

How to Achieve a Level Playing Field for Innovation: A Dialogue on Regulating Legal Services in the 21st Century

Takeaways World Justice Forum, Working Session

May 1, 2019 11:45am - 1:15pm

Coordinated by Hague Institute for Innovation of Law (HiIL)

To bridge the justice gap, innovation is needed, yet the regulation of legal services and procedural rules create obstacles. The Innovation Working Group of the Task Force on Justice has called for a “level playing field.”

In this working session, representatives of the access to justice movement and organized bars considered case studies from South Africa, the United States and elsewhere and engaged in constructive dialogue. What does a level playing field look like? What are the impediments to reform? Are there win-win solutions?

The session took place on the basis of an Issues Paper prepared by HiIL (Maurits Barendrecht) with input from the Dutch Ministry of Justice and Security on Issue 1. The paper was further refined, and the dialogue was facilitated, by the following Working Session Leads: Rebecca Kourlis (Executive Director IAALS), Karin Bruinenberg (NL Ministry of Justice and Security Adviser on Innovation and IT), William Hubbard (Chair Board of Directors World Justice Project), Thomas Susman (Strategic Advisor Government Affairs American Bar Association), Noleen Leach (Head Unit of Applied Law, Cape Peninsula University of Technology), Trevor Pegley (Director Visionhall), Noleen Leach (Head Unit of Applied Law, Cape Peninsula University of Technology).

This short report reflects the issues as presented to the participants of the Working Session and the takeaways from the dialogue. This working session was not intended to be a traditional panel. The organizers wanted it to be an active sharing of skills, knowledge and resources, collectively applied to specific problems and contexts with concrete takeaways. The takeaways below do not reflect the opinions of individual participants, but summarize the skills, knowledge and resources shared.

Issue 1: How to regulate high quality justice journeys that lead to fair solutions? A government perspective.

SDG 16.3 | The Ministry of Justice and Security of the Netherlands and many other ministries in the world are working on their access to justice agendas. They are inspired by the trends reflected in the report '[Equal Access to Justice for Inclusive Growth: Putting People at the Centre](#)', by the Organisation for Economic Cooperation and Development..

Complex pathways | The report indicates that justice systems are made up of a series of complex pathways or 'justice chains'. It provides guidance on how to effectively measure and address people's legal needs and incorporate people-centred perspectives when designing and planning responsive and integrated legal and justice services.

Towards people-centred design and delivery | As recognized in the report, good practices on a more people-centred service delivery are emerging, but limited. Data necessary to measure access to justice in a holistic manner does not yet exist. This complicates assessing the effectiveness of justice and legal interventions.

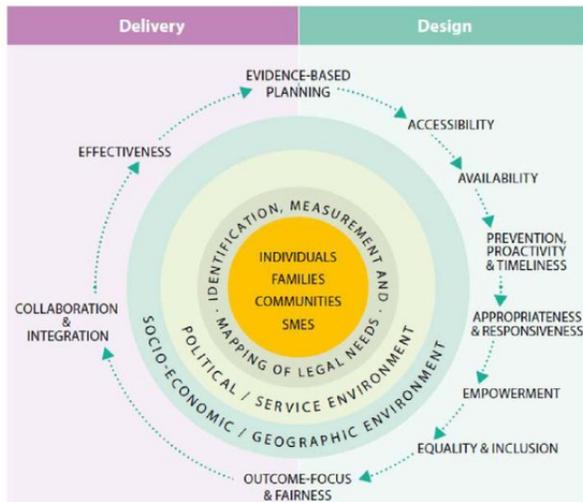
Regulating professionals is current approach | The Minister of Legal Protection of the Netherlands is responsible for the functioning of the national formal justice system, including ADR. The current institutional frameworks are aimed at effective delivery of services by professionals. The quality of these services is guaranteed by rules and regulations aimed at amongst others upholding the high standard of the legal professions, such as bailiffs, notaries, and lawyers: a profession-centred perspective.

How to ensure quality of people-centred delivery ? | Recognizing that the rule of law is not the exclusive domain of law professionals only, and keen to further explore a more people-centred service delivery in the justice sector, the ministry would be interested in learning from experts how to rethink the traditional approaches to delivering legal and justice services, as advocated in the report, by focusing first and foremost on responding to people's needs and to personalize services.

Which indicators? The ministry is particularly interested to learn:

- How to ensure the quality of legal services delivered, when adopting a more people-centred service delivery in the justice sector
- How to incorporate the traditional core values of the rule of law, such as accountability, impartiality, fairness, and legality.

Figure 6.8. Criteria for people-centred legal and justice services



- The report mentioned seven people-centred design criteria, that could (additionally?) be used to measure the quality of services: 1) accessibility, 2) availability, 3) prevention, proactivity and timeliness, 4) appropriateness and responsiveness, 5) empowerment, 6) equality and inclusion, and 7) outcome-focus and fairness.
- How to operationalize these criteria?
- Could lessons be learned from the OECD healthcare quality indicators (box 5.3)?
- As the report states, 'People's needs and experiences are key to identifying

innovation potential in and provide the rationale for reflecting on the delivery of legal and justice services'. The ministry is open to learn how a more people-centred legal service approach has enabled innovators to deliver top-notch innovative legal services to the public, while maintaining the traditional core values for the quality of the rule of law.

Takeaways on the kind of problem | The problem is multifaceted and consists of a series of interrelated issues. Finding a framework for tackling the problem is already a difficult task. A more explorative process is perhaps needed, gradually developing a shared understanding and scenarios for action. The paradigm is changing. Perhaps this cannot be captured well if we continue to consider step by step changes in current rules.

Takeaways on needs for scalable services | In order to close the justice gap, we should be creating an environment that is empowering tech-based solutions, that are scalable, and that are fitting the needs of the most vulnerable, as well as those of the middle class, small businesses and other citizens. The Task Force on Justice Report summarizes the areas where innovation is happening and needs to be scaled: see overview below.

Better Justice Journeys ... (Task Force Report page 63)



This is an interesting test case for the adequacy of current regulation. Who would be allowed to perform these activities? Who could provide the tools for these activities? Would these organizations or individuals have access to capital and revenue models under these rules? Would lawyers, courts or outsiders be allowed and best placed to develop these services and implement them in a scalable way? What are the barriers to implementing supporting technologies such as cloud tech?

Takeaways on goals | Participants tend to agree that the main goal of regulation should be consumer protection: the user-centred perspective. Protection of lawyers against competition is not included in the goals. Lawyers should be protected, however, from interference by governments and other powerful interests, because they may have to assist citizens in standing up to power. Regulation models should be evidence-based. Risk to consumers and complexity of services to be rendered should be central elements, or at least among the guiding principles.

Takeaways on risks | Beyond general worries about quality, the participants did mention few examples of risks against which consumers should be protected. The risk of “exploitation and selling hope to people in a vulnerable position” was mentioned. How is this risk, which is more or less associated to any service or product offered to consumers, to be regulated? Health care services regulation is a source of inspiration. Legal and

justice services are different in some respects: for instance, equality of arms is one of the values that should be protected.

Takeaways on transforming regulatory space | There is broad agreement that opening up the regulatory environment is required. When there is a regulator, the regulator will start making rules. The risk of overregulation has to be managed. Prioritising a good framework for the most important areas for access to justice (most urgent legal problems) is recommended. Perhaps creating regulatory panels for these areas is an option.

Takeaways on free zones and sand boxes | The current situation may require kick-starting innovations so that the justice gap can be closed in a foreseeable future. A presumption of no regulation, would that work for certain areas? The concept of regulation free zones could be developed. Sandboxes are another useful concept. In this environment, regulation would not be the starting point, but would gradually develop on the basis of needs and risks associated to the particular service.

Takeaways on type of rules | Complexity in the regulatory environment is a barrier to innovation and effectiveness. A principled based, multi-factor regulatory framework may lead to uncertainty: “gray is costly”.

Issue 2: What should be focus of regulation and deregulation efforts?

Different levels of regulation can be relied on:

- **Regulation of professions** | In many countries, the legal profession has worked with government to regulate the professions. This is usually combined with reserved activities: only certain qualified professionals can give legal advice, assist people in court procedures or execute certain transactions for them. In other countries, no or only few reserved activities exist (Finland, countries in Eastern Europe).
- **Regulation of entities** | Regulation can also focus on entities (firms, companies) rather than individual professionals.
- **Regulation of procedures** | Court procedures, and other (administrative) procedures giving access to solutions, can be regulated along the lines of general principles or in a more detailed way.
- **Regulation of activities** | The regulation can also focus on how to perform a certain activity.

Who regulates? | Regulation can be left to the professions, to the courts, or to an independent regulator. Germany and England have professional regulators that are independent of the profession (the bar). The 2018 [review](#) of legal services regulation in

Scotland suggests one independent regulator for all professions, entities and activities. For procedures, the courts (and other providers of procedures) themselves may determine the rules of procedure. Their activities may be supervised by another body. Rules of procedure can also be codified in formal legislation.

Takeaways on the level of regulation | Outcome focused regulation may be a better perspective than the current focus on provider regulation. Health care regulation and financing focuses on specific treatments and drugs, which have to be tested against clear criteria. If provider regulation is considered – for certain reserved activities – regulation of the level of individual providers has to be complemented by regulation of entities.

Takeaways on who regulates | The participants tended to adhere to the principle of independence. The body setting, interpreting and enforcing the rules should be independent of the professions and entities supplying justice services themselves. Can courts be seen as independent for this purpose? Judges may be close to the legal profession and some new services may “compete” with courts, or influence their caseloads and revenue-models. Transparency is an important value when setting up a regulatory body.

Takeaways on representation in regulatory bodies | Regulatory bodies are creating structures that make it hard to have all interests be represented fairly. The consumers/endusers of services should be represented.

Issue 3: How to create a level playing field?

Traditional providers (courts, legal professions, providers of informal justice) struggle to serve individuals in a scalable way. This market is shrinking in some countries (see Henderson, [Legal Market Landscape Report](#), Commissioned by the State Bar of California, 2018). A variety of start ups, NGOs, mediators, ADR platforms, experts and innovators offer new types of services. The most promising innovations are often linked to traditional court processes and legal services. So innovations need to comply with regulation for professions and rules of procedure. This creates tensions and barriers to innovation (Innovation Working Group of the Task Force on Justice, [Innovating Justice: Needed & possible](#), 2019).

One example is the model of [community paralegals](#). In many countries this model is restricted by rules not allowing paralegals to charge a fee for their services, or prohibiting them to give legal advice (see Noleen Leach, [The Paralegal and the Right of Access to Justice in South Africa](#), 2018).

On the other hand, courts and the legal profession are also restricted in what they can offer to the users of their services. Rules of procedure make it difficult to innovate court interventions. Tendering rules do not allow courts to implement useful innovations such as off the shelf case-management systems. Rules regarding ownership of law firms make it difficult to attract outside capital and relevant know how. Lawyers working for individuals do not have access to business models that are available to other providers of consumer services (Hadfield and Rhode, [How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering](#), 2015).

What can be a strategy to gradually create a more level playing field for all providers of justice services?

From the perspective of providers of innovative services, a secure way of gaining access to the market of legal and justice services is lacking. From the perspective of providers in the system (courts, legal professions) providers of new services can be seen as unwelcome

Takeaways on interaction with government agencies | Innovators assisted by HiIL's Accelerator program describe how they rely on individual contacts within ministries, courts or bar associations. They often depend on links to services supplied by government agencies and courts (data, calendars, integration in existing services, APIs).

Takeaways on implementing improved processes | Some innovations are alternatives to current processes in courts or elsewhere (case-management systems, innovative court procedures). Effective services may also contain elements of legal advice, resemble adjudication in some way or somehow help in enforcing rules (informing, information gathering, blaming, shaming, praising). These services may be close to reserved activities or activities provided by government agencies and courts. Overall, leaders of these organizations may or may not be willing to cooperate with private sector service-providers to achieve their own goals and targets.

Takeaways on level playing field | Many promising innovations get stuck in pilots, because there is no process for accepting and scaling "treatments" that are better than current processes and procedures. A more structured process for testing, accepting and broadly implementing improved treatments would streamline innovation.