
71 Xiaolin Peng & Jun Zhang, “Zhixiao” Hua Cui Hexie Guo (“Case Quality Evaluation Flower Brings Hamounious Fruit”), Legal Daily, 11-12-2012, 2012, at 009; Zhongfa Yang, Shaoxing: Zhua Guanli Qiangduiwu Tizhixiao (Shaoxing: Improve the Management, Enchance the Personal Growth and Upgrade the Case Quality), People’s Court Daily 007 (2014); Xingjun Zhao, Zi Gong; Qidong Zhiqianyuesheng De “Zongkaiguan” (Zi Gong: Turn on the Switch to Upgrading the Case Quality), People’s Court Daily 008 (2014); Yedan Li, Why Chinese Trial Judges Opt for Mediation, in Rechtspleging En Rechtsbescherming 221 (Reyer Bass et al. ed., 2015)
72 Chinese Case 39(L).
73 Chinese Case 24(L).
75 Chinese Case 20(J).
76 Chinese Case 27(L).
disputant said to the judge, "Last time you told me you would grant me 9,000 yuan if the verdict comes out, so you suggested that I settle with 7,000 yuan. Now you say 6,000 yuan? You are so inconsistent."77 The judicial mediation activities can last until the moment when the verdict was ready.

The one-shot mediation setting in the Netherlands leads to fewer problems than what happens in the Chinese practice. The judges can be specific without relying on general arguments, and the chance of their later-on change of opinion during the settlement phase of the court session is minimal. As such, unnecessary vague arguments and changes in argument were seldomly heard in these court sessions. But if it happened, it immediately led to a problem. For example, when a Dutch litigant was explaining why he felt coerced into a settlement by the judge, he said: "After the adjournment (of the court session) during which we reached an agreement, the judge made me promise I would stick to that agreement. After that he admitted he was mistaken in his provisional opinion, in my disadvantage."78

The above findings from the Netherlands and from China show that judges’ ever-changing opinions are detrimental to litigants’ perception on judicial mediation.

Caucuses

Caucuses undermine the neutrality of the mediation session since one party can impose impact on the judge without the presence of the other party; the other way around, the judge has too much power to interpret messages, define issues, and engineer a result. Since caucus is against the principle of audi et alteram partem, it is forbidden in both countries’ trial processes. However, when it comes to mediation, it is another story in the Chinese practice.

We have never observed caucuses in the Dutch judicial mediation practices. As we stated before, this would be a deadly sin against the procedural principle of audi et alteram partem (not only applied in Holland, but also by the ECHR). However, caucuses often occurred in some observed cases of Chinese judicial mediation, and hardly any information was exchanged afterwards. These caucuses were always initiated by the judge, without asking if the parties agreeing with it. The judges often started caucus by asking the other party to step out of the mediation room. The most important strategy used in caucuses is to emphasize the weaknesses of the present party’s case. In some judge’s words, he "lowers the present disputant’s expectations"79 by pointing out the weak points of the present party and the strong points of the other.80 As one judge elaborated, "If the defendant is losing the case, then I ask the plaintiff to give up certain claims to make them compromise."81 Another judge said, "If the mediation offer has exceeded the adjudication result, yet the obligee doesn’t want to give in, then I would say to the obligee, ‘If you don’t accept the mediation result, I might deliver a verdict that is less.’ Or to the obligor, ‘If you don’t pay this, you might need to pay more or even lose the case completely.’"82 For example, in Chinese Case 12, the judge kept telling the worker that it might not be easy to get his compensation according to the present evidence, while telling the factory that the termination of a labor contract is illegal, so they have to pay anyway. This technique gave the impression to the disputants that the judge is always talking for the other litigant.

The usage of caucuses heavily sabotages the neutrality of those Chinese judges in judicial mediation. As a disputant said, "One party left the room while the mediator was talking to the other one. The mediation sessions are back-to-back. We don’t know what the other party thought. Both parties can discuss face-to-face, but the judge dominates that process. He didn’t allow us to meet the other party. We are all protected by the judge and can only meet the other party in a hearing. The mediation process is not so transparent. We don’t have adequate information, how can we make a compromise?"83 According to a lawyer who specializes in labor disputes, disputants often complain about the lack of transparency in mediation. The lawyers said, “Many workers questioned why the judges speak for the other party. Some workers even believe that they are all corrupted. All officials shield one another. Even if the workers reached an agreement through mediation after all, they still don’t appreciate what courts do, but think they themselves sacrificed their interests to make a compromise."84 After caucuses, some workers also echo this concern and have the suspicion that the judges are biased towards the other party.85

Dutch judges are inclined to give a nuanced exposé in order to leave room for both parties to settle in their provisional opinions: both parties preferably need space to move in negotiations. But both parties hear the same exposé and judges are - as far as we can see - sincere in what they are saying. Exactly this sincerity makes some judges more reluctant to give a provisional opinion if they think one party is fully in the right: they do not want to suggest otherwise, but cannot leave enough room in their exposé.86 If insincerity is suspected the reaction of the Dutch litigants or lawyers is negative as it shown by those Chinese cases. A Dutch

77 Chinese Case 21 (O).
78 Janneke van der Linden, Zitten, luisteren en schikken, Research Memoranda 2008/5, p.56.
79 Chinese Interview W2013.
80 Chinese Interview P2013.
81 Chinese Interview N2013.
82 Chinese Interview X2013.
83 Chinese Case 1(F). Another example, “I haven’t seen the defendant, how can I say if I’m satisfied. The mediation should be held between two parties; altogether, this is what mediation should be”. Chinese Case 19(W).
84 Chinese Case 26(L).
85 Chinese Case 26(W); Chinese Case 28(W).
86 See also footnote 23.
Why Some Chinese Disputants Doubt the Fairness of the Trial?

The procedural issues in the judicial mediation further affect the perceived fairness of the trial should mediation fail. Most existing research studies attribute the judges’ potential bias in litigation to the information flows from the previous mediation session to the official hearing. In the Netherlands however, the impact is slight, as the trial phase always precedes the mediation phase, and normally the judges have already come up with a clear vision of the judgement when they are doing judicial mediation. However, we argue there is another important reason why mediation could affect perceived fairness of the trial.

We find both Dutch and Chinese litigants have difficulty in separating judges’ adjudicating role from the judges' mediating role. In China, among the 26 interviewees who talked about this distinction, 15 admitted that they did not understand the difference at all. Ten interviewees focused on direct observations of the judges’ performance, for example, “adjudication means the parties present their cases with evidence, while mediation means both parties make a compromise, and solve the dispute anyhow.” While the trial happens just once.” The judge is serious in a trial, but a bit easy going in mediation… I can feel the difference from her tone and her attitude." All the interviewees believe that the judges were mediating in their role as “judges”, which means their authority was derived from the courts and involved applying rules and possibly adjudicating later.

The litigants’ confusion of role-change leads to different consequences. For Dutch litigants, their being fairly treated in the litigation process phase of the court session and the strong connection between the litigation phase and the settlement phase can feel the difference from her tone and her attitude.

In the official hearing. In the Netherlands however, the impact is slight, as the trial phase always precedes the mediation phase, and normally the judges have already come up with a clear vision of the judgement when they are doing judicial mediation. However, we argue there is another important reason why mediation could affect perceived fairness of the trial.

In Dutch litigation there is a lower chance of this occurring since judges point out strong and weak points of both parties only after the official hearing. In the Netherlands however, the impact is slight, as the trial phase always precedes the mediation phase, and normally the judges have already come up with a clear vision of the judgement when they are doing judicial mediation. However, we argue there is another important reason why mediation could affect perceived fairness of the trial.

In Dutch litigation there is a lower chance of this occurring since judges point out strong and weak points of both parties only after gathering all information about the case and in the presence of both parties. So if the mediation fails, there is a lesser chance of a verdict that is the contrary to what was said by the judge during the settlement phase of the court session.

7. Conclusions

In this article, we provide a more context-based and practice-based understanding and comparison about a single norm “judicial mediation” in two different contexts: a mature legal system that tries to expand judges’ work, and a developing legal system where the formal litigation procedure is under construction. Dutch and Chinese judges are both promoting settlement through the skills and techniques that are common in practice, from providing a platform for settlement, evaluative opinion on the litigation related issues, to the efforts on promoting mutual understanding on broader concerns. We try to understand why experiencing relatively similar judicial mediation process, Dutch disputants are satisfied, while the Chinese ones are less, thus to shed the light on the problems of the Chinese mediation process and the differences in the procedural justice perception of the disputants.

87 Janneke van der Linden, Zitten, luisteren en schikken, Research Memoranda 2008/5, p. 56.
88 Chinese Case 8(W)
89 Chinese Case 9(W)
90 Chinese Case 20(W)
91 Chinese Case 9(W); Chinese Case 10(F); Chinese Case 11(F); Chinese Case 25(W); Chinese Case 28(F); Chinese Case 31(F).
92 In the Dutch questionnaire we put forward 11 statements about elements of perceived procedural justice during the settlement phase of the court session, such as voice, due consideration and respect. The vast majority of the litigants were positive about all these elements. In the interviews we asked them about their answers in the questionnaire. Hardly no one made any distinction between the two phases. In fact most of the time the perceived procedural justice proved to be based on what was said and done during the first phase of the court session, the phase about gathering information to be used in the written verdict later on.
on how to understand thus maintain litigants’ positive experience with in judicial mediation in a developed legal system, as in the Netherlands, and on how to improve it in a developing legal system, such as in China.

It finds, in the Netherlands, the judges are independent and have established reputation, thus even though the judges interests realized through judicial mediation, such as cleaning dockets- known to the litigants- do not harm their neutrality. However in China, some Chinese judges do promote mediation owing to their own interests or the one day’s guanxi to the judge. In the mediation process, the litigants’ doubt is not mitigated but enhanced through the caucuses and continued mediation throughout the whole court procedure. This doubt is furthermore transited to the disputants’ perception on the litigation, since Chinese litigants- similar to the Dutch- have difficulty in separating judges’ adjudicating role from their mediation role. They treat judges’ judicial mediation behaviors as part of the trial process.

This study sheds light on the following three aspects of our understanding and evaluation of the multi-tasking judge that is becoming a trend in the developed world and elsewhere. First of all, the opinion that judges can absolutely not mediate the cases they are trying is proven unconvincing by the promising results of the Dutch judicial mediation practice. However, it does not mean some Chinese judges as we observed should continue to mediate the same way as they did. The mistrust of the disputants is a combination of the judicial environment, judges’ motivation, and how mediation is conducted. The key challenges are on the one hand, judges should not have interests that are realized through the black box-like mediation; on the other hand, judges’ behaviors in mediation should be regulated by ethical codes and procedural regulation. Any arbitrariness and the unregulated caucuses will eventually backfire with regard to the litigants’ perception on the justice served by the Chinese courts.

Second, to embed judicial mediation, one jurisdiction’s context should be carefully taken into account. In the country like the Netherlands, judicial mediation happens in the context that judges are independent without much bureaucratic evaluation, and no documented cases of bribed judges exist in modern history. Our study on the Dutch part showed no loss of the neutrality, even though litigants know that a settlement brings interests -such as cleaning dockets- to the judge.93 However, Chinese judicial mediation functions in a different context; judges do not only have their own interests of cleaning dockets and avoiding adjudicating difficult cases, but also because guanxi or judicial bribery is an important challenge facing the Chinese legal system.94 As a litigant, it is impossible to find out why the judge is promoting mediation, for both litigants’ own interests, for judge’s own interest of closing cases or avoiding making decisions for complicated cases, or for the interests of the other litigant who has guanxi- if not bribery- to the judge . In particular, the repetitive mediation and caucuses enhance the disputants’ suspicion that the judges are trying hard to promote mediation because of ulterior reasons, even though in most cases, we did not observe any guanxi attached to the cases. This is the mistrust in the context of the Chinese judiciary, a fundamental challenge that does not face the Dutch judiciary. In this way, similar judicial mediation practices lead to contrasting outcomes.

Next, judicial mediation happens under the shadow of litigation process, and should not deviate from the requirement of due process. Many judges would like to be therapeutic judges, however, our study has shown, litigants do not treat judges as mediators, and they cannot separate the judicial mediation from the formal legal process. This means any “informal” practices happened in the name of judicial mediation, are interpreted by the litigants as part of the formal trial (or, the whole litigation process becomes arbitrary). For example, the usage of caucus in China deviates from the audi et alteram partem, and it eventually sabotages the litigants’ perception on both judicial mediation and litigation.

Overall, this article sheds light on our understanding of behaviors in the name of “mediation” global wide. The lessons we learn from the comparison reminds us, when we are evaluating the global trend or try to learn from other jurisdictions, we need to put that into a country’s context. In particular, more empirical evidence needs to be collected when we are observing informal judicial behaviors in developing legal systems.

93 We did not ask in the questionnaire if the litigant assumed a personal interest of the judge in reaching a settlement. A few times the parties in the interview spontaneously said they assumed that the judge had his/her own interest in a settlement, in terms of reducing the workload, but then the parties nevertheless did not criticize the sincerity of the provisional view of the judge on the case. They tend to see it the reducing of the workload for the judge more as a side effect of their settlement, a nice bonus for the judge, but not an incentive to actually settle. We did ask the judges though, in the questionnaire after the court session, if their efforts to make the parties settle were influenced by the complexity of the particular case. Sometimes judges answered that this influence indeed existed. In the questionnaire the Dutch judges filled in after the court session we asked if the complexity (high/normal/low) of the case influenced the effort they made (high/normal/low) to make the parties settle. Out of exactly hundred questionnaires only 2 times the answer was given that the high complexity of the case made the judge put more effort in a settlement and 3 times the opposite was answered (low complexity, less effort).

Book Review: Courts in Federal Countries. Federalists or Unitarists?


Niels Graaf, Montaigne Centre, Utrecht School of Law, the Netherlands

Over the past 20 years, there have been indications that scholarship on comparative judicial practices is undergoing intellectual revision. Besides disciplinary boundaries becoming more blurred, there is a drift toward studies of ‘dialogue’, not only between courts, but also between courts and politics. The most notable study involving this subject thus far is Tim Koopmans’ groundbreaking Courts and Political Institutions (Cambridge 2003).

Courts in Federal Countries: Federalists or Unitarists charts a new course to this brand of scholarship. Nicholas Aroney and John Kincaid’s collection of essays aims to add greater insight into the role of judicial power in relation to federalism. To that extent, this book examines whether high courts in federations lean in a unitary direction by stimulating the powers of the general government, or in a federalist direction by fostering powers of – what is in a name - regions, cantons, Länder, or provinces.

A great part of this latter task is left to Aroney and Kincaid, who summarise, compare, and analyse the work of the collection’s contributors in their conclusion. They observe that the predominant leaning of 11 of the 13 selected high courts has been in favour of the general government - although no contributor explicitly frames his or her high court in this way.

While Aroney and Kincaid intimate that this might have something to do with the design of the particular constitutions, they draw our attention to the importance of attending to the basic constitutional foundations of each country’s federal system. The point is made that these conceptions, underlying the federal polity, are important in shaping the orientation of courts in a federalist or unitarist direction. These conceptions are influenced by history as a path-dependent evolution or revolution (‘Never again!’), formation by integration or devolution, cultural and political homogeneity or heterogeneity, constitutional and institutional structures, and legal traditions and culture. The primary finding of this comparative analysis is that the courts in most of the selected federations do not regard federalism as especially important. Surprisingly, federalism is, except for in Switzerland, little more than an instrumental value.

In this context, the present volume is indeed a welcome addition to existing literature. Peter Russell, as stated in the foreword of the collection, makes a plausible case that modern scholarship failed to focus adequately on courts and federalism. Yet it would be a mistake to suggest, as he does, that scholars have not examined this connection. Courts in Federal Countries: Federalists or Unitarists resonates rather strongly with Edmond Orban’s foundational collection of essays Fédéralisme et Cours Suprêmes (Bruylant Presses de l’Université de Montréal, 1991).

The collection under review, however, widens the angle of coverage. Analysing a wide array of themes, the individual contributions address a common set of questions with an impressive geographical reach. They all analyse the evolution of the particular federal system, the mode of the constitutional delineation of legislative, executive, and judicial powers, the country’s court system, as well as its broad legal traditions and judicial culture, and the influence and importance of the courts within the federation. These essays are straightforward articles that easily stand on their own.

Not all of the contributors are in agreement, however, on questions of definition. The volume lacks methodological coherence. For example, the paragraphs on judicial culture form a mixed bag. Some of the contributions regard the concept as an invitation to study judges. Others present the concept in a more broad way: judicial culture as a shared idea — the image of the role of the judge in society. While there might be some truth in using both characterizations, it makes it relatively hard to facilitate comparison.

The book contains 13 essays, written by scholars from all selected countries, stretching from Australia to Belgium, and from Ethiopia to Canada. This very wide range of federations enables the analysis of judicial power in relation to federalism in the most general way. The cases which the contributors researched include, for example, cultural heterogeneous versus homogeneous countries (e.g. India versus Germany), common-law versus civil-law systems (e.g. U.S. versus Mexico), established versus
emerging democracies (e.g. Switzerland versus Nigeria), and quasi-federal systems (Spain and South-Africa). This angle rescues this research from a narrow Western focus and allows for new reflection and, in doing so, makes a significant contribution to the existing literature.

Yet such a broad approach runs the risk of diluting the contextual position of courts and, moreover, attaching too much relevance to the term federalism. The concluding observations are not in dispute, but more equal cultural comparisons would have allowed a more precise assessment of the nature, meaning, and relative importance of the role of judicial power in relation to federalism.

None of this is entirely new for the editors. Aroney and Kincaid argue in their conclusion that the variations in approach displayed by courts can be explained by the courts’ legal and institutional context. They note that ‘history admittedly covers a broad swathe of explanatory terrain’ and ‘there is, as a consequence, a kind of path dependency at play in many cases’.

Maybe a tantalizing example of such path dependency concerns the fact that the only high courts described as being consistently balanced between centralisation and decentralisation are those of Belgium and Germany. The question arises whether this is because of their shared northern continental legal cultural background? Perhaps it is, perhaps not. In other words: the problem with the chosen broad approach is that it is very difficult to untangle the relationship between courts and federalism from the economic, social, and cultural processes occurring simultaneously.

This is not to say that the countries analysed in this collection are irrelevant. Several essays warrant special attention. Suberu does a masterful job explaining how the Supreme Court of Nigeria functions as an arbiter between the federal government and the states, and the oil-producing states and non-oil-producing states. Hessebon and Idris offer, among other things, a thoughtful account of the political and sociological reality of the new Ethiopian constitutional order after 1994, in which there was a huge gap between those who were framing the Constitution and those who staffed the judiciary. These constitutional systems, which have been insufficiently researched in the past, give intriguing insight into the relation of constitutional courts and the conflicted constitutional status of local governments in Africa.

In a more traditional vein, Casanas Adam (Spain) and Brouillet (Canada) offer clear insight into how a relatively centralised constitution can be federalised over time. And, even if the story is familiar to scholars acquainted with the literature in German, Benz gives a good overview of how institutional structures of German federalism have contributed to make the German Federal Constitutional Court a key player in politics.

Regardless of the described omissions, those interested in courts, federalism and comparative law will find in Courts in Federal Countries much of value. This rich account is likely to become a touchstone for future debates about the nature of courts in federations.