

## Why Judges Should Be In Control: IT's and Artificial Intelligence may improve courts services but are no panacea for backlogs and speeding up proceedings

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*Last but not least, having a high performance drive is perfectly compatible with having a good time!*

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When it comes to IT's in justice administration and in courts and in court proceedings, their effects on court work and on society depends on the interactions between the judges, the court organization, the legislator and the court users.<sup>1</sup> Developing electronic caseflow management systems usually means the transformation of the shifting of paper-files into the logistics of electronic files in the back offices of the courts. There can be many separate back-office routines, for example concerning the standing of a case-filing party, concerning the payment of the court fee, concerning the registration of evidence and informing the other party, delivering of sentences and so on. These routines

usually are closely connected to the rules of procedure as established in a procedural code, and are based on essential legal values, like the right to a fair trial, and the right to counsel. IT's can integrate these routines in caseflow management systems. When these internal Case-flow management systems are connected with the possibilities to bring cases to court electronically and to communicate electronically between the court and the parties, consequently the paper files will eventually disappear. Eventually, because also today, not everybody has access to the internet. Therefore, for a while, bringing cases electronically to electronic filing needs to be accompanied by maintaining

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<sup>1</sup> Mario Procopiuck, Information technology and time of judgment in specialized courts: What is the impact of changing from physical to electronic processing? Government Information Quarterly Volume 35, Issue 3, September 2018, Pages 491-501 <https://doi.org/10.1016/j.giq.2018.03.005>, concludes in his quantitative study on the efficiency of specialized courts in Brazil: The findings of this study indicate that judges and judicial administrators are constrained by the legal system and the strategic use of time by litigants. This is an important point for judicial administration, which is blamed for delays when its performance is poorly understood. In this sense, the Brazilian case shows that the responsibilities of the legal system must be institutionally demarcated to speed justice; case duration also depends on the intentions and strategies of the litigants, and the allocation of competencies and resources by judges and judicial administrators.

the possibility of traditional paper case filing. It is not right to effectively exclude those citizens from access to justice who have no access to the internet.

It should be noted however that IT and artificial intelligence can assist citizens to get easier access to courts, without the help of a lawyer.<sup>2</sup> The further benefits of electronic case filing are that the time to exchange papers (letters etc.) between the court and the parties is reduced to zero; the chances that a file is lost somewhere (for example in the shelves, or at a judge's home) are near zero. That cases will be decided more swiftly is not a necessary consequence when the case content and the rules of procedure do not change. Judges and court staff need just as much time to make legal assessments and write judgments. Judges will not take on a more dominant role in directing the parties' motions and restricting delays, only because IT is involved. Fighting delays demands that judges take on a much more dominant role in case management.<sup>3</sup> Court management and case management in courts, and the development of IT applications in courts are value driven. Therefore, it is unlikely that electronic case filing by itself will increase court productivity and diminish time to deposition significantly.<sup>4</sup> Speeding up proceedings and reducing backlogs presume that judges and courts act responsibly and are democratically accountable for their functioning.<sup>5</sup> The least they can do is to show that they care and work on improving their performances in terms of backlogs, speed, treatment of parties and quality of decisions. This implies a connection to the legislative concerning the effects of legislation on case-loads and concerning the budget and the production capacity of the courts. IT can help, but judges and the managers in the courts are the main actors.

Many IT firms claim their systems will enhance productivity. But achieving such aims is difficult. I once

witnessed the presentation of a phone app developed for a region in Indonesia, by which anybody could signal burglary or theft to the police electronically. This was presented as major progress. I do agree, it enhances the accessibility of the police registration system tremendously. But of course, the introduction of such a facility does not bring automatically the increased capacity of the police to solve the extra crimes that have entered the registration system. The risk of course is, that citizens have higher expectations because of such an app, and that they will be (extra) disappointed afterwards, if the police does not get more (wo)manpower to address an increased number of cases. The business model of IT consultants does often not allow them to openly communicate what risks it takes to develop and implement IT systems. That leads to risks of failure of IT projects, especially in the public domain, and this is connected to blaming games. IT firms have experience with those games, they know the risks. For example, politicians often demand an increased productivity, also of the courts as a barter for public investments in IT. These demands are not really based on experience and are a way to divert responsibility from politicians for IT failures to the institutions in the justice domain. It is my experience that IT firms do not like to take the blame and neither do politicians.

That does not mean, however, that it is not worthwhile to transform the functioning of courts by means of IT. It is worthwhile, because IT permeates all parts of life. Large groups in our societies expect to be served by justice institutions (and public administration in general) electronically. It is inevitable and it must be done! But it takes time to make it work and success is not self-evident.

If one wants to use IT to render reliable court services to the public, this demands much more than

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2 Zeleznikow, J., 2017. Can Artificial Intelligence and Online Dispute Resolution enhance efficiency and effectiveness in Courts. *International Journal for Court Administration*, 8(2), pp.30–45. DOI: <http://doi.org/10.18352/ijca.223>; Reiling, D., 2017. Beyond court digitalization with ODR. *International Journal for Court Administration*, 8(2), pp.1–6. DOI: <http://doi.org/10.18352/ijca.225>.

3 Petra Pekkanen (ed), *Caseflow Management Handbook, Guide for Enhanced Court Administration in Civil Proceedings*, Lappeenranta, LUT University, 2016.

4 This is also supported by Adalmir Oliveira Gomes, Simone Tiëssa Alves, Jéssica Tragueto Silva, *Effects of investment in information and communication technologies on productivity of courts in Brazil*, *Government Information Quarterly*. Volume 35, Issue 3, September 2018, Pages 480-490. <https://doi.org/10.1016/j.giq.2018.06.002>

5 Augusto Zimmermann, *How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal*, (2008) 11 *International Trade and Business Law Review* 179-217 asserts that such responsibility is lacking in the Brazilian judiciary.

the mimicking of paper-based court proceedings and court routines. It demands a rethinking of rules of procedure, the roles of judges and court staff, and of back office routines. It also demands a redesigning of those roles and responsibilities. In other words, for society to benefit from the implementation of IT in the courts, the functioning of courts as organizations need to be transformed. And of course, this should leave the guarantees for judicial independence and impartiality unaffected. But such transformation will nevertheless touch the content of judicial work. IT systems demand that the people working in the courts, judges included, work with those systems. This demands a certain discipline from everybody working in the courts. And the discipline presupposes a minimum consent with the design and functionality of the IT system. Furthermore, it demands that lawyers and attorneys work with the same system, and such transformation also demands cooperation of the legislator, who is responsible for the rules of procedure. This, by itself, makes the development and implementation of IT systems in courts highly complex. Part of the problem is the conservatism of judges and lawyers.<sup>6</sup> Developing new court methodologies implies experiments. The idea of experiments is to find out what goes right and what goes wrong. If the culture is that one is blamed for what goes wrong, no one wants to participate in experiments.<sup>7</sup> Lawyers generally do not like the streamlining of court proceedings and making the courts accessible without the help of a lawyer. The lawyers usually object to streamlining court proceedings in terms of legislation and often lobby against such changes.

In this perspective of conservatism as a feature of courts as organisations of judges and court staff, and the lawyers serving the courts, the reliable registration of cases filed at a court, and certainty about the identity of the parties, for example by means of an electronic check with the population register, the business register, the land register, etc. is already progress. In criminal cases, to know where a suspect stay by means of an electronic information system (prison, at home) is already progress compared to paperwork, because it makes it possible to send them an indictment. The

same applies for the party to be summoned in civil cases and their address of residence.

In this regard, artificial intelligence in the judicial field can assist the courts and judges in making better informed decisions. Artificial intelligence can support division of labor in the courts, can assist citizens in on-line filing of cases, and it can help judges to find the right information for decision making and for reading through very large files. Big Data may even help to check the reliability of evidence – but this presupposes that judges and court clerks do understand the query and how the relevant algorithms work. If they don't understand, they will not be able to assess the relevance of the outcomes of the query. A judge googling for evidence is not acceptable in court proceedings. The least we can say here, is that the use of Big Data as a part of evidence in courts is that it requires new rules of evidence, that make certain that the judges are in control. For example, skin color or ethnicity may be part of Big Data and you would not want to make that play any role in judging whatsoever. The risk may be in criminal law that ethnicity leads to a conviction because a similar ethnicity of suspects was present in so many similar earlier cases. In this way, ethnic discrimination will breed discrimination, and arbitrariness would be given a role in court decisions.

Big Data and algorithmic automation are not a panacea for backlogs. I can only imagine automation in uncontested money claims. As soon as a money claim is contested, a human mind needs to assess the claim, give parties the opportunity to tell their part of the case, and finally take a decision. Algorithms are not intelligent by themselves, they cannot deal with the fuzziness of large parts of the law and of cases. And if the law changes, they need to be reprogrammed. I never heard of an algorithm that can hear parties and take a court decision. And it is unlikely that anybody will accept such a court decision as legitimate. There may be some firms that offer online arbitration as an alternative for court proceedings, but it is questionable if these decisions will be legally sound and legitimate. The risk of course is, that those who cannot afford real

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6 Dory Reiling, in: Anne Wallace, Interview with Dory Reiling,

International Journal for Court Administration. Volume 10, nr. 1 2019, p. 1-4. <http://doi.org/10.18352/ijca.293>

7 Ibidem.

court proceedings will be forced to make use of those businesses, because they are relatively cheap. Effectively, the risk is that societally speaking, lady justice turns her back on those people and that justice is only for those who can afford court proceedings. That may lead to the Rule of Law as a business model that excludes the poor.

Psychologically, procedural justice can mainly be achieved in human interactions.<sup>8</sup> The success of problem-solving courts, especially drug-courts, can be explained by those interactions.<sup>9</sup> Probably, the most efficient way to deal with court cases based on Big Data would be to delegate it to Facebook or Google for example. But their algorithms are not public, and they would be not transparently accountable for their decisions, as courts and judges are. Delegating court decisions to algorithms is not acceptable under the rule of law. When we come to trust courts and judges, it is not because they are infallible, but because we see their efforts to avoid arbitrariness in court hearings and in the justification texts of court decisions. They apply the law to the case at hand, creating equal opportunities for the parties to plead their case.<sup>10</sup> But here also, this is not about a rosy view of judicial work, and I do not mean to plea against IT in courts at all. But I do plea for humans in control of court decisions and of the use of artificial intelligence. In the same fashion, the virtual realities of internet and social media demand new restrictions on judicial behavior in order to avoid appearances of bias.<sup>11</sup>

In conclusion, IT can help courts and judges tremendously to improve their performances both quantitatively and content-wise, within the court organization and in relation to the communities they serve. Jurisprudence databases can help courts and judges to reach better consistency in their decisions, over time and in the entire jurisdiction. In some cases, with a file of thousands of pages, search machines can help judges and their staff to read through the file, without having to read every word in it. Artificial intelligence can help the courts in assessing evidence. Caseflow management systems and on-line working on files, can save quite some slack time. Electronic storage enables files to never get lost. IT can help the courts communicate more efficiently with the parties. But to speed up case management and reduce backlogs, judges need to take control over proceedings and dare to instruct parties that they will not accept unreasonable delays. They could do that even without the help of Information Technology if they take on that societal responsibility.

8 E. A. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (1988) and the research they have published since then. In the Netherlands: K. van den Bos et al., 'On the role of perceived procedural justice in citizens' reactions to government decisions and the handling of conflicts', (2014) 10 *Utrecht Law Review* 4, pp. 1-26; H. A. M. Grootelaar, *Interacting with procedural justice in courts* (diss.), Utrecht, 2018.

9 Berman & Feinblatt, *Good Courts, the case for problem solving justice*, Quid Pro books, New Orleans 2005/2015, pp. 124-126; O. Mitchell, D.B. Wilson, A. Eggers & D.L. MacKenzie, 'Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts', *Journal of Criminal Justice* 2012, p. 60 and pp. 69-70

10 A further indication that this makes a difference can be found in: Vasconcelos, C.C. de, Oliveira, E.W. de, and Netto, W.L., 2018. *The Impact of Attorneys on Judicial Decisions: Empirical Evidence From Civil Cases*. *International Journal for Court Administration*, 9(2), pp.32-42. DOI: <http://doi.org/10.18352/ijca.244>

11 Paul van den Hoven., 2015. *The Judge on Facebook*. *International Journal for Court Administration*, 7(1), pp.18-26. DOI: <http://doi.org/10.18352/ijca.147>; Schutz, P.D. and Cannon, A.J., 2013. *Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts*. *International Journal for Court Administration*, 5(1), pp.25-33. DOI: <http://doi.org/10.18352/ijca.5>