Growing justice

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Growing Justice: Justice policies and Transaction Costs

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Maurits Barendrecht[1]

Growing Justice: Justice Policies and Transaction Costs

Abstract

This paper reviews the literature on policies aiming to improve the rule of law and the operation of a legal system. It takes a bottom up perspective of clients seeking access to justice and uses transaction costs on the market for justice as a criterion to evaluate justice policies. Most justice is created through 'justice transactions,' including informal help from friends, legal advice, information about law, ADR services, other forms of informal justice, and adjudication. Such transactions are seriously hampered by three major transaction cost problems, however.

Justice policies include codification, setting up courts and reforming them, financing of courts, legal aid, ADR, developing rules of procedure, and regulation of the legal profession. The transaction cost perspective explains why many traditional justice policies do a poor job to increase access to justice or to diminish the costs of civil justice. More promising justice policies enable justice to emerge bottom up, in the interactions between clients and providers of justice services (microjustice, legal empowerment). These policies focus on the information needs of disputants, low cost default procedures, choice for plaintiffs, accountability towards clients, gradual, needs-based formalization of legal relationships, and strengthening informal compliance mechanisms.

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I. Introduction

One of the classical responsibilities of states towards their citizens is to establish the rule of law and to ensure access to justice. Governments do this by designing and enacting 'justice policies'. Courts are created and maintained, public prosecution is set up, and the legal profession is regulated. Procedures are defined in codes of civil procedure, criminal codes are enacted that make clear which conduct is a crime, and contract law facilitates private transactions between citizens. Governments also subsidize courts and legal aid. If their legal system is criticized, they may introduce alternative dispute resolution, or reform legal aid, courts, civil procedure, and the tort system. This paper suggests a new way to evaluate such justice policies: by looking at their potential to reduce the transaction costs on what can be called the market for justice.

Over the centuries, the actions taken by individuals to protect their rights have led to what we now identify as a legal system. Precedents, laws, contracts, property rights, and procedures were developed. It has become commonplace to expect the rule of law as something created and upheld by the state. If the justice is not accessible, or the rule of law is not established, it is the state that failed. But historically, it is not unrealistic to look at law as a by-product of people bringing their claims to advisers, lawyers, courts, kings, and politicians. The way people take action to protect their rights is therefore a good starting point for analyzing whether people get the legal protection they need.

Let us thus look at the position of the client (plaintiff) who experiences a need for justice in a relationship to another person (defendant). Urgent justice needs may arise when crimes have been committed, or when problems arise in contractual relationships. Clients will then turn to friends, lawyers, or others for information and advice, and probably also to persons who can exert influence over their opponent. These people deliver a service to the client, which can be studied as a market transaction. Obviously, buying justice is not a straightforward transaction such as purchasing a car or obtaining a loan from a bank. Behind the need for justice, usually a conflict of interest with the defendant is looming. The defendant may not cooperate to delivery of a just outcome. What a just outcome is, may also be unknown. A lawyer, or even a judge, has interests that are not perfectly aligned with those of her clients. So clients have to monitor the performance of the lawyer and the judge, and should probably invest in means to ensure that they do

their job. These extra costs that a client faces on his way to justice can be studied as transaction costs.

In this paper, I use this transaction cost analysis to evaluate justice policies. Section II explains the approach in more detail. In Section III to VII, we follow the plaintiff who tries to obtain a just outcome. We distinguish five main types of justice services that help him on the way. These services enable the plaintiff to (1) meet the defendant in order to seek a cooperative solution, (2) communicate and negotiate (talk), (3) distribute gains and losses fairly (share), (4) decide on outcomes, and (5) stabilize the relationship with the defendant. For each type of justice services, we identify the sources of transaction costs that make them difficult to deliver to clients in a sustainable and affordable way (Subsection A). After this 'market analysis', we identify the most common interventions of governments on this justice market and investigate whether these are likely to lower the transaction costs (B). Thereafter, we discuss some possible alternative justice policies that have more potential to lower transaction costs and thus to improve the rule of law and access to justice (Subsection C).

Section VIII discusses the transaction costs that arise because a legal system has to be more than its five constituent parts. In economic terms, there are complementarities between the five types of justice services. Thus, we obtain a broad picture of the market for justice and the way governments intervene. This leads to an overview of helpful and less helpful policies (Section IX).

II. Approach

A. Justice Policies

Governments all over the world struggle with their justice policies. Legal services tend to be expensive; courts slow and, occasionally, unpredictable, or downright corrupt. In developed economies, budgets for legal aid and courts are limited. Lawyers have obtained extensive powers to self-regulate their profession, but governments are increasingly asked to review this regulation, because it may have a negative impact on competition, harm the interests of clients, and slow down innovation of legal services (Hadfield 2008).

Justice policies are also high on the international agenda. The international community faces the problem of failing states, unable to deliver the basic stability that is implied in the rule of law. Human rights are another item: they may be recognized by states in treaties, but should also be guaranteed in the practice of ordinary lives. There is also a growing understanding that effective justice policies are key to economic development. Although the precise links are disputed, both policy makers and researchers agree that enforceable property rights, labor rights, and business rights help economies to grow and to distribute the benefits of economic growth more evenly (Kaufmann 2003; Buscaglia and Stephan 2005; Commission on Legal Empowerment of the Poor 2008; Haggard, MacIntyre et al. 2008; Kaufmann, Kraay et al. 2008). Access to justice is a precondition for this (Jensen 2002; Kaufmann 2003; Commission on Legal Empowerment of the Poor 2008).

Most justice policies have a top down orientation. Rules are written down in constitutions, codes, and legislation. Then courts are set up, public prosecutors are appointed, and the legal profession is stimulated to organize itself. Once this is done, governments should maintain the resulting 'legal system'. The rule of law literature agrees that this top-down implementation has not been very successful (López de Silanes 2002; Botero, La Porta et al. 2003; Golub 2003; Carothers 2006; Dam 2006; Hammergren 2007; Davis and Trebilcock 2008; Haggard, MacIntyre et al. 2008). Investments in formal legislation and institutions like courts do hardly result in actual protection of the rights of ordinary citizens or small to medium sized companies. There is abundant evidence that access to justice, either through the norms, lawyers and court of a formal legal system, or through informal

arrangements, is insufficient in many places and in many situations (Rhode 2004; Yuille 2004; Fitzpatrick 2005; Commission on Legal Empowerment of the Poor 2008).

Although some institutional economists argue that, historically, the rule of law has been first implemented for elites (North, Wallis et al. 2009), most scholars and politicians now place their bets on bottom up approaches. Civil society can create informal ways of protection that are more effective than the formal legal system, so they argue (Davis and Trebilcock 2008; Tamanaha 2009). Citizens should become legally empowered, or facilitated through microjustice when they face justiciable legal problems (Golub 2003; Van Rooij 2007; Commission on Legal Empowerment of the Poor 2008).

What lacks, however, is a theory that can explain why these bottom up approaches might work, and which policies are more likely to succeed than others. The rule of law literature has not yet delivered a consistent theory behind interventions. It shows much conceptual debate about what the rule of law is (Ringer 2007; Tamanaha 2008), but much less discussion about the ways to make it happen. The assumption seems to be that systematic institution building is possible, if governments only would be able to decide which institutions they want. A part of the literature mentions sequencing as a problem, but this suggests again that these writers know what should be done, the issue merely being where to start (Carothers 2007).

Once the top down perspective is changed for bottom up approaches, the lack of theory behind justice policies becomes even more problematic. The focus of attention now shifts to creating access to justice. But what type of justice do people need, and how can access to it be created? The literature on access to justice tends to distinguish five waves of access to justice reforms, oriented at supplying legal aid, public interest litigation, alternative dispute resolution, opening up the market for legal services, and better regulation of the legal profession (Cappeletti and Garth 1978; Parker 1999). This gives some indication of the shifting beliefs in what works to create access to justice, but does not explain why such approaches might work, or why some of them have failed. There are two common threads, however, and these I will pick up in this paper.

First, the basic idea of access to justice expressed here is one of services provided to clients. As Landes and Posner have showed, lawyers, mediators, and even adjudicators like courts can be considered to be providers on the market for justice (Landes and Posner 1979). They are the ones who try to deliver fair outcomes to clients. Second, the reforms all seem to be oriented towards making this market work in a better way: by subsidies, by stimulating certain types of justice services, or by (de)regulating the market. Combining these threads, and adding a theoretical perscpective, I propose to evaluate justice policies acccording to their potential to lower transaction costs on the market for justice services.

B. Justice Needs

Justice needs can be defined as a need for protection by outside norms or interventions that structure the conduct of other persons (Barendrecht, Kamminga et al. 2008). When does such a need arise? Legal needs studies, in which a sample of the population is interviewed by researchers about their legal problems and ways to cope with them, have been conducted throughout the world (Curran 1977; American Bar Association 1994; Genn and Beinart 1999; Genn and Paterson 2001; Dignan 2004; Van Velthoven and Ter Voert 2004; Currie 2005; Coumarelos, Wei et al. 2006; Michelson 2007; Gramatikov 2008; Michelson 2008). These studies show consistent patterns of justice needs (Barendrecht 2008; Barendrecht, Kamminga et al. 2008). Demand for justice services is most urgent in three types of conflict, where the stakes are high and where people depend on others for their well-being.

Personal security presents the most salient category of problems. People seek basic protection of their human rights, and try to protect themselves against violence, unlawful

taking of property, and unlawful detention. Secondly, they enter long term relationships with substantial specific investments, such as family, work, land use, neighbor, and business relationships. These relationships have to cope with change. Because changes in circumstances, preferences, and abilities are difficult to predict, rights and obligations cannot be determined at the moment the relationship starts (known as the issue of incomplete contracts). Adaptation to change through negotiation is a necessity, but the parties are dependent on each other, because they invested in the relationship, and cannot walk away from it without leaving these investments behind. So some sort of neutral dispute system is necessary (Williamson 1987; Nooteboom 1992; Barendrecht 2008; Robson and Skaperdas 2008). Examples of conflicts in these long term relationships are inheritance issues, divorce, termination of employment, and problems regarding compensation for the use of land to be paid to owners. A third category of conflicts emerges from contracts between buyers and sellers, or from obligations of the bureaucracy to its citizens. Here, the issues are mostly what the plaintiff could expect (interpretation of contracts and of applicable regulation), how the defendant contributed to these expectations by giving or withholding information (duties to inform), and whether the defendant delivered goods or behavior that live up to the legitimate expectations of the plaintiff (Barendrecht 2009).

The empirical studies cited above show that most conflicts are solved through negotiation. Conflict resolution can aptly be described as a negotiation process in which the parties try to achieve Pareto efficient outcomes (create value), and bargain about distributive issues (share value), but this process is complicated by the parties being dependent on each other. They cannot solve the conflict with somebody else if their negotiations fail, like they can go to another seller of a car if they fail to reach agreement on the price. Because of this bilateral monopoly, they need mechanisms to decide on the outcome if they cannot reach an agreement. This creates the need for justice services.

C. Justice Transactions

A first, intuitive understanding of justice services would probably distinguish two basic types: legal advice and neutral, third party interventions. But from the interdisciplinary literature on conflicts, dispute system design (Ury, Brett et al. 1988; Costantino and Sickles Merchant 1996; Menkel-Meadow 1996; Bendersky 2003; Barendrecht 2008; Bingham 2008; Bordone 2008; Barendrecht 2009), institutional design (Hadfield 2008) and legal procedure, five necessary and sufficient dispute resolution tasks can be derived. In essence, justice services help clients to perform these five tasks. For each of these five basic types of dispute services, basic technologies have become available.

Task	**Description**	**Basic technology**
1. Meet	Centralized forum for information processing in which both parties participate	Make costs and benefits of participation for defendant higher than costs and benefits of fighting, appropriation, or avoiding
2. Talk	Communication and negotiation	Support integrative negotiation (interest based)
3. Share	Distributing value fairly	Supply information about fair shares (sharing rules, objective criteria)
4. Decide	Decision making procedure	Make option of a neutral decision available (at low cost)
5. Stabilize	Transparency and compliance	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance

Table 1 Necessary and Sufficient Elements of a Dispute System with Basic Technologies for Delivery (Barendrecht 2008).

The plaintiff and the defendant have to meet somehow. Friends or lawyers may help a plaintiff to make meeting more attractive for the defendant. Mediators and lawyers can then help the parties to communicate and negotiate in a structured way. If they provide information about ways other people have settled similar disputes (norms, objective criteria), the plaintiff and the defendant can solve the distributive issues more easily.

Decision-making in the bilateral monopoly is facilitated by the availability of a low cost neutral decision, that provides an exit option for both parties. Stabilizing relationships is a matter of making expectations explicit and creating motivation to live up to the outcome. Formats for contracts and registrations, as well as strategies to induce compliance, can be supplied to serve these interests of clients.

Dispute system design is still a young discipline, but there is a beginning of a common understanding of "what works" in order to perform these five basic types of services (Ury, Brett et al. 1988; Wall Jr and Callister 1995; Tyler 1997; Wall, Stark et al. 2001; Bendersky 2003; Bingham 2008; Bordone 2008; Barendrecht 2009; Wall Jr and Chan-Serafin 2009). These best practices can build on years of conflict research by social psychologists, economists, and socio-legal researchers (Barendrecht 2009). Negotiation and conflict resolution technology can deal with emotions and psychological barriers. Procedural justice satisfies the procedural needs of the parties. If norms for distributing value are unclear, suitable objective criteria can be developed. If justice is not achieved through negotiations and bargaining, a neutral third party can break the impasse, if necessary by giving a binding decision. If a powerful defendant does not cooperate, he can be forced to do so by increasing sanctions, rewards, and other incentives.

We may probably assume that the basic justice technologies are now sufficiently developed. If justice is out of reach for many people, the cause is unlikely to be that justice providers do not know what to do for their clients, or face high costs of interventions. Although there are some exceptions, where interventions are indeed very costly, a major problem seems to be that clients and justice providers do not succeed in concluding suitable justice transactions.

D. Transaction Costs of Justice Services

Justice can only reach a plaintiff if there is a provider of justice services who is motivated to deliver suitable services to this plaintiff. Assuming these justice services cost less to produce than the value for the plaintiff, such transactions will take place, unless the costs of concluding the transaction are too high.

Transaction costs analysis is usually applied to the broader economy. On the market for goods and services, buyers and sellers incur various costs of undertaking a transaction (Williamson 1981; Rao 2003). The parties have to search for suitable partners, inform themselves about the attributes of goods and services, and negotiate a contract. After the contract has been concluded, the buyer has to monitor the performance by the seller, and the seller has to ensure that the buyer pays the price. Transactions need some governance structure and this is costly to set up. Legal costs and other costs to resolve disputes are textbook examples of such transaction costs. Regulation of the market is sometimes necessary to prevent market failure, and where governments step in other rules are needed to diminish government failure. The costs of regulation, the costs of running the economic system, are also transaction costs.

Legal advice, dispute resolution, and regulation are also services that have to be provided by people to other people, however. Plaintiffs conclude justice transactions with advisers, such as lawyers, and experts, or with neutrals, such as mediators, judges, neutral factfinders and arbiters. In the area of enforcement, police officers, bailiffs, and other government agents may have to be involved. On informal paths to justice, plaintiffs and defendants may consult friends, local leaders, and religious authorities. In case plaintiffs have to deal with powerful companies or individuals as defendants, they may have to convince other people with similar complaints to join the action. In order to put enough pressure on the defendant, thousands of people may have to join forces. These transactions can again be studied through the perspective of transaction costs. In a sense, this is thus a second order transaction cost problem.

Transaction costs of justice services include again the costs of information about suitable providers of justice services, the search costs, and the costs of negotiating the transaction (Rao 2003). For instance, a plaintiff will have to explain his problem to the lawyer, and the lawyer will have to decide on which conditions he will take the case. If a local leader is addressed, he will also hear the plaintiff, and then decide whether it is worthwhile for him to help the plaintiff. After the plaintiff has reached agreement with the provider of justice services that he will take some action, the plaintiff has to monitor the service provider and see to it that he delivers what he promised (Williamson 1981; Williamson 2005).

Another type of transaction costs are the costs of running the part of the economic system that delivers justice services, These costs include the costs of coping with market failure and government failure. Market failure may arise from public goods, externalities, incomplete markets, and incomplete information. Government failure may also be caused by limited information, as well as by limited control over private market response, over bureaucracy, or over the political process (Stiglitz 2000). Each way of organizing transactions, either through the market or through goverments, has its costs and the challenge is to minimize these costs (Williamson 1999; Rao 2003; Brousseau and Raynaud 2006).

Table 2 gives an overview of transaction cost problems that are likely to occur in justice markets (Barendrecht 2009). Each of the five types of dispute resolution services that a plaintiff needs, has its own characteristics that lead to certain transaction cost problems. Three transaction cost problems are most salient in these five justice markets.

First, buying dispute services is difficult because two opponents are unlikely to agree on the kind of service they need. Disputants may experience psychological barriers that make it difficult to enter a cooperative procedure and often also have strategic reasons for not agreeing on a procedure. These coordination problems persist during the dispute resolution process. When courts or other neutrals decide disputes, they thus experience insufficient incentives from their clients to supply high quality and low cost procedures.

A second source of high transaction costs is that dispute services partly consist of providing expertise. Such information tends to be difficult to sell for a profit because of its public good character. As a consequence, conflict management skills (integrative negotiation know how), objective criteria for settling distributive issues, and relationship formats (contracts) do not always reach the persons that need them most.

Third, justice transactions tend to have a higher value if other justice transactions are also available. Negotiation assistance and neutral decision making by courts, for instance, work better if objective criteria for settling distributive issues are available. The incentives on defendants to solve conflicts cooperatively and to live up to outcomes typically come from the joint effects of monitoring, the value of reputation, the threat of informal sanctions, internal motivation, and formal enforcement. Many people have to cooperate to make this happen. These complementarities, network-effects, or connected transactions require an integrated approach (Barendrecht 2009).

These major sources of transaction costs explain several important characteristics of justice markets. Although it would generally be most efficient if two disputing parties would consult one neutral agent, such transactions with mediators or arbiters are unlikely to occur. Instead, the parties tend to go to unilateral advisers, such as lawyers. Because the market for neutral assistance is likely to fail, the state steps in with a procedure in which the defendant is obliged to appear before a court. Transaction cost analysis also explains why legal services tend to be individualized. This is a business model that circumvents the public good character of information. Negotiation skills, conflict management know how, and knowledge about norms for distributive issues is hard to sell for a profit, because it can spread freely to other customers once it is sold. Furthermore,

legal uncertainty is likely to occur: the market will not produce sufficient objective criteria for settling distributive issues. Finally, litigation and other forms of adjudication tend to be inefficient, because plaintiff and defendant are unlikely to agree on a procedure, and because of the connectedness between different justice services.

Tasks	**Basic technology**	**Sources of Transaction Costs**	**Market reactions**
1. Meet	Make costs and benefits of participation for defendant higher than costs and benefits of fighting, or avoiding	1. Difficulties of concluding ex post dispute resolution agreements: - Psychological barriers - Strategic barriers 2. Cooperation between many people needed to organize sufficient incentives on powerful defendants to cooperate	1. Little demand for mediation, arbitration, and other tailor made neutral dispute services 2. Unilateral advice where neutral services would be more efficient 3. Demand for patronage (help from people who can influence the defendant) 4. Demand for checks and balances
2.Talk	Support integrative negotiation (interest based)	Information about negotiation and conflict management is public good	1. Insufficient supply 2. Business models for delivering expertise: - individualized advice - coaching client through process - taking over process from client - packaging information
3. Share	Supply information about fair shares (sharing rules, objective criteria)	1. Information about fair solutions is public good 2. Providers of fairness information face pressure/criticism from all sides	1. Insufficient supply 2. Business models for delivering expertise (see above)
4. Decide	Make option of a neutral decision available (at low cost)	1. Difficulties of concluding ex post dispute resolution agreements: - Psychological barriers - Strategic barriers 2. Insufficient incentives on neutral to provide efficient processes and fair solutions because of: - dependence on neutral - low frequency of transactions - uncertainty and complexity - monitoring difficulties.	1. Access to neutrals on markets is unavailable or unreliable 2. States provide neutrals
5. Stabilize	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance	Information about contracting and making relationships transparent is public good Cooperation between many people needed to organize sufficient incentives on powerful defendants to cooperate	1. Insufficient supply 2. Business models for delivering expertise 3. Lack of enforcement, in particular against powerful defendants
Supply Chain Approach	Strengthen links between tasks	Complementarities/connectedness between the five types of services	Integrated business models for providing unilateral legal services, mediation and adjudication

Table 2: Sources of Transaction Costs on Markets for Justice and Ways Markets Cope with Them (Barendrecht 2009)

The following five sections explore how government interventions in the justice sector react to these transaction cost problems. For each of the five types of justice services, I first give an impression of the structure of the market. I describe the basic technology, discuss some best practices for delivering the services, and identify justice providers that are active on this market. Then, I summarize the transaction costs problems that occur on this market (Subsection A)? Next, current justice policies are discussed, taking their potential to diminish transaction costs as a criterion for evaluation (Subsection B). As many of these policies not seem to address these problems squarely, Subsection C identifies alternative justice policies that tackle the problems of transaction costs more directly, and that thus may be more promising.

III. Letting Disputants Enter a Cooperative Procedure

A. Market Analysis

Managing a conflict in a cooperative way requires interaction between parties. A procedure or negotiation is unthinkable without some kind of information exchange (Shariff 2003). The parties require some kind of process where both of them are present and willing to communicate about the conflict: a room, or a tree under which to talk; written communication channels, or a webinterface. The first challenge for a plaintiff is to tempt the defendant to come to such a meeting place.

The basic technology for letting the defendant (and the plaintiff) participate in cooperative dispute resolution is to make the costs and benefits of participation higher than the costs alternatives, such as fighting or avoiding the other party. The meeting place can be made attractive by being safe, close (low travelling costs), and giving the prospect of a solution with high value for the defendant.

Letting disputants meet in order to solve a dispute cooperatively is difficult, Psychologically, one or both of the parties may suffer from loss aversion or overoptimism, and emotionally it may be hard to face the other party again. The parties may distrust the proposal of the other party to solve the conflict in a particular procedure, a phenomenon called reactive devaluation (Ross 1995; Barendrecht and De Vries 2006). Strategically it can be more attractive for the parties to avoid or postpone meeting, especially for a defendant who is better of now than he expects to be after resolution of the dispute. Landes and Posner called this the “submission problem” in the context of letting the disputants chosing a private judge (Landes and Posner 1979).

Theoretically, a transaction aimed at solving the dispute through mutually agreed upon methods poses a bargaining problem. By agreeing on the procedure, the parties influence the outcome of the dispute (see, for the distributional effects of agreeing about institutions in general, Knight 1992). Bargaining failure is likely, because parties tend to do better if they take extreme positions, commit to earlier offers, or use delaying tactics (Muthoo 1999; Muthoo 2000; Mnookin 2003; Barendrecht 2009).

The high transaction costs of concluding an agreement over the way to resolve a dispute have a major impact on the market for dispute services. They are probably the most significant reason why state interventions in this market are needed. If it was easy to solve disputes simply by buying dispute services, governments would probably not set up courts and legal procedures.

Moreover, this transaction costs problem causes serious trouble on the market for alternative dispute resolution. Mediation and arbitration services are widely available, but demand for it is negligible, because it requires two parties who jointly decide to contract such a third party, which is unlikely to happen in case of a dispute (Barendrecht and De Vries 2006; Barendrecht 2009; Velikonja 2009).

On the micro-level, plaintiffs respond to this problem in two different ways. These reactions create a lively market for unilateral legal advice, as well as an even more interesting demand for powerful ‘neutrals’ that can influence the defendant. These transactions are complicated and make life not always easier for the plaintiff.

An agent such as a lawyer is in a slightly better position to solve a problem of how to meet with the opposing party than the client himself (Mnookin, Susskind et al. 1999). He may be more skilled in contacting the other party and inducing her to cooperate, as well as being less emotional and thus avoiding some psychological barriers to conflict resolution. But he cannot reduce reactive devaluation, over-optimism and loss aversion if he contacts the other party as an agent for the plaintiff. The strategic barriers to reaching an agreement over the dispute resolution process do not diminish because the agent is

present. With a lawyer, it is still difficult to solve the second order bargaining problem. In this "second" dispute, over the way to solve the "first" dispute, the parties are still likely to put forward extreme offers, use delaying tactics, and commit themselves to positions.

In many countries, the major reason a plaintiff uses a lawyer is probably that he is the one who can activate the court system. Hiring a lawyer may signal that court action is imminent, making the threat of court action more credible. But concluding a transaction with a lawyer also creates new transaction cost problems: How to incentivize him to obtain a speedy and high value solution to the dispute? How to prevent an arms race where both lawyers invest more and more in winning the dispute, creating work for each other? And a lawyer is most effective if he can threaten with a neutral intervention, which may be unavailable.

An alternative for the plaintiff is to go to a person who can influence the defendant. People look for parents, bosses, clan leaders and government officials who can help them to get their way in relationships with others. Asking the powerful for help can be also be seen as a transaction. The powerful person offers his interventions, which will cost him an effort, and will probably want something in return: cash, support for his causes, or an increased reputation. The transactions between plaintiffs and powerful third parties have high transaction costs, because influencing a defendant is a highly context specific task, which is difficult to monitor. Moreover, the defendant may be influenced in a way that is undesirable. Therefore the demand for interventions from the powerful creates an additional demand for checks and balances on power.

Task	1. Meet
Description	Centralized forum for information processing in which both parties participate
Basic technology	Make costs and benefits of participation for defendant higher than costs and benefits of alternatives such as fighting, or avoiding
Best practices for dispute services/-transactions	- Local meeting places or other channels of communication - Pre-mediation skills - Social norms to solve conflicts cooperatively - Enhance incentives that link to reputation of defendants to solve conflicts cooperatively - Option of default judgment
Possible providers of services	- First line legal aid (paralegals) - Friends and advisers - Community leaders - Mediators - Courts
Sources of Transaction costs	1. Difficulties of concluding ex post dispute resolution agreements: - Psychological barriers - Strategic barriers (bargaining failure) 2. Cooperation between many people needed to organize sufficient incentives on powerful defendants to cooperate
Market reactions	1. Little demand for mediation, arbitration, and other tailor made neutral dispute services 2. Unilateral advice where neutral services would be more efficient 3. Demand for patronage (help from people who can influence the defendant) 4. Demand for checks and balances

Table 3 Market Analysis for Services that Assist Disputants with Meeting

A third way to cope with the high transaction costs of meeting is to agree on a dispute resolution mechanism before a conflict arises (Landes and Posner 1979). Business partners, for instance, sometimes put an arbitration clause in their contracts. More complex dispute resolution agreements may provide for several stages of dispute management, prescribing first negotiations between the parties, followed by mediation, and, as a last resort, arbitration.

Ex ante dispute resolution agreements work because the psychological barriers of reactive devaluation, loss aversion, and over-optimism are less prominent at the time the parties conclude a contract. As long as there is no actual conflict, the risk of bargaining failure regarding a conflict resolution clause is also lower. Both parties generally wish to

minimize the costs of future conflict in their relationship, so they are quite likely to agree on a way to resolve possible disputes.

Most agreements about a way to resolve future disputes are part of a contractual arrangement. This formalization process does not take place in many relationships, though. Most family, business, land use or neighbour relationships are not made explicit in a contract. Tort claims or claims against governments are seldom preceded by a contractual arrangement. Even if a written contract is reached, this opportunity to choose a dispute mechanism is not always used. Eisenberg and Miller found that only 20% of contracts between sophisticated business partners contained a dispute resolution clause (Eisenberg and Miller 2006).

Often, one of the parties takes up the formalization process that produces dispute resolution clauses. Employers write employment contracts. Sellers and building contractors refer consumer disputes and building disputes to specialized neutrals. The problem with dispute resolution clauses in adhesion contracts is that there can be serious doubts regarding neutrality. Plaintiffs may be excluded from using litigation mechanisms that they wanted to use after the conflict arose, or may be confronted with an arbitrator who depends on a constant stream of cases from the defendant. These worries translate into an extensive debate, continuing before the courts, on whether arbitration clauses in adhesion contracts should be allowed or not (Ware 2004; Sternlight 2005; Brunet, Speidel et al. 2006; Sternlight 2007).

B. Current Interventions by States

The stage is set. High transaction costs of agreeing to meet and solve a dispute cooperatively shape the markets for justice. Plaintiffs go to unilateral advisers (lawyers), or to powerful peopls who can influence the defendant, unless they have concluded an ex ante dispute agreement, but that is unlikely. Let us now see how governments intervene in this area. Do they tackle the problem that two people in a dispute cannot agree on a suitable way to manage the dispute? Are these policies effective in reducing the transaction costs of such an agreement?

1. Reducing the Rewards of Continued Conflict

An indirect response to the high transaction costs of meeting is to make other ways of solving conflicts, such as fighting, less attractive. Societies have social norms and legal rules that prohibit the use of violence by citizens. Besides lowering the costs of conflict, such rules make fighting less attractive as a way to solve the conflict. Cooperation thus becomes more likely (Hirshleifer 2000; Hirshleifer 2001; Posner 2003). Restraints on using some technologies of conflict, such as strikes or employee lock-out in labour conflicts, also makes cooperation more likely (Posner 2003)

However, these policies do not diminish the transaction costs of meeting. They do not lower the psychological and strategical barriers to starting a negotiation process and jointly deciding on a procedure to cope with the conflict. Moreover, strategies that use other forms of power, such as threats to withhold essential goods to the other party (access to water, food, economic opportunities, or protection), are not affected by these rules. So powerful defendants still have many other options than sitting down with the plaintiff to reach a fair solution.

2. Judgments by Default

Societies also developed procedures in which the defendant is forced to meet with the plaintiff. If he does not cooperate in the procedure by putting forward his views on the conflict when summoned, a default judgment will be issued against him. The basis for this judgment by default is usually the point of view of the plaintiff. So the decision will generally be unfavourable for the defendant, giving him a powerful incentive to

cooperate. Ultimately, a defendant has to talk to the court, and thus it is more sensible for him to talk about the conflict with the plaintiff prior to that occasion.

We should note, however, that this incentive to meet and talk only works if a plaintiff can credibly threaten to take the defendant to court. Poor plaintiffs may not be able to do this, especially if defendants know that they do not have the resources to sit through a civil court procedure. For governments, the costs of organizing a court system that is able to guarantee enforceable default judgments are substantial.

A similar problem regarding access to a neutral decision may arise for public law enforcement. The administrative and other costs of criminal prosecution may be so high that the threat of an orderly criminal procedure is not credible anymore. Police officers, who can be seen as the plaintiffs in these procedures, may then choose to neglect crime, or resort to violence to fight it, because these options become a more attractive alternative for them.

Finally, the incentive of a default judgment is still indirect. It is an incentive to appear in court and defend oneself against an accusation. In order to avoid this procedure, some defendants prefer to try settlement negotiations. There is no direct obligation to participate in such negotiations.

3. Stimulating Mediation and Arbitration

Lately, governments have started to promote mediation as a way to solve legal disputes. Mediators have been trained and mediation programs have been set up. For international conflicts, diplomats from many countries are available to facilitate talks between the parties.

Unfortunately, merely offering these services does not seem to substantially help in bringing disputants to the negotiating table. Mediation is hyped, but it solves a negligible proportion of disputes. Its main source of survival after 30 years of experimentation in the US and Europe is as an add-on to courts (Goldberg and Shaw 2007; Velikonja 2009). In court annexed mediation, judges refer some of their cases to mediation. Ex post mediation, agreed directly between the parties without a contract or a neutral person telling them they have to mediate, is still the exception. The same is true for arbitration (Landes and Posner 1979).

Our analysis strongly suggests that the cause of this problem is not an insufficient supply of low cost mediation and arbitration services. In fact, helping other people to solve their disputes is psychologically rewarding work and many mediators offer their services. Mediation is also good value for money. Mediation services attract high satisfaction ratings and big majorities of users say they will use it again in future conflicts (Wall, Stark et al. 2001; Wissler 2004; Wall Jr and Chan-Serafin 2009). It is not, however, an answer to the high transaction costs of meeting, the psychological barriers to agreeing on a process to solve the conflict, nor the strategic barriers that are likely to lead to bargaining failure influenced by making mediation available.

It is easy to see how the availability of mediation only tips the balance in favour of going to the meeting place in a limited category of cases. For the defendant, it makes meeting and talking a bit more attractive because it creates a friendly and private environment to discuss issues. Availability of mediation services at the meeting place also influences the expected outcome because the parties may then be able to create more value. If the parties already want to cooperate, it thus helps them.

But availabilty of mediation does not really change the way value will be distributed. If the dispute is (mostly) about distributing value, and a neutral decision is not available for a reasonable price so that the expected outcome is still low for the plaintiff, mediation services are not likely to make a real difference and the plaintiff will not find it very

attractive. In the words of Hazel Genn, one of the leading experts on mediation: “Mediation without a credible threat of judicial determination is the sound of one hand clapping” (Genn 2008). For the defendant, if his goal is to extract as much value from the distributive issues as possible, mediation services are not very interesting either. At the mediation table, he cannot as easily use delaying tactics, make extreme offers, commit to earlier offers, or hide information, although these are the strategies that lead to the best results in distibutive bargaining. As we will see in Section VII where complementarities are discussed, mediation services are far more valuable for both parties if they are delivered in the shadow of an easily accessible neutral decision.

C. Promising Policies

We discussed three government policies (prohibiting violence, threatening to issue default judgments, and making mediation available) that indirectly stimulate the parties in a conflict to meet. These policies do not directly tackle the problem, however. They do not lower the costs of jointly determining a way to solve the conflict. There may be policies or market solutions that make it easier to agree about a process to solve a conflict.

1. Social Norms and Unilateral Pledges to Deal with Conflict Cooperatively

One such policy is instilling a social norm, or even imposing a legal rule, that parties in a conflict should meet and talk. If they cannot solve the conflict through negotiation, they should at least look for a process to solve the conflict, or to cope with it in a way that minimizes difficulties. That can be felt as an obligation. Social norms about the ways to deal with conflict exist in many cultures, communities, and organizations. Collectivist cultures tend to stress the need for harmony, and have less tolerance for other strategies such as fighting. Mediation by third parties is stimulated by social norms in many Asian countries (Wall, Stark et al. 2001). Chinese conflict management embodies “a culture of three”, in which it is preferred to have a third party present above solving conflicts in direct, confrontational negotiations. The third party can help persons with status to loose face, avoid the assertiveness necessary in direct conflict negotiations, help disputants to cope with emotions, and restore harmony (Jia 2002).

Legal norms to meet and talk also exist. Many bar associations have at least a nominal rule that requires lawyers to attempt settlement before they bring a case to court. Conflict between employees and employers can be reduced by allowing employees and employer to organize themselves, and creating a setting in which they will trust each and negotiate (Posner 2003).

A unilateral pledge to cooperatively solve conflicts is a possibility as well. The CPR pledge has been accepted by a number of U.S. companies. This policy statement obliges subscribing companies to seriously explore ADR in cases with other signatories before pursuing full-scale litigation. Such a pledge reduces the probability of bargaining failure regarding a way to process the conflict. Likewise, a government agency can commit itself to resolving disputes with citizens through direct and informal communication, and, if necessary, to negotiations assisted by a mediator.

2. Opening the Market for Neutral Dispute Resolution Services

As we have seen, lawyers acting unilaterally for one of the parties may contribute to the dispute resolution process. This, however, has costs: clients and lawyers have dissimilar interests, and invoking lawyers increases the possibility of an arms race. Lawyers add additional levels of communication and thus complexity (Mnookin, Susskind et al. 1999). Folk wisdom is that lawyers are sometimes necessary, but should be avoided whenever possible.

Lawyer services can be developed, however, that are less likely to increase transaction costs (Lande 2005; Lande 2008). Lawyers may empower the client to meet and talk,

lowering the costs of confrontation for him, if they work as a coach, staying in the background, helping the client to communicate and negotiate.

Another possibility is to let a neutral person set up a pre-mediation process, in which the option of making an agreement about a way to cope with the conflict is discussed with both parties. Paralegals and other first line legal aid providers often try to contact the other party on behalf of their clients in order to get the communication going. Facilitation of meeting may help to overcome the second order bargaining problem in similar ways as a mediator may help to overcome the first order bargaining problem. There is little research, however, on the effectiveness of these first line interventions, and also little descriptive work regarding the best practices for nurturing these initial contacts between disputants (see Moore 2003 for some possible interventions).

One step further is the development of neutral dispute resolution services that integrate this first phase. The plaintiff goes directly to a neutral dispute resolution provider. This person commits himself to the plaintiff to facilitate a transparent process that leads to a fair outcome against reasonable cost, not to maximize the plaintiff's outcome. If a client comes with a problem, the consultation can be about the possible views from both sides, about ways to solve the problem, and about neutral criteria that may be applicable. The facilitator establishes contact with the defendant and invites him to participate, giving him the same commitment to process and a fair outcome. If the defendant does not participate, the process continues without him and creates reasonable incentives for the defendant to live up to the outcome that results from the process (see Barendrecht 2009 for an exploration of this approach).

Although they have not yet been tested extensively, it is likely that these approaches can lower the transaction costs of meeting. Reactive devaluation is less likely, particularly if it is not the opponent but a neutral who proposes a suitable dispute resolution procedure. A neutral, who is generally less susceptible to negative emotions, may also be able to reduce over-optimism as to what will happen if the conflict remains unresolved. He may also reduce the probability of bargaining failure, as he can facilitate information exchange.

But other problems may emerge. It remains to be seen whether these more neutral dispute resolution services can develop into a sustainable business model. Not only does a neutral have two clients that may not be on speaking terms, she has to secure payment of her fees from both of them. Although more neutral models are frequently practiced by lawyers, they are not yet emphasized in legal education. Regulation of lawyers tends to stress the unilateral model. And non-lawyers, who may have the necessary coaching skills, often do not have access to the market for such services because of the tight regulation of the legal profession in many countries (Stephen and Love 1999). Even if neutral legal advice in conflicts is permitted, one-sided legal advice may still be the norm in the legal profession.

3. Regulating Ex Ante Dispute Resolution Agreements

As we saw, ex ante dispute resolution agreements are a good tool to lower transaction costs. Regulation of such clauses can be an important contribution to increasing their acceptability, and to prevent abuse of ADR. Several authors have suggested criteria that make ADR clauses more acceptable, which are sometimes already part of legislation or case law (Welsh 2004). Making them binding for the (powerful) party who wrote the clause and not for the (less powerful) consumer or employee (Sternlight 2007) is one option. Criteria as to the acceptability of waiving punitive damages claims, extensive discovery, or participation in class actions are important as well. On the positive side, criteria can be formulated that guarantee procedural quality, outcome fairness, and low cost access to justice.

Most of the scholarly discussion focuses on arbitration clauses, mediation clauses, and jurisdiction clauses when choosing a particular court for dealing with disputes. Dispute resolution agreements, however, can be more sophisticated than that. They may stipulate that the parties will first consult with each other in case of a dispute. If they do not agree on substance, they can agree that they will search for a procedure. If they still cannot agree, the clause can tell them to ask a third party to determine the procedure, for which they can set some criteria beforehand.

4. Requiring Repeat-Players to Offer an Accessible Dispute System

A more active regulation policy is to require an organization to have a suitable dispute resolution mechanism in place (O Shea and Rickett 2006). Financial services regulators and telecom regulators have started to require an effective dispute resolution mechanism as a condition for being given a license to operate in the consumer market.

Interestingly, companies facilitating consumer markets make similar moves. The “Square Trade” dispute resolution process is mandatory for eBay sellers. Trade organizations sometimes also require that a member lets his disputes be resolved by a private dispute resolution mechanism.

Such policies can be extended to other areas where repeat-players regularly have disputes with users of their products or services. Government agencies, companies serving a certain number of customers yearly, and employers with a certain number of employees could be required to have a dispute resolution system in place that is of sufficient quality and offers low cost access to justice. If these dispute resolution schemes are adequately monitored (against criteria such as the ones discussed in the preceding paragraph), they may be a powerful way to increase access to justice. This is particularly true if the consumer or employee can opt out and choose to use a court action instead (Sternlight 2007).

5. Co-opting Powerful Defendants

The biggest threat to a dispute system is that a powerful defendant has insufficient reasons to cooperate. An extreme example of this is a dictator who has committed atrocities in the past and is now an obstacle to lasting peace and economic development. Somehow, the costs of not cooperating have to be increased for him, and the benefits of cooperating as well. But why would he cooperate in the future if he can expect to be severely punished for what he did in the past? It may be necessary to co-opt him by granting him some form of immunity. Prosecution of heads of state, as is now taking place before the International Criminal Court, may be a good idea in order to prevent future harm, but it is also an obstacle to peaceful resolution of conflict as it raises the costs of cooperation for dictators.

This setting is not unique for the international arena. Employers using unfair employment conditions and husbands committing domestic violence face a similar trade-off. For them, cooperation may be too threatening because sanctions loom large.

The solution can be found in two directions. The costs of non-cooperation can be raised by increasing the likelihood of sanctions, such as the use of force against dictators, or other perpetrators. If a government has the resources to bring every perpetrator to justice, to conduct a trial, and to inflict costly punishment, this resolution can be a sustainable policy.

Lowering the costs of cooperation for perpetrators can be another road to a peaceful settlement of conflict. This is the realm of transitional justice (Mani 2005). Truth and reconciliation commissions, like the ones used in South Africa and many other post-conflict situations, may not meet everyone’s taste for justice. Economically, they make sense though. Cooperation is made more attractive for those who cooperate, in manners such as telling the truth, by granting them immunity from sanctions. For the victims of the

crimes committed by the apartheid regime, this process, which can lead to apologies and reconciliation, may or may not be the optimal outcome. However, this way to induce defendants to meet and talk can be preferable, because the expected outcome for the victims is still better than the alternatives, including the possibility of getting no justice at all, or of a civil war that would destroy many opportunities for joint gains in the future (Lie et al. 2007). The same reasoning applies to disputes between individuals. Informal justice mechanisms in developing economies, which have to operate in situations with low levels of enforcement, tend to concentrate on reconciliation, even in cases of severe crimes (Quinn 2005).

The broader message is probably this: In situations of unequal power which cannot be restrained by government action (and this is often where the need for justice is biggest!), a dispute system that promises completely neutral and fair justice for all participants is likely to be ineffective. It will not be used, in particular, if costly retribution is part of it. Hence, only the second best solutions may be feasible, in which the outcomes are unambiguous improvements of the position of the less powerful parties, but not 'perfect justice.' This settling for second best justice is not for eternity, however. The cycle of creating stability, new challenges, and coping with conflict can start once again. In several rounds of improvements, which may take many years, it is possible to move gradually towards a truly satisfactory situation.

IV. The Market for Negotiation Assistance

A. Market Analysis

Once he has succeeded in opening communication channels, the next service a plaintiff needs is assistance in the negotiations that will take place. The basic technology for this is generally described in the literature as integrative – or problemsolving – negotiations (Walton and McKersie 1965; Fisher, Ury et al. 1991; Lewicki, Saunders et al. 2006). This well developed technology supports negotiations by creating an environment that promotes communication and information-sharing, reviewing and adjusting perceptions. In these processes, the focus is on the needs, wishes and fears of the disputants. Integrative negotiations are interest based. The disputants are advised to take a joint problem-solving approach to the dispute, be creative in developing a number of solutions, and choose a (win-win) solution that best fits the interests of both parties. Skills and practices that support these processes are described in the literature and tested to some extent as well (Wall, Stark et al. 2001; Moffitt, Bordone et al. 2005; Deutsch, Coleman et al. 2006; Oetzel and Ting-Toomey 2006; Wall Jr and Chan-Serafin 2009).

Task	2. Talk
Description	Communication and negotiation
Basic technology	Support integrative negotiation (problemsolving, interest based)
Best practices for dispute services/-transactions	- Negotiation assistance (integrative negotiations) - Communication, active listening, questioning techniques - Reframing and adjusting perceptions - Managing emotions and interaction - Improving relationship, recognition, apology, supply of coping skills - Standard formats for integrative negotiations (identify interests, issues, explore win-win solutions)
Possible providers of services	- Advisers - Lawyers - Mediators (facilitative) - On-line facilities
Sources of Transaction costs	Information about negotiation techniques and conflict management is public good and experience good
Market reactions	1. Insufficient supply 2. Business models for delivering expertise: - individualized advice - coaching client through process - taking over process from client - packaging information

Table 4 Market Analysis for Services that Assist Disputants with Talking

Transactions in which the parties buy these services can be concluded with friends or family members who happen to have these skills. Professional mediators, (cooperative) lawyers, and perhaps even with online dispute resolution providers can supply them as well (Katsh, Katsh et al. 2001; Wall, Stark et al. 2001; Moore 2003; Lande 2005; Lande 2008). In an ideal world, people in a conflict could learn these skills cheaply, or they could be coached by a professional who helps leads them through the communication and negotiation process.

Such services have trouble to reach customers with limited resources, though. Assistance with resolving a conflict using the techniques and skills of integrative negotiations basically consists of delivering expertise. Markets for such information goods are special, because information is a public good (it is difficult to exclude people from using it once it is supplied), an experience good (the quality of the information can only be assessed by the customer after delivery) and the upfront production costs of the information are high in comparison to the marginal costs of producing an extra copy and distributing it (Varian 1998; Stiglitz 1999). If a professional just teaches his clients how to communicate and negotiate, he will soon be out of business, because clients can spread this information freely, and are likely to be unwilling to pay for the information upfront.

Thus, the transaction costs on this market are substantial and providers of conflict management skills have to find ways around it. Like other professional services firms, lawyers typically sell services that are customized and individualized. Often they combine delivery of information with other work, such as conducting negotiations for clients (instead of just coaching them) or litigation. These business models diminish the possibility for clients to reuse or to resell the information (Dawson 2005). However, these mixed and individual services tend to be expensive for the client. Hiring an individual expert such as a professional lawyer for the maybe ten hours that are needed to negotiate a simple dispute is too costly for most individuals. Dispute resolution services, like other knowledge products usually delivered by professional services firms, easily become a luxury good.

B. Current Interventions by States

Gradually, we now gain an understanding of the market for justice, using transaction costs analysis and knowing about the newest technologies for solving disputes, including the technology of integrative negotiations that dates from the 1960's and became a mainstream part of conflict management in the 1980's. But governments had to put dispute systems in place long before that. Their systems for coping with conflicts developed over the centuries. They had to cope with the effects of the transaction costs problems, lacking an understanding about the causes of these problems, and with limited knowledge about ways to solve conflict. What societies experienced, was a substantial number of disputes, an apparent unwillingness of disputants to meet and talk about these disputes, and a tendency of disputants to go to unilateral advisers or powerful people. The broader message they probably picked up was that many people are not able to solve their problem through negotiations. Somehow, the decisions have to be made for them. So governments resorted to norms and to decision makers with undisputed authority.

1. Framing Disputes in Terms of Rights and Obligations

What gradually emerged in most societies is the procedure of resolving disputes in terms of who is right or wrong. If a conflict continues, a party can bring forward a claim that his rights were infringed on, and the other party can present a defence. The dispute is thus discussed in terms of rights and obligations. If this discussion does not lead to a result, a neutral third party has to decide for them. Thus, courts of law have to be established.

This rights and obligations approach is attractive. It can build on moral categories and social norms about what good conduct is, which may come from religious sources. For a

functioning market economy, it is very important that people live up to their contractual promises. So contractual rights and obligations are added to the norms that courts can enforce. Moreover, the moral duties as well as the norms related to enforcement of property rights and contracts can be applied generally, so that similar cases can be treated alike. They can also be used to reign in the powerful third parties who are asked to intervene in conflicts. Their power becomes less absolute, if they are bound by the rule of law.

Reframing disputes in terms of rights and obligations also has several disadvantages. The legal framework does not necessarily fit the perceptions of clients. Many researchers have established that clients addressing the formal legal system feel that their needs are not sufficiently taken into account and experience a loss of control, which is commonly attributed to the selection effects of viewing social conflicts through a legal lense (see Relis 2002 for an extensive review of the literature).

Morover, invoking a right and accusing a person that he has committed a wrong easily leads to polarization. It implies moral superiority of one party over the other, which is likely to lead to denial, or defensiveness. In disputes, the parties are very sensitive to being treated like other persons, and with all due respect. They use the way they are treated as a cue for their social status (Lind and Tyler 1988; Tyler 2007). The dynamics of accusing and excusing can be very troublesome in dispute resolution (Allred 2005). Escalation of conflicts is often the consequence of using this framework of rights and obligations.

Another complication is that many conflicts are hard to solve on the basis of pre-existing duties that have not been fulfilled. As we saw, conflict is inherent to long term relationships with high specific investments, where it is caused by changes in circumstances that the parties cannot regulate completely in their contracts. Problems between business partners or family members are thus hard to resolve on the basis of right and wrong. Judging these conflicts on the basis of rights and obligations does not go well with the idea of an incomplete contract. And even in one time transactions, most disputes have other causes than pure opportunism. Most people know quite well that they have to pay for what they order and should deliver goods of appropriate quality, and have sufficient reasons to do so. The basis of contractual disputes is often a misunderstanding, or unhelpful communication at the time the problems came up. Even for major crimes, framing the issues in terms of rights and obligations is unlikely to do the job. Victims of crime have other needs besides a desire for punishment. They would like to be informed, to be offered an explanation, and to see their harm repaired.

Finally, the confrontation creates an additional need for unilateral advice. Now, people not only need a trusted adviser who can coach them in difficult times, but also someone who can inform them about their rights and obligations. The need for a lawyer is increased.

Solving conflicts through a system of rights and obligations is thus a mixed blessing. It fits moral categories, reinforces norms of desired behaviour, and prevents abuse of power to some extent. But it also raises the costs of dealing with disputes because it increases the possibility of escalation and impasse, leads to much uncertainty because many real life disputes are hard to solve by applying pre-existing norms, and creates an extra need for legal expertise.

2. Legal Aid

Thus it is not surprising that governments resort to another common justice policy. They supply conflict management expertise to the poor who cannot afford it, and because the government dispute resolution system is based on rights and obligations, this is considered legal expertise. Most governments supply subsidized legal aid, or stimulate lawyers to do pro bono legal work. Some other models developed as well, such as the

use of public defenders, in which government agencies provide legal aid in criminal cases.

These policies are troublesome, however, because subsidizing legal aid given on a one lawyer to one client basis is a very expensive way to get conflict management know-how to the parties (Pearce 2004). Most states only offer legal aid to defendants in criminal cases facing severe sentences, and in a restricted manner to some plaintiffs in civil cases. Only a few countries have broad programs for legal aid in civil and administrative cases.

More fundamentally, legal aid exacerbates the problems associated to unilateral advice, such as the possibility of an arms race between the parties (Pearce 2004). Giving the poor legal aid will not bring them equal access to justice if their richer counterparts can afford better lawyers.

3. Mediation Aid

More recently, governments have started to subsidize mediation. In theory, this is an attractive approach because one mediator can replace two lawyers, and the problems with unilateral advice are avoided. Mediation also applies the method of integrative negotiations. These policies typically have little impact, however, for the reasons discussed earlier. The problem of letting two opponents agree on one mediator remains unsolved, whereas a party to a dispute can engage a lawyer without consulting her opponent.

Moreover, mediation does not really fit the rest of the formal dispute resolution system that has been built on enforcing rights and obligations. Procedures, legal education, professional norms, business models, and the social norms of lawyers are all based on this model. So mediation is embedded in practices where lawyers do an intake with their clients focussed on rights and obligations, where they negotiate on this basis, and where courts interprete legal norms in order to decide conflicts in which mediations failed.

Conflict management, and in particular the way to support integrative negotiations, is a new technology, which basically changed the way in which negotiations can be structured. Before that, the world just had to accept that some disputants do not communicate. With this new technology, up to 90% of people in a conflict can communicate and negotiate in order to improve their relationship, and around two thirds actually solve the dispute. If we take the long term view, it seems to be a disruptive technology, a paradigm change. But this new technology cannot take hold, unless the surrounding system also adapts to the new possibilities.

Once a system of resolving disputes is based on a certain technology, the costs of changing this are likely to be huge, however. Resolving conflicts in terms of rights and obligations is a game everyone knows. Lawyers, courts, law schools and lawyers in the government form powerful interest groups. As collectives, they have little interest in changing the game, and individual lawyers cannot easily change it by themselves. New entrants in the market face barriers, such as the prohibition for non-lawyers to give legal advice in important markets like the U.S. and Germany. So, subsidizing and stimulating mediation is not likely to be a very successful justice policy in the short run.

C. Promising Policies

Instead, governments should rethink their interventions in the light of the new technical possibilities, but with a keen eye for transaction costs. Availability of conflict management know-how has made new ways of supporting negotiations possible. In the light of the new technology of integrative negotiations, government interventions in this part of the dispute resolution market may have become too broad. Before this conflict resolution technology developed, it was sensible to subsidize lawyers and to see neutral decisions by courts of law as the main way to let parties solve disputes. Now that we know that

many issues in disputes can be solved by integrative negotiations, and the market can supply this, governments can target their interventions in a better way.

Governments have already started to retreat. Trials and judgments by courts have become the exception, and settlement is the norm in civil disputes. Even in criminal cases, plea-bargaining has taken over. In the once considered very litigious US legal system, the trend has been named the 'Vanishing Trial' (Galanter 2004). But then what should governments supply instead?

1. Education in Integrative Negotiations and Conflict Management

A promising approach can probably be found by directly confronting the major causes of transaction costs: the public good and experience good character of conflict management know-how. One way to spread this knowledge is through education programs, and this becomes an increasing part of the legal aid agenda. Non-formal legal education (Commission on Legal Empowerment of the Poor 2008), human rights education (Ramírez, Suárez et al. 2007), civic education (Davies 2004), or public legal education (Buck, Pleasence et al. 2008) are the terms under which this message is conveyed.

Learning how to solve disputes, how to negotiate, and other relationship know-how seem to be valuable assets for anybody, but these skills are not taught at school in any formal way. NGOs in developing countries invest in teaching women and employees about their rights, and use a mixture of mass media, programs for schools, clinics, and paralegal services to spread the message (Penal Reform International and Bloom Legal Clinic of the Northwestern School of Law 2007; Commission on Legal Empowerment of the Poor 2008). Besides basic knowledge about law, these programs increasingly teach skills for coping with conflict, for instance in situations of domestic violence .

The good news is that communication and negotiation skills are fairly general and can be used in most economic and personal relationships. A basic negotiation course can be taught in a week and this seems money well spent. Negotiation expertise is a public good that may have a big impact on human well-being if it were more universally available. Both economic growth and human development depend critically on how good people are in creating win-win relationships with other people and how they manage the disputes inside these relationships.

The bad news is that the curriculum of schools and universities are full and belong to the kind of institutions that are most resistant to change. Slots in primary and secondary education are thus very difficult to obtain. In this respect, it is interesting to note that the theory and skills of integrative negotiations are not even an obligatory part of the curriculum in economics. Economists assume that wealth and welfare will be created by transactions, but do not study how transactions are formed.

A more targeted approach is to spread this know-how to people who are likely to find themselves in the beginning stages of a conflict, or at key transitions in their lives (Buck, Pleasence et al. 2008). Some American states apply this principle by requiring that people complete a divorce course before they are admitted to a divorce procedure. Programs assisting women with dispute skills in order to cope with domestic violence have been linked to maternity care programs in developing countries (Commission on Legal Empowerment of the Poor 2008).

2. Economies of Scale in Communication and Negotiation Advice

Once in a dispute, the parties must cope with the skills they have at that moment. Disputants may learn on the spot, but they will often need help with communicating and negotiating in a productive manner. The challenge is to bring this expertise to the negotiating table at a low cost, which means without having to pay one professional for exensive individualized dispute advice.

The most promising approaches here are in the area of finding economies of scale. Legal expenses insurers have developed ways to serve many clients with similar problems by standardizing their services through protocols. Specialized dispute resolution services are offered by trade unions and consumer organizations to their members. Government outfits and law clinics at universities offer basic legal advice to people with legal problems. Paralegal programs are the most promising variant for developing economies (Maru 2006).

Increasingly, legal advice is supported by internet interfaces, so that clients can start with self-help and then go onwards to personal advice if necessary. Advice can now be obtained by posting questions on the internet and obtaining answers in return for a fee. Websites that use this model include findlaw.com and lawguru.com. The question remains, however, whether this leads to viable business models for selling expertise. Like most IT companies, the providers struggle with keeping the balance between attracting many customers with free services and selling more sophisticated services for a fee.

Most of these standardized services still have to integrate communication and negotiation advice into their offerings, however. The market still perceives the need as a legal need, and not so much as a need for knowing how to communicate and to negotiate (Hacker 2008). Governments can surely help to adjust this perception, which is caused by their prior interventions in this market. Because mechanisms for dispute resolution are widely perceived as a task for state institutions, the public is likely to appreciate some guidance from the government regarding the best ways to solve disputes. Public awareness programs regarding the way conflict management know how can be obtained are one way to achieve this.

3. Structuring Settlement Negotiations

A more direct way to stimulate the use of modern conflict resolution know-how is to structure the communication in disputes along these lines. This is the modern equivalent of the rights and obligations approach. Instead of inviting people to frame their dispute in legal terms, the parties can be asked to communicate about their emotions and their needs, wishes and fears. Moreover, a government dispute system can ask them to bring forward a number of possible solutions and to suggest legal criteria and social norms for evaluation of these solutions, instead of requiring the plaintiff to formulate a claim and the defendant to submit all his possible defences.

This negotiation support system could have the form of procedural rules, very similar to the codes of procedure, but now applicable to the negotiations that usually precede the court action. Other possibilities are to build a web-based negotiation support system, or to let interest groups come to a code of conduct for the settlement of claims (Van Zeeland, Kamminga et al. 2007). Again, a motive for this government intervention could be to compensate for the existing government incentives to frame a conflict (only) in terms of rights and obligations.

Once such a framework is in place, the market can bring additional negotiation and communication skills to the table. As we have seen, there are many people around who wish to assist people with communication and negotiation, once they sit in a room and are ready to be helped. Mediators, other neutral facilitators, online dispute resolution services, collaborative lawyers, or more traditional lawyers can provide these services. Finding the people with the right skills is something disputants can sort out by themselves, probably with support from a little regulation that helps clients to distinguish good quality from bad quality, as is common in other professional services (Stephen and Love 1999).

V. Supplying Information about Fair Solutions

A. Market Analysis

In disputes, the parties always have to cope with distributive issues. The parties must determine an amount of compensation, the length of a notice period, a way to divide assets which they jointly own, and sometimes the severity of a sanction. Bargaining in this situation of bilateral monopoly is likely to fail, because parties tend to obtain better results if they have more patience, make more extreme offers, commit themselves more, have more attractive outside and inside options, and have more information. (Muthoo 1999; Muthoo 2000; Carraro, Marchiori et al. 2006; Korobkin and Doherty 2007). This all amounts to uncooperative conduct. Consequently, the tension between creating value, for which cooperation and information sharing is most effective, and distributing value, where a unilateral strategy is usually more succesful, complicates the process of dispute resolution (Mnookin, Peppet et al. 2000).

The only known way this bargaining failure can be prevented, is by bringing neutrality in the game. Information about the way other people have settled similar issues is one way to do provide a neutral point of view. Informing the parties about solutions reached in comparable situations helps them to assess the fairness of outcomes (Pillutla and Murnighan 2003; Husted and Folger 2004; Cialdini 2007). Market prices, rules of thumb used in practice, social norms, or case law can provide people with this information (Fisher, Ury et al. 1991; Shell 2006; Barendrecht and Verdonschot 2008; Verdonschot 2009). These 'objective criteria' create a shadow of the law, a neutral image of a just world, that the parties can use as a point of reference for reaching agreement (Mnookin and Kornhauser 1978; Cooter, Marks et al. 1982; Hacker 2008; Nisenbaum 2009; Ray 2009). People in a dispute tend to ask for these criteria: what did others get in my situation (Hacker 2008)?

Task	Share
Description	Distributing value fairly
Basic technology	Supply information about fair shares (sharing rules, objective criteria)
Best practices for dispute services/-transactions	- Bargaining assistance (distributive negotiations) - Objective norms and criteria for three/five most common issues in most common disputes that: o can be applied easily; o weigh similar elements for both; o give a continuous range of outcomes, not binary answers (yes/no); o belong to the parties (legitimacy, fairness, appropriateness); o allow for adjustment to situation: o are not exclusive; o show what others did in similar situations; Make this information widely available in order to increase transparency
Possible providers of services	- Advisers - Lawyers - Mediators (evaluative) - Legislators - Courts rendering precedents - Legal academics Legal information providers (publishers)
Sources of Transaction costs	1. Information about fair solutions is public good and experience good 2. Providers of fairness information face pressure/criticism from all sides
Market reactions	1. Insufficient supply 2. Business models for delivering expertise (see above)

Table 5 Market Analysis for Services that Assist Disputants with Sharing

Unfortunately, objective criteria are not always available (Barendrecht and Verdonschot 2008; Yeazell 2008). Information about the going rates of justice is costly to produce (Barendrecht 2009), because it requires extensive knowledge about the ways disputes of a certain type have been settled by the disputants or decided by neutrals. The information has the character of a public good: once the information is published, the marginal costs of letting another person use the information is close to zero, and it is very difficult to exclude people from using the information. To make things worse, the client can only know whether the information is valuable for him if the norms are disclosed to

him first. But why should he pay upfront for a good that still has to prove its value? Because the production costs of this information are high, and it is a public good, as well as an 'experience good', there is little commercial incentive to produce rules regarding suitable ways to deal with distributive issues (Posner and Rasmusen 1999; Parisi 2000).

To make things worse, the producer of distributive rules is unlikely to have many friends. Because of the natural tendency of people to be biased in the way they perceive fairness, producers of distributive norms are likely to be criticized from all sides.

The market for legal expertise thus has similar characteristics as the one communication and negotiation know-how. Lawyers offer tailor made legal advice, and bundle legal information with other services, such as helping parties to write a contract or to argue a case in court. Legal information providers such as writers of handbooks and publishers of databases supply packages, in which procedural rules, rules of conduct put down in legislation and commentary are sold together with an occasional norm for settling distributive issues. If a plaintiff just wants to know what the usual criteria are for dividing assets in a divorce, for damages in a personall injury case, or for compensation if a second hand car has serious defects, there is often no place to go.

B. Current Interventions by States

The scarcity of public information about distributive issues is a problem that has been tackled by several government interventions.

1. Codificattion

Making law transparent is a classical task of governments. Following the examples of Justinian and Napoleon, states enacted civil codes, criminal codes, and codes of civil and criminal procedure. The extent to which they codified law varies between common law countries, where more of the task of making law transparent is left to the courts, and civil law countries, where legislation is the primary way to make law transparent. Although common law and civil law are often presented as opposites, the amount of centralized codification is primarily a matter of degree. Both common law and civil law systems see making law transparent as a government task and do this partly through codification.

However, codes have not been able to give citizens access to the information that is needed to settle their disputes. A consumer who has a dispute with a seller about the quality of the goods he bought will find in the code that he is entitled to the quality that is described in the contract, or the quality that may be expected from goods of this type in general. Parties in a divorce, or an employment contract termination, will only obtain limited information about their entitlements. Civil codes give little attention to very common causes of disputes. Transitions in long term relationships, changes of circumstances, and interactions in which both parties made a series of small, understandable mistakes, are issues that are hardly touched upon.

Generally, codes are rather abstract statement of rights. They thus mainly provide a structure for reasoning, or a way to frame issues in a dispute. This can be very useful because it is easier to compare outcomes across cases if the outcomes are classified in categories of legal problems. Whilst rules from codes somewhat limit the range of possible outcomes, they rarely give much guidance for the outcome itself. The going rates for rights remain hidden for the general public. Codes hardly ever mention percentages, amounts or numbers.

It is not so difficult to find the sources of government failure here, that are causes of transaction costs. Governments have limited information about the going rates of justice because they do not know how private disputes are usually settled. Codification projects tend to be the realm of academic lawyers. They have access to precedents, but, as we will see, these are also not very informative about the going rates of justice. Because the

lawyers working on the code are not able to provide guidelines, they focus their attention on providing an encompassing framework for legal reasoning. Codes have the ambition to be comprehensive in this respect. This means that codification efforts are often targeted at making the code cover every imaginable problem. The discussion in codification projects is thus mostly about the different ways to systematize the law. These projects attract little or no attention from the general public, which is understandable because codes do not seem to have much impact on outcomes. Currently, the vivid academic debate about a European Common Frame of Reference for contract law is a case in point. In this academic debate, there is surprisingly little discussion about the distributive effects of the rules that are in the process of being designed (Hesselink 2006; Kerber and Grundmann 2006; Smits 2008).

Another reason why codes tend to remain silent on distributive issues is related to the format of rights and obligations. Any codification of knowledge needs a model, a language and concepts in which the codification takes place (Cowan and Foray 1997). Unsurprisingly, the existing legal codifications tend to follow the model of rights and obligations. Civil codes regulate how people can establish property rights, how they can conclude a contract, under what conditions a contract is enforceable and what their obligations are to prevent damage to others (tort law). Criminal codes qualify conduct as crimes and mention the sanctions that can be attached to them. The rights and obligations model is not likely to produce concrete guidelines for settling real life disputes in which both parties interacted in a way that was less than perfect.

Limited incentives are also a problem. Codification experts in the government bureaucracy are not directly responsive to client needs (Couyoumdjian 2008). Sometimes they are more concerned with the integrity and the system of their code than with the way it is used in practice. Because lawyers and repeat-playing disputants may very well have an interest in keeping legislation complex (Galanter 1974), they are unlikely to put pressure on the codification experts to do a better job Whilst plaintiffs who are one-shotters need transparency at the time they use a rule, they are unlikely to need it again in the future. So, from both sides, there is little pressure on governments to provide good information on the going rates of justice.

For legislators, and as we will see for courts, an impediment to the development of objective criteria is that legal norms are thought to be binding. There are good reasons for this requirement. Legal norms often cannot be fully supported and explained by one consistent set of reasons. Law is frequently based on 'incompletely theorized agreements' (Sunstein 2007). Thus, the courts and the subjects applying the law cannot be left free to consider the substantive reasons behind the rule and improve it if necessary (Sherwin 2006; Schauer 2008). If legal norms are to provide law and order they must not be questioned and, therefore, they are binding. The downside of this requirement is the increase in costs of developing criteria. Widespread agreement about the norms is necessary, at least in a democracy, and they should pass through a formal legislation process. If courts are setting precedents, they have to operate cautiously. Errors in binding norms have to be avoided because they are difficult to correct at the stage of applying the norms. Thus, legislators may refrain from creating norms or set open-ended norms that give little guidance to the parties in a dispute.

The political process is also ill suited for negotiating and deciding norms for distributive issues. Politicians have little to gain from taking clear stances regarding ways their citizens should divide the gains and losses of their private transactions. Only some norms – like sentencing guidelines for criminals and, currently, norms for salaries of business leaders – are interesting for politicians, because they protect the interests of many voters against the selfishness of a few.

Thus, codes tend not to provide the information that people need to settle their distributive issues. This is understandable once we look at the incentives for those

involved in writing the code. Once a code is enacted, however, it becomes a tool for teaching future lawyers. The code will influence their ways of thinking and doing. It reinforces the idea that the law consists of rather abstract and open ended rules that classify issues more than guiding the way towards solutions for real life problems. In the minds of lawyers working in law practice, solving actual disputes happens in an interaction between the parties and, probably, the courts. They are helped by legal expertise that operates within the broad framework of rights and obligations. Little of this expertise is codified. Lawyers are probably not unique in this respect. Cowan and Foray show that the initial high costs of codification may sustain an equilibrium in which a large group of experts has little interest in codification, although this would have high social benefits (Cowan and Foray 1997).

2. Precedents

Another government intervention in the area of providing legal information that helps people to settle distributive issues is the assignment of this task to courts. Within the broad framework of rights and obligations that form the existing legal system, the courts can give guidelines about reaching outcomes in concrete disputes. This task of courts exists both in legal systems where the courts defined the framework in the past and have powers to adjust it (common law) and in legal systems where this structuring is primarily done by means of codes (civil law, Germanic legal systems). In practice, both types of legal systems have a division of labour between courts and legislators in which more abstract rules and more concrete guidelines have to be formed in an interaction process (Calabresi 1999; Ponzetto and Fernandez 2008).

Building a body of case law is a slow process, however. Litigation, up to the phase of decision making by a court, takes time. Generating sufficient experience with a number of different disputes may cost five to ten years. Aligning these precedents in appellate review and through decision making by the highest courts can easily be a matter of five more years (Ponzetto and Fernandez 2008). Moreover, the prevailing culture among judges is to see a dispute as an individual problem that needs a contextualized decision. Consequently, even the highest courts may see the production of rules as a by-product of their true task: doing justice in the individual case. Thus, it can take decades before a clear guideline emerges from case law. As a result, court decisions seldom give much guidance in issues of sentencing, sharing of liability, damages, or other quantitative matters (Bovbjerg, Sloan et al. 1989). Searching databases of case law for percentages, numerical guidelines or ranges of damages leads to a very limited number of hits.

Incentives are probably misaligned here as well. Judges generally do not have many reasons to create precedents that are useful for future parties (Landes and Posner 1979). They face similar problems as politicians. What they say is likely to be seen, at least by one of the groups involved, as a decision against their interests. Accordingly, making such rules will not add much to a court's popularity. Lower courts that create clear guidelines expose themselves to criticism from higher courts. With some creativity, it is always possible to find an example of a situation in which the proposed guideline should not be applicable. Add to this the doctrine of binding precedent, or at least an obligation on the part of courts to follow an established line of precedents (Fon and Parisi 2006), and higher courts will think twice before expressing a clear guideline. It binds them for the future as well. It takes more time and effort of judges to agree on a more general guideline than on a narrow decision in one case (Sunstein 1999). Overall, courts are rather cautious. They favour rulings that are narrow, in the sense that they govern only the circumstances of the particular case, and also shallow, in the sense that they do not accept a more general theory of the legal issue (Sunstein 2008).

3. Supporting Law Faculties at Universities

The market and government failures linked to the production of legal information are probably one of the reasons why states tend to invest in law faculties at universities. Within universities there is a lively debate whether legal scholars at universities should

be real scientists, testing theories about law and its effects, or if they should collect, organize and publish the legal information from legislation and precedents. The latter function is certainly one that is much appreciated by law practice. Law firms and other providers of justice services buy legal information from academics in the form of law books, law review articles, and legal education.

Legal academics have not always been effective in producing information about objective criteria for distributive issues. The prevailing attitude has become that academic lawyers should reflect on what happens in case law and in legislation. Therefore, they primarily follow the trends in production of norms in these sources of law. Within these categories, they are likely to focus on the information that is easiest to access and has the greatest impact. This focus tends to be case law from the highest courts and changes in codes. These changes in the law are thoroughly commented on from all sides. Academics at law faculties seldom analyze hundreds of cases from lower courts in order to find patterns in decision-making by using statistical methods. This lack of responsiveness to the needs of clients is understandable, if we look at the transaction costs of supplying this information again. It would be a time-consuming and costly business from which the results would be immediately copied by all those other academics writing their own textbooks.

C. Promising Policies

How can providers of justice services, courts, academics, or legislators be seduced to produce helpful objective criteria, going rates, sharing rules, prices of rights, or whatever name we give this information? This is an area that has hardly been researched yet, so we cannot do more than explore the issues.

1. Improving Incentives to Generate Guidelines

A person can gain from providing information about objective criteria in many different ways. Besides financial profits, the satisfaction of helping others to solve disputes can be one such motivation. Another reason can be the fame associated with providing a lasting solution for a category of disputes. Rules sometimes carry the name of their authors. For example, the Loi Badinter that introduced strict liability for car owners causing accidents has the name of the French Minister of Justice who was the driving force behind it. The Learned Hand formula for negligence is named after the judge (and philosopher) who wrote it down in the case *United States v. Carroll Towing Co (1947).*

If courts have to deal with many similar cases, they sometimes have an incentive to provide more clarity about the basis of their decisions. Otherwise, they will be overburdened with work, or be exposed to accusations of unequal treatment in similar cases. Other incentives work in the opposite direction. A court or decision-maker providing clear guidance for future cases will attract a lower number of cases in his future because more cases settle. This can lead to a reduction in income, as well as a loss of opportunities to make a difference (Landes and Posner 1979).

More generally, the way courts are funded is an area for enquiry. It might be worthwhile to develop methods for financing courts that tie compensation to the responsibility of solving all disputes in their jurisdiction in a low cost/high quality manner within a limited amount of time. If a court's financing would be tied to its dealing with all divorce cases or employment issues, the court is likely to look for economies of scale and for ways to increase the likelihood of settlement. Communicating guidelines for distributive issues to disputants achieves both goals.

2. Rulemaking through Intermediate Private Institutions

Many schedules, guidelines, and formulas that are used within the legal system are non-binding rules. Commissions or groups of academics design schedules or formulas; judges join forces to agree about non-binding guidelines.

This can hardly be a coincidence. The costs of binding distributive rules are high. They have to pass through formal procedures with limited capacity, they will be exposed to criticism from all sides, and the rules will limit flexibility of decision-makers. Thus, new, lower cost ways of rulemaking develop. As institutional economists have noted, groups may jointly form their own institutions because the transaction costs of individual coordination or coordination at the state level is too high (Brousseau and Raynaud 2006).

Governments can see this as undesirable competition and, thus, try to preserve a rulemaking monopoly, but they can also choose to facilitate such private rulemaking processes. Developing nonbinding guidelines is still costly for stakeholders, and it may be difficult for them to finance these efforts. The process of rulemaking works best if groups of stakeholders are involved, but presided over by a neutral body, which governments can provide. The state can also put pressure on the private rulemaking process by threatening to use its procedures for formal and binding rulemaking if the stakeholders do not solve the issue themselves.

3. Removing Restraints on Rulemaking for Distributive Issues

Another approach is to remove restraints on governments and courts that produce rules for distributive issues. A good strategy may be to have general principles as binding rules in combination with specific non-binding guidelines for recurring problems. Damages for personal injury cases, for instance, can be determined on the basis of the general and binding principle that all loss of income has to be compensated. Schedules can than give guidelines for establishing the amount of damages, whilst the parties and the courts retain the possibility to deviate from the schedule if the general principle is violated.

Instead of discussing in a general way whether precedents are binding, it could be left to the courts themselves to decide how strongly they recommend that other courts follow their criteria. Similarly, a civil code could have a combination of general principles with specific criteria as guidelines for recurring issues under the article in question.

The idea that codification should be comprehensive is another restriction that raises the costs of production of useful criteria. If legislators and courts would focus their efforts on criteria for the problems that are most frequent and urgent for citizens, then the costs of producing rules would drop. Depending on the costs of error and the costs of decision making, it is possible to find an optimal level of specificity of rules (Fon and Parisi 2007; Sunstein 2008). Generally, more specific rules are desirable for problems that occur frequently (Kaplow 1992). Instead of relying on interest groups, parliamentarians, individual judges, or lawyers working in the justice department to set the agenda, governments might research the most urgent needs for criteria and then focus efforts in that direction. One additional reason for adopting this strategy is that producing the right type of guidelines will diminish the costs of courts and of subsidized legal aid.

4. New Models for Sharing Rules

In the information age, codification of knowledge has become much easier. The cost of codification has fallen, the ability to codify more complex phenomena has increased, and the value of codified knowledge has risen because it became less expensive to reproduce and more valuable (e.g. faster) to use (Cowan and Foray 1997). This general truth is likely to apply to legal codification as well.

Objective criteria for distributive issues, the going rates of justice, have a similar role as pricing information. Sustainable business models exist for sites that inform the public about prices of goods. It is true that this is easiest for goods that are homogeneous and standardized, but sites that compare prices of rather complicated goods, including insurance or loans, have developed. They now compare products that have many relevant attributes. Similarly, it may become possible to develop bottom-up models for sharing criteria for distributive issues. Local going rates for settling recurrent issues could be uploaded to a website so that others can use them. Such a “wiki-norms solution”

depends on the willingness of individuals to share their knowledge about such criteria. As of yet, it is uncertain whether it will be possible to create a forum on which the going rates of justice can be made transparent by users of the dispute system, but attempts to achieve this are under way (Barendrecht and Verdonschot 2008 and www.microjustice.org).

One problem is that websites disclosing pricing information tend to be tied to spot markets where the goods in question are traded. Here, sellers have an incentive to disclose their price if it is low. Sellers or buyers usually pay a small commission to fund the infrastructure for disclosure of pricing information. Rights, however, are not traded like telephones or holiday homes. They are settled with one particular opponent, so there is little reason to inform others of offers to settle for a certain price. Other incentives have to be offered to induce people to disclose information about the going rates of justice. People could do this for money, because it enhances their reputation, or for altruistic motives.

VI. Delivering the Option of a Neutral Decision

A. Market Analysis

The plaintiff also needs the option of a neutral decision that imposes a fair outcome on the plaintiff. This justice service is an essential element of a dispute system. It is valuable to the plaintiff, because it creates incentives on the defendant to participate and to make moves towards a fair solution for the distributive issues. Moreover, the neutral supervises the negotiation process, making aggressive bargaining tactics less likely, and can take decisions if the parties do not reach an agreement (Barendrecht 2009).

Task	4. Decide
Description	Decision making procedure
Basic technology	Make option of a neutral decision available (at low cost)
Best practices for dispute services/-transactions	- Adjudication - Simple procedure (oral presentation, hearing, decision) - Limited fact-finding - Judicial/neutral case-management and information processing - Online formats for defining interests, distributive issues, possible solutions, decisions - Stimulate cooperative attitude - Procedural justice: voice, participation, trustworthiness, neutrality, interpersonal respect. - Discussion of possible objective criteria for outcome - Integration of decision making and settlement - Mild time pressure - Preliminary judgments in more difficult cases More generally: minimize sum of decision costs and error costs
Possible providers of services	- Persons with informal power - Courts - Arbitrators - Neutral fact-finders State agencies
Sources of Transaction costs	1. Difficulties of concluding ex post dispute resolution agreements: - Psychological barriers - Strategic barriers 2. Insufficient incentives on neutral to provide efficient processes and fair solutions because of: - dependence on neutral - low frequency of transactions - uncertainty and complexity - monitoring difficulties.
Market reactions	1. Access to neutrals on markets is unavailable or unreliable 2. States provide neutrals

Table 6 Market Analysis for Services that Assist Disputants with Deciding

Let us assume that a plaintiff and a defendant would look for a judge on the market for private transactions and that they found one. This is unlikely, as we have seen in Section IIIA, because parties in a dispute have difficulties to agree on a procedure, but let us

imagine for a moment they have succeeded in overcoming this problem. Now how will their transaction with the private judge unfold? Normally, the client of a service provider would make clear what he wants, negotiate a price, and then monitor whether the seller will do a good job.

A privately contracted judge, however, has two clients. They would need to give their judge instructions what they want from him: How to exchange views and documents? How much time for the hearing? A jury or a bench trial? How many witnesses will be called? How will they be questioned? How to conduct settlement negotiations? On many of these issues, the plaintiff and the defendant are likely to disagree, because they expect to obtain better results in one version of the procedure, or make elements of the procedure a bargaining chip if their opponent is strongly in favour of one way of dealing.

Consequently, a private judge or an arbiter does not get a clear message from his clients regarding the kind of interventions they want, or the costs they want to spend. Once they find themselves before a judge, the parties are also unlikely to go to another judge because they are unhappy with the first one. The consent of the other party would be needed for this. The parties are locked into the service of this one judge, but cannot give him clear instructions. They are also unlikely to need the services of the judge in the future, because most parties will not be regular clients of courts. If, exceptionally, one of them is a regular buyer of judge services, this is bad news for the other party and likely to affect the neutrality of our private judge. Managing this neutrality is another transaction cost problem that should be solved. The private judge may be inclined to accept side payments from one of the parties to influence the decision. This is difficult to detect for the other party.

In sum, the transaction costs of hiring a private judge are very substantial. The normal discipline of the market does not work well if a plaintiff tries to hire a judge.

B. Current Interventions by States

1. Courts

Taking into account the number and size of these transaction cost problems, it is unsurprising that governments intervened. The standard policy that developed over time was to nationalize the business of providing neutral decisions by setting up an independent judiciary. Every nation has a court system for solving civil and criminal disputes, and most countries have some form of judicial review of decisions by the administration as well. It is often possible to opt out of this government system, but we saw that this is difficult, as it requires agreement between both disputants, which is not likely to materialize (Section III.A). So most disputes are solved by formal courts set up by states, or in the shadow of their interventions. Courts face little competition.

Courts set up by governments are not very efficient institutions. Clear signals of this are the amount of court delay that is pervasive around the world and the high costs of litigation (Trubek, Sarat et al. 1983; Buscaglia and Dakolias 1999; Messick 1999; Zuckerman 1999; Peysner, Seneviratne et al. 2005; George 2006; Cabrillo and Fitzpatrick 2008). This is even true for courts in developed economies that have had a stable court system for more than a century (Woolf 1996; Rhode 2004; Peysner, Seneviratne et al. 2005). Courts are slow in taking up information technology. They do not systematically incorporate innovations in conflict management in their services, although there is much criticism on the way courts intervene in disputes (Tyler 1997). The inefficiencies are so apparent, that the basic attitude of citizens is that litigation should be avoided. Governments have accepted this, which is a strange state of affairs, taking into account that courts were set up in the first place in order to help people to solve problems they cannot solve themselves.

There is general agreement between scholars studying courts about the reasons for these inefficiencies. Judges have insufficient incentives to deliver high quality and low cost services (Trubek, Sarat et al. 1983; Messick 1999; López de Silanes 2002; Botero, La Porta et al. 2003; Peysner, Seneviratne et al. 2005; George 2006; Cabrillo and Fitzpatrick 2008).

There is also a fair amount of consensus about the policies that are unsuitable to increase efficiency. Making money for courts available and asking judges to render neutral decisions in conflicts is not enough to create access to neutral decision making (Botero, La Porta et al. 2003). Empirical research confirms that hiring more judges does not increase the productivity of the courts (Beenstock and Haitovsky 2004), nor does a salary increase (Choi, Gulati et al. 2009). These outcomes are understandable, because just giving judges the task to decide disputes does not make it easier for clients to determine what courts should do for them, to monitor court performance, and to make them satisfy client needs. Shifting from private judges, who try to make a business from deciding conflicts, to state paid judges is not a solution for most of the transaction problems. The only real change is that judges become less dependent on the parties for their income, so they may be less tempted to take side payments from the parties, but also less inclined to do a good job for their clients.

The incentives that are lacking in the market place will have to be put in place by governments. If the clients cannot decide what exactly they want from the judge, and cannot monitor her sufficiently, someone else has to take over this task. If this does not happen, a likely type of government failure that applies here is inadequate control of the bureaucracy. Individual judges may be very motivated to deliver adequate solutions for disputes in time, but their internal motivation is not complemented by external incentives (Posner 1993; Cabrillo and Fitzpatrick 2008). So let us see which incentives governments have put in place.

2. Extensive Rules of Procedure

Extensive regulation of the procedure is one way to protect the interests of the clients of courts. Civil procedure rules and codes of criminal procedure, as well as their counterparts for administrative litigation, typically exist of hundreds of articles, with many details about filing claims, providing evidence, rules for hearings, options of intermediary decisions, rules for many different complications that can arise during the procedure, and rules on how the court gives reasons for its decision.

This extensive regulation protects the parties to some extent because it makes the tasks of the courts more transparent and their performance thus more easy to monitor. Appeal courts, colleagues, lawyers, and legal academics can monitor whether judges follow the rules of procedure. If they do not comply, their reputation as a judge and their career opportunities will suffer.

But making courts stick to the procedural rules attracts the usual risks of a rule based bureaucracy. Instead of focusing the judge on the needs of the disputants, the rules can easily become a target in themselves. In the dysfunctional variant, rules become an obsession (Bovens 2005; Bovens 2007).

Moreover, rules of civil, criminal, and administrative procedure do not cover all the needs of the disputants in a systematic way. They tend to deal mostly with issues that are easy to address in general terms, like the opportunities of both parties to submit their point of view at various stages of the procedure, and formal issues like the data that documents must contain to identify the plaintiff and the defendant (see, for instance, Article 5 of the Principles of Transnational Civil Procedure: ALI and UNIDROIT 2004). More complicated, but much more essential issues like the way the parties present their case in documents, or the way a hearing is structured are mostly left to the individual lawyer of judge. The trade off between error costs and decision costs is not addressed, or only in very general

terms like an obligation of the court to “resolve the dispute within a reasonable time” (Article 7 PTCP).

The operation of courts is indeed rather bureaucratic, probably more bureaucratic than one can find in any other government agency. Researchers have begun to measure the efficiency of procedures by counting the number of procedural steps, the costs of accessing the procedure, or the amount of time at least one of the participants is active when compared with the duration of the procedure (see the World Bank "Doing Business" reports and Djankov, La Porta et al. 2003; Gramatikov 2008). In these terms, even simple court proceedings tend to compare unfavourably with other procedures in the bureaucracy. As a consequence of this, the expected costs of litigation can easily be higher than the value at stake (Zuckerman, Chiarloni et al. 1999). Waiting times for hearings and decisions can be months, or even many years (Messick 1999; Zuckerman 1999; Zuckerman, Chiarloni et al. 1999).

Another signal of the inefficiency of court procedures is the acceptance that professional lawyers are needed to steer clients through the system. In many countries, using lawyers is even obligatory for important types of court proceedings, whereas having to hire a lawyer obviously adds to the cost of access to a neutral intervention. This is even more worrisome, because the parties can become trapped in an arms race, where they try to invest more and more in convincing the court of their position (Tullock 1980; Hirshleifer 2000; Cabrillo and Fitzpatrick 2008). It is obvious that this war of attrition is more likely to occur in situations where lawyers are paid by the hour, and thus have an interest in keeping the war going.

3. Protecting Clients and Monitoring Neutrals through Appeals

Governments also help to monitor and control the courts by setting up a complaint mechanism in the form of appeal courts. A party that is not satisfied with the outcome can ask the appeal court to reverse it. Because there is always the possibility of an appeal, lower courts will know that decisions that are not truly neutral have quite a substantial probability of being detected (Shavell 2004).

An obvious problem with an appeal as a solution to the monitoring problem is that it adds to the transaction costs. An appeal can be used by a powerful defendant to increase the costs of accessing justice for plaintiffs. Compared with complaint mechanisms for other services, where a customer can pick up the phone and give his feedback to a call center, appeals are extremely formal and costly. Private arbitration procedures usually do not include the possibility of appeal, which suggests that parties setting up these procedures usually think they are too costly in comparison to the advantages (Landes and Posner 1979; Barendrecht, Bolt et al. 2006).

As a mechanism for enhancing the quality of outcomes, appeals have rather limited effects, because there are normally no sanctions for lower courts that are reversed in an appeal, except for those judges that have the ambition to become an appeal judge themselves. Moreover, appeal courts tend to monitor only whether the decision of the lower court is legally correct and whether the rules of procedure were observed. Many attributes of legal decisions and procedures that are important to clients are not covered by this type of monitoring. Appeal courts usually do not oversee whether courts interacted with the clients in a respectful and effective way (interpersonal justice, informational justice). They do not assess whether the decision solves the problem of the parties, whether the procedure was cost efficient, or whether the outcome was delivered timely (Cabrillo and Fitzpatrick 2008).

4. Independence of Courts

Guaranteeing independence is another common element of the regulation of courts. Good salaries for judges and appointments for life are often presented as tools to prevent corruption. The measures to guarantee independence have been researched

extensively. Most effective are a transparent case management system with transparent and consistent rules for the assignment of cases; predictable rewards and penalties driven by performance-based indicators, with a consequent clarification of the career paths for judicial and law enforcement officers; specific organizational roles for judicial, prosecutorial and police personnel in order to secure their own internal independence; increasing capacity to review the consistency of court rulings; and a political system in which alternation in power becomes a likely outcome of periodic elections, so that all parties have an interest in an independent judiciary that actively controls government (Buscaglia and van Dijk 2003).

Unfortunately, the independence of courts is not only a valuable principle of state organization, but also a shield against incentives that would align the interests of courts closer to those of their clients (Posner 1993; Cabrillo and Fitzpatrick 2008; Choi, Gulati et al. 2009). Opportunities for interactions with the parties that are normally a good way to align the interests of principals (clients) and agents (courts) have to be curtailed because of the danger of corruption. Judges who would like to learn more about client needs may refrain from this because they want to keep a distance.

Independence of courts means that courts are not fully part of the government structure with internal and external feedback mechanisms. Thus, it may not be fully appropriate to study them as entities exposed to government failure. A more adequate description of their economic position may be as service providers who have been granted a monopoly. The rules of procedure give them this monopoly position because they are the only dispute resolution forum where the defendant has to appear under the threat of a sanction in the form of an enforceable default judgment. Courts are in some respects even more problematic than other monopolists because they are more isolated from their clients. Most courts do not directly work with clients, but only through the lawyers as middlemen, who do not have a direct interest in a low cost and speedy resolution to the dispute.

Monopolies usually fall under some sort of external supervision or regulation of the price and/or quality of the services they supply (Sappington 2005). This aims to guarantee that they take the interests of their client seriously enough, and in a balanced manner, when compared to their own interests. Supervision of courts is not truly independent, however. Appeal courts are part of the same hierarchy. We also saw that their supervision is limited to some aspects of the quality of outcomes and procedures, thus leaving the costs and many other quality attributes unguarded.

Establishing judicial councils is the most recent attempt to improve the governance of courts (Fabri and Langbroek 2000). The major reason for their establishment has been to decrease the possibilities of the administration to influence the court system. Judicial councils can guarantee that courts are a truly independent government body by removing decisions to appoint judges and to allocate budgets from other government agents. Judicial councils can also improve the management of courts. Judicial councils, however, do not have clear responsibilities to provide low cost access to neutral interventions of appropriate quality. The rules of procedure are outside their control. Their organisations usually have no mechanisms that ensure that clients' interests are taken into account. Because the councils are led by judges and answerable only to the community of judges, they tend to behave more like an interest group of judges than like an independent supervisor of courts.

C. Promising Policies

Until now, government policies have not been very successful in making high quality and low cost court interventions available to citizens. From the perspective of transaction cost analysis this is not surprising, because they have not directly tried to diminish the costs of transactions between neutral adjudicators and their clients. They focused on appeals as a monitoring device, procedural rules as a way to constrain the parties and the judge,

and independence as a guarantee for neutrality. It has proven to be difficult to make courts more efficient and responsive to client needs in this way. Transaction cost analysis suggests to look elsewhere.

1. Simple, Low-Cost Default Procedures

The main transaction cost problem that has to be solved is that the parties cannot determine between the two of them what is an adequate procedure for their conflict. So this has to be determined for them. Governments thus set a default procedure, from which the parties can agree to opt out. Opting out, however, is an almost theoretical option, specifically because of the strategic and psychological barriers to agreeing on a procedure, so setting the default for procedures is a very crucial decision.

Default procedures (usually the ones codified in procedure rules) have traditionally been formulated by members of the legal profession. Judges, lawyers, and legal academics have an interest in providing accurate decisions. In the long run, they also have an interest in setting the defaults in a way that maximizes the total sum that disputants invest in legal dispute resolution. It is unlikely that their procedural designs will result in default rules that minimize the costs of error and the costs of decision-making (Tullock 1980; Cabrillo and Fitzpatrick 2008), which would be optimal for citizens.

Governments thus have to solve this conflict of interest between the legal profession and the users of the legal system. They can design the procedures themselves or carefully supervise the way the legal profession is serving the public. If the target would be default procedures that minimize the costs of error and the costs of decision-making, then the result would probably be a simple and low cost procedure for all standard disputes, including divorce, employee dismissal, consumer problems, neighbour problems, property conflicts and business disputes. Total decision costs should probably not be more than 10 to 15% of the value at stake. If, during such a procedure, the costs of error in the particular case seem to be higher than average, a more sophisticated procedure can take off, with better fact-finding and more elaborate interaction between the parties and the court. Instead of a high cost default, with little possibilities for the parties to restrain costs, the system could provide a low cost default, with possibilities to decide on a higher level of investment in accuracy.

Simplifying procedures is indeed often mentioned as an effective way to improve access to justice and court performance, both by external observers (López de Silanes 2002; Botero, La Porta et al. 2003; Islam 2003; Cabrillo and Fitzpatrick 2008; Commission on Legal Empowerment of the Poor 2008) and by experts in the law of procedure (Woolf 1996). This policy is likely to have other positive effects on transaction costs as well. The quality and cost-effectiveness of a simple procedure is more easy to monitor than a complex one. If the default is a low cost procedure, the defendant has more reasons to negotiate a fair solution. Bargaining failure will be less likely, because delaying tactics and threats to inflict high litigation costs on the other party will not work anymore.

But is it possible to design low cost default procedures that have sufficient quality? Most disputes between individuals, as well as the conflicts that companies are involved in, are rather standard in nature. Disputes about the delivery of goods and services are mainly about how both parties contributed to quality expectations versus the actual quality of what was delivered. Disputes related to termination of long term relationships (divorce, employment, landlord-tenant, business relationships) are primarily a matter of applying objective criteria to a limited amount of standard issues, such as adequate notice periods and compensation. The scenario's in which most crimes take place are also rather common. It is rare for the facts to be seriously disputed. If they are, the evidence is not very difficult to evaluate, and the real issue is an adequate package of retribution, treatment, restoration of harm, and possibly reconciliation. It is not being suggested that deciding disputes is easily done. In fact, some cases are very complicated. Decision making by courts, however, is not in an entirely different league as, for example,

decisions about medical interventions, or decisions by senior managers. It requires expertise and skilful application of best practices.

A promising approach is to have a court hearing early in the process, where a judge discusses settlement opportunities with the parties, often after giving them some guidance on the distributive issues, and also rendering summary judgments (López de Silanes 2002; Miller 2008). In this way, the courts manage their costs, and the option of a neutral intervention may become available at a much lower price. Moreover, a more active judge can compensate inequalities in skills and knowledge between the parties, and this is probably a much more effective way to create equality of arms than legal aid (Resnik 1982; Pearce 2004).

Much depends, however, on the design of this preliminary hearing and the moment the hearing takes place. If extensive fact-finding is required or usual before this hearing, the costs for the parties will not be substantially reduced. The tendency to require extensive exchange of information before the court looks into the case already has a name: frontloading of costs (Peysner, Seneviratne et al. 2005). Courts should be induced to consider not only their own costs, but also the costs of the parties of initiating a procedure up to the hearing. Just a simple form may be sufficient, asking the parties to give preliminary answers to some questions about the dispute: how the relationship developed, how the problem triggering the dispute came up, the interests that have to be satisfied, which attempts to solve the problem have been made, and some possible solutions. The key documents and correspondence that have been exchanged could be added to this.

Besides extensive fact-finding, the biggest impact on aggregate litigation costs probably comes from the need to use a lawyer. Thus, making this the exception, rather than the rule, is likely to help. For the most common disputes of individuals it seems to be possible to design procedures in such a way that representation is unnecessary. Experience in Japan and in many countries with small claims procedures shows that it is possible to attain high levels of efficiency and litigant satisfaction (López de Silanes 2002). Recent empirical research into the outcomes obtained by represented and unrepresented clients suggests that the so-called 'representation premium' is diminishing (Adler 2008). Research also shows that the more complex a procedure, the more adversarial, and the more dominated by professional lawyers, the greater the need for representation (Sandefur 2006). Thus, simplifying procedures diminishes the need for a lawyer.

2. Accountability towards Clients

Other strategies may enable the clients to monitor court performance. In order to fight court delay, publication of performance data for individual judges has proven to be effective in the United States (López de Silanes 2002). Individual calendars increase accountability of individual judges and have proven to be effective tools to speed up the pace of justice (López de Silanes 2002). Likewise, the other costs suffered by users of the court services can be measured in combination with the quality of processes and outcomes as experienced by the users (Gramatikov, Barendrecht et al. 2008). Transparency of this type of data, and thus increased accountability towards clients (Cabrillo and Fitzpatrick 2008), is probably more effective than attempts to measure court performance in terms of inputs or observance of internal quality standards (Cabrillo and Fitzpatrick 2008; Albers 2009). It is also more effective than mere regulation of attributes of the procedure. Statutory time limits for decisions without ways to monitor and enforce individual performance of judges do not work (López de Silanes 2002).

Specialization of courts also increases accountability. It makes courts more clearly responsible for dealing with a certain class of disputes, and creates interfaces where client needs can be made transparent. In addition, it has all the other advantages commonly associated with the division of labour (López de Silanes 2002).

Another approach that seems to be successful is to make court interventions obligatory for a certain type of disputes. If courts have to be involved in order to get a divorce, to dismiss an employee, or to terminate a lease, this increases the pressure on courts to deliver decisions in time against low costs. Obviously, however, this may add to the administrative costs for the parties as well, so it is a type of policy that should only be considered for disputes that are likely to need neutral interventions anyhow.

The overall approach is to create closer relationships between clients and courts, thus enabling them to monitor each other's effectiveness and increase the incentives to use each other's time efficiently. Part of this strategy can also be to let clients pay fees that are proportional to court effort. An example of the latter is to charge court fees based on how much of the court's time is used (López de Silanes 2002; Cabrillo and Fitzpatrick 2008). Courts in Singapore, for example, ask increasing fees for each day of court hearings. Courts can also ask fees for the hearing and, if the case is not settled, separately for the written decision.

3. Giving Plaintiffs Choice

Promising as these approaches may be, they are part of one particular strategy to solve the problem of failure on the market for neutral dispute resolution services. Instead of letting the parties decide, government decides for them by which process they will solve disputes. Are there other ways in which the market for neutral decisions can be facilitated? Having neutral ADR providers available for disputants, and waiting until the plaintiff and the defendant are ready to come, is no solution, as we saw. There should be some reason for the defendant to show up and participate in the process.

One option is to make the sanction of an enforceable default judgment more broadly available. Instead of giving formal courts of law an exclusive jurisdiction, and thus a monopoly position, it may be possible to let a number of neutrals compete for plaintiffs by making their jurisdiction non-exclusive (Botero, La Porta et al. 2003). In such a setting, the plaintiff can chose the neutral with the best price/performance ratio and neutrals will start competing for business (depending on the way they are funded).

Giving plaintiffs a choice can happen in many ways. Plaintiffs may have the option to address a neutral from an informal dispute system, a neutral complaint commission outside the formal court system, an ADR program offered by the defendant, a number of different courts within the formal system, courts from different states, or summary proceedings instead of full proceedings. This forum-shopping is generally seen as beneficial if it is motivated by a desire of the plaintiffs to find a low cost and high quality procedure (Ghei and Parisi 2004).

However, the plaintiff will not only look at the quality and the costs of the procedure, but also at the expected outcome (Klerman 2007). If the variation in possible outcomes over the different forums is large, forum-shopping may be motivated by being able to opt for a forum that is likely to yield a more favourable outcome. Thus, neutrals may lose their neutrality as they try to attract more business from plaintiffs by rendering pro-plaintiff decisions (Landes and Posner 1979). Although there is no agreement yet about the desirability of forum-shopping, there is a consensus that it should be restrained to some extent by choice of law rules that determine which forum and substantive law regimes are accessible by the plaintiff (O'Hara and Ribstein 2000). The debate about forum-shopping is fiercest in high stakes litigation related to patents, bankruptcy, and class actions, however. This is not so surprising, because in these areas plaintiffs often have a wide range of choices available due to conflicts extending over many jurisdictions, and costs of litigation that are less relevant than the ability to influence the substantive outcome.

At the opposite end of the spectrum are cases with low stakes in comparison to the costs of litigation, and low expected variability of outcomes. Most disputes of individuals are in

this class, particularly if objective criteria for distributive issues have been published, so that systematic biases of courts can easily be monitored and corrected. In such an environment, plaintiff's choice and increased competition between neutrals seems largely beneficial. Giving poor people access to multiple paths to justice makes them less dependent on particular neutrals. Moreover, defendants are quite likely to be repeat players and they can set up competing dispute resolution systems by ex ante dispute resolution clauses in their standard contracts (Klerman 2007) or by offering plaintiffs a low cost and high quality neutral alternative (see Section III).

The information age, with its low cost transparency, creates new opportunities for managing the tension between letting people shop for efficient fora and for favourable outcomes. Most jurisdictions have developed rules that limit the number of possible fora (personal jurisdiction in the US, forum non conveniens in civil law countries). Thus, plaintiffs have a choice, but not a choice between an unlimited number of neutrals. Possibly, a system where the plaintiff can choose the neutral from a list can co-exist with some kind of oversight by an authority that hears appeals. This system works well in commercial arbitration. The list can give information about costs, duration, and other essential elements of the procedure (Gramatikov, Barendrecht et al. 2008). Some kind of certification of neutral adjudicators can be required. Such a system can be combined with ratings by customers on the impartiality of the neutral and other quality characteristics.

This gradual opening up of the market for neutral decision making services is already happening. It is essentially what takes place if informal dispute resolution systems are incorporated in the formal legal systems (Commission on Legal Empowerment of the Poor 2008). This can be done in a variety of ways. First, local court-like forums can be recognized as a forum next to formal courts, so that the plaintiff has a choice. Secondly, some disputes can be left to exclusively to informal courts, and their decisions become enforceable in the formal system, either subject to full appeal at the formal courts, or under a more limited type of supervision. Our analysis suggests that giving plaintiffs a choice is preferable. Incorporation of informal systems as an exclusive forum is probably a good temporary solution, as it lowers the costs of access to a neutral decision, but in the long run it creates a new monopoly, with little incentives for the providers of the neutral service.

Besides opening up the court monopoly, other tracks for innovation can be explored. For distributive issues, it may be possible to organize evaluation in such a way that the plaintiff and the defendant can obtain several independent neutral views simultaneously. This approach is an extension of the idea that a court consisting of multiple judges is less prone to judgment error or bias than a single judge. This requires, however, that disputants can inform such a forum about their interests, views, emotions and other relevant facts at low costs. At the present stage of dispute resolution technology, this is still a problem. On-line dispute resolution tools may at one time help to solve this problem.

4. Terminating Unhelpful Approaches

The literature on court reform and court performance has also identified some policies that are unhelpful. Sometimes these approaches are even likely to increase the costs of transactions between clients and a neutral who helps them to decide the distributive issues. These policies generally follow from the analysis provided in the preceding paragraphs, but it is good to list them here again, as they are so frequently proposed and applied.

Making legal representation obligatory or broadly subsidizing legal aid in standard litigation is an understandable policy. If court procedures are difficult to access for disputants, they need help. But in the long run, these policies weaken the incentives on courts to serve clients according to their needs. Because lawyers help clients already, courts do not need to simplify procedures. Gradually opening up the legal services

market, so that those other than lawyers admitted to the bar can help clients with presenting their case, drives down costs of access to justice and will make courts more responsive to clients' needs (Islam 2003; Baarsma, Felsö et al. 2008; Commission on Legal Empowerment of the Poor 2008). This should be combined with increased accountability of courts towards clients. Like any other government service, a court procedure should be understandable and accessible for citizens with average capabilities. Help should be available, but not be a necessity.

Limiting competition among courts and between courts and other neutral decision makers is undesirable. So sorting out jurisdiction issues by giving one court exclusivity is not a good idea. Competition increases the possibility that services are tailored to the needs of the clients. On the other hand, specialization is helpful as well, so the optimal number of competing neutrals is higher than one but not as big as the number of lower courts in a medium sized country.

Stressing quality or accuracy of decisions, without constraints on aggregate litigation costs for the disputants, is unhelpful (Cabrillo and Fitzpatrick 2008). Incentives on judges should not be distorted towards either high quality or high costs.

VII. Making Arrangements Explicit and Enforcement

A. Market Analysis

Dispute resolution does not come to an end once a settlement is reached, or a judge has taken a decision. Settlement contracts and judgments have to make clear what the parties can expect from each other in the future. Moreover, enforcement has to be ensured.

Lawyers may assist the parties in making clear what they will pay, do, or refrain from doing in the future. They do this by supplying them with contracts, which often have standard clauses that provide solutions for recurring conflicts. Unfortunately, contracting information has again a public good character, and is an experience good, so it is difficult to make money with supplying these services. Lawyers do this by individualizing the information, but their contracting services are again out of reach for many individual clients.

Property rights and personal identity can also be proven by individualized documents. But it is often more efficient to register them at a central place, so this information becomes available to everyone. Setting up a registration system requires the cooperation of many people, however, so the transaction costs are high.

Task	5. Stabilize
Description	Transparency and compliance
Basic technology	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance
Best practices for dispute services/-transactions	- Standard negotiating, settlement, and decision documents (contracts/registrations) for most common disputes and issues; - Registrations, contracts, regulation (may be costly) Informal compliance mechanisms (reputation, reciprocity, identification, authority) - Expected sanctions and rewards
Possible providers of services	- Lawyers, mediators, notaries, other legal advisers - Community pressure - State agencies - Police - Bailiffs
Sources of Transaction costs	Information about contracting and making relationships transparent is public good Cooperation between many people needed to organize sufficient incentives on powerful defendants to cooperate
Market reactions	1. Insufficient supply 2. Business models for delivering expertise 3. Lack of enforcement, in particular against powerful defendants

Table 7 Market Analysis for Services that Assist Disputants with Stabilizing

The parties must also ensure that each of them, and in particular the defendant, lives up to the agreed outcome. Enforcement of contracts, settlements, and judgments is a matter of sufficient internal motivation for the defendant, supplemented by external incentives when needed. Take the example of a consumer who is entitled to a sum in damages determined by a neutral adjudicator. The seller of the goods may be motivated to comply because he accepts this as a fair decision (Beersma and De Dreu 2003; Tyler 2006; Tyler 2006; Hollander-Blumoff and Tyler 2008), because he wants to maintain a good reputation with customers, because he sees the neutral as an authority, because other conform to the law as well (Cialdini and Goldstein 2004), or because of the threat of sanctions from the justice system (Kennett 2000).

Plaintiffs have always been creative in finding ways to induce compliance. Fafchamps studied how commercial contracts are enforced in Ghana. He shows that compliance with contractual obligations is mostly motivated by the desire to preserve personalized relationships based on mutual trust. Harassment is the main form of debt collection. Other enforcement mechanisms – court action, reputation effects, use of illegitimate force – are less important. Contract renegotiation is common, suggesting that compliance to outcomes is often bought by additional concessions (Fafchamps and Lund 2003; Fafchamps 2004).

The formation of groups that reserve important relationships to group members also helps to enhance enforcement. These groups include trade organizations for commercial contracts. Clans, local communities and extended families may take care of compliance with land use agreements, employment contracts, and family relationships (Ouchi 1980; Greif 2006). Property rights on land are often collectively held so that the group can jointly protect the property against threats from outsiders (Deininger 2003; Fitzpatrick 2005).

However, these ways of organizing compliance have high costs and only work in a limited number of situations. Self-enforcing contracts can help if reputation for either one of the parties is important enough to perform, or if the value of the transaction is low (MacLeod 2007). Strong groups also have their drawbacks. The number of transactions with people other than group members will be more limited. People from within the community cannot easily sell their property to outsiders or trade with them in other ways. Employment relationships or marriages with outsiders are more difficult if compliance is organized in this way. Because the group is ‘closed,’ the likelihood of conflict with outsiders who want access to its resources is substantial. Inside the group, the members organize their own enforcement, and it may be that individuals are severely punished for minor offences, or that there is an internal hierarchy in which some people (men, people with resources such as political connections) do markedly better than others (women, poorer persons) (Goldstein and Udry 2008).

If we look at the most common categories of disputes again, it is clear that these private enforcement mechanisms will often not help. Quality of goods or services will mostly be a problem if the parties expect little future interaction and if the trade has a high value. Conflicts in long term relationships are often related to termination and end in settlements where one party has to pay a sum of money as compensation, together with some obligations for both parties regulating their future (lower level) interactions. The members of the group may not have sufficient reason to help the plaintiff to enforce these outcomes against another member of the same community. In case of tort claims, or human rights violations, where compensation or some sort of sanction is likely to be part of the outcome of the dispute resolution process, next to obligations to refrain from similar acts in the future, the group may have insufficient means to influence an outside perpetrator.

From the perspective of the plaintiff, organizing compliance can thus be a difficult task. Many different people may have to be involved in order to gain sufficient influence over the defendant.

B. Current Interventions by States

Making relationships transparent through contracts and property rights, as well as enforcement of these rights, is often seen as one of the core tasks a government in a free market economy should perform. As we may expect by now, governments are not necessarily very effective in overcoming these transaction cost problems. They have found it difficult to set up registrations, provide contracting formats, and organize enforcement. In many countries, these government services still do not reach a substantial proportion of the population. Taking a closer look at the way these policies influcence transaction costs may help to understand why.

1. Registrations of Identity

One way the government can help to make relationships transparent and reduce the costs of enforcement is by the registration of rights. This begins with giving people a means to prove their identity so that they can be recognized as owners of property, parties to a contract, or beneficiaries of social security (Setel, Macfarlane et al. 2007; Szreter 2007; Barendrecht and Van Nispen 2008; Commission on Legal Empowerment of the Poor 2008; Sabates-Wheeler, Devereux et al. 2009). Informal ways of ascertaining identity have emerged in many communities. Szreter describes how Anglican churches set up parish registers in rural 17th century England, and thus satisfied a local need to establish age, lines of inheritance, legitimization of bastardy, and eligibility for primitive forms of social security. Obtaining this registration was an important reason to be a member of the church, so the church was eager to supply this service. Once migration to the cities started in the 19th century, the local parish registers could not keep up with the demand for registration and the state took over (Szreter 2007).

Building an effective registration system is difficult and costly. A birth registration system requires an initial investment through some form of information technology. Then, it is necessary that parents have sufficient incentives to go through the registration procedure, and bureaucrats have sufficient reasons to help them. Network effects add to the transaction costs. If many people refrain from registering because they face high costs of queueing or travelling, the system becomes unreliable. Entering the system often has high costs because parents have no valid documents themselves, and must first start formal court procedures to obtain these. They may also fear becoming subject to taxation. Civil servants may have insufficient incentives to help the poorest of the poor to register. For them, the transactions that are necessary to make registration happen are less likely to occur (Setel, Macfarlane et al. 2007; Barendrecht and Van Nispen 2008).

2. Registrations of Property Rights

Registrations of property rights in land (titling) make clear which persons have which rights to use, sell, or appropriate which pieces of land. Informal ways of making entitlements to land transparent develop locally, because communities profit from this once their land has a certain threshold value (Rakodi and Leduka 2004). At later stages of development, this is typically a task that is taken over by governments.

More security and transparency in entitlements to land has been shown to lead to a higher investment of urban squatters in their homes (Field 2005), better access to the labour market (Field 2007), better health conditions, and other social benefits (Payne, Durand-Lasserve et al. 2007). Security of interests in rural land is also linked to higher investment and productivity (Goldstein and Udry 2008; Fenske 2009; Galiani and Schargrodsky 2009). The role of titling in this, however, is contested (Deininger 2003; Cousins, Cousins et al. 2005; Payne, Durand-Lasserve et al. 2007; Otto 2009). The link

between having a formal title and increased access to credit (with land as a collateral) seems to be weak (Payne, Durand-Lasserve et al. 2007).

Property rights protection through registration (titling) is difficult to achieve. Boundaries have to be surveyed, documents must be drafted, and registration has to be undertaken by a trustworthy neutral. If conflicting claims of property arise, they have to be decided on by a neutral or another third party. Tenure rights are often ambiguous, or in the hands of poorly delineated families or communities, so there is a lot of sorting out to be done before a piece of land can be registered in one person's name. This registration almost certainly has some distributive effects (Knight 1992; Payne, Durand-Lasserve et al. 2007). Thus, it becomes attractive to use the system to one's advantage, which the affluent may do better than the poor, and men better than women. Besides being tools of the powerful, registrations can quickly become outdated, as use patterns change and not every person involved has incentives to register his rights on land. Finally, having a formal title means little if there is no protection against eviction by the more powerful.

In summary, titling systems require many transactions between many people that must all work well. The network effects are such that using the system becomes more valuable if more people participate. This is unlikely to occur in rural settings (Cousins, Cousins et al. 2005; Otto 2009) and not always likely in urban settings (Lanjouw and Levy 2002).

3. Default Rules for Contractual Relationships

Governments also play an important role in making explicit what the parties in a relationship can expect from each other in the future. The market is very active here, as lawyers supply boiler plate clauses that people can use in their contracts. But they do so against the background of default rules for contracts that are government made. If the parties have not regulated their future relationship in an explicit contract, it will be assumed that they have made the same arrangement as others in a similar situation (a majoritarian default rule, see Ayres and Gertner 1989; Korobkin 1998). Civil codes and case law determine these default rules.

Because of the way the information market operates, it is questionable whether sufficient contracting expertise reaches the citizens who need it. Lawyers and other legal information providers are probably hesitant to share this information widely. Governments may also have insufficient incentives to produce suitable default arrangements for – say – the consequences of divorce, settlement of property disputes in a village, or an employment relationship that is likely to be adjusted many times during a 10 year period. In this respect, default rules are similar to objective criteria. Legislators and courts will not profit much from them, and have to spend a lot of effort on formulating them (see Section VB).

Another problem is that drafting default rules is usually left to lawyers. They may be rather task-oriented, and use a rights and obligations approach to the relationship that does not take into account the emotional and relational issues that also determine whether a relationship will be successful. .

A final transaction cost problem mentioned in the contracting literature is that default rules are sticky. Both parties have to agree to deviate from them, and this raises the costs of contracting for the parties to relationships for which the default rule is not appropriate (Korobkin 1998; Ben-Shahar and Pottow 2006).

4. Enforcement by State

Because there are situations in which market mechanisms clearly fail to produce enforcement, a demand for public enforcement arose (Polinsky and Shavell 2000). State enforcement typically builds on the authority of courts and uses the threat of sanctions. There is ample evidence that this type of enforcement can work and is necessary,

particularly for arms length commercial transactions such as providing credit (Jappelli, Pagano et al. 2005).

Countries differ in how they organize public enforcement of dispute outcomes: some leave it to the courts, some organize a regulated private profession to deal with it, a few put the executive in charge, and others have a system of mixed responsibility (Henderson, Shah et al. 2004). Public enforcement of court decisions is problematic in most countries, however (Kennett 2000). It consists of a process of finding assets of the debtor, bringing them under control of the creditor, letting them be sold publicly, and bringing the proceeds in the hands of the creditor. Debtors who frustrate this process may have to be threatened with sanctions and put in jail (Henderson, Shah et al. 2004). This requires an intricate cooperation between plaintiffs seeking enforcement, bailiffs, police, banks, and bankruptcy lawyers to sell the property of a debtor and allocate the proceeds.

Besides these network problems, government failures that are likely to be present are absence of information (about the assets of the debtor), and insufficient incentives to perform the tedious and sometimes dangerous task of making people pay what is due to others. Henderson et al. report five categories of problems as the most important obstacles to enforcement: the efficiency and integrity of the judicial enforcement and justice system, delays, costs, inadequate access to information, and lack of accountability of the actors in the enforcement process (Henderson, Shah et al. 2004).

C. Promising Policies

What can governments or NGOs do to lower the transaction costs of making expectations in relationships explicit and ensure that these solutions to a dispute are enforced? This is a far-reaching question, and the answers are strongly related to the core functions of contract law, property law, and registration of rights. These functions are extensively debated in economics, law, development studies, and other disciplines that theorize about the ordering of relationships. We cannot do more than indicate the type of reasoning that is suggested by the transaction costs approach and link it to some of the research that has recently become available.

1. Formalization As Is and Step by Step

Identity registrations and registrations of property rights are valuable tools for making relationships explicit and transparent so that people can rely on each other. In the process of registration, however, rights are allocated. People who are registered as citizens get access to pensions, schools, and other government services. Registering property means a piece of land will now be owned by a man, a community, and (less frequently) a woman or a farmer. Because of these distributive effects, the dynamics of disputes may arise (Payne, Durand-Lasserve et al. 2007). The registration system needs to have a mechanism to resolve these disputes fairly, making it more costly to operate, and less accessible.

The emerging consensus is to lower these transaction costs by gradual formalization. Formalization processes should increase security of tenure instead of allocating property rights. Giving people an address on a street, and providing infrastructure (roads, sewerage, water) creates increased trust that their position will be recognized. It already helps if personal use of land is registered, and this can later be upgraded to long-term leases or freehold (Durand-Lasserve and Selod 2007). If different people from a family or a group use the land or have other claims on it, registering these claims at least protects the groups against outsiders. Registration of transactions and outcomes of disputes about land is generally less costly than registering rights because it focuses on situations where the clients felt a direct need for transparency, thus it is more demand-driven.

These non-formal ways of increasing tenure security focus on registering the situation as it is and as the need arises. Registering is seen more as making existing relationships

transparent than making them legal. Transparency can be achieved by noting which use has been made of land by which persons, for how long, and by which agreement with whom. Such a more open system does not try to resolve all issues that may arise, but may do enough to make the relationships workable for the foreseeable future (Payne, Durand-Lasserve et al. 2007). If new disputes arise, they can be resolved more easily on the basis of this information. The outcomes of the disputes can be made transparent in the system, and thus the registration will gradually reflect more of the legal status of the land.

The gradual approach fits in the paradigm of minimizing error costs and decisions costs. Economies of scale can be reached in large scale titling programs, and it is important to look for them, but taking just one big leap to registration of individual property rights for every piece of land has high decision costs. It can also lead to unfair outcomes and, thus, high costs of error.

A similar step by step approach may work for identity documents. Uncertainties in birth dates, misspelling of names, or even uncertainties about parentage can be seen as an obstacle to registration. If these issues can be resolved quickly, the increased certainty is valuable. But in many countries, these issues require more extensive and costly procedures on higher levels of administration, or even higher courts (Barendrecht and Van Nispen 2008). Besides making procedures less formal, and thus reducing the decision costs (see Section VI.C), one option is simply to live with the uncertainties for the time being. A person is better off with identity documents showing that he was born either on 24 March 1980 or 24 March 1982 compared to not being able to prove his identity at all. Sorting out his birth date can probably wait until he is close to the age where he is entitled to a pension.

Access to registration is in many ways similar to access to the neutrals who have to settle a dispute. Clients can become dependent on the registrar in similar ways. A viable strategy is to make the civil servants in charge of registration more responsive to client needs. It helps if clients have multiple points of access, so that they can avoid civil servants who have backlogs or ask for bribes. This is available in the e-seva projects in Andhra Pradesh, India, where citizens can use kiosks in different sites to interact with the government about permits and registrations (Commission on Legal Empowerment of the Poor 2008).

2. Menus for Making Relationships Explicit

The market for contracts, settlement agreements, and written judgments is again a market for expertise. Unfortunately, the recurring public good problem and experience good problem make it difficult to get the right expertise to clients. Standard documents that make the relationship explicit are difficult to obtain. These documents would lay down the expectations that parties could realistically have about their future relationship in case of a divorce, a neighbour dispute, or a termination of employment. Some kind of ex ante formalization of long term relationships can also be beneficial, as in a marriage contract, a will, or a contract about cooperation between business partners.

Here, there seems to be ample room for innovation. Instead of one set of default rules provided by the state, the parties can be offered a menu of choices for suitable contractual arrangements (Ayres 2006). Production and publication of fair and efficient arrangements by private parties can be stimulated (Hadfield and Talley 2006). Governments, or private parties, could also begin to certify certain standard arrangements as fair and valid. Instead of regulating agreements by limiting freedom of choice ex post through courts that invalidate a contract, governments could stimulate productive and fair relationships ex ante.

The way relationships are regulated can be enriched with knowledge of the social sciences. The legal way of making expectations explicit is to write down rights and

obligations. Relationships, however, are more than tasks and duties. It also helps if people know about each others' interests, wishes and fears. Besides commercial interests, relational and process interests can have a place in a contract. Besides sanctions and bonuses, it can be useful to talk about situations in which both parties consider the relationship to be a success or a failure. Besides an allocation of risks, it is useful that the parties think about the main threats to the relationship, and determine ways to share gains and losses if these materialize (see Section V about objective criteria). In contracting practice, there is some activity aimed at reinventing relational contracting in this direction. In complex infrastructure projects, contract charters can form the basis for the cooperation between the parties (Walker and Hampson 2003; Van den Berg and Kamminga 2006). In these charters, the parties lay down how they see the relationship and how they will communicate.

Another way in which governments can facilitate the market for stabilizing relationships is by ensuring that contracts can easily be used across jurisdictions so that economies of scale can reached. The basic tensions and interests caused by an employment relationship are similar in Korea, the Netherlands, and Zimbabwe. Cultural differences will certainly exist, and these can be reflected in different templates from which the parties can choose. Contract law, however, departs from freedom of contract everywhere, and governments can take care that contracting parties are not surprised by unexpected forms of illegality. The least governments could do is to list the situations in which their courts will not enforce a clause in the types of contract that are most essential for the economy. This sort of regulation would save parties involved in such a contract from having to ask for specialized legal advice.

3. Facilitating Compliance Mechanisms

The transaction costs of organizing compliance can be reduced by making it easier to exchange information about compliance. People tend to improve enforcement by investing in connectedness: if they share more information with more people about performance of a debtor, they have more impact on his reputation (Dhillon, Rigolini et al. 2006).

This connectedness can probably be facilitated by offering internet-platforms on which information about compliance can be shared. EBay enables buyers to exchange information about sellers. Hotels and restaurants are now routinely evaluated by customers on the internet. Internet networking sites such as Facebook and LinkedIn make it possible to share information about people in new ways as well. Likewise, the status of compliance with settlements or judgments can be reported. This might start with a neutral mention of an issue as unresolved. In case of continued non-performance, the information could go more towards the direction of shaming. It would certainly be necessary to protect debtors against people abusing such tools, but this protection is also needed for the existing enforcement mechanisms.

Other strategies to increase access to compliance can be developed. The literature on enforcement suggests simplifying procedures for enforcement and privatizing enforcement tasks whilst putting them under neutral supervision, and organizing access to information about the whereabouts of assets of the debtor (Henderson, Shah et al. 2004).

4. What Works

When facilitating the market for obtaining enforcement, governments and NGOs should keep in mind that the basic technology of providing compliance is not only a matter of incentives. The joint effects of intrinsic motivation and of external triggers living up to the decision are what matters. There are many reasons why people might comply with what they have agreed on as a dispute solution or with a judgment by a neutral. They may consider this to be their duty, feel it is fair to do so, or be afraid of sanctions. The psychological literature on compliance suggests several mechanisms to induce

compliance: reciprocation, the human tendency to be consistent in their acts, imitation of what others do, positive reinforcement, identification, and authority (Cialdini and Goldstein 2004). A culture where disputes are considered to be normal, where solutions are found in cooperation between the parties and a neutral, and where compliance is expected can help at least as much as the threat of formal sanctions.

These approaches have clear links to the attempts in many countries to decrease recidivism. In the 'What Works' literature, the internal motivation of perpetrators to participate in programs is seen as a crucial factor (MacKenzie 2006; Wormith, Althouse et al. 2007). In many other ways, these programs are combining classical enforcement (monitoring, increasing the probability of sanctions) with positive incentives and factors that are known to enhance internal motivation (structure, respectful treatment, conditional help with obtaining housing and work). Expertise regarding law enforcement in order to reduce crime is far more developed compared to the know-how on enforcement of property rights and contracts. The similarity between both types of enforcement is their attempt to induce people to have more respect for the legitimate interests of others.

VIII. Complementarities

A. Market Analysis

Talking about a system suggests something more than the sum of its parts. That is certainly true for dispute systems (Bendersky 2003). Each of the five justice services we discussed is more valuable if the other services are supplied as well (Barendrecht 2009). Stimulating the defendant to enter a cooperative dispute resolution process (Task 1) is a more valuable service if there is adequate help with negotiation (2), information about norms for distributing value (3), and the option of a low cost neutral decision (4), which can be enforced (5). A plaintiff gets more value from negotiation assistance (Task 2), if he has the option of asking for a low cost neutral decision (4) that is enforceable (5). Norms for distributive issues (Task 3) make adjudication (4) easier and the ideas about fairness incorporated in these norms make it more likely the outcome can be enforced (5). A good basic structure for making an agreement explicit such as a standard contract (Task 5), can also be used to identify issues for negotiation (2), and serve as a template for a judgment (4).

These complementarities, or connectedness between services, are a cause of transaction costs. Before suppliers can offer effective services, they have to ensure that the other services are available as well. This network has to be established and adjusted if an innovation takes place in one of the tasks. If mediation services provide better negotiation assistance, this creates new opportunities for adjudication as well.

Providers of legal services understand this and try to offer integrated services. Lawyers help plaintiffs to contact defendants, coach them in negotiations, inform them about distributive issues, and litigate for them. Judges decide cases, but nowadays also help clients to settle distributive issues, and sometimes even to problemsolve in integrative negotiations.

This coordination may be difficult, however. Judges do not interact frequently with lawyers, because they want to keep a distance out of worries to lose their independence. At the interfaces between negotiation, bargaining, and adjudication there is also competition between lawyers and judges. Judges tend to promote a more active and problemsolving attitude of courts, whereas lawyers like courts to stay passive and only become active if one of the lawyers asks them to intervene.

B. Current Interventions by States

1. Legal System Reform: Law and Development

Governments have invested in making dispute services work in concert. Many programs aimed at enhancing the rule of law in developing countries have organized efforts at various levels of the system. Codification projects providing information about norms were combined with investments in improving the court system, and sometimes also with setting up an independent legal profession that can help to negotiate disputes (Jensen 2002; Carothers 2006; Dam 2006).

The gist of the papers assessing these policies is a negative evaluation of their effects (Davis and Trebilcock 2008; Tamanaha 2009). This lack of success should hardly be a surprise, if we use the perspective of the transaction costs on the markets for justice. These policies tend to combine approaches that were not very effective in making dispute transactions happen in the first place. Moreover, they did not address some important elements of the dispute supply chain: having people meet, helping them to negotiate, organizing low cost access to neutrals, and guaranteeing enforcement.

2. Reforms in Developed Economies

In developed economies, policies that aim to reinforce all five necessary and sufficient elements of a dispute system are unheard of. Civil procedure reform (Zuckerman, Chiarloni et al. 1999) focuses on the rules of procedure; court reform on the organization of courts; mediation programs on letting judges send people to mediation (Wissler 2004); codification efforts on writing down rights and obligations; tort reform on changing rules of tort law (Currie and MacLeod 2008); consumer protection law on improving the substantive rights of consumers; reforms of the legal profession on increasing competition among legal service providers.

All tend to be separate issues. They are dealt with at different times by different commissions and with different constituencies. Improvements in one section of the justice system is unlikely to have effect, though, if other parts of the system are not taken into account as well. Referring disputants to mediation is not very effective if it happens just before the court decides, and most of the costs of litigation haven been made. Improving the organization of courts is unlikely to be beneficial for clients, unless the procedures by which courts adjudicate are also reconsidered. Changing substantive rules of tort law without looking at the incentives on lawyers and courts makes little sense.

C. Promising Policies

While the connectedness between various types of dispute resolution services is a problem, it is also an opportunity. If the weakest links in the supply chain can be found and addressed, the other services will become more accessible and profitable to supply as well.

1. Supply Chain Approach to Access

Strong complementarities suggest an integrated, supply chain approach to justice services. Governments could focus on the services with the biggest complementarities, hoping that improvements in one part of the dispute resolution market will spill over to adjacent markets.

Low cost access to neutrals, for instance, is an efficient way to improve the negotiation climate in the shadow of the law and to drive down the aggregate costs of dispute resolution. This is especially true if judges or other neutrals approach the problem in the same way as the clients do in their negotiations. If legal rules and procedures used by the court focus on interests and link to the formats of (integrative and distributive) negotiations, the supply chain will run more smoothly. Low costs of access are more affordable and, thus, can be paid by the parties who use the services themselves in the

form of court fees, which is also a way to make neutrals answerable to their clients more directly. Such a policy may be hard to implement, though, because it requires rethinking the relationship between courts, their clients, and their sponsors within government.

Another policy with positive spillovers is the publishing of the going rates of justice for the most important disputes through guidelines or otherwise. As we saw, this not only makes bargaining failure less likely, it also enables clients to monitor the lawyers that help them and the neutrals who decide their distributive issues. Because expectations of all players involved will be more aligned if objective criteria are widely shared, the overall costs of disputing will drop. Thus, justice transactions become more attractive to conclude, and more accessible for clients. This policy is a modern way to fulfil an old ideal: codification.

A final example of choosing a policy with strong complementarities is to invest in default formats for common relationships. Marriage contracts, employment agreements, and business partnerships can be made explicit in standard ways, with menus for different arrangements that deal with the typical sources of tension and conflict. These formats can bring the benefits of explicit contracting within reach of every citizen. Such standard documents can also take over the functions of contractual default rules, serve as a template for dispute resolution, and facilitate the writing of judgments by courts.

2. Monitoring, Accountability and System Ownership

Because of the strong complementarities between the different justice services, it also makes sense to monitor the performance of the system. Current monitoring systems and measurement efforts tend to focus on the performance of courts (Cabrillo and Fitzpatrick 2008; Albers 2009). System wide performance measurement would also gauge the abilities of the system to facilitate settlement negotiations and to organize enforceable outcomes. Besides the performance of courts as decision makers, the availability of clear substantive rules (objective criteria) and the enforceability of outcomes would be assessed.

Such a method could measure the time and cost for the average user to go through the process, from the first attempt to obtain outside help to get in contact with the other party, up to the final outcome (Gramatikov, Barendrecht et al. 2008). The quality of the procedure and the quality of the outcome can be measured against several criteria (Gramatikov, Barendrecht et al. 2008), preferably from the perspective of the user (Masser 2009). A monitoring system could also try to visualize the number and the complexity of the steps an individual has to take in order to obtain an outcome, as demonstrated by the work of De Soto and several others (De Soto 2000; Djankov, La Porta et al. 2003; Masser 2009 and the yearly Doing Business reviews by the World Bank).

Supply chain monitoring makes transparent what can be expected from suppliers in the system. If employment disputes are costly to deal with and lead to low quality outcomes, governments can revise their policies in this area. Courts, legal services providers, and possible new entrants in the relevant justice market will adjust their services in response to this information as well. Clients can make more informed decisions about using the system, and press for change if necessary.

3. Focus on Problem Categories

Making a justice system work across the board is a daunting task for civil servants at ministries of justice and for managers within the judiciary. They often feel responsible for dealing with every thinkable dispute and crime. If they see their task in this way, they are likely to issue comprehensive codes and procedural rules that are general in character. Courts tend not to be very specialized, and deal with a broad variety of disputes. Performance of such a broad system is difficult to measure, because the same procedure is applied to a great variety of disputes with different issues, different needs for fact-finding and different client budgets.

Focusing on problem categories, as well as improving the supply chain for these categories, seems to be a more successful approach. Law firms tend to specialize, and court specialization is believed to lead to higher efficiency (Cabrillo and Fitzpatrick 2008). The complementarities in a dispute system point in the same direction. It makes more sense to systematically improve access to justice for situations such as divorce, employment disputes, and business conflicts, as opposed to trying to reform courts, to invest years in overall codification, or to subsidize legal aid in general.

IX. Conclusions

Our analysis took the perspective of justice as a set of goods that are delivered by people to other people. This market for justice does not work perfectly, and that is where governments intervene with justice policies. The analysis from the perspective of transaction costs suggests that many justice policies are less than a perfect fit to the problems they need to address. Table 8 summarizes the results.

If two opponents find it difficult to choose a procedure, it does not help to offer them mediation, send them each to a lawyer, or make sophisticated but expensive litigation available. Stimulating cooperative dispute resolution by social norms, facilitating the market for neutral dispute services, and requiring repeat-players to offer an accessible dispute system is likely to be more effective. Access to simple, low-cost default procedures is needed to induce fair settlements. Giving plaintiffs a choice between different procedures and neutrals – without consent of the defendant being necessary – can help to achieve this. Accountability of courts (and other neutrals) to clients is also important.

Existing checks and balances on courts, such as extensive rules of procedure and appeals, have important disadvantages. Focusing on rules of procedure easily lead to bureaucracy and makes procedures less transparent for disputants. Appeals tend to improve the formal, legal quality of outcomes. But they do not stimulate judges to diminish the costs of litigation, to provide procedural justice, and create outcomes for disputes that fit the needs of the parties. Moreover, these mechanisms do not influence the quality of settlements, which are the primary way to resolve disputes.

Where the public good character of information is the problem, governments can create additional incentives to supply the needed information. Without such incentives, it is highly unlikely that negotiation expertise, codes, precedents, or law review articles will ever meet the information needs of those clients that cannot afford to hire a lawyer.

Governments and NGOs can make information more accessible by providing public legal education programs or needs-based codification, by stimulating production of guidelines for settling distributive issues, or by developing open source models for sharing information about objective criteria. Structuring settlement negotiations, menus for contractual relationships, and certification of fair standard contracts are also helpful ways to enhance access to justice.

The complementarities between justice services suggest an integrated approach, aimed at the entire supply chain for each type of disputes. Monitoring, accountability and system ownership are highly important here. Mediation programs, codification projects, reform of civil procedure, or projects aimed at improving access to courts are less likely to be effective than measures that target all elements of dispute systems for categories such as property disputes, employment issues, or business conflicts. Making powerful defendants participate and creating transparency of property rights, and their enforcement, are best seen as gradual processes, in which many people contribute to a portfolio of incentives on the defendant to cooperate.

Tasks	Basic technology	Sources of Transaction Costs	Existing Policies	Additional sources of transaction costs	Possible innovative policies/services that lower transaction costs
1. Meet	Make costs and benefits of participation for defendant higher than costs and benefits of fighting, or avoiding	Difficulties of selling cooperative dispute services to opponents: - Psychological barriers - Strategic barriers Cooperation between many to make powerful defendants cooperate	1. Prohibition of violence and enforcement of this prohibition 2. Judgment by default 3. Stimulating mediation	1. Costs of monitoring and enforcement prohibition violence 2. Costs of organizing credible threat of default judgment	1. Stimulating cooperative dispute resolution by social and legal norms 2. Opening markets for neutral dispute resolution services 3. Regulating ex ante dispute resolution agreements 4. Requiring repeat-players to offer an accessible dispute system 5. Co-opting powerful defendants gradually
2.Talk	Support integrative negotiation (interest based)	Information about negotiation and conflict management is public good and experience good	1. Framing disputes in terms of rights and obligations 2. Legal aid 3. Mediation aid	1. Polarization in relationship governance 2. Increased need for legal advice 3. Search, bargaining, coordination and monitoring costs client-lawyer relationship 4. Increased costs of hiring neutral 5. Unilateral legal services create extra demand at other side (externalities)	1. Education in negotiation and conflict management 2. Economies of scale in communication and negotiation advice 3. Structuring settlement negotiations
3. Share	Supply information about fair shares (sharing rules, objective criteria)	Information about fair solutions (objective criteria, going rates of justice) is public good and experience good	1. Codification 2. Precedents 3. Legal academics	1. Governments lack information about client needs and going rates of justice 2. Insufficient incentives to produce and publish useful legal information 3. Limitations imposed by political process	1. Improve incentives to make guidelines 2. Privatize production of objective criteria 3. Non-binding rules and precedents 4. Needs based codification (instead of comprehensive codification) 5. Sharing rules (open source)
4. Decide	Make option of a neutral decision available (at low cost)	Difficulties of concluding ex post dispute resolution agreements Insufficient incentives on neutral to provide fair/low cost processes	1. Setting up courts 2. Extensive rules of procedure 3. Protecting clients through appeals 4. Independent courts	1. Bureaucratic procedures 2. Appeals increase costs of access 3. Appeals distort incentives to improve quality and diminish costs of procedure 4. Independence is shield against incentives	1. Simple, low cost default procedures 2. Accountability towards clients 3. Giving plaintiffs choice (competition between neutrals) 4. Terminating unhelpful policies (obligatory legal representation, etc.)
5. Stabilize	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance	Information about contracting and making relationships transparent is public good Enforcement requires transactions with many participants	1. Registrations of identity 2. Registrations of property rights 3. Default rules contracts 4. State enforcement	1. Distributive effects of allocating rights to individuals 2. Information is public good 3. Insufficient incentives from government 4. Costs of imposing sanctions 5. Coordination and monitoring costs	1. Gradual formalization as is, with access to dispute resolution 2. Menus for making expectations in relationships explicit 3. Certification of fair standard contracts 4. Facilitating reputation mechanisms that enhance compliance
Supply Chain Approach	Strengthen links between tasks	Complementarities (connectedness)	1. Legal system reform	1. Insufficient incentives from government	1. Supply chain approach to access 2. Integrated dispute resolution services 3. System monitoring and ownership 4. Focus on problem categories

Table 8 : Sources of Transaction Costs on Markets for Justice and Policies that may Reduce them.

In some ways, governments may do too much. A court decision on all issues is usually available, although it may be sufficient that courts facilitate settlement and decide on the remaining distributive issues. Governments also tend to have a monopolistic attitude towards production of law, supply of neutrals, and enforcement of law. This may crowd out market activities in these areas. Governments tend to regulate legal services in ways that are not clearly linked to the goal of resolving disputes in a fair and efficient manner, and their regulation efforts seem poorly related to the causes of market failure and government failure.

Analysis of the market for justice services also sheds new light on the viability of business models for providers of legal services. The success of the one-lawyer-one-client model is probably not so much a conspiracy of the legal profession (Hadfield 2000), but can instead be explained by the tendency of disputants to look for a trusted adviser in combination with the public good and experience good character of information. This model is reinforced by the prevailing framework of rights and obligations as tools to solve disputes. The one-lawyer-one-client model is not viable, however, for serving justice needs of the poor. This adversarial model is also less attractive in the light of modern conflict resolution and negotiation technology. Mediation fits these developments, but it is not viable as a business model because of the difficulties disputants face when they have to agree on a dispute process ex-post.

Finally, the transaction costs approach of this paper offers a new explanation why attempts to implement the rule of law top down have largely failed. Writing legislation, setting up courts, organizing the procecution, and regulating the legal profession is unlikely to create access to justice. Such justice policies have no answer to the basic transaction costs problems that plague the market for justice. Affordable and sustainable justice services will emerge bottom up, because people have justice needs. Governments should facilitate this, by lowering the costs of agreeing to a dispute procedure, by stimulating the dissemination of information that fits the needs of clients, and by lowering the costs of organizing enforcement.

The analysis thus suggests that smarter justice policies are possible. The basic technologies for supplying justice are available. If the transaction costs can be lowered, these technologies can lead to innovation on the market for justice services (Islam 2003; Hadfield 2008). Legal entrepreneurs, courts, and NGO's may step in to develop low cost approaches that fit the basic technologies and the best new practices. Examples are development of neutral "meet and talk services", internet portals for objective criteria/going rates of justice, low cost/high quality default procedures, procedural rules that provide choice of neutrals for plaintiffs, formats for making expectations explicit in common relationships, and reputation mechanisms for enforcement.

Governments should stimulate these innovation processes. They, and the NGO's working in the justice sector, can develop smart institutions that facilitate justice markets in a way that minimizes transaction costs. The state can be guardian of the rule of law by letting justice grow, on the micro-level, from the relationships between clients and justice providers.

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