

Trend Report / Part 1



Towards Basic Justice Care for Everyone

Challenges and Promising Approaches

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Executive Summary

Every year, one in every 8 people on earth runs into a serious conflict that is hard to avoid: at home, at work, regarding land, about essential assets they bought, or with local authorities. About half these people do not succeed in obtaining a fair, workable solution. This may evolve into a threat to their livelihood. What can be done to reduce the unnecessary suffering, injustice, and poverty caused by this lack of legal protection?

The **Innovating Justice Forum 2012** addresses this problem. In this trend report, we assess systematically what is known about access to justice, focusing on civil justice, administrative justice and redress for victims of crime. Our approach is new, because it consistently uses the perspective of what people seeking access to justice need, bringing together evidence from many different disciplines about what works to meet these needs. From this perspective, we also describe the trends in innovative approaches from many different countries across the globe, showing why and how these are beginning to close the access to justice gap.

The approach of the Forum is straightforward. We start with what is known about **justice needs**. What are the most urgent problems for which people tend to turn to advisers and neutral third parties for assistance? What is the impact of these problems?

Then we analyze **what works** to solve these problems. The answer is, with some exceptions, a surprisingly simple one: helping the parties to negotiate, whilst making a quick and low cost option of adjudication available. So we proceed with investigating what makes it difficult to negotiate a fair outcome and to get the appropriate kind of assistance.

Throughout the world, innovative lawyers, NGO's, project leaders, judges and entrepreneurs are working hard to improve access to justice. Their **innovations** are about to change the delivery of justice in fundamental ways. We highlight the trends in these innovative approaches, showing how each of them contributes to a setting in which fair outcomes can be guaranteed.

In a second part of this Trend Report on Basic Justice Care for Everyone, we will report how a panel of experts and innovators, meeting in The Hague on 16 and 17 April during a Working Conference on the topic, evaluates each of these promising approaches. Another outcome of this meeting will be a number of **recommendations on the setting for innovation** in the area of basic justice care. What is needed to nurture these innovations so that the access to justice gap can be closed? What can policy makers, the legal profession, donors, social entrepreneurs, innovators and law faculties doing legal research contribute?

The Price of Injustice

Throughout the world, people call for justice. In the Arab world and elsewhere, they rally behind parties that have justice as their mantra. This report is about the most frequent and urgent needs for justice: fair, affordable and timely solutions for problems that can become part of everybody's life. Can such basic justice care become available to everyone?

In a group of 1.000 adult people, between 150 and 450 new, serious legal problems are likely to occur every year. Although crimes committed by strangers attract most attention in the media, the ten most frequent and urgent problems actually tend to come with our most vital and close relationships. They occur in the family, during employment, or between neighbours. Conflicts arise around land and housing, buying goods and services, or in the local community and the way it is governed. Even getting an ID may require a lot of effort and significant procedural skills. Many of these problems are solved, even in countries without well-functioning courts and other legal institutions.

But if we take 300 problems as a starting point, about 150 of these problems tend to remain unsolved, because people do not feel empowered to take action, or do not reach a settlement when they do act. At least some of the 150 solutions reached are also not very fair.

The price of such injustice is high. Each conflict not dealt with in a fair way comes with stress for the people involved, health problems, a risk of escalation, disturbed relationships, a lack of trust, or harm that remains unaddressed. Economic costs are high. They manifest themselves as lower production, lower investments, and lost opportunities to improve livelihoods and government services. In addition, sustained feelings of injustice can eventually lead to violence.

Legal needs studies conducted in 25 countries, combined with data from other research enable a very rough estimate of the worldwide access to justice gap and what can be realistically achieved. If the access to justice setting were benign, as shown by the best performing countries, between 60 and 90 of the 150 unsolved problems could be addressed and solved. Moreover, the fairness of processes and solutions could be raised substantially. Such an access to justice gap exists for a majority of the people in the world, perhaps even as many as two thirds. According to these rough estimates, each year around 200 million people suffer unnecessarily from problems that can be solved and 100 million more from problems that can be settled or decided more fairly. That is a lot of injustice.

What can be achieved: Supporting Negotiation and the Option of Adjudication

This report argues that we now have the knowledge and means to go after injustice more systematically. Most land conflicts can be solved within six months, in a fair way, although it will be much harder in locations where large scale violence and expulsion of populations have produced many owners. But families living on the land, other stakeholders and developers need a solution, so that they can build their livelihoods or homes on the land. Fair, effective solutions can also be made available for crises in other relationships: divorce, domestic violence, personal injury resulting from accidents, termination of employment, access to natural resources, unpaid debts or defective products. Grievances about failing services from governments can be remedied, so that those in power will be more responsive to the needs of small businesses and families. Not all crime can be prevented, but if it happens, victims can be treated in a respectful way, harm can be repaired, or at least recognized.

How can this be achieved? Research shows most conflicts are solved by direct negotiation between the parties. When dealing with crimes, intensive communication with each person involved is needed as well. Improving these interactions is key. In the vast majority of cases, access to justice is a matter of organizing a way for the parties to interact, to listen to each other and explore good solutions, to decide on distributive (win-lose) issues using norms, to address a third party for a decision if necessary and to comply with the outcome.

During these processes, the parties to conflicts seek advice and get assistance from an enormous variety of helpers. Friends, family members, employers, local leaders and victim support groups provide volunteer services. The police, legal aid organizations, law firms, social workers, trade unions, journalists, and legal aid insurers are among the many professional organizations that also help to provide access to justice.

Adjudication by third parties is exceptional, but a very important part of the supply chain. Many issues are zero sum. When bargaining about money, allocating an acre of land or deciding on an appropriate sanction, the people involved need the option of addressing a third party. If truly accessible, the mere availability of this option urges both parties to negotiate in a fair way and to think about the existing norms for appropriate solutions.

Formal courts of law are special, because they set examples, provide rituals for dealing with conflicts, and have procedures for deciding the most difficult cases. Judges from official courts nowadays supervise the settlement process and give a neutral decision if necessary. They can be very effective resolvers of disputes, but are less so if they frame problems in terms of right and wrong and if their procedures are costly. Informal tribunals can give effective protection as well. Influential persons from the community and government officials offer additional paths to justice. Modern media also play a key role by mobilizing the “the court of public opinion.”

A State of the Art for Access to Justice Policies is Missing

In the past, reformers have concentrated on improving laws and court procedures, and monitoring human rights. Lately, there has been a shift towards providing better legal information, simple conciliation procedures (mediation, other alternative dispute resolution), and new forms of legal aid. At the beginning of the 21st century, these efforts have been a moderate success. Some of these policies did not work as well as expected.

In this setting, governments have difficulty ensuring equal access to justice to everyone. Subsidizing courts and legal aid, reforming procedures, and delivering legal information tends to happen in an uncoordinated way. Some policies even seem to contradict one another: can citizens be asked to stay away from courts and be promised good access at the same time?

Challenges for Suppliers of Access to Justice

What makes it so hard to deliver for lawyers, judges, NGO’s, and all others motivated to relieve the need for access to justice? In Chapter 4, we bring together the latest insights from economists and other disciplines studying access to justice that explain why assistance with negotiation and adjudication processes is so difficult to organise. Regulation of services in the justice sector is often out-dated. The rules only support specific roles of lawyers, mediators and courts. Other laws prescribe which procedures courts should use in a centralized, inflexible way. Together, these rules create barriers for innovation by legal professionals, and even higher ones for outsiders wanting to introduce innovative forms of solving justiciable problems.

All neutral providers of justice have a difficult relationship with their primary customers. They have to serve two parties, with opposing interests, who somehow have to agree on and cooperate in a process that will produce a solution. Usually one of them is dissatisfied, and the other party needs to pay, do something, or change behaviour as a part of the solution. Often this is a person or a government agent with more bargaining power, who may not be inclined to change the status quo. This defendant is not likely to submit to a process suggested by the complainant. This “submission problem” is a likely reason why voluntary mediation, arbitration or any other dispute mechanism based on consent of both parties is hardly ever used.

If a timely solution is needed, and to guarantee fairness of outcomes, judges and other third parties cannot wait for a defendant to submit and fully cooperate. They have to intervene in a more active manner.

Research shows what judges and informal tribunals need to deliver good access to justice. First, they require a setting in which they are rewarded for creating fair, timely, appropriate solutions against reasonable costs for the parties. Unfortunately, the current monitoring mechanisms (mainly appeals) focus on one particular part of this task: whether courts apply the right norms. Second, judges and other adjudicators can be very effective if they use simplified, specialized procedures that can cope with all issues between the parties.

A third problem for adjudicators is that they are supposed to provide public benefits (guidelines and case law that can help people to settle future conflicts, the option of third party intervention) as well as private ones (speedy, adequate solutions for individual problems). So they need adequate funding and monitoring models, giving incentives to cover all their roles in supporting negotiation and adjudication.

Another barrier to assisting people seeking access to justice is that it is very hard to make money by delivering valuable legal information. The most common model, individualized legal advice, is an expensive mode of delivery. As a result, people do not get low cost access to legal information. And most law firms acting for individual clients stay small and local. Scaling up civil society projects delivering individual legal aid has also proven to be difficult.

Innovative Approaches for Supporting Negotiation and Adjudication

In this report, we show how justice providers across the world are working hard to narrow the access to justice gap, tackling these challenges one by one. Their approaches have emerged bottom up, in the practice of legal advice or of court procedures, in informal rulemaking and dispute resolution processes, whilst designing web-based tools that help to solve conflicts, or in academic research. They tend to focus on the most urgent problems people have in their relationships with others, and on their needs for justice, fairness and effective solutions.

Strengthening people's own capabilities to solve these disputes in a way that is sustainable and affordable, is key in these approaches. They all facilitate and support the process of negotiation and adjudication.

Seven Promising Strategies

The interdisciplinary literature and the vast know how from practitioners make it possible to identify what does not work; what works but is very costly; and what has been tried for a long time but has not made a dent. The most promising directions for innovation are the following.

- **Specialization: Terms of Reference and Monitoring**

Specialized courts and specialized legal services tend to be much more effective than general processes for criminal or civil law problems. Land conflicts require mapping of the way land has been used in the past, allocation of rights, adequate relocation and determination of fair compensation. Neighbour conflicts, consumer complaints and divorce (with or without domestic violence) require different capabilities, processes and interventions.

Increasingly, procedures for resolving conflicts are being benchmarked. Terms of reference can be determined for disposition times, necessary elements of the procedure and specific capabilities needed for fact-finding, facilitating interaction between the parties and decision making. Justice experiences of users of procedures can also be monitored in surveys. Do they feel they had voice and were treated respectfully? To what extent did the outcome reflect their needs, restore their harm, and will it be a durable solution? Benchmarks and monitoring inform judges and other providers how they can improve their working methods. Clients know better what to expect and professionals get more feed-back.

- **Legal Information Targeted on Needs of Disputants**

Traditionally, legal information is made available through laws and through court decisions. Although searchable databases make it easier, it may still take a lot of time and money to unearth the legal information relevant for solving a land dispute in a remote part of Nigeria or Indonesia. Codification by legal scholars, sponsored by ambitious governments, has been one way to lower these information costs. Right now, legal information policies are one of the

highest priorities in the of legal empowerment paradigm, because better information improves bargaining positions. It enables people to assess the fairness of what their opponents offer them as a settlement.

Legal information is most useful if it is understandable, tailored to the problem at hand, and arrives just in time. Ideally, it is sufficient to cope with the problem, it offers limited options, and it is easy to put into practice. If people work with the information, they tend to need assurance from a help desk or a support group.

Criteria for fair solutions, such as schedules for compensation, child support guidelines and standards for sanctions, are very helpful tools for settling zero sum issues. Collecting and publishing such sharing rules for the most common and urgent problems can be a priority in legal information programmes. In the time of the internet, and using open source methods, this is a rather low cost option, with very high expected benefits. But such websites are notoriously difficult to fund.

Going rates of justice are different from country to country, and often within countries, so multiple sharing rules may exist next to each other. But people still get guidance from competing norms. And if prices for compensation or sanctions differ too much, there will be a tendency to adjust once they become widely known.

- **IT Platforms Supporting Negotiation and Litigation**

Resolving conflicts and structuring relationships is basically a matter of exchanging information. The parties, the people assisting them, and adjudicators learn about issues, facts, points of view, underlying needs, possible solutions, proposed norms and, eventually, decisions on these issues. This flow of information can be supported by forms and standard documents that ask the right questions. IT platforms now supply tools for assembling legal documents to millions of clients. Websites supporting on line mediation and negotiation are becoming available. The most sophisticated services ask questions to parties as a mediator would do, but also inform the parties how certain disputes are normally decided. Information submitted by the parties is organized issue by issue. Judges, arbiters or jury members can log in and type their decision on line.

- **Facilitators and Paralegals Working Towards Fair Solutions**

Many people rely on customary justice processes, informal interventions by local leaders, and similar arrangements in neighbourhoods in cities. Although informal justice may be used to boost the positions of those already in power, and some outcomes raise questions from a human rights perspective, these processes tend to be evaluated positively by the people that use them. Because of their focus on conciliation and dialogue, integrating modern mediation techniques and dispute resolution know how is rather easy.

Programmes with paralegals, facilitators or barefoot lawyers are now among the most popular methods to increase access to justice in developing countries. These local volunteers or part time professionals can be provided with training in dispute resolution skills and in the legal principles that are most relevant for their practice. In developed economies, employees of legal expenses insurers, and providers of legal aid, tend to work in a similar way. In their working methods, they combine elements of the traditional roles of lawyers, mediators and judges. They are at the front line of developments where lawyers and judges increasingly use mediation skills, whereas mediators focus more on fair outcomes.

- **Choice of Third Party Adjudication Processes**

If a court procedure takes three years and costs a fortune, the option of adjudication is not effective. The threat of going to court is unlikely to impress the other party, especially if the person has little bargaining power and limited funds to spend. Availability of legal aid, lawyers financing claims on a no-win no-pay basis, or legal expenses insurance changes this game.

But a far less costly way to enhance access to justice is to create alternative adjudication mechanisms. Because of the submission problem, this only works if the plaintiff can address this forum without the consent of the other party. Informal tribunals in villages, committees specializing in employment issues or landlord-tenant problems, religious courts for divorce, ombudsmen for complaints about governments and fast track court procedures are examples. Competition between third party adjudicators gives choice and increases incentives to be really helpful. Monitoring processes and outcomes, or the option of appeal to a formal court of law, can protect the legitimate interests of defendants.

- **Using Reputation to Induce Compliance**

Access to justice also requires that people live up to what can be expected of them. Negotiated outcomes and decisions by adjudicators can be reinforced by the option of sanctions. Research shows, however, that compliance can also be enhanced by increasing procedural justice, through greater participation in negotiated outcomes, integration of obligations on both sides in the solution, and by using the incentives of a good reputation. Websites and other modern media now play a role here, but informal justice mechanisms, with their local roots, can also expose misbehavior or insufficient efforts to reach a good solution.

- **Sharing Practices, Evidence Based Protocols**

Specialization seems to clash with the idea that most conflicts are local and can best be solved in the local setting. But as we have seen in health care, services can reach a higher level of quality level if information about the best treatments is made available to general practitioners working in a local context. Conflict resolution is becoming more evidence based. Many disciplines provide knowledge on what works in negotiation and in bargaining about zero sum issues, on mediation techniques and on effectiveness of third party interventions. For domestic violence, global standards of practice are emerging. Gradually, this knowledge is beginning to find its way into legal dispute resolution processes and the new discipline of dispute system design. Paralegals, judges, lawyers and other dispute professionals are now being trained in mediation and negotiation skills, which are based on this research. Practitioners working at NGO's in developing countries develop best practices as well. Within the next decade, this knowledge may develop into evidence based protocols for solving the most frequent justiciable problems.

Ideally, these protocols should integrate the processes of negotiation and (preparing for) adjudication. From the perspective of clients they are one and the same process. Judges, mediators, facilitators, lawyers and others involved may see themselves as playing in different leagues. But for clients they are all providers of difficult to distinguish services that lead towards an acceptable outcome.

Supporting Innovation Towards Basic Justice Care for Everyone

Cutting edge approaches are being developed now and these innovations are highlighted in the report. Interestingly, none of these approaches requires major subsidies. The private sector and civil society can play a key role in delivering access to justice. Governments should nurture these innovations, acknowledging that access to justice cannot be organized top down, by issuing legislation alone, or by large scale subsidies. Governments, NGO's and social entrepreneurs can also encourage the process of world-wide sharing of the best practices. That is our best hope to fight injustice. Step by step, problem by problem, in a way that is similar to how the medical profession fights disease.

1. Starting From Justice Needs



1.1 Faith

Access To A Unique Identity

Faith was born in Masimba, a small village in the Western part of Kenya, in the last year of the second millennium. In the days after celebrating her birth, her mother and father went through another stint of hard labour. First, they completed a notification form at the chief's office. Then they travelled two hours and stood in line for a long time at a district registration office, behind several dozen other people. Many of the people in line were illiterate, causing difficulties in the filing process. The official in charge worked with pen and paper as his only tools. Speeding up his work would merely create longer lines of people, so he had little reason to lessen the ordeal of his customers. After having been in queues for the equivalent of almost two working days, paying a small extra fee (needed because they themselves had incomplete documents), and waiting for almost two years, Faith's parents finally received a certificate showing the name of their daughter, the place and date of birth, as well as the names of her mother and father.

According to estimates based on surveys and other data, only 44% of Kenya's parents in rural areas have registered their youngest daughter.¹ In 2011, when the Kenyan government pronounced a new law confirming that children must have a birth certificate in order to get access to schools, many parents rushed to get it, facing fines for late registration and awkward procedures. But Faith is now among the first girls in the village to have completed primary school. Ten years from now, she may be able to earn a living for herself and her family, perhaps thanks to a loan from a bank, or a business that she may start. Faith will have no trouble proving her identity when she applies for an official job, buys property, marries, goes to a hospital, registers at a website, inherits money from her parents, or wants to travel to another country. Access to this certificate gives her access to a world and a wealth of services. Simply because other people can rely on her being a person with a unique identity.

Meanwhile, in India, 20 million people get a new identity. Not two years from now, but this month and each past month! The unique identity is 12-digit number matched to fingerprints, a photograph and even an iris scan. Costs are a fraction of those of Western ID's and the corresponding back-office. Major IT firms have bid on parts of this huge project, and serve the clients applying for the identity with their sophisticated scanning devices for sums in the order 1\$ per person. The program is lead by Nandan Nilekani, a former chairman of Infosys, and incorporates best practices from the IT industry: smart outsourcing and subcontracting, rigorous targets and quality standards, precise protocols for every eventuality, integrating networks of databases and the hard work of implementing locally. The actual scanning happens in the hot, humid Indian countryside, where some workers have hardly any print left on their hands, and many people are illiterate. But the men and women doing the scanning have to overcome these problems, because the entire supply chain will not be paid its share of the 100 rupees (\$2.50\$) by the government if there is no unique identity issued.

The system has been tested by intensive criticism: it would not be able to reach the poorest 15% of the population and people with disabled hands or eyes; terrorists would be able to get a local identity and privacy would be endangered by involving all these private contractors. The latest evaluation data suggest that these risks are real, but very small: only 0.14% of people cannot be registered in this way, and need to get identity documents manually. False rejections and false acceptance rates are very low (0.057 and 0.035 respectively).² Meanwhile, Indians vote with their feet. Each working day, one million people apply for the new number, even though some of them need to wait a few hours in lines.

¹ IDLO Kenya Country Report, Strengthening the Legal Protection Framework for Girls in India, Bangladesh, Kenya and Liberia, 2010, p. 6.

² See for the latest developments: http://en.wikipedia.org/wiki/Unique_Identification_Authority_of_India

This is what can happen if innovation enters the field of access to justice. Social entrepreneurs find new delivery models, using state of the art technologies, and integrate them in existing legal and administrative frameworks. If a process is challenged on its fairness, the effects on people can be tested and compared to the achievements of alternatives. And the potential is huge. Other countries having difficulties with their ID systems, look in awe at what happens in India now. There is no apparent reason why these innovations cannot cross state borders, if adapted to local realities.

Coping With Domestic Problems: Can Promising Approaches Be Scaled Up?

Can such innovations provide breakthroughs in other fields of access to justice? Throughout the world, women are the first clients showing up when human rights NGO's put a sign on the door that suggests they offer legal services. Take Faith's older sister. She dropped out of school to get married at fourteen. Now, she talks in a soft voice about domestic problems. There is lack of money, her husband is living with her irregularly, and occasionally he gets violent. What she hopes for is a relationship without fear. She needs stability in her own life and that of her two children. A regular stream of child support payments by her husband would be helpful. Possibly, it would have saved the life of her youngest son who contracted malaria while his mother lacked the resources to consult a doctor.

Good services are now available for some women who are experiencing domestic problems. NGO's provide them with a type of coaching that looks remarkably similar whether it is in Nairobi, Dhaka, Cairo, rural Nicaragua, or in a town near Chicago. Group facilitators trained in psychology and law help Faith's sister to establish a principle of non-violence in the house, but also to communicate more effectively with her husband instead of haggling when he comes home hungry. She feels supported by a group of women in a similar position. If necessary, paralegals help her and her husband to negotiate a fair amount of child support, using the best available dispute resolution skills. If all goes well, this amount is guided by a clear formula designed by judges and refined by academics that takes into account the needs, and the means, of each member of the family. This ensures that both husband and wife trust that they give or receive an amount that is similar to what others agree on. When there is no resolution, the issue can be taken to a tribunal for family matters. It has a procedure that is easy to understand, delivering a decision within a few weeks. Payments of the husband will then pass through the hands of the NGO, so that the husband has even better reasons to support his children regularly.

The basic knowledge about coping with such problems seems to be available, but as we will see, most of these NGO's still work on a small scale. They reach a few hundreds of women each year. They may provide good services, but have no clear benchmarks or tools to evaluate them. Their effectiveness also depends on how family courts work for their community. Not all women with domestic issues have a realistic option to involve a judge or another third party with the skills and the authority to deal with these sensitive issues.

Land and Housing Problems: Good Practices Are Emerging

"Tenants, land owners, squatters," these are the special names lawyers give to another group of regular clients. But they are not different from other people. We all need a secure, safe place for our livelihoods, whether we are occupying land not used, paying a rent, or have invested in land to build on in the future. If we have tenure security, we can improve our house from year to year, start a business, or work hard to increase the earnings from the plot we use for farming. Threats to security of tenure may come from unexpected increases in rent, or from straying livestock destroying crops.

Faith and her parents moved to town three years ago, living on land her parents do not formally own. Together with their neighbours, they invested in primitive sanitation, sort of paved the main road, and struggled hard to get running water. Now government officials and a private developer have made plans for apartment blocks and some office buildings. In the mean time, Faith's uncles have begun to behave like co-owners as well.

This is another problem for which good solutions are now within reach. Good designs of procedures for compensation and resettlement have been the topic of socio-legal and economic research. Multiple claims, based on temporary occupancy of the same land are more difficult to resolve, but across the world courts and informal tribunals have found workable solutions for this in the aftermath of civil wars. Good procedures take into account the need for mapping the different types of use, timely communication, exploring options for allocating rights, negotiation about compensation, and the opportunity of an appeal to an independent forum, which must have experience with valuation of property and a lot of local knowledge. Principles for determining fair compensation are heavily debated. But there is a general tendency across borders to award at least the replacement value of the land, the buildings and the use of communal property. Next to that there will be costs and taxes, compensation for damage to crops and buildings. Most of the remaining debate is about the size a premium on top of this, which can be based on a fair share in the value of the new development, but also on a realistic assessment of the many practical difficulties of restarting life at another location.³ Furthermore, large amounts of cash received as compensation can be hard to manage inside a poor family, so good arrangements for saving are becoming state of the art in dealing with land conflicts as well.

1.2 Serving Justice Needs In A More Effective Way

Making People Work on Fair Solutions

Struggles with civil servants about obtaining identity documents, domestic problems and threats to tenure security - these are three examples of problems any person in the world can run into. There are more of these frequent, standard problems: inheritance issues, termination of employment, neighbour problems, theft, unpaid bills and difficulties regarding pensions and social security benefits. The list is long, but not endless. If we add victimization by crime and accidents, complaints about products and services, and conflicts between partners in a small business, these categories cover 90% of the legal problems an individual runs into in most countries.

Usually, what should happen to solve these conflicts is clear in broad, general, terms. One way or the other, the parties directly involved in a problem must start communicating again and be helped to negotiate solutions that will work between them. They also need to agree on fair remedies, which can be established with reference to standards and guidelines that should, ideally, be publicly available. If no agreement can be reached, courts or other third parties have to help them to take a decision, and to monitor compliance.

The Knowledge Is Available

The devil is in the details of making this work. For each of these problems, the best processes and solutions are different. Sometimes, it is very hard to make them available. In the practice of law, whether it be in Africa's pluriform legal systems, or in a multilayered sophisticated court structure, there will often be competing norms and criteria.

But we know by and large how these problems can be treated effectively. As we will show in this report, NGO's, entrepreneurial lawyers, legislators and judges have developed innovative procedures for each of these problems. Socio-legal researchers, negotiation and conflict resolution experts and economists explained and tested why some processes work better than others. Negotiators can deal with the complexity of multiple norms, finding the middle ground. Software developers and owners of websites selling legal tools are now transforming this knowledge into low cost services that are more affordable. The challenge is to bring this together, to make these treatments affordable for everyone and to scale up the services that work best.

³ See, for instance, Asian Development Bank, Capacity Building for Resettlement Risk Management: Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India, 2007, chapter I and V.

Making Justice Needs Tangible and Visible

That is urgently needed. Unfortunately, many people still do not have access to affordable and effective solutions for these problems that disrupt their lives. The size of this problem is one of the unknowns. But well founded estimates are possible. In Chapter 3 of this report we show that in some countries only 30 to 40% of the common justiciable problems reported by people are solved in any definitive way, whereas other countries succeed in solving up to 70%. Moreover, not every negotiated solution or every decision by a court is perceived as a fair one. Participants in some divorce procedures give an average rating of 4 on a five point scale for distributive justice or procedural justice, whereas procedures for similar problems in other countries have ratings around 2 on that scale. Population surveys conducted in 66 countries and expert opinions which add up into the WJP Rule of Law Index 2011 indicate a huge access to justice gap. Long delays in courts and limited access to affordable legal services are the main indicators of system failure.

Lack of access to justice has consequences far beyond conflicts that keep on frustrating the individuals involved. Knowing that future conflicts with other people can be solved in a fair, neutral way; knowing that there will be some form of accountability; that is at the base of our trust in other people outside the small group who share the same genes. Insecurity and distrust not only keep us awake at night, but also make us spend time and money on costly precautions. These resources are diverted from what would otherwise be invested in improvements of our own lives, and that of our family, in relationships, at home, at work, or in the town where we live. Violence coming from strangers can be disastrous and attracts a lot of attention. Most violence, though, be it in the house, in the neighbourhood, or between groups, builds up from tensions in relationships that are neglected, leading to deep feelings of injustice. The stakes are high.

But these needs are often not very visible. If we want Faith to succeed in life, we know that decent food, water, good forestry, housing, education, health care, a basic income and job opportunities are necessary. Most of these goods are tangible, like rice, clear water, trees, bank notes, pills, schools and hospital buildings. They can be touched, felt, entered, experienced and are part of daily life. As is justice. But justice doesn't pour out of the tap, isn't a currency in our wallet, or a pill that makes a flu go away. That is why making the case for justice has proven to be so difficult. And why most efforts go to the most visible and tangible sources of injustice, such as clear violations of human rights, war crimes or preventing child labour.

This report highlights the needs and the opportunities for basic justice care. It focuses on the most frequent and urgent problems that can become part of everybody's life. And on justice as a hidden force, working in the background, structuring relationships, providing fairness, resolving problems, preventing disorder. Justice at work. Often overlooked, especially when it comes to the problems of everyday life.

1.3 Vision and Strategies Beyond Grievances and Better Laws

Many people and organizations are working hard on the challenges of providing reasonably fair solutions for these problems. One of the lessons from the past has been that working from the top, by investing in better laws, better courts, police and prosecution, has not always been successful. At best, establishing the rule of law in this way is a slow process.⁴ The 2011 World Development Report told us that even the fastest reformers among countries emerging from large scale conflict take 40 years to build the rule of law.⁵

⁴ Carothers T. *Promoting the Rule of Law Abroad: in Search Of Knowledge*, Washington DC, Carnegie Endowment for International Peace (2006); Stephen Haggard et al., 'The Rule of Law and Economic Development', in: *29 Annual Review of Political Science* (2008); Trebilcock M. J., Daniels R.J. *Rule of Law Reform and Development. Starting a Fragile Path of Progress*, Cheltenham, UK: Edward Elgar (2008)

⁵ P. 109

More recently researchers and reports have begun to focus on new approaches, more bottom up, working from the problems people actually experience and from their capabilities. Besides doing many projects and evaluating practices, the UNDP is setting up knowledge networks around legal empowerment and the World Bank created a Global Forum on Law, Justice and Development. Governmental organizations and NGO's such as Open Society Justice Initiative, Oxfam, Amnesty International, DGZ, USAid, OAS and the Asian Development Bank developed successful programs and interventions. Many of these programs are now focusing our attention on better legal information, on lower cost services by paralegals and on specialized services for women and other disadvantaged groups. We will call these initiatives justice needs approaches, because they have in common that they start from the actual problems that people experience and their capabilities to solve them. These capabilities are then strengthened. This can be done by local initiatives, which some proponents of bottom up reform are arguing for. But, as we will show in this report, justice needs approaches can also be scaled up across borders, and stimulated by new types of codification, precisely because they start from people's problems and not from the laws or the legal system that has been built in their country.

Among the many initiatives, it is not easy to distinguish between the more promising ones and those that have less chance of being successful. Basic criteria for setting priorities and shared evaluation criteria for justice needs approaches are still lacking.⁶ With some notable exceptions, discussed in this report, projects tend to be small, serving 1000s of people rather than millions, and have difficulty scaling up. Many subsidized - free - legal services are offered, but it has been hard to find funding models that are more sustainable.

Although justice needs approaches have justice needs and capabilities as a common starting point, no shared vision has yet developed where to go from here. One of the advantages of the top down strategies is that the vision behind it is clear. Rule of law and access to justice meant good laws and high quality enforcement. Strategy was thus a matter of writing better laws, arguing for better case law from courts, and letting lawyers, judges and police enforce the law. That can be planned, budgeted, prioritized and done. Processes were also clear, because any problem occurring can be reframed as a grievance about non compliance with a law (see box Grievance and Remedies).

Grievances and Remedies	
A common way to picture the process of access to justice is to see it as a process from a grievance to a remedy that follows five steps, and where each step is supported by activities from (legal) professionals. ⁷	
Recognition	< Legal protection (by laws)
Awareness	< Legal awareness
Claiming	< Legal aid and counsel
Adjudicating	< Adjudication
Enforcing	< Enforcement and civil society oversight

⁶ See: UNDP, *Making the Law Work for Everyone* (Report of the Commission for Legal Empowerment of the Poor), Part II, Chapter 5 (2008) and *Hague Journal on the Rule of Law* (2011), Issue 2 for the state of the art.

⁷This model has been developed first by Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...* (1981), 15 L. & Soc'y Rev. 630, 630-649. It has been adapted later, and is often used in the so-called human rights based approach to access to justices, see the much cited: UNDP, *Access to Justice, Practice Note*, 2004.

The vision behind justice needs approaches has not yet fully emerged. The human rights movement has been one of the inspirations behind many programs, but not every access to justice issue can usefully be framed as a human rights issue. Legal empowerment has been framed as improving the bargaining position of the disadvantaged, but it closer resembles an aspiration, however, then a leading program or paradigm about how to implement this.

Defining Legal Empowerment

“Legal empowerment is both a process and a goal. As a matter of process, legal empowerment includes legal reforms and services that improve the bargaining positions of: farmers seeking secure land tenure; indigent criminal defendants pursuing due process; women battling domestic violence; and communities pressing for the delivery of medical, educational or other government services to which they are entitled. As a goal, it strengthens such populations in terms of their income, assets, health, physical security and/or, most generally, freedom. The essentially bottom-up nature of legal empowerment means that it aims to build such populations’ capacities to act on their own”,

Steve Golub, What is Legal Empowerment? An Introduction, 2010.

Access to justice strategies have been developed recently for countries such as Indonesia, Australia, Nigeria and the UK, and earlier on for many states/provinces in the US and Canada. They are now followed by strategic plans for access to justice in Kosovo, Somalia and Palestine. In the Arab states, better access to justice has been one of the demands behind the Arab spring movements, where people ask for punishment of the old guard, better services from governments and less intervention in their lives. The emerging strategies on access to justice show a very interesting mix of policies and some clear tensions:

- For Indonesia, the strategy is very broad, ranging from legislation and local governance, to access to justice in a more narrow sense. In that area, it has a prominent place for comprehensive legal aid, but also for improving community justice and access to paralegals.
- Meanwhile, developed economies have found out that comprehensive legal aid and free use of courts is difficult to sustain. The recent Australian access to justice strategy stresses alternatives. It argues for providing legal information through the internet, self-help, focus on real life problems and early intervention, accessible out of court solutions, simplified court procedures and ensuring costs are proportional to issues.⁸
- The clear message from many governments is now that their citizens should avoid going to court. At the same time access to adjudication is seen as a fundamental right. Policy makers stress independent courts of law as essential elements of the rule of law for the Arab world and elsewhere, but it is not yet clear what are the preferences of the Arab people for their legal systems.
- In the recent law and development literature, informal justice has been evaluated much more positively and has become a focus of many proposed strategies.⁹ There is still uncertainty, however, about the way these practices can be strengthened.

⁸ A Strategic Framework for Access to Justice in the Federal Civil Justice System, A guide for future action, Access to Justice Taskforce Attorney-General’s Department, Commonwealth of Australia, September 2009.

⁹ Wojkowska, E. Doing Justice: How informal justice systems can contribute, UNDP, December 2006. Isser, D. (ed.), Customary Justice and the Rule of Law in War-Torn Societies, USIP, 2011.

- Country wide strategies show where innovation takes place and what is believed to work. Most of the public funding in the area of rule of law still goes to courts and to assistance by lawyers in court procedures. However, little is done to ensure that court procedures become more accessible and affordable.
- Alternative Dispute Resolution (ADR), and mediation in particular, has been promoted as an alternative to costly adversarial adjudication. But it is now also integrated in court procedures, being an addition rather than an alternative.
- Strategies tend to be pragmatic, rather than based on sound analysis of what is needed and what works. They are likely to reflect compromises between stakeholders in the access to justice industries. Lawyers and judges tend to be well organized as professions and have good access to politicians.
- Interestingly, many strategies do not contain a financial paragraph. They may list the current expenditures of governments for access to justice, but usually do not redirect funds. Private costs of access to justice are usually not taken into account.

1.4 Access to Fair, Affordable Solutions: A Five Step Framework

“A good justice system should provide a pathway to fair and equitable outcomes. Where possible, the justice system should focus on resolving disputes without going to court. Where court is necessary, the Framework can ensure the courts are accessible, fair, affordable and simple. The traditional adversarial system is no longer relevant or sustainable for most disputes”.

A Strategic Framework for Access to Justice in the Federal Civil Justice System, A guide for future action, Access to Justice Taskforce Attorney-General’s Department, Commonwealth of Australia, September 2009

Starting from actual problems, as well as capabilities to solve them, it may be possible to develop a vision on access to justice that has less inherent tensions. If problems are the input, then the desirable outcomes are fair and equitable solutions. With appropriate solutions as a goal, the agenda of improving access to justice then becomes much more straightforward. It is to select the strategies that are likely to improve the capabilities of the stakeholders, increase the number of fair solutions and lower the costs of reaching these solutions for all stakeholders.

As we will see in Chapter 2, the processes in which people actually try to obtain a solution for their problems have been researched. These processes suggest a more detailed framework for analyzing access to justice strategies that will be used throughout this report.

When difficulties arise with a neighbour, a seller of goods, a thief, or a government official, the complainant is triggered to take action because he or she feels a certain situation is not acceptable. Often both parties are dissatisfied with the current situation. Establishing renewed contact is normally the first action one of them takes, although in criminal cases this will be done much more cautiously and using intermediaries that can provide security. Contacting is not always done in the form of confronting the other party with a (legal) claim or even a grievance. One of the findings of negotiation research is that patterns of accusations and defensiveness are even a barrier to conflict resolution.¹⁰ So a good framework for analyzing access to justice strategies should not assume a claim, a grievance, an accusation of inappropriate conduct, or an adversarial procedure. These ways to express dissatisfaction with an existing situation are just possible manners to take up a problem with the other party.

¹⁰ Keith Allred, “Relationship Dynamics in Disputes: Replacing Contention with Cooperation” in: M. Moffitt (ed.), *Handbook of Dispute Resolution*, 2005, p. 83.

Analytical Framework: A Process Giving Access To A Fair Solution

An alternative framework starts from what most people actually do when they seek access to justice. A dispute system supports this process, with information, with incentives and with options to involve third parties as decision makers or providers of enforcement. This support can be provided in many ways, by many different types of providers.

Tasks	Description	Basic methods to achieve this
Meeting	Contacting and starting an interaction with the other party about the problem	< Sufficient reasons and incentives to cooperate
Talking	Negotiation (interest based)	< Negotiation skills and structure
Sharing	Bargaining about who gets/does what	< Information about rights, rules, and fairness standards
Deciding	Growing towards a decision	< Option of third party decision (adjudication, formal, informal), trilateral governance
Stabilize	Making explicit and organizing compliance	< Incentives to comply (public involvement and oversight)

Next, research shows negotiation is the most common way to solve problems, so improving the quality of these processes is key. In these negotiations, the parties bring in their wishes, their needs and their worries. They look for solutions that best address these interests. But they also invoke rights and rules as support for their bargaining position when they ask the other party to pay, to change his conduct, or to do something else. Often, both sides bring issues to the table. So the grievance-remedy model of access to justice should be extended. An essential element of seeking access to justice is that at least one other person is involved. Usually, that other party should take some action on the problem, such as listening and recognizing harm, paying compensation, giving access to land or other assets, or changing behaviour. And the most common way to attempt to achieve this is by communicating and negotiating with the other party.

Third parties are also involved when people seek redress for problems. These can be judges, but research shows that people rely on a much broader range of third parties, such as parents, teachers, local leaders, government agents, bosses and friends.¹¹ Sometimes, they mobilize a broader group of people, turning them into a court of public opinion. Third parties influence the other party and induce the parties to reach a solution. If necessary, they can take the decision and that puts pressure on the negotiations. The procedure before a third party for holding another person accountable can be informal (complaining with a local leader in a village) or more formal (courts of law). Third parties can be institutionalized, such as tribunals for dealing with consumer complaints or courts dealing with labour issues, or be created ad hoc, such as a process mobilizing farmers who strive for better compensation for their land which has been taken for a major building project.

Only in a minority of conflicts, does a court or another third party actually imposes a solution. Although this happens infrequently, it is essential that a third party is available. By being there, the third party provides a neutral perspective, which has been called the shadow of the law. The option to involve a third party and to let this person decide makes the disputants behave more reasonably in their negotiations.

¹¹ Sandefur, R.L. The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy, *Loyola of Los Angeles Law Review* (2009, p. 949).

Once the third party is involved, the communication and negotiation between the complainant and the other party tends to continue. Usually, the third party collects information, structures the issues, mediates and works towards a decision, together with the parties. This process has been called *trilateral governance*. As a judge the third party may have to decide the remaining issues when the parties continue to disagree, but he also will try to build support from the parties for the decision and to look for a reasonable degree of acceptance. Otherwise the problem is likely to continue, with yet other third parties being involved, such as a court of appeal.

Organizing compliance is essential as well. Usually, remedies such as compensation, transfer of assets to the complainant or a sanction are costly for the other party. So there must be incentives to comply. This is one of the functions that is provided by the broader community. Non-compliance with reasonable outcomes of negotiation and adjudication is likely to be seen as negative. Playing on a person's wish to retain a good reputation is a very important tool to achieve access to justice, next to sanctions such as fines and imprisonment.

This framework involving five basic tasks for achieving fair, acceptable outcomes (meeting, talking, sharing, deciding and stabilizing) is certainly not a complete description of outcomes and processes that are relevant to solving the most urgent justice problems. It is not the only possible model, and for a rather simple process of obtaining birth certificates the description may be too complex. For criminal justice it may be less appropriate, although addressing the criminal justice system is another remedy a victim can choose, whereas the interaction between victims and perpetrators gets more and more attention, and people are sometimes both victim of violence and accused of committing it. But, as we will see, this framework at least addresses some of the tensions in current access to justice strategies. It focuses on strengthening the interaction between the parties. Information about laws, incentives and involvement of third parties are tools to enable this interaction, but access to justice can be more than access to laws and legal remedies. Lawyers, judges and other professionals are providers of access to justice, but they are not the only possible providers. This framework also allows for informal tribunals, websites or paralegals, although there may be differences in quality and costs.

In this report, we will focus on access to justice for individual citizens in the relationships of their everyday lives and for small businesses. But our analysis of how people seek access to justice and how these processes can be improved may also be relevant for other problems in which people or organizations look for accountability.

1.5 Basic Justice Care Is Similar Across Borders and Cultures

The new approaches discussed in this report are applied in many countries, in the context of different legal systems and even across cultures. Paralegal programs have spread from South Africa to Mali and from Sierra Leone to the Philippines. Mediation techniques are used throughout the world for family problems and neighbour disputes. Procedural justice research confirms that people from different cultures value similar elements of procedure. This reflects a general understanding that patterns of legal needs and doing something about them are rather similar across cultures.¹²

There may be differences in the way respect is valued and shown, but on every continent people in a conflict feel a need for respect. Voice, participation, accuracy in fact-finding, neutrality and information about the process are generally appreciated as well. Harmony in the community may be more important in Asian cultures, but good, fruitful and stable relationships on which people can rely are appreciated elsewhere.

¹² See, for instance, Kritzer, H.M., *The antecedents of disputes: complaining and claiming*, in: *Oñati Socio-Legal Series*, v. 1, n. 6 (2011) - *Current Socio-Legal Perspectives on Dispute Resolution*.

Universal Processes And Local Practices

A framework for access to justice strategies that starts from problems enables learning processes across borders. The needs and interests behind tenure protection are similar for every person living on the globe. The same is true for the recurring issues in consumer complaints, the difficulties of making governments deliver on promises of social security and pensions, or the issues around child support.

The legal contexts of divorce law can be very different, but in the end every jurisdiction uses one of a limited number of calculation methods for the monthly payments from husbands to children. Problems are very similar, criteria for fair solutions can be exchanged, negotiation processes and procedures in courts are comparable.

Still, local knowledge and local practices can be very valuable. Many communities have their own rituals and sayings that support justice and peace-making processes. On top of this, the legal community has built its own culture.

Courts supply rituals and ceremonies that intend to make it easier for people to communicate, to treat each other with respect and to accept that certain decisions are being taken for them. Courts are not only resolvers of dispute, but also designed as beacons of neutrality. Judges become leaders by example: they show how different groups and individuals can have a fruitful debate, communicate about the most awful things that can happen between people, and come to reasonable solutions. Although traditional procedures make these processes too formalistic, many judges now try to bring in more empathy and more focus on the issues as they are experienced by the people in their court rooms. They provide hope and they provide closure.

Rites, rituals and rights

In their beautifully illustrated book *Representing Justice, Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, Judith Resnik and Dennis E. Curtis analyze how Renaissance "rites" of judgment turned into democratic "rights". They show how rules and rites developed that require Western governments to respect judicial independence, provide open and public hearings, and give access and dignity to "every person." From over 220 images, readers can follow how the aspirations for justice are reflected in court buildings, statutes and paintings.

The literature on informal justice systems offers countless examples of rituals and religious beliefs that strengthen the solutions and the values of peacefulness and conciliation behind them.¹³

Global Methods and Local Services in the Health Care Sector as Source of Inspiration

One source of inspiration can be the health care sector, to which we will often refer. Here practitioners, academics and a large supplying industry work hard to develop knowledge about the best treatments and are committed to using the latest technologies, testing new treatments extensively. There is also much thought on the possible organizational models for delivery and on the possible ways of financing a health care system. Combating diseases is a global venture, but it happens locally, on the ground, achieving enormous gains in average life expectancy almost everywhere. Throughout the world, health care workers have a clear common goal: curing people and caring for those who suffer from disease. Likewise, the goal of the justice sector could be to cure the problems that come up in relationships, to prevent them from happening again and to relieve the harm done.

¹³ Ewa Wojkowska, *Doing Justice: How informal justice systems can contribute*, UNDP, December 2006, p. 18. See also the extensive literature accessible through key words "rites, rituals, informal justice".

Evidence Based Health Care And Justice Care?

The evidence-based approach emerged from the field of medicine and has been adopted in areas like health care (encompassing medicine, psychiatry, nursery, etc), management, education, and development economics.¹⁴

Evidence-based practice can be based on data from research, practitioners, clients or other stakeholders. Study designs that randomly assign subjects to an experimental or control group that each receives a different intervention (Randomized controlled trials, RCT's) are in some respects considered to be the golden standard.

However, the essence of evidence-based practice is that the current best evidence (which can be all types of evidence ranging from RCT's to individual case reports) is conscientiously, explicitly and judiciously used to rationalize policy and actions of practitioners.¹⁵ What the current best evidence is and how it can be developed is both dependent on the discipline involved¹⁶ and the question that has to be answered.¹⁷ Furthermore, evidence bases will evolve as new practices are gradually developed and at the same time applied (with a feedback loop). Crucial in this respect is transparency of the quality of evidence so practitioners can critically appraise it.¹⁸

RCT's are known for being able to yield robust data. They are not appropriate for answering all questions. For instance, the costs and efficiency of the treatment or the user friendliness of certain interventions for practitioners, the impact on the patients' satisfaction and experiences are hard to assess in this way. When the health care sector changed from being physician-centered to being patient-centered, other methods became more prominent as well.¹⁹

In the health care literature, four sources of evidence that can be distinguished, that together provide a fuller picture, tap the rich expertise in practice, and each might require different methodologies.²⁰ These sources can also guide efforts towards making the practice of justice delivery evidence-based. The following table gives a brief description of each source, and some examples of research questions and corresponding methodologies.

Source	Question	Methodology
Research: Data from research literatures	<ul style="list-style-type: none"> To what extent is law X consistent with human rights? What are the effects of transparency of sharing rules on negotiated outcomes? 	<ul style="list-style-type: none"> Desk Research, Case Law Analysis Experiment, Randomized Controlled Trial
Practitioners: Data obtained through practitioners like lawyers, judges, paralegals, police, etc.	<ul style="list-style-type: none"> What are effective ways of involving more powerful defendants in a dispute resolution process? What is a common amount paid to a personal injury victim for loss of income? 	<ul style="list-style-type: none"> Case Report, Focus Groups, Interviews Focus Groups, Interviews

¹⁴ See Trinder, L. and S. Reynolds (2000). Evidence-based practice: A critical appraisal, Wiley-Blackwell. Banerjee, A. V., E. Duflo, et al. (2011). "Poor Economics." Public Affairs: New York.

¹⁵ Sackett, D. L. and J. E. Wennberg (1997). "Choosing the best research design for each question." *Bmj* **315**(7123): 1636. Concato, J., N. Shah, et al. (2000). "Randomized, controlled trials, observational studies, and the hierarchy of research designs." *New England Journal of Medicine* **342**(25): 1887-1892. Bhandari, M. and P. V. Giannoudis (2006). "Evidence-based medicine: what it is and what it is not." *Injury* **37**(4): 302-306.

¹⁶ Upshur, R. E. G., E. G. VanDenKerkhof, et al. (2001). "Meaning and measurement: an inclusive model of evidence in health care." *Journal of Evaluation in Clinical Practice* **7**(2): 91-96.

¹⁷ Sackett et al 1997.

¹⁸ Guyatt, G. H. and J. W. Busse (2006). "The philosophy of evidence-based medicine." *Evidence-Based Endocrinology*: 25-33. Guyatt, G. H., A. D. Oxman, et al. (2008). "What is 'quality of evidence,' and why is it important to clinicians?" *Bmj* **336**(7651): 995-998.

¹⁹ Laine, C. and F. Davidoff (1996). "Patient-centered medicine." *JAMA: the journal of the American Medical Association* **275**(2): 152.

²⁰ Rycroft-Malone, J., K. Seers, et al. (2004). "What counts as evidence in evidence based practice?" *Journal of advanced nursing* **47**(1): 81-90.

<p>Clients: Data obtained through (potential) clients of justice services</p>	<ul style="list-style-type: none"> • What is the impact of availability of legal facilitators on the legal empowerment experienced by the community members? • What are the differences in procedural justice experienced by parties between court A and court B? 	<ul style="list-style-type: none"> • Randomized Controlled Trial, Most Significant Change method, Cross-Sectional Survey • Cross-Sectional Survey
<p>Local context: Data from the organizational context, stakeholders</p>	<ul style="list-style-type: none"> • How can legal services targeting the poor be made sustainable? • How can court procedures be effectively shortened? 	<ul style="list-style-type: none"> • Case Report • Case Report

In the following, we will encounter some interesting and challenging differences between the justice sector and the health care sector. One of them makes it much more difficult to solve problems adequately than in the health care sector.

In the justice sector, it is hard to tell whether a treatment works. An adequate solution for a problem about land requires two persons, who are likely to have opposing interests. So it is not easy to check whether the solution works by simply asking each of the clients. For health care workers, the feed-back on their treatments is straightforward. They can check whether symptoms disappear and whether their patients come back with their complaints or not. However, the justice sector is on its way to overcome this problem. Justice research has developed measuring instruments for satisfaction of users with different elements of justice, and for a number of other outcomes, such as the costs of access. Such instruments can now be used to distinguish better treatments from less adequate ones.

1.6 Knowledge from Many Places and Disciplines

The methodology followed in this report is rather straightforward. We follow the approach advocated by many leaders in the field that developing effective solutions to real life problems, starts from the problems themselves and builds on the resilience of people to tackle these problems, enhancing these local capabilities.²¹ So we go through a number of simple questions: What are the problems for which people seek access to justice (Chapter 2)? What are the present ways they are solved and what is the gap between needs and fair solutions (Chapter 3)? Why does supply of access to justice so often fails to meet demand (Chapter 4)? What are promising directions for improvement and innovation (Chapter 5)?

The current report is grounded in research and data from the actual practice of delivering justice. We establish what is known about what works. If that is unclear, we provide reasons from research why something is (un)likely to work. We build as much on data as possible. Some of it collected by us during various research projects on access to justice and legal empowerment, but most collected by others and synthesized by us in earlier 'input papers'.

Legal needs surveys carried out in over 25 rich and middle income countries give clear indications on the trends in justiciable problems in those countries, the ways they are solved and on the number of them that are not solved in a satisfactory manner.

²¹Nussbaum, Martha C. and Amartya Sen, eds. (1993). *"The Quality of Life"* Oxford: Clarendon Press; Christine Parker, *Just Lawyers: Regulation and Access to Justice*, Oxford University Press (1999), Chapter 7; UNDP Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone II* (2008), Chapter 1; Desai D. & Sage C., "Justice. Security and Justice Thematic Paper", World Bank Development Report 2010, p. 24

Chapters 2 and 3 are based on this body of research, and on a synthesis of this we carried out ourselves.²² Far fewer studies have been conducted in lower income countries, but we have information from countries such as China and Indonesia.²³ We also obtained data on legal needs from small scale surveys among prospective clients of NGO's providing legal services in Azerbaijan, Bangladesh, Egypt, Mali, and Rwanda.²⁴

Explaining why demand for access to justice is not met by effective supply is more difficult (see Chapter 4). Law and economics research worked on bargaining in the shadow of litigation and on the incentives of courts and other third party mechanisms.²⁵ Action research conducted together with Oxfam Novib and local dispute resolution partners in Azerbaijan, Bangladesh, Egypt, Mali and Rwanda explored the barriers to scaling up.²⁶ Reviewing the literature on the "market" for legal services and for third party dispute resolution proved to be very helpful.²⁷

These are the three pillars for the argument that investment in sharing rules (guidelines, common solutions, codification of customary solutions), dispute resolution skills, choice between several third parties and monitoring are among the most urgent ones. Clear rules, accessible courts and monitoring mechanisms are public goods that have proven to be difficult for governments to supply. If these goods become available, the local market for dispute resolution services is more likely to take off, and these local capabilities can become more sustainable and affordable. Independent experts commissioned by Oxfam Novib, each covering one of the countries mentioned above, confirmed these priorities by and large.

For the promising approaches in Chapter 5, one main source of data is the interdisciplinary literature regarding bottom up law and development. There are a number of good reviews of what works and what not.²⁸ IDLO and the Van Vollenhoven Institute published a range of studies on legal empowerment and many case studies on the way informal justice systems can contribute to the delivery of justice.²⁹ Studies by a group of authors from and around the World Bank have reviewed what works and what not in court reform programs.³⁰ Access to justice reports and strategies commissioned by governments show trends in policies that are thought to be effective. On the micro-level of a conflict between two people, much research has been done by negotiation theorists, social-psychologists, game theorists and law and economics scholars.

²² Barendrecht M., Kamminga P., Verdonshot J.H. "Priorities for the Justice System, Responding to the Most Urgent Problems of Individuals", Tilburg University Legal Studies Working Paper No 002/2008

²³ Michelson E. "Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China", *American Sociological Review* (2007) 72:1018; UNDP, "Justice for all? An Assessment of Access to Justice in Five provinces of Indonesia" (2006)

²⁴ Gramatikov, M.A., & Verdonshot, J.H. (2010). *Legal needs of vulnerable people: A study in Azerbaijan, Mali, Rwanda, Egypt and Bangladesh*. (TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, 009/2010)

²⁵ Landes W. & Posner R., "Adjudication as a private good", *Journal of legal Studies* (1979), Cabrillo F. and Fitzpatrick S. *The economics of Courts and Litigation*, Edward Elgar Publishing (2008)

²⁶ Barendrecht M., van Dijk M., Gramatikov M., Monster J., Porter R. and Verdonshot J.H., "Microjustice in Five Developing Countries: Opportunities for Growing Justice Bottom Up", Action Research Oxfam Novib/Tisco with the cooperation of Ain O Salish Kendra (Bangladesh); CEWLA (Egypt); Haguruka (Rwanda); Praxis (Azerbaijan); Deme So (Mali), 2010.

²⁷ Barendrecht M. "Understanding the Market for Justice" Tilburg University Legal Studies Working Paper No 009/2009; Barendrecht M. "Growing Justice: Justice Policies and Transaction Costs", TISCO Working Paper Series on Civil law and Conflict Resolution Systems No 009/2009.

²⁸ Haggard 2008 (supra), Trebilcock M.J. & Daniels R.J., *Rule of Law Reform: Charting the Fragile Path of Progress* (2008)

²⁸ See Wojkowska 2006 and Isser 2011 (Supra).

²⁹ See IDLO website for overview: <http://www.idlo.org>.

³⁰ Messick R.E. "Judicial Reform and Economic Development: A Survey of the Issues", *The World Bank Research Observer* (1999) 14(1): 117-136; López de Silanes, F. (2002). "The politics of legal reform." *Economía*: 91-136. Botero, J. C., La Porta R., et al., "Judicial Reform", *The World Bank Research Observer* 18(1) (2003); Hammergren L.A. *Envisioning Reform. Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America*, Penn State Press (2007)

For employment conflicts, divorce, land conflicts, consumer issues, personal injury, debt problems, and neighbour disputes specialization has occurred. This has led to best practices in specialized legal aid units and in courts that are very relevant for access to justice. Moreover, this chapter makes use of the data collected on www.innovatingjustice.com, where innovators described promising interventions and gave indications of the critical success factors behind these interventions, as well as the potential number of beneficiaries.

A field of research that has not yet been fully linked to access to justice and law and development is dispute system design.³¹ This emerging discipline uses theories and empirical data from bargaining research, negotiation research and research about mediation and arbitration as third party interventions. We wrote two input papers reviewing this literature and collecting knowledge that is immediately relevant for access to justice through third parties who promote negotiation but are pressing towards concrete, fair results acceptable to both parties.³² A recent overview of empirical legal research covers a much broader terrain, but gives a good overview of the state of the art in studying how the formal legal system contributes to access to justice.³³

As to the concrete working methods of legal aid providers, the NGO's Praxis (Azerbaijan), ADHOC (Cambodia), Cewla (Egypt), Cord (Cambodia), Zoa (Cambodia), KBH Lampung (Indonesia), Kituo Cha Sheria (Kenya), and the IRC (Thailand) were willing to share their best practices on www.microjusticeworkplace.net. This now has a collection of tools for each of the tasks that is relevant in the process of seeking a resolution for a justiciable problem. Thanks to their cooperation, we now have a first impression of actual working methods and the capabilities on which access to justice practices rely in different places of the world. Many of these practices could be linked to recommendations from the literature on dispute resolution, mediation techniques and effective legal procedures.³⁴ This suggests it is possible to develop evidence based working methods and protocols that can be used across borders, adapted to the specific culture and circumstances where necessary.

Each of the major trends described in Chapter 5 triggered its own body of research and data collection. Paralegals and judicial facilitators are supported by handbooks, network websites and some evaluative studies.³⁵ Online dispute resolution has been developing quickly. This research has been reviewed recently, showing directions for further innovation.³⁶

Although providing better access to legal information is an important part of access to justice strategies and programs in developing countries, there is still little research on the most effective approaches.

³¹ William Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, London: Jossey-Bass Publishers (1988); Bingham L.B., "Designing Justice: Legal Institutions and Other Systems for Managing Conflict", *Ohio State Journal on Dispute Resolution*, (2008), Lande J., "Using dispute system design method to Promote Good-Faith Participation in Court-Conneted mediation Programs...", *UCLA Law Review*, Vol. 50 (2002); Dispute System Design : An Introduction. by Professor Robert Bordone. Symposium. Harvard Law School (2008)

³² Barendrecht M. "In Search of Microjustice: Five Basic Elements of a Dispute System; Best Practices for an Affordable and Sustainable Dispute System: A Toolbox for Microjustice" Tilburg University Legal Studies Working Paper No 002/2009

³³ Cane, P & Kritzer, H. (Eds.) *Oxford Handbook Of Empirical Legal Studies*, Oxford University Press, 2010.

³⁴ See the website and Monster J., Porter R.B. and Barendrecht M., "Dispute Resolution Practices of Legal Aid Organizations in Developing Countries", Tilburg Law School Research Paper No 001/2012

³⁵ The Namati network www.namati.org has an overview of literature and tools, see also the Haki network - www.hakinetwork.org, Maru V., "Between law and society: paralegals and the provision of justice services in Sierra Leone and worldwide" *The Yale Journal of International Law* Vol. 31:427 (2006); Kokke M. and Vuskovic P. "Legal Empowerment of the Poor in Nicaragua" Working Paper Series (2010)

³⁶ Katsh E. and Rifkin J. *Online dispute resolution: resolving conflicts in cyberspace*, Jossey-Bass, San Francisco (2001); Zeleznikow, *Enhanced dispute resolution through the use of information technology*, Cambridge University Press, Cambridge (2010) Jelle van Veenen, *Getting to : -) The potential of online text-based communication to support interest-based dispute resolution*, Maklu, Antwerpen (2011)

Input papers reviewed legal information strategies of NGO's in developing countries³⁷ and the interdisciplinary literature on the impact of so-called objective criteria (guidelines for dealing with money and other distributive issues).³⁸

Progress in monitoring and measuring access to justice has been triggered by justice research in social psychology and various other disciplines, leading to major advances in understanding of the different forms of justice that people value.³⁹ A collection of innovations in the justice sector and descriptions by innovators of their experiences gave us many additional insights that are used throughout this report.⁴⁰ The HiiL networks of experts on the Rule of Law, and its yearly meetings, ensured access to many promising approaches and invaluable practical insights in what works and what not.

This methodology has many limitations. We certainly will have missed many important insights and innovations, in particular developments from countries that have to cross language barriers to the English speaking community. The perspective is that of justiciable problems, and the basic finding that these are generally solved by communication, negotiation and adjudication, using norms and oversight by the community as additional means to find a solution. The report focuses less on criminal law. On many issues, the evidence is limited, and more close to an educated guess from experts. We did not dwell at length on the mechanisms of the formal legal system, and it may be that we oversaw some of its strengths. One of the criticisms on drafts of this report has been that it covers too many issues. It may be that we overestimated the importance of some of them.

But as the many different sources used and the length of the report suggests, there is little evidence that basic justice care for everyone will become possible by one or few magical approach. What we suggest after considering the evidence is that breakthroughs are possible through a gradual and collective learning and innovation process. Learning by doing. Learning from doing and from research. Learning across borders. Learning from other public services. Learning from setting goals and priorities and working towards them systematically. Learning from making mistakes.

³⁷ Verdonschot J.H. & Barendrecht M., "Providing Legal Information: What Do We Know About Effective Strategies", *forthcoming*

³⁸ Barendrecht M. and Verdonschot J. H., "Objective criteria: Facilitating Dispute Resolution by Information about Going Rates of Justice", TISCO Working Paper Series, No. 005/2008; Verdonschot J.H. "Delivering Objective Criteria: Sources of Law and the Relative Value of Neutral Information for Dispute Resolution", TISCO Working Paper Series, No.001/2009.

³⁹See publications in the journal *Social Justice Research* and the Special Issue on measuring and monitoring access to justice of the *Hague Journal on the Rule of Law* Vol.3:2 (2011)

⁴⁰ See the innovations displayed on www.innovatingjustice.com and the literature on justice sector innovation that is accessible via the innovation tools and lab pages on this site.

2. Problems Every Person May Run Into



2.1 At Least One Serious Problem in 5 to 10 Years

Traditionally, legal needs have been estimated through analysis of the use of legal services and judicial institutions. The number of disputes that are resolved by courts, arbitration panels or mediators have been used to illustrate the levels of disputes in the society. Or the number of issues leading to private legal advice or state funded legal aid can be used as indication of legal needs. Finally, legal needs might be estimated through the amount of public resources invested in official and unofficial dispute resolution processes.⁴¹

But many problems never reach courts or these sources of legal advice. Furthermore, bare statistics do not tell us what the alternatives to official justice are. Do people bury their problems because they cannot reach courts or do they get access to justice by other means?

Since the 1970s the legal needs of the people are estimated in a radically different approach. Looking for ways to improve legal aid systems, researchers collect evidence about met and unmet legal needs. The so called 'justiciable events' approach focuses on people and their experiences to portray how law affects their everyday life.⁴² A justiciable problem is not a legal term. It is a recognizable situation from life, described in comprehensible language, which has a legal solution but can also be resolved through other means (such as a simple discussion between the parties).

Not all problems with potential legal solutions are justiciable. Many situations are trivial and should not be regarded as problems that have to be solved with legal means. So research into legal needs tends to be limited to problems with a certain level of intensity.

What all legal needs studies find is that many people experience difficult legal problems, but the proportions vary greatly. In 2003, 67,5% of the interviewed individuals in the Netherlands reported experience with at least one serious and difficult to resolve legal problem for the last 5 years.⁴³ Six years later, 60,5% of Dutch respondents reported that they had to deal with a justiciable problem.⁴⁴

A lower incidence of legal problems is reported in studies from the US (50%)⁴⁵ and New Zealand (51%)⁴⁶ despite the fact that these studies covered more problems or asked for household experience as opposite to individual experiences. Studies from Canada⁴⁷ (44,6%), Russia⁴⁸ (31%), Ukraine⁴⁹ (54%) and Bulgaria⁵⁰ (46,3%) find that about half of all respondents recall at least one serious and difficult to resolve legal problem.

⁴¹ An excellent comparative overview of such input data is assembled every 2 years by the European Commission on the Efficiency of Justice (CEPEJ), see www.cepej.org.

⁴² Hazel Genn defines justiciable event as "a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being "legal" and whether or not any action taken to deal with the event involved the use of any part of the civil justice system." See below footnote 51 at p. 12

⁴³ Van Velthoven, B. C. J., & ter Voert, M. 2004. Paths to Justice in the Netherlands. Looking for signs of social exclusion. In K. Caminada, & B. C. J. van Velthoven (Eds.), *Department of Economics Research Memorandum 2004.04*: 28. Leiden: Leiden University.

⁴⁴ Van Velthoven, B. C. J., & Klein Haarhuis, C. M. 2010. *Geschiedbeslechtsingsdelta 2009. Over verloop en afloop van (potentieel) juridische problemen van burgers*. Den Haag: Boom Juridische Uitgevers.

⁴⁵ American Bar Association, Consortium on Legal Services and the Public, "Legal Needs and Civil Justice. A Survey of Americans", Chicago (1994)

⁴⁶ Maxwell G. et al. "Meeting Legal Needs", New Zealand: Legal Services Board (1999)

⁴⁷ Currie, A. 2010. The Legal Problems of Everyday Life The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians: Department of Justice, Canada, available at http://www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_aj1/toc-tdm.html

⁴⁸ Study conducted by PILnet Russia, report on file with the authors

⁴⁹ Study conducted by International Renaissance Foundation Ukraine, report on file with the authors

⁵⁰ Gramatikov, M. "Multiple Justiciable Problems in Bulgaria" Tilburg University Legal Studies Working Paper No. 16/2008.

In her influential *Paths to Justice* (1999) study Hazel Genn reports that 34% of the respondents from England and Wales have experienced a non-trivial legal problem⁵¹.

A 2001 study from Scotland finds that 23% of the respondents experienced a legal problem.⁵² By far the lowest proportion of justiciable problems are reported in a study from Japan⁵³ (19.5%) closely followed by recent research in Moldova⁵⁴ (22.5%). Population survey conducted in Mongolia reports that about 31.5% of the respondents report that they ever had an experience of approaching judicial institutions such as courts, police officers or prosecutors.⁵⁵

With a couple of assumptions, we can use the existing data in order to calculate a rough prevalence of legal problems per 1,000,000 people. For instance, the 60.5% of the Dutch citizens who reported experiencing a problem, reported an average of 3.1 problems in the past 5 years. From this, we can calculate approximately how many problems are dealt with by the adult population in the Netherlands; 375,000 significant and difficult to resolve legal problems per 1 million per year! Similar calculations suggests that each year there are 446,000 legal problems per million adult Canadians. In Bulgaria there are just less than 200,000 legal problems per million. For England and Wales the prevalence is very similar - 205,000 justiciable events per year per 1 million adult citizens, and for countries such as Japan and Moldova the incidence of justiciable problems is likely to be in the range of 150,000 per million. This means that we can conservatively estimate that the average adult person in the world encounters at least one justiciable problem every 5-10 years.

2.2 Ten Frequent Problems

Almost invariably consumer disputes are the most frequently reported justiciable events in developed and transitioning countries. Given the huge number of transactions it is no surprise that almost every study reports that consumer problems are experienced most frequently. In fact only two studies report that non-consumer problems were more prevalent - study of villagers in China and an Australian study which looked at a broader mix of civil and criminal disputes.⁵⁶

Unfortunately, comprehensive studies on poorer, non-western societies are much harder to come by. A study on small samples of vulnerable people in Azerbaijan, Mali, Rwanda, Egypt and Bangladesh suggests a different picture.⁵⁷

⁵¹ Genn, H. G., & Beinart, S.. *Paths to justice : what people do and think about going to law*. Oxford, England ; Portland, Or.: Hart Pub (1999). In a later study in England and Wales, Pascoe Pleasence found a similar proportion - 36% of the respondents faced a justiciable problem. See Pleasence, P., Buck, A., Balmer, N., O'Grady, A., Genn, D. H., & Smith, M. 2004. *Causes of Action: Civil Law and Social Justice*. London: Stationery Office.

⁵² Genn, D. H., & Paterson, A. 2001. *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law*. Oxford: Hart Publishing

⁵³ M. Murayama, S. Minamikata, R. Hamano, K. Ageishi, I Ozaki and I. Sugino, Legal Problems and Their Resolution: Disputing Behaviour in Japan, paper presented at the Annual Meeting of the Research Committee on the Sociology of Law, Paris, July, 2005. p. 2

⁵⁴ Study conducted by Soros Foundation Moldova, report on file with the authors

⁵⁵ UNDP with Ministry of Foreign Affairs of Mongolia & Open Society Forum, *Access to Justice: Needs Assessment Report* (2005), available at: http://www.forum.mn/res_mat/AccessToJustice_eng%20.pdf

⁵⁶ Michelson, E. 2007. Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China. *American Sociological Review*, 72: 459-485, Coumarelos, C., Wei, Z., & Zhou, A. Z. 2006. *Justice made to measure: NSW legal needs survey in disadvantaged areas*: Law and Justice Foundation of New South Wales.

⁵⁷ See above footnote 17.

The respondents were more likely to report serious problems in their vital relationships - family disputes, problems with employers, use and ownership of house/land and personal security problems.

A study covering disadvantaged groups in five Indonesian provinces put access to government services and subsidy schemes at the top of the list, followed by land issues (appropriation for commercial or other purposes by government, border conflicts) and domestic problems (violence, no contribution of husband to costs of raising children). Problems regarding wages and working conditions, regarding crime and neighbour conflicts were also mentioned frequently⁵⁸. In East Timor 76% of the interviewed individuals reported involvement in some type of dispute in the last three years⁵⁹. Land disputes, domestic violence, theft, non-family fights and household quarrels are reported as the most frequently occurring problems.

Recent study reports the people of Timor-Leste experience most frequently disputes over property ownership, property damage, land usage, physical assault and theft⁶⁰. Most of the claims received by the Kosovar Ombudsman relate to administrative services, followed by land issues and employment disputes.⁶¹

"The first three years of my marriage went fine and I gave birth to our first child. Three or four months after that, my husband started beating me and asking me for money. He pressured me a lot, so I managed to get first 3000, then 17000 and then another 6000 taka [\$30, \$170 and \$60 respectively] from my family. My husband waited until he got all this money and then kicked me out of our house and after a while vanished himself. After a long time, I saw him in the streets. When I addressed him, he suggested that we go to a restaurant to talk. But when we were in the restaurant he managed to take my money again and leave with it. Ain 'o Salish Kendra [legal aid NGO in Dhaka] helped me to send notices to my husband twice, but nothing has happened. In the meantime I felt very ill, which was very difficult on your own and despite the notices, nothing has happened."

Woman in Dhaka, Bangladesh

Vulnerable people are also consumers but they rarely depict the breaking of a consumer contract as a serious problem. They are less likely to purchase consumer durables or financial services, but it is also possible that they focus on the serious and pressing problems and deliberately neglect the others. After all, if someone is evicted from his house the purchase of a defective article may seem a negligible problem in comparison. This is clear from a study into the legal needs of refugees living in refugee camps at the Thai-Myanmar border.⁶² Officially, refugees are forbidden to work and travel outside the camps although there are many exceptions to the rules. Consumer problems are almost invisible in the camps. The two most frequent problems that the refugees are family disputes and problems that concern the communal integrity.

Nicaraguan respondents were mostly concerned with theft, damage to crops and property as well as disputes related to birth certificates.⁶³ According to other studies a significant proportion of the Nicaraguan citizens has no proper ID documents. For instance, 15.3% of all births in the country are not registered meaning that one child out of six lives without that type of legal protection.⁶⁴

⁵⁸ UNDP, Justice for All, An Assessment of Access to Justice in Five Provinces of Indonesia, 2007,

⁵⁹ The Asia Foundation. 2004. Law and Justice in East Timor. A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor. Available at http://asiafoundation.org/pdf/easttimor_lawsurvey.pdf

⁶⁰ Chopra, T., Pologruto, S., & de Deus, T. 2009. Fostering Justice in Timor-Leste: Rule of Law Program Evaluation, available at http://pdf.usaid.gov/pdf_docs/PDACM677.pdf

⁶¹ Correspondence with Richard Zajac Sannerholm, on file with the authors

⁶² Forthcoming report of the International Refugee Committee

⁶³ Baseline report on effectiveness of judicial facilitators program in Nicaragua, on file with authors

⁶⁴ Suzanne Duryea, Analia Olgiati, Leslie Stone (2006), *The Under-Registration of Births in Latin America*, Working Paper #551, Inter-American Development Bank.

Ten Frequent Problems		
Problem	Incidence per year/per thousand inhabitants	Remarks
Consumer problems	<ul style="list-style-type: none"> • Canada 2009 (79) • Netherlands 2009 (95) • England and Wales 2010 (60) • Bulgaria 2007 (30) • Russia/Sverdlovsk region 2010 (40) • Ukraine 2010 (53) • Moldova 2011 (7) • Japan 2005 (18) 	More frequent in higher and middle income countries
Neighbours	<ul style="list-style-type: none"> • England and Wales 2010 (21) • Bulgaria 2007 (20) • Russia/Sverdlovsk region 2010 (38) • Ukraine 2010 (20) • Moldova 2011 (12) • Japan 2005 (20) 	
Family (including inheritance)	<ul style="list-style-type: none"> • Canada 2009 (37) • Netherlands 2009 (25) • England and Wales 2010 (28) • Bulgaria 2007 (8) • Russia/Sverdlovsk region 2010 (family 25, inheritance 23) • Ukraine 2010 (12) • Moldova 2011 (12) • Japan 2005 (8) 	
Employment	<ul style="list-style-type: none"> • Canada 2009 (64) • Netherlands 2009 (82) • England and Wales 2010 (37) • Bulgaria 2007 (9) • Ukraine 2010 (32) • Moldova 2011 (6) • Japan 2005 (11) 	More frequent in higher income countries
Tenure/eviction/property rights	<ul style="list-style-type: none"> • Russia/Sverdlovsk region 2010 (33) • Ukraine 2010 (14) • Moldova 2011 (10) • Japan 2005 (land/house 5) 	More frequent in lower income countries
Accidents	<ul style="list-style-type: none"> • Canada 2009 (10) • England and Wales 2010 (28) • Bulgaria 2007 (7) • Ukraine 2010 (4) • Moldova 2011 (5) • Japan (27) 	More frequent in higher income countries

Ten Frequent Problems (continued)		
Problem	Incidence per year/per thousand inhabitants	Remarks
Access to public services	<ul style="list-style-type: none"> • Canada 2009 (8) • England and Wales 2010 (30) • Bulgaria 2007 (21) • Russia/Sverdlovsk region 2010 (8) • Ukraine 2010 (42) • Moldova 2011 (12) • Japan 2005 (4) 	More frequent in lower income countries
Violence (non domestic)	<ul style="list-style-type: none"> • Russia/Sverdlovsk region 2010 (13) 	
Debt	<ul style="list-style-type: none"> • Canada 2009 (73) • Netherlands 2009 (57) • England and Wales 2010 (33) • Bulgaria 2007 (10) • Russia/Sverdlovsk region 2010 (10) • Ukraine 2010 (20) • Moldova 2011 (5) • Japan 2005 (8) 	More frequent in higher income countries
ID and birth certificates	<ul style="list-style-type: none"> • Russia/Sverdlovsk region 2010 (5) • Ukraine 2010 (10) • Moldova 2011 (2) 	More frequent in lower income countries

From the data in the table above, a few more patterns can be inferred. Disputes over money as well as employment problems are more frequent in Western societies (Canada, England and Wales, Netherlands). On the other hand, problems with public services and social benefits are more frequent in transitioning countries such as Bulgaria, Ukraine and Russia. For instance, under-funded and under-performing health care systems are depicted as serious and difficult to solve problems in Ukraine (22% of all problems) and Russia (3%). But the incidence of such problems is related to the scope of entitlements from the government. The refugees in Thailand have very basic access to medical assistance but do not see it as a problem. They may not be used to having an inclusive health care system, and therefore do not portray the lack of such system as a problem about which they can complain.

Labour disputes are an important issue. In the two Dutch studies problems with employment are the second most frequently experienced category of legal problems (2003 - 30% of all problems; 2009 - 25.3% of all respondents).⁶⁵ Also, in the Ukraine study, workplace-related problems were ranked as the second most frequent problem following consumer disputes. Family and neighbourhood relationships are also social assets that need protection. In England and Wales (1999, 2003), Bulgaria and Russia, various instances of disputes with neighbours are the most common problem after consumer problems. Socio-economic, cultural and spatial patterns can explain the prevalence of neighbourhood conflicts. For instance, the Russian sample was drawn from residents of large and middle sized cities from the Sverdlovsk region.

⁶⁵ See above footnote 43 and 44.

Many of the respondents there live in big blocks of flats, and this cohabitation entails numerous tensions and disputes. Not surprisingly the people from these cities often experience serious disputes and problems related to cohabitation.

Family problems might not be the most frequent problems but are certainly among the most pressing. In most studies the problems with family relationships are less prevalent than problems of consumption, debt, labour, neighbours and public services. In the Russian study, however, 10% of the reported justiciable problems refer to family problems such as relationship breakdown and divorce, parental rights and domestic violence etc. Vulnerable people are significantly more likely to experience problems in their family relationships.

An action research study in Mali (49%), Rwanda (32% of all problems), Egypt (27%), and Bangladesh (29%) showed that the interviewed clients of legal aid organizations most often seek legal protection for family related problems.⁶⁶ Poverty and vulnerability tend to make the family more important. Women and children depend on families for protection, housing, income and status. Thus, a problem with the family relationship risks their most vital capabilities.

In countries and territories torn by internal and external conflicts, the problems that are experienced partly have a different character. According to surveys in Sierra Leone, Congo, Gaza, the West Bank, Colombia, Mali and Côte d'Ivoire up to 33% of the respondents report that someone in their immediate family has been displaced. In the West Bank 31% of the interviewed say that a family member has been arrested and 15% report a torture. In Sierra Leone 35% of the sample has lost contact with a relative due to social level conflicts. About 17% of the respondents from Colombia and Gaza say that they have lost a family member because of the ongoing military conflicts.⁶⁷

In Aceh, Indonesia, the justice needs of citizens in the aftermath of the 2004 tsunami were related to a lack of housing, land claims (border disputes, missing documents), unequal distribution of aid/social security, inheritance and domestic violence. In the areas affected by major conflict, issues about human rights violations (intimidation, torture, disappearances, summary executions, theft and destruction of property, corruption, displacement) were common as well.⁶⁸ This study suggests that these problems associated with major conflict come on top of the normal access to justice issues in any country. Providing access to justice to remedy these problems in the aftermath of civil wars is obviously an enormous challenge to a country and its citizens.

2.3 Impact of Problems

The impact of problems is also an important factor. A consumer dispute for relatively low value does not affect life in the same way as a lost job or eviction from the only family house. Torture, imprisonment or home looting are not comparable to these again in terms of impact. Design and delivery of basic justice care necessitates evidence based knowledge on both the frequency and magnitude of the experienced justiciable problems. The 2009 Dutch study asked the respondents to indicate the level of seriousness of the problem. Health care problems (including accidents), family disputes and problems with children were marked as the most severe categories of justiciable problems (see Table below). All three categories were scored with a mark above 3.8 on a scale of seriousness in which 5 indicated that the respondent was completely occupied by the problem.

⁶⁶ Barendrecht M., van Dijk M., Gramatikov M., Monster J., Porter R. and Verdonshot J.H., "Microjustice in Five Developing Countries: Opportunities for Growing Justice Bottom Up", Action Research Oxfam Novib/Tisco with the cooperation of Ain O Salish Kendra (Bangladesh); CEWLA (Egypt); Haguruka (Rwanda); Praxis (Azerbaijan); Deme So (Mali), 2010.

⁶⁷ The World Bank, *Conflict, Security and Development, World Development Report (2011)*, p. 59

⁶⁸ UNDP and Bappenas, *Access to Justice in Aceh. Making the Transition to Sustainable peace and Development in Aceh (2007)*, p. 34-38.

Problems ranked by impact/severity	
Source: Veldhoven and Klein Haarhuis (2010), p. 57	
Problems	Perceived seriousness 1 – not serious; 5 - very serious
Employment	3.4
Owning residential property	3.1
Renting out rooms or property	3.2
Living in rented accommodation	3.2
Faulty goods or services	3
Access to public services	3.2
Money	3.8
Relationships and other family matters	4
Children under 18	4
Other (discrimination etc.)	3.6
Someone took legal action against the respondent	3.8
Been threatened with legal action	3.4
Started or considered court proceedings	3.8
Total	3.3

A similar approach was employed in the 2010 Canadian study of justiciable events. The respondents were asked to rate on a scale from 1 to 5 how important it was to resolve the problem/s. More than 60% of those interviewed said that the resolution of family problems was extremely important or very important (see). When asked about consumer problems, only 10.4% of the respondents reported them as extremely, or very, disruptive for their daily life. In comparison, 39% of the respondents who experienced family relationship breakdown reported that the problem was severely disruptive to their daily lives. Other family problems were also portrayed as severely or very disruptive. Problems related to disability, pensions, social assistance, and personal injury were also rated as extremely or very disruptive.⁶⁹ Ab Currie estimates that if every Canadian who experience the disruptive consequences of a justiciable event visited a doctor only once, the added cost to the healthcare system will be 27 million Canadian dollars per year.⁷⁰

⁶⁹ See above footnote 47 at p. 32

⁷⁰ Currie, A. 2008. The Costs of Experiencing Justiciable Problems, manuscript on file with the authors

Problems ranked by impact/severity Source: Currie (2010), p. 34	Problem Was Disruptive to Daily Life - %			Important to Resolve Problem - %		
	Extremely or Very	Somewhat	Number	Extremely or Very	Somewhat	Not Very or Not At All
Consumer	12.6	29.9	57.5	47.9	32.9	19.2
Employment	33.8	34.8	37.4	67.3	21.3	11.4
Debt	18.7	30.9	50.4	59.6	26.4	14.0
Social Assistance	79.1	12.5	8.4	62.5	12.5	25.0
Disability Pensions	60.4	29.2	10.4	81.3	12.5	6.2
Housing	31.2	36.6	32.2	71.3	18.1	10.6
Immigration	35.3	47.1	17.6	85.1	11.8	2.1
Discrimination	38.5	31.9	29.6	65.1	15.7	19.2
Police Action	27.5	29.4	43.1	54.9	30.4	14.7
Relationship Breakdown	41.2	44.0	14.8	81.5	11.5	7.0
Other Family Law Problems	52.9	39.7	7.4	94.1	4.5	1.4
Wills and Powers of Attorney	28.0	40.4	31.6	78.1	15.1	6.8
Personal Injury	53.1	31.3	15.6	83.2	11.9	4.9
Hospital Treatment or Release	55.4	24.1	20.5	83.3	11.9	4.8
Threat of Legal Action	21.6	35.3	43.1	70.6	15.7	13.7

Justiciable problems are not only subjectively perceived as serious and disruptive. The 2006 study in England and Wales found that 16% of the respondents report ill-health as direct consequence of their legal problem.⁷¹ Four in five of those respondents also needed medical treatment. 27% of the people who report a problem said that the problem led to stress-related illness. Similarly, in the 2007 Bulgarian study 17% of the people who experienced at least one justiciable problem also say that the problem led to ill-health. More than half had to cope with serious stress, 54% lost money.⁷² About 7% of the respondents in the Bulgarian study report a direct link between the justiciable problem and negative impact on important family relationships.

There is reason to believe that the impact of problems is higher for disadvantaged people in lower income countries. Members from target groups of legal aid NGO's in five developing countries reported the following impact of legal problems on their lives.

⁷¹ Pleasence, P., Balmer, N., Tam, T., Buck, A., Smith, M., & Patel, A. 2008. Civil Justice in England and Wales. London: Legal Services Research Centre

⁷² See above footnote 50

Experienced Impacts of reported legal problems by country (Percentage of respondents)

Source: Barendrecht, Models for Sustainable Legal Aid: Experiences from NGO's in Five Lower Income Countries, 2010

	Azerbaijan	Mali	Rwanda	Egypt	Bangladesh	Overall
Stress	58	39	62	64	94	61
Loss of money	53	61	52	53	59	55
Loss of time	22	47	46	22	15	30
Health problems	39	45	20	52	35	30
Damage to relationship	9	29	27	39	35	26
Loss of employment	19	43	13	14	6	19
Other	22	12	3	10	3	11
Do not know/Do not want to answer	3	-	-	2	-	1

Stress is mentioned most frequently, followed by loss of money, health problems, lost time, and damage to relationships. Both the clients and lawyers/paralegals assisting them told stories in interviews and focus groups that dealing with these problems goes along with many tensions and uncertainty. In Bangladesh, the poorest country of all, stress is even more prevalent. This pattern is confirmed in literature about the economic lives of the poor, who lead a significantly more stressful daily life than other people.⁷³

Legal problems often appear in constellations. People who experience certain sorts of problems are likely to face other, related challenges. Many justiciable events studies uncover the relationships between multiple problems. Ab Currie estimates that each additional problem increases the risk of encountering a next problem. For instance, the probability of experiencing an additional problem raises to .394 for people who have already had two legal problems.⁷⁴ Similar effects are found in the Bulgarian study.⁷⁵

Not only do problems occur together, but they come in discernible patterns. These patterns are fairly stable, the three studies in England and Wales report similar clustering of legal problems. Family problems is the most distinguishable cluster.⁷⁶ This means that divorce, domestic violence, custody disputes and other instances of family disputes often occur together. Consumer, debt, employment and neighbourhood problems often fuse into an *economic* cluster. Identical clusters are identified also in the Canadian (2010) and Dutch (2009) studies.⁷⁷ Similarly, problems related to renting, homelessness and welfare benefits tend to take place together. Pascoe Pleasence and his co-authors call this grouping a *homelessness* cluster.⁷⁸ Less robust but still visible in the 2004 and 2006 England and Wales studies is the *discrimination* cluster comprised of discrimination and clinical negligence problems.⁷⁹

Some justiciable problems trigger or cause others. Employment problems for instance lead to more debt and consumer problems.⁸⁰ Relationship breakdown also causes debt but also leads to other family problems. Domestic violence is another vivid example of a problem triggering other events. Often domestic violence is followed by separation and divorce, maintenance, division of property, employment, and childcare among many others.⁸¹ Personal injury and work related accidents lead to unemployment or diminished employment opportunities.⁸²

⁷³ Abhijit V. Banerjee & Esther Duflo, "Aging and Death under a Dollar a Day," National Bureau of Economic Research, Inc. (2007)

⁷⁴ See above footnote 47 at p. 44

⁷⁵ See above footnote 50

⁷⁶ See above footnote 70

⁷⁷ See above footnotes 47 and 44

⁷⁸ See above Pleasence et al. in footnote 42

⁷⁹ See above footnotes 42 and 71

⁸⁰ Currie A. "A National Survey of Civil Justice Problems of Low and Moderate Income Canadians: Incidents and patterns", National Survey of Civil Justice Problems, (2010), p. 52

⁸¹ Pleasence P. et al. *Causes of Action: Civil Law and Social Justice*, First Edition, Norwich : TSO (2004) p. 34

2.4 Tensions in Vital and Close Relationships

When improving access to justice is the challenge, it is important to get an idea about the location of the problems. Where must the capabilities to solve them be found and strengthened? Where is the other party to be found that needs to cooperate to a solution? If we look at the lists, many of the most disruptive legal needs do not involve disputes between individuals from different backgrounds or even communities, but are between people who see each other daily and live close together.

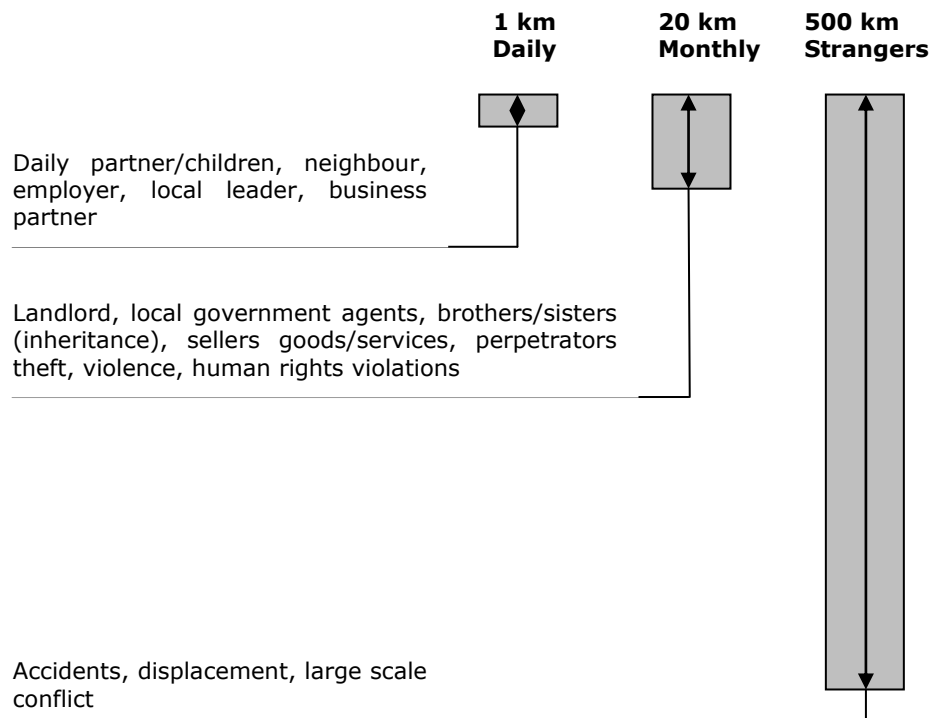


Figure 1: Proximity of problems

These conflicts almost always have a basis in a relationships between individuals, in which at least one person is highly dependent on the other person. Husbands and wives are dependent upon each other for the upkeep of their homes and lifestyles, business partners are dependent upon each other for the maintenance of their livelihoods, and neighbours are dependent upon each other for continued peaceful, stress-free, lifestyles. People need security of tenure in the relationship to their landlord and their local government. For public services, they are dependent on this particular civil servant or on that particular village leader. It is this dependence in ongoing relationships which is often at the root of conflict, but also makes it difficult to solve, because the value invested in that relationship is so high.

⁸² Genn H., *Paths to Justice: What people Do and Think about Going to Law*, Oxford: Hart Publishing (1999), p. 35.

High relation specific investments create dependence, conflicts and need for third party governance

According to Oliver Williamson and other institutional economists, these difficulties arise from a combination of at least two of the following three factors: high (relationship specific) investments, the inability to predict the future and regulate the long lasting relationship beforehand (unforeseen changes, accidents and circumstances) and/or the possibility of opportunistic behaviour. These are the situations in which people cannot negotiate a solution themselves, but need a third party and outside norms (trilateral governance).¹

In the absence of such factors, conflicts may occur, but they are much less disruptive to the lives of individuals. If you are dissatisfied with a meal served in the local market, you just avoid this eatery the next time. A refrigerator can be expensive to buy, but if it does not work this is hardly ever life threatening. The value of relationships at home, at work and in the immediate neighbourhood is much higher, as is the dependence on particular people, because it is costly to walk away from these relationships. A husband and wife face great difficulties if they separate. The costs of separation are high in both financial terms (accommodation, food, heating and transport costs are all likely to increase) and in terms of more intangible costs (costs of the stress incurred, as well as the additional difficulties brought on through management of child-care arrangements and the distribution of jointly owned property). These investments occur in all the key relationships in the most common conflicts. Conflicts over land often involve the investment of time, effort and money in improving that land, and can represent the livelihoods of the parties involved. Housing and property often represent the largest investment that an individual or family make. Professional investments are similarly often under threat, whether under the guise skills acquired and needed at this particular workplace, networks, business reputation, expertise, or relationships with key partners. Walking away from a particular local leader or government is often only an option for young, unmarried people, who have not yet invested heavily in their current livelihoods, because it requires costly resettlement in another location, or even migration to another country.

Even the vast majority of violence is not coming from strangers. It is experienced within the framework of a pre-existing relationships. Criminal violence between individuals who are unknown to one another does occur, but its most common occurrence is as domestic violence between family members (7.7m incidents of domestic violence in the US⁸³ compared to 1.43m other violent crimes⁸⁴, in 2000). A Dutch study showed that the vast majority of homicide victims knew the perpetrators.⁸⁵

2.5 Beyond Right and Wrong

Conflicts often happen in valuable, close and ongoing relationships. They usually arise gradually. Many small acts and reactions may have fuelled the escalation, as conflict researchers have found out. Conflicts do not necessarily imply that somebody has cheated or breached pre-existing rules. Most conflicts arise because it is impossible and undesirable to regulate everything beforehand and because things happened that nobody intended to happen, such as accidents, gradual escalation of dissatisfaction or changes in preferences.

⁸³ Tjaden P., Toennes N., "Extent, Nature and Consequences of intimate Partner Violence" Findings From the National Violence Against Women Survey: US Department of Justice, Office of Justice Programs (2000)

⁸⁴ United States Crime Rates 1960-2010, available at: <http://www.disastercenter.com/crime/uscrime.htm>

⁸⁵ P.R. Smit en P. Nieuwbeerta, Moord en doodslag in Nederland, 1998 en 2002-2004, WODC 2007, reporting only 11% of murder cases where victims and perpetrators did not know each other already

This means that a simple framework of right and wrong, or one of claims, norms and sanctions, is often not sufficient. Certainly, violence, damage to property, financial losses, pollution, falsehood and distressed relationships should be avoided as a matter of principle. But focusing on who was at fault in causing them is often not the most effective way to find a solution.

Legal aid providers in developing countries tend to stay away from the framework of right and wrong. Many of them consider it good practice not to approach the other party with a claim or an accusation. They hear the story from their clients and then ask the other party for his/her view, without any evaluation of judgment.⁸⁶

Modern legal systems also tend to move away from dealing with divorce and termination of employment on the basis of wrongful acts. Changes in circumstances, leading to an unacceptable situation for one of the parties, is sufficient. This is in line with recommendations from the literature on dispute resolution which recommends to stay away from patterns of accusation and defences.

These traits of the relationship stimulate the need for third party intervention. In ongoing conflicts, parties are not able to, or one of them does not want to, reach solutions between themselves. There is a need for a third party to act as a mediator between the parties. This need for third party intervention is not always best fulfilled through formal court systems if they are based on establishing who acted wrongly. Interest-based mediation approaches provide a better chance of finding a solution to the problem that satisfies both parties interests, and allows the mutually beneficial relationship and dependencies to continue beyond the conflict. Interest based adjudication is also developing rapidly. It has become the basis of modern family law, where the interests and needs of children, husbands and wives have become the key points of reference.

2.6 Benefits of Access to Justice: Empowerment, Growth, Peace

The direct benefits of better access to justice come with a solution of the conflict. Adequate remedies tend to improve the livelihoods of at least one of the parties: better housing, improved family relationships, better working conditions, increased financial resources for those receiving social security benefits, or compensation that can be reinvested. The stress and the other impacts associated with a conflict are likely to diminish, or even to disappear. Well-being is likely to increase. Besides this, many indications of indirect benefits exist.

Empowerment

In the law and development literature, links are proposed between access to justice and abilities of people to take control over their lives. Both the rights based approach to development and the legal empowerment movement promote interventions that improve the bargaining positions of the disadvantaged. These can be farmers seeking secure land tenure; indigent criminal defendants pursuing due process; women battling domestic violence; and communities pressing for the delivery of medical, educational or other government services to which they are entitled. Access to justice is expected to strengthen such populations in terms of their income, assets, health, physical security and/or, most generally, freedom.⁸⁷

Efforts to quantify legal empowerment and its relationship to poverty are still in their infancy, but such a link is likely. Just think of a migrant worker who gets injured in a work related accident.

If his employer will not pay the medical bills, debt will surge, it will be difficult to pay the rent and he might have to return home as a jobless and homeless man.

⁸⁶ Monster J. et al. "Dispute Resolution Practices of Legal Aid Organizations in Developing Countries", TISCO Working Paper No 001/2012

⁸⁷ Golub, S. (Ed.). 2010. *Legal Empowerment: Practitioners' Perspective*. Rome: International Development Law Organization.

Access to a fair solution for this migrant worker means that his medical bills will be covered, going back to work and continuing to climb the ladder that will help him out of poverty, and his family with him. For a poor person, an unresolved legal problem is likely to represent a personal poverty trap. Poor people have less, if any, resources to compensate failures in the justice system. At the same time, they are almost destined to experience the full range of barriers to access to justice.

Protecting Investments and Stimulating Growth

Economics textbooks cite protection of property rights and enforcement of contracts as central conditions for private investment and economic growth. This is likely to be true at the level of households as well. There is ample evidence that farmers and families enjoying better tenure protection tend to invest more in their farms and houses.⁸⁸ Better homes and more productive land are among the most direct ways to improve living conditions for poor people, their children and the communities they live in.

In the US, well enforced child support payments, one of the usual elements of a good solution in case of relationship breakdown, correlate positively with more years spent at school.⁸⁹ Because they raise the price of fatherhood and of leaving spouses, they are associated with less extra-marital births and a lower divorce rate.⁹⁰ More generally, better rights in case of contested divorce have been found to decrease domestic violence.⁹¹ If property rights after the dissolution of a marriage are clearly attributed, preferably on a no fault basis, this is likely to increase home ownership.⁹²

In labour relationships, severance payments by employers are an important element of social security in lower income countries. They are a form of protection that stimulates investment in the skills and assets that are specific to the job, and can lead to higher productivity, especially if these payments are not unreasonably high and linked to jobs for which such relationship specific investments are needed. There is little evidence that severance payments (as opposed to more stringent protection against dismissal) have important side effects, such as distortion of the labor market.⁹³

Preventing Armed Conflict and Fostering Social Harmony

As the well researched World Development Report 2011 has found, lack of opportunities, justice and fairness in life increases the probability of (large scale) violence.⁹⁴ According to the report, the best way to prevent wars is to improve access to jobs, personal security and justice. To witness, the report mentions the word justice a staggering 587 times, although the precise causal relationships between injustice and large scale violence are still hard to identify.

One possible relationship is that unequal access to political power and benefits for their constituents tends to motivate leaders of disadvantaged groups to take action. But rebel movements such as the Taliban also need recruits who actually want to take up arms. They also need supplies and protection from the population.

⁸⁸ Deininger K. et al. "Tenure Security And Land-Related Investment: Evidence From Ethiopia", *European Economic Review*, Vol. 50:6 (2006), pp. 1245–1277; Deininger K., Ayalew D., Yamano T. "Legal knowledge and economic development: The case of land rights in Uganda", *The World Bank Policy Research Working Papers* (2008); Van Gelder G.L., "Legal Tenure Security, Perceived Tenure Security and Housing Improvement in Buenos Aires: An Attempt towards Integration", *International Journal of Urban and Regional Research* (2009).

⁸⁹ Knox, V. W. & Bane, M. J. "Child Support and Schooling" In I. Garfinkel, S. S. McLanahan, & P. K. Robins (Eds.), *Child Support and Child Well-Being* (pp. 285-310). Washington, DC: The Urban Institute Press (1994)

⁹⁰ Nixon, L. "The Effect of Child Support Enforcement on Marital Dissolution " *Journal of Human Resources* 32(1): 159-181 (1997)

⁹¹ Stevenson B. and Wolfers J. "Bargaining In The Shadow Of The Law: Divorce Laws And Family Distress", *Quarterly Journal of Economics* (2006) p. 267.

⁹² Stevenson B. "The Impact of Divorce Laws on Marriage-Specific Capital" *FRB of San Francisco Working Paper No. 43* (2006)

⁹³ Holzmann R, Vodopivec M. (ed.), *Reforming Severance Pay: An International Perspective*, The World Bank Books (2011), p.12; Parsons D. O. "Mandated Severance Pay and Firing Cost Distortions: A Critical Review of the Evidence", *IZA DP No. 5776* (2011)

⁹⁴ The World Bank, *The World Development Report 2011: Conflict, Security, and Development*, available at http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR2011_Full_Text.pdf

For this, they tend to build on dissatisfaction with local law enforcement and justice institutions. Sometimes, they even try to implement their own systems for delivery of justice. Legitimate institutions for dealing with conflicts about land and property also provide an alternative platform for contests about ownership, channelling conflicts from resolution through violence to peaceful resolution.⁹⁵

After a civil war, there is a large probability of having another war within a decade. Transitional justice has been found essential to prevent this. Besides investigation of major war crimes, truth commissions have to be established at the level where the impact has been felt.

Community courts have to deal with compensation and other remedies for victims, primarily in case of displacement, damage to property and violence.⁹⁶

Better access to justice for the most urgent problems is likely to be related to general feelings of justice and political inclusion. If people feel included, that may have an effect on people's tendency to obey legal, social and moral norms. They are more likely to comply with such norms when they are perceived as legitimate and just.⁹⁷ Lack of access to justice or unequal justice affects voluntary compliance. When people do not believe that the rules are legitimate and their application is unequal, they are less likely to comply.

Many researchers find that traditional justice interventions are motivated by concerns of *social harmony*.⁹⁸ In Nicaragua and other Latin American countries paralegals are believed to decrease conflict at communal level. Disputes and grievances are considered as disruptive forces in the life of the community. Dispute resolution practices giving better access to justice tend to reduce the amount of conflict and preserve the existing social order.

2.7 Summary

Justiciable problems follow patterns. The ones with the highest impact tend to come up in key relationships between people living or working together for a long time and investing much in these relationships. These are family issues (divorce, inheritance), employment (termination), land and housing issues (property rights, tenure, eviction) and neighbour problems. The more vulnerable the people are, the greater their reliance on these close relationships, and the greater the impact of such conflicts on their lives. Even violence is often occurring in these key relationships.

Access to documents proving identity and access to government services are also frequent and rather urgent problems, as are theft and debt problems. In groups and countries with higher incomes, consumer issues are the most frequent problems, but their impact tends to be less. Accidents and access to health care issues can be high impact problems as well.

The most urgent justiciable problems are related to live events. They are local and are often related to unexpected change, long existing patterns of interaction and escalation. Solving them requires more than applying existing norms to facts that have happened in the past. The solution has to be accepted by and integrated in the mostly local relationships.

⁹⁵ See previous note.

⁹⁶ WDR at pp. 270-276

⁹⁷ See Tyler, T. R. *Why People Obey the Law*. Princeton: Princeton University Press (2006)

⁹⁸ See Harper, E. (Ed.) *Customary Justice: From Program Design to Impact Evaluation*. Rome: International Development Law Organization (2011) and Ubink, J. (Ed.) *Customary Justice: Perspectives on Legal Empowerment*. Rome: International Development Law Organizations (2011)

3. What People Do To Address Problems



3.1 Many Helpers, Many Paths to Justice

The type of legal problems and their impact being more clear now, the next question is how people try to solve them. Which capabilities do they have? How do they proceed?

There is much variation from country to country, from rural to urban settings, from problem type to problem type. But the basic patterns are similar and have been documented in many legal needs studies:

- Some people do nothing;
- A majority seeks information, help or support, most often from people close to them, but sometimes also from a wide range of professionals and officials;
- Most people contact the other party again, in order to try to solve the problem through negotiation; a helper may do this for them, or together with them, going to the husband, the employer, the civil servant who has to supply the services;
- Negotiation and bargaining towards some sort of agreement or settlement is by far the most common way problems are resolved;
- Letting the other party know that courts or other third parties will be involved if no solution is reached, is part of most strategies;
- Actually involving a third party happens less frequently; a wide range of different third parties can be involved;
- Directly involving a third party (and not contacting the other party directly) sometimes happens; it is more frequent if people are afraid, or expect the other party to be unreasonable; and if they expect that the third party will actually take some action.
- A small minority of problems is actually adjudicated (decided) by a third party; judges and other third parties tend to try to help people to exchange information and negotiate first, taking decisions only when there is continued disagreement.
- If a decision is taken, either by agreement or by a third party, there may be problems with compliance to the decision.

For First Advice Lawyers are Rarely An Option

Coping with difficult situations requires choices among between alternative strategies. When faced with legal problem people need information and advice. For this, lawyers are rarely an option. Even in countries with developed civil legal aid infrastructures like Canada, England and Wales and The Netherlands, people look much more often for advice in their social networks: families, friends and increasingly the internet. According to Dory Reiling when looking for legal information people search primarily for ways to solve the dispute or grievance.⁹⁹ In countries such as the Netherlands and England and Wales the source of such type of advice are specialized public organisations as well as providers of legal aid services. Police is an unexpected source of information for many problems that we deem as belonging to the civil justice system.

The availability of trained lawyers (and the price of their services) varies across countries. In Egypt, with a population of 85 million people, there are around half a million lawyers, many of them struggling to make a living from legal work.¹⁰⁰ In Mali there are only 265 lawyers serving a nation of more than 14 million. In the relatively wealthy Kazakhstan there are provinces where there are less than 13 lawyers per 100 000 inhabitants.

⁹⁹ Reiling D., *Technology for Justice, how information technology supports judicial reform*, Leiden University Press (2009)

¹⁰⁰ International Bar Association's Human Rights Institute (IBAHRI), *Justice at a Crossroads: The Legal Profession and the Rule of Law in the New Egypt*, November 2011.

Comparative research suggests that individuals with legal problems tend to go to lawyers when the problem is difficult or when the stakes are high, for instance in a case involving severe personal injury against a wealthy defendant or one who is well insured. If the price mechanism works, people in countries with more lawyers per head will be more likely to consult a lawyer.

Negotiation Solves Most Problems, Adjudication Very Rare

The most salient result of these legal needs surveys is that only a very small percentage of legal problems is ever brought to courts. This appears to be true for both high income, transitioning and low income countries. Virtually all legal needs studies report that less than one in 10 legal problems ever reaches court or another official institution. Even in a highly developed legal system such as the one of England and Wales, only 5% of those who managed to solve their legal problem used some form of adjudication as a way to decide what should happen.¹⁰¹ Almost two-thirds of the respondents report that the justiciable problem was resolved by agreement between the parties. In other countries the same pattern prevails: resolution through agreement by the parties is the normal way to solve disputes, adjudication is the exception. Throughout Europe, the average yearly number of civil litigious cases per 1 million people above 18 is around 15.000, compared to the 200.000 to 400.000 new legal problems per year that can be expected.¹⁰²

Informal Justice is Dominant in Low Income Countries

In low income countries, the proportion of problems adjudicated by official courts is likely to be even lower than the 5 to 10% reported in high income countries. A survey study conducted in Vietnam reports that about 6% of the interviewed have ever accessed a court to solve a problem¹⁰³. Furthermore, only 6% have ever used lawyers' services. The number of civil cases (including family cases) per million people is only 2.000 in Vietnam and in neighbouring Laos it is a mere 400. In 2011 the number of civil cases which were brought into the first-instance courts was 3,129 including 951 family cases and 290 commercial cases. The number of criminal cases which were treated at the first-instance court was only 3,017 on a population of 6.4 million.¹⁰⁴

Although reliable data on the size of these barriers are lacking, many authors report dramatic obstacles on the way to courts in terms of legal costs, distance to be travelled and language. Corruption, stigmas and unwillingness to help the disadvantages are also frequently reported. Geographical proximity is another serious barrier. About 84% of the population of Cambodia lives in rural areas but all courts are concentrated in cities¹⁰⁵. Costs of travel, lodging, legal services as well as the value of lost opportunity to work are discouraging many Cambodians from using the judicial system. Moreover, the Cambodian courts are perceived as clogged with backlogs and chronic delays.

¹⁰¹ See above Pleasence at al. at footnote 42 at p. 96.

¹⁰² Based on European Commission for the Efficiency of Justice (CEPEJ), European judicial systems Edition 2010 (data 2008): Efficiency and quality of justice, p. 143

¹⁰³ UNDP, *Access to Justice in Vietnam: Survey from a People's Perspective* (May 2004), available at: http://www.undp.org.vn/digitalAssets/4/4667_A2J__Engl_.pdf

¹⁰⁴ Hiroshi Matsuo, Access to Justice in Indochinese Countries (unpublished paper, obtained by courtesy from the author).

¹⁰⁵ UNDP Cambodia, *Pathways to Justice: Access to Justice with the Focus on Poor, Women and Indigenous People* project publications (2005), available at: <http://www.un.org.kh/undp/knowledge/publications/category/pub-pathways-to-justice>

"My husband was very violent on me and ultimately left me with the children. The police initially would not help me but after I gave them some money they went to his house. But when they came there, the family of my husband gave them more money, so now the police does not want to help me anymore. I do not have more money to spend so I cannot continue."

Woman in Dhaka, Bangladesh

"There is a stigma. In the Middle-East, if you go on the streets, the stigma will be there. For protection, you go to your own family."

Representative of CEWLA, Legal aid NGO in Cairo, Egypt

Therefore a significant proportion of the disputes is resolved or managed by different semi-official or unofficial mechanisms. The role of third parties, as adjudicators, as mediators or as authorities convincing the parties to settle, is firmly in the hands of village elders, family leaders, local 'fixers', religious leaders or other people with authority over the parties, sometimes assisted by jury-type of arrangements in which members of the community participate. These third parties are estimated to have a market share of up to 90% in low income countries, in particular in rural areas.¹⁰⁶ Sometimes there is a more or less explicit and stable procedure for addressing the third parties, which can be very close in its effects to more formal institutions such as community courts. In Vietnam, the People's Committee of the Communist Party has given conciliation power to a Village Conciliation Board.¹⁰⁷ Often, such official bodies or tribunals only have formal jurisdiction over minor cases, which cannot be sanctioned as a crime or administratively. If these rules are taken seriously by the tribunals, this leaves the conflicts which are most likely to escalate without accessible remedies.

Sometimes there are just people who take on the role of conflict solver when faced with disputes in the community. They can be family members or respected figures in the community, People in need often ask help from first the nearest and most accessible person and only if that doesn't work they will go to less related parties for help. A woman with marital problems in Egypt is likely to first talk a respected family member, called a *Kebir*, before seeking advice of a non related third party. In Cambodia many people seek justice from the local authorities in cases of domestic violence and divorce, land disputes, family and neighbourhood quarrels, debt but also sexual assault, robbery and personal injury¹⁰⁸.

Many lower income countries have partly institutionalized such arrangements, creating local tribunals, or endorsing them if they already existed.¹⁰⁹ They followed a similar path as many European countries, where justices of the peace deal with many local conflicts and with small crime. Governments in some developing countries now work with NGO's to enhance village courts and local courts in the urban areas (Major such projects include: Casas de Justicia Colombia 1995, USAID; Local Council Courts Uganda 2005, Undp; Abunzi Courts Rwanda; 500 Village Courts Bangladesh 2010, UNDP; Village Courts, Gram Nyayalayas, India, 2008; Religious Courts in Indonesia, AUSAid and Australian Family Court, 2008).

Law is One Way to Obtain Access to Justice

These initiatives build on an increased understanding that access to justice cannot be achieved if adjudication by formal courts of justice, with trained legal professionals as adjudicators, is the norm for all conflicts.¹¹⁰

¹⁰⁶ Wojkowska E. "Doing Justice: How Informal Justice Systems can Contribute", UNDP Dec. 2006

¹⁰⁷ Hiroshi Matsuo, Access to Justice in Indochinese Countries (unpublished paper, obtained by courtesy from the author).

¹⁰⁸ See previous footnote.

¹⁰⁹ Chirayath L., Sage C. and Woolcock M., Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems, background paper for the *World Development Report 2006: Equity and Development* (2006)

¹¹⁰ Wojkowska E. "Doing justice: how informal justice systems can contribute" UNDP (2006); Ubink J. and Van Rooij B., Towards Customary Legal Empowerment, SSRN Working Paper Series (2010); Harper E. "Engaging with Customary Justice System" IDLO Working Paper No 7 (2011).

According to leading access to justice researcher Rebecca Sandefur, in the United States and other developed nations, most civil justice problems are never taken to law. "When one examines how people actually handle their civil justice problems, one observes both a widespread resignation to these problems and an enormous variety of attempted remedies, a minority of which involve the explicit use of law."¹¹¹

Informal access to justice mechanisms are usually more close, affordable and accessible to people in the community. The modes of decision making and the norms that are used, are often believed to be fair by the members of the community because they identify them with custom, tradition, or religion and the authority is recognized by the community. These positive aspects result in a relatively high compliance and satisfaction.¹¹²

However, besides all these positives, there are also concerns about the quality of the processes and the outcomes delivered by informal conflict solvers. For lower income countries, the weak position of women in traditional justice services is most commonly mentioned as real concern from a human right perspective, but also other marginalized groups may not benefit from access to fair solutions. Corruption, misuse of power, and a failure to meet basic process standards such as neutrality, opportunity to be heard, and equal application of the rules without regard to the identity or status of the parties are other problems that are mentioned frequently.¹¹³

3.2 Estimating the Access to Justice Gap

Many reports and academic articles argue that access to justice is insufficient.¹¹⁴ They point to barriers such as high costs, formalistic procedures, long delays, discriminatory practices, lack of trained legal assistance and corruption at courts. The Commission on Legal Empowerment of the Poor estimated that 4 billion people live outside the protection of the law.¹¹⁵ It gives many convincing examples of large groups of people that do not have access to timely court decisions, to ID documents or to documents that acknowledge their property rights.

"Many judges have walk-in hours for parties, even explicitly stated on their doors. A sign can be found with the days and times he is available for parties of cases pending before his court. During these hours, he receives parties. Alone."

Lawyer in Bamako, Mali

In this section, we show how the access to justice gap can be quantified. We also estimate the size of the access to justice gap on the basis of the data that are now available.

Problems for Which Complainants Took No Action

A first indication of a lack of access to justice is that people take no action because they do not believe that doing something will help. An early study from the US claims that around 25% of the legal problems are lumped and never acted upon. Rebecca Sandefur researched further what might be the reasons for inactive behavior in a culture which is noted for its litigiousness.¹¹⁶

¹¹¹ Sandefur (supra).

¹¹² See for religious courts in Indonesia: Sumner C. and Lindsey T. "Courting reform, Indonesia's Islamic courts and Justice for the Poor", *Lowy Institute Papers* Vol.31 (2010).

¹¹³ Tamanaha B.Z. "The Primacy of Society and the Failures of Law and Development," 44 *Cornell International Law Journal* (2011), Stephens, Matthew, "The Commission on Legal Empowerment for the Poor: An Opportunity Missed." *Hague Journal on Rule of Law* 1 (2009):132-155; Harper E. "Engaging with Customary Justice System" IDLO Working Paper No 7 (2011)

¹¹⁴ See Rhode, D. L. *Access to justice*. Oxford ; New York: Oxford University Press (2004)

¹¹⁵ Commission on Legal Empowerment of the Poor. *Making the law work for everyone*. New York: United Nations Development Programme (2008)

¹¹⁶ Sandefur, Rebecca L. 2007. "The Importance of Doing Nothing: Everyday Problems and

Using focus group interviews she finds that those who lump their problems did so because of multiple reasons. Shame and embarrassment from the problem is the most pressing reason to take a passive strategy. Second, the interviewees are concerned that taking action would be too costly given the expected benefits. Another reason for doing nothing was a perceived power imbalance between the disputants. Negative previous experiences with particular problems decreases significantly the willingness to act.

"We do not have money for 'law'. You have to be rich to do something because you will always have to bribe."

Woman in Dhaka, Bangladesh

"In general, people do not trust the law. They feel that law enforcement might create a problem for you. Hence, people are a bit hesitant in reporting problems. Usually, they only start reporting problems when they see a couple of problems solved. In general, people do not prefer to apply to court. This is seen as a last resort that is insulting. Moreover, courts are often biased and corrupt. The person who pays most or has better contacts often wins."

Director of Praxis, legal aid NGO in Baku, Azerbaijan.

Various justiciable events studies report that relatively few people lump their serious and difficult to resolve legal problems, while other studies suggest that doing nothing is a widely used strategy. It is possible that cultural and methodological issues contribute to the difference. For instance, in some studies, the respondents might mean with to *do nothing* that the problem has not been taken to a dispute resolution forum. For other respondents, passivity might have different scope - i.e. take no actions at all after the problem is recognized as serious. Nevertheless, the differences can be indicative of justice gaps. From the legal needs studies it is rather clear that more problems are buried in the countries with a less developed infrastructure for delivery of accessible referral, legal advice, and other relevant services.

Hazel Genn reports that only a small proportion of the people in England and Wales are passive when a problem strikes.¹¹⁷ Similarly, both studies from the Netherlands indicate that ultimately only about 6% of the legal problems are left without any action on the side of the affected person.¹¹⁸ However, a subsequent study from England and Wales reports that 19% of the respondents who experienced a problem did not take action.¹¹⁹ This means that almost one in five problems was left without response. In Canada around 16.5% of those who reported problems say that they did not take any action because of a particular reason. Other 5.7% report that they did nothing but it was because the problem did not merit action. Despite the massive public expenditures on legal aid in the United Kingdom, the Netherlands and Canada there is a significant proportion of people who deliberately do nothing to solve legal problems.

In the US, Bulgaria, Ukraine and Russia there is no universal civil legal aid scheme. This means that when there is a serious legal problem the affected individuals have to rely on their own resources, capabilities and energies. Above we saw that no action is undertaken in a quarter of all legal problems in the US. In the Russian study the percentage of lumped problems is 15. Similar findings are reported by the Bulgarian study. 28% of those who reported at least one or more legal problems say that they did nothing in response. Indeed, some of the respondents who reported lumping also said that they met the other party.

Responses of Inaction." Pp. 112-32 in *Transforming Lives: Law and Social Process*, edited by Pascoe Pleasence, Alexy Buck and Nigel Balmer. London: TSO

¹¹⁷ See above at footnote 39

¹¹⁸ See above at footnotes 40 and 41

¹¹⁹ See above at footnote 48

Clearly in this study an inaction has been understood as not referring a problem official or unofficial dispute resolution fora. If meeting the other party is re-classified as an active strategy, the proportion of the lumped problems in the Bulgarian study reduces to 14%.

The Ukrainian study reports that inaction was the main strategy in 41% of all serious and difficult to resolve problems. Even if this figure indicates grievances that were not referred to any means of dispute resolution we see that almost half of the respondents do not take their problem beyond the other party and perhaps the circle close around them! What might be the reasons for such a gap between the needs for justice and the supply of fair outcomes?

Above we discussed shame, economic costs and perceptions of powerlessness as reasons for inaction. In Ukraine the most prevalent motivation for inaction is the feeling that nothing can be done to solve the problem (39% of all reasons). Disbelief that something can be done is also the most often cited reason by the English and Welsh as well as the Bulgarian respondents (respectively 31% and 36%) who reported at least one justiciable problem. Fear that the resolution of the problem will cost too much negative emotions and stress is the second reason in Ukraine for lumping a problem. Similar considerations are cited as reasons for not actively pursuing a solution to the problem. Worries about the time it would take to solve the problem (19.3% of all reasons) as well as lack of confidence in own abilities to cope with the situation (15%) were the two most significant factors for the respondents in Russia. Lack of money is rarely the major reason for lumping a problem. One in ten Bulgarian respondents says that money was the reason for doing nothing. Respondents from England and Wales, the Netherlands and Canada were significantly less worried about out-of-pocket expenses.

Data on inaction rates in developing countries are harder to come by. In a study about grievances in rural China, 33% respondents did nothing about the problem, 46% entered bilateral negotiations with the other parties, 14% went to an informal relation or a village leader, almost 4% to a government office above the village level and only 1.8% went to a lawyer or a court.¹²⁰

These data can be compared with indicators on access to civil justice collected by the World Justice Project. The indicators are based for 50% on population surveys in which people are asked about their opinions and experiences with justice systems, conducted in the 3 largest cities in 66 countries. For 50% the indicators find their basis in around 30 expert opinions per country. Sub-factors of access to justice include: accessible and affordable legal advice and representation, accessible and affordable civil courts, absence of discrimination, corruption, government influences and unreasonable delays, as well as effective enforcement and ADR. The Table below suggests that higher inaction rates tend to be reported from countries which are scoring low on access to justice as perceived by experts and by citizens surveyed in the three biggest cities of each country.

Country	Inaction Rate reported in Legal Needs Study	WJP 2011 Rule of Law Index Ranking on Access to Justice, Normalized Score
Netherlands	6%	3 rd place out of 66 countries, 0.82
UK	5%, 19%	10/66, 0.71
United States	25%	21/66, 0.63
Bulgaria	28% (14%)	38/66, 0.55
Russia	15%	40/66, 0.54
China	33%	44/66, 0.52
Ukraine	41%	63/66, 0.40

¹²⁰ See above at footnote 53 at p. 495

Inaction to legal problems is not distributed randomly. Certain groups of people are more likely to stay passive than others. People who have lower levels of education, earn less, live in rented accommodation or belong to the age 18-25 age group are much more likely to lump a problem than those who are more affluent and educated. It is not difficult to explain the relationship. Those who have more resources and better education can mobilize significantly more tools in order to solve the problems. If the resources are meagre there are less alternatives and mere inaction is one of these alternatives.

Unsolved Problems

Lumping a problem is not the only indication of a access to justice gap. Most people actually do something to solve their problem. They either attempt to engage help from others or try to solve the problem with their own actions, contacting the other party. But even if active steps are taken, not all reach outcomes. Many people take steps, but stop at some stage, without obtaining a result.

Most justiciable events studies ask whether the problems have been resolved or not. A solution can be obtained through some sort of agreement or settlement, which is always the most common form of resolution, or by a decision from a court or another third party that is accepted by the parties as solution, usually less than 10% of the problems reported.

Unsurprisingly, not all people who take action achieve a resolution to their legal problem. In general, those who take active steps solve more of their problems. The proportions vary greatly by country, type of problem, availability of legal advice and demographic characteristics.¹²¹ Between one third and half of all justiciable problems which had been actively pursued do not bring resolution (see table below).

Country	% Justiciable Problems Solved	% Problems Not solved
Bulgaria	27,7	42,3
Ukraine	51	48,3
Canada (2010)	54	35,2
England and Wales (1999/2004)	48/64	36
The Netherlands (2009)	59.5	40.5
Australia (New South Wales) (2007)	61	39
Russia	66	33,4

Not all problems can be solved. Perhaps a proportion of the outstanding problems were regarded as not appropriate for legal solutions after consultations with providers of legal advice or dispute resolution services. Still the large number of unresolved grievances and disputes adds to the justice gap.

¹²¹ It should be noted that there is a variation in the rate of resolution by year when the problem was reported. For instance, van Velthoven and Klein Haarhuis (2009) find that only 8.3% problems which occurred at the beginning of the 5 year reference period were not resolved. On the other hand, 15.3% of the problems reported in the last year were not resolved. Solving problems takes time but it’s also possible that after passage of significant time people simply start counting justiciable events as problems and accept the fact that the situation will remain not solved.

What is a realistic target resolution rate?

Actual resolution rates depend on various factors. If equal access to justice for all is the ambition, demographic characteristics such as age, income level, gender, country and rural/urban environment should not make a difference. But the type of problem is also relevant, and there realistic resolution rates may be different:

- For issues related to tenure security and property rights in housing and land higher income countries may be able to reach an almost 100% score.
- If the problem is termination of employment a well functioning legal system may be able to reach final solutions through settlement or adjudication in 90% of the cases.
- Legal needs surveys report high resolution rates are also possible for consumer problems. Neighbour issues, debt problems and personal injury problems tend to be more difficult to resolve.¹²²
- For criminal justice, lower targets may have to be accepted. The number of instances of theft that can realistically be resolved is likely to be lower than 50% in many countries.
- A 75-78% resolution rate is often achieved in well-functioning mediation programs.¹²³ Adjudication can solve an additional number of problems in the range of 5%, although not every judgment brings a solution that is accepted by the parties.
- Overall, the best performers in the table above reach 60-65%.

A higher resolution rate up towards 70 or 75% could thus be a realistic and worthwhile aspiration. Resolution rates of 55% or lower are almost certainly an indication of severe access to justice problems in a country.

In the textbox above, an analysis is presented showing what a realistic resolution rate could be. It results in a target of 70 or 75%. A resolution rate of 75%, with inaction for 5% of the problems, would still mean that 20% of the problems are unsolved within 3 or 5 years. This could be due to unrealistic positions held by one of the parties, to intractable conflicts that are very difficult to solve, or to problems that go away because one of the parties moves to another part of the country. In legal needs surveys, around one quarter of people tend to be satisfied with issues that are not resolved.

Satisfactory Outcomes and Processes

But not every solution reached is a good one. It may be that the parties settle under pressure, that informal justice systems make women or poor people accept unfair outcomes. A court decision may be unfair, because it is based on laws that are not updated to reflect current views on what is a fair and just solution. A woman in Bangladesh or in Egypt may be forced to accept a low amount of child support from her ex-husband, because going to court for this may take many years and be very costly.¹²⁴ Not all problems that are resolved, are settled or decided in a satisfactory way.

Legal needs surveys sometimes ask people to what extent they are satisfied with the outcome. The methodologies used in each survey are different, however, and this makes comparison very difficult.

¹²² Genn, *What People Do and Think About Going to Law* (1999); Pleasence et al. *Causes of Action: Civil Law and Social Justice* (2004)

¹²³ Brett J.M., Barsness Z.I., "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four major Service Providers", Research Report, *Negotiation Journal*, Vol 12(3): 259-269 (1996); Wall J.A., Stark J.B., Standifer R.L. "Mediation: a Current Review and Theory Development", *The Journal of Conflict Resolution*, Vol 45 (3), pp. 370-391 (2001).

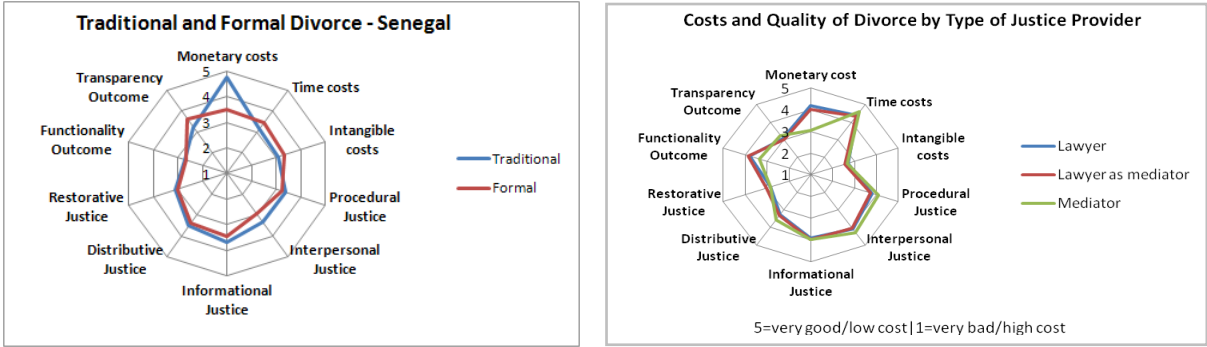
¹²⁴ Barendrecht M., van Dijk M., Gramatikov M., Monster J., Porter R. and Verdonschot J.H., *Microjustice in Five Developing Countries: Opportunities for Growing Justice Bottom Up*, Action Research Oxfam Novib/Tisco with the cooperation of Ain O Salish Kendra (Bangladesh); CEWLA (Egypt); Haguruka (Rwanda); Praxis (Azerbaijan); Deme So (Mali), (2010)

An Australian survey found 79% satisfied (13% dissatisfied).¹²⁵ In UK, 44% achieved their main objective.¹²⁶ The ABA study in the United States found that satisfaction with the outcome of legal issues was reported by 54% per cent of moderate-income households, but only 38% of low-income households.¹²⁷ In Moldova, the respondents who had experience with serious and difficult to resolve problem were asked about the fairness of the outcome. About 15% consider the resolution of the problem as unfair.

Another way to measure satisfaction with outcomes is to survey the clients of a particular procedure or process. A methodology is available which maps paths to justice on seven justice indicators and three categories of costs.¹²⁸ Access to justice is not only about fair outcomes, but also about a fair process. A significant body of social psychology research demonstrates that procedural justice is equally important as outcome justice when people assess the fairness of their experiences. So the methodology assesses not only the outcomes of the paths to justice but also the quality of the process.

Examples of a lack of access to justice in this sense are given in the following graphs. The first relates to two divorce procedures in Senegal - a traditional, customary justice one, and an official one in the formal justice system. What the lines demonstrate is that the users of these two particular procedures perceive the processes as relatively fair, but also see significant room for improvement. One noticeable difference is the lower monetary costs of traditional divorce.¹²⁹ Traditional divorce is also perceived as slightly better in terms of procedural justice, interpersonal justice and informational justice. On the other hand, the perceived quality of the outcome of the two paths to justice is almost identical.

The second graph allows for a comparison with divorce procedures in the Netherlands. Slightly depending on the type of provider, divorce procedures in this country score significantly higher on interpersonal justice, functionality (effectiveness of the outcome) and somewhat higher on procedural justice and informational justice. There is not much difference as to the costs and the satisfaction with distributive justice. On the other hand, the Senegalese procedures do better on transparency of the outcome and (lower) stress.



Concentrating on the measurable aspects of processes that people use to solve their every-day problems provides significant detail about people’s needs and the way they rate outcomes and procedures. Graphs like the one above indicate justice gaps but also provide benchmark data which can be used to improve constantly the paths to justice.

¹²⁵ See Coumarelos, C., Wei, Z., & Zhou, A. Z. *Justice made to measure : NSW legal needs survey in disadvantaged areas*: Law and Justice Foundation of New South Wales (2006)
¹²⁶ See above footnote 42
¹²⁷ See footnote 45
¹²⁸ See Gramatikov, M., Barendrecht, M., Laxminarayan, M., Verdonschot, J. H., Klaming, L., & Zeeland, C. V. *A Handbook for Measuring the Costs and Quality of Access to Justice*. Apeldoorn, Antwerpen, Portland: Maklu (2010)
¹²⁹ Five means low costs while 1 indicates high cost.

For instance, an on line supported divorce procedure, facilitated by mediators in the Netherlands showed higher scores (around 4) for procedural justice, interpersonal justice and even distributive justice. If divorce procedures in more countries would show such scores, this suggests that this is a possible bench mark.

Estimated Access to Justice Gap

With all the caveats described above, we could very roughly say that the best performing countries have an inaction rate of 5-10%. Some problems go away by themselves or proved to be less important after all. If the inaction rate for justiciable problems is higher than that, this suggests a lack of empowerment, resources and/or options to obtain access to justice. Inaction rates of 15% or higher reflect serious problems with access to justice. The data displayed suggest that this may well be the case for countries representing more than two-thirds of the world population including the US (which scores low on accessible/affordable courts and legal advice), Russia and China.

What is the access to justice gap in relation to unresolved issues that could be resolved? Although reliable data are lacking, there are indications that many countries have resolution rates of below 60%, whereas a number of countries have resolution rates of 55% or lower. Comparing this to the resolution rate of 70-75% that can be achieved, this means that some 20-25% of disputes are not resolved although they could have been resolved.

Finally, there is ample evidence that not all solutions are seen as fair solutions, and more importantly, that higher fairness rates can be achieved. Overall satisfaction with solutions by 80% of those affected has proven to be possible in one study, whereas ratings for different elements of justice by both parties to conflicts in the range of 4 on a 5 point scale may be within reach as well.

These figures come down to the following access to justice gap, which is a very rough estimate based on data which are only available for a minority of countries. Starting from a basis of 1.000 adult people living in industrialized society, with 300 new, serious disputes per year (see Section 2.3), there are every year 30 disputes which those with grievances would address and 60 more conflict situations they would solve, if the access to justice setting would be more benign as shown by the best performing countries. Moreover, the fairness of solutions and processes of the 150 disputes that are currently resolved can be raised substantially from a level of average (just above 3 on a 5 point scale) to moderately satisfied (close to 4 on a 5 point scale). This access to justice gap is currently present for a majority of the population of the world, and perhaps two thirds of it. Each of these disputes entails stress for the persons involved, their possible health problems, a risk of escalation and violence, disturbed relationships, a lack of trust, harm that remains unaddressed, out-of-pocket costs, lost opportunities to improve livelihoods and government services, and sustained feelings of injustice.

3.3 Getting Stuck On The Path To A Fair Solution

So, in many countries, there is still a huge gap between the legal needs of people and a fair solution. Many people do nothing, stop half way or have good reasons to be dissatisfied with results.

To get a better understanding of the gap between demand and supply, it is necessary to study the process of obtaining access to justice more closely. We use the five step model described in Paragraph 1.4 for this. It posits the necessary and sufficient tasks in solving legal problems that people usually need some kind of support for. If access to justice is not obtained, then the party seeking access to justice got stuck with one of these five tasks. He or she did not even start this part of the process, left the process, or was not satisfied with the quality of the outcome. This model allows us to map and explain the obstacles that people may encounter when they try to seek support to resolve a conflict. It also suggests how access to justice can be improved.

A Five Task Dispute Resolution Model		
Tasks	Description	Basic methods to achieve this
Meeting	Contacting and starting an interaction with the other party about the problem	< Incentives to cooperate
Talking	Negotiating (interest based)	< Skills and structure
Sharing	Bargaining about who gets/does what	< Information about rights, rules, and fairness standards
Deciding	Coming towards a decision	< Option of third party decision (adjudication, formal, informal), trilateral governance
Stabilize	Making explicit and organizing compliance	< Incentives to comply (public involvement and oversight)

No Contact with the Other Party

In the majority of situations, whenever there is a legal problem, one person wanted to get something done by someone else. It may be to let the government to provide for a fair compensation after eviction. Or to have the family members of a deceased husband refrain from grabbing property. For this, the person experiencing a problem will have to interact with the other people involved and exchange information, as well as views and possible solutions. This can be done via informal contacts, through a paralegal, or in a courtroom. Bringing the parties together in a cooperative process (let them "meet"), is thus one of the tasks that need to be performed. Each of the two parties have to come together in one place, where they start working on the problem. Around a table, in a court room, by telephone, through lawyers writing letters or through the internet.

What can go wrong at this stage? Shame, embarrassment with the problems between husband and wife can be a reason for a woman not to take action or for a man not answering an invitation to sit down and talk. Expectations that taking action would be awkward, too costly, or time consuming play a role, as well as a perceived power imbalance. Research shows people prefer a neutral environment to sit down and talk. Often, they appreciate the guidance of a neutral person. Victims of crime sometimes need protection because they fear retaliation.¹³⁰ In official justice institutions the environment can be formal, without good privacy, and the atmosphere can be authoritarian rather than supporting an open dialogue.

Meeting Places: Not So Secure and More Secure

"In Egypt, in order to obtain a Khola divorce requested by the woman, the couple has to go through a reconciliation process before two mediators. This often takes place in a busy and public office, a place that is hostile to talking about sensitive personal matters."

Lawyers from CEWLA, Cairo

"In Mali, at legal aid offices, Deme So and Wildaf created 'a house of conversation'. In this place privacy and ground rules for good communication are guaranteed, and are aimed specifically at supporting a constructive process."

Story from Mali. Told by facilitators from Deme So and Wildaf

¹³⁰ Morris A., Maxwell G. *Restorative justice for juveniles: conferencing, mediation and circles*, Hart Publishing (2001), p 125

For the other party, it may be attractive to avoid a meeting. By not communicating with the other family members involved, or by not appearing before a court that has to decide on the ownership of the land, a solution can be postponed. If he expects to have to pay a big sum of money or to concede on major issues of ownership, the other party may react strongly to the idea of a discussion, hoping that the problem will go away, fearing it will not. Involving a third party may be needed. Courts use the threat of a judgment by default or the issuance of a contempt order: they give judgment against the defendant if he does not show up to react to what the plaintiff has to tell.

Depending on the type of case, many things have to be organized before both parties are willing to talk about the problem at the same time and in the same place. They need a setting to exchange information in which they both participate or where their views are at least represented.¹³¹

Failing Communication and Negotiation

The process that takes place once the parties meet defines the quality of the solution. A good solution is unlikely if there has been no effort made to uncover the real needs and interests of the parties. Conflict resolution theorists tend to recommend interest based, problem solving negotiation as the primary and most effective way to address conflicts.¹³² Negotiating on the basis of needs is a very common human interaction process, which is at the basis of friendship and commercial transactions. People in low income countries tend to develop their negotiation skills, because they need to bargain about their share in food, their personal security, a place to live and everything else that they cannot take for granted.¹³³

But research shows that these capabilities may be insufficient in situations of conflict. Differences in perceptions about what happened and about the real needs of the other party are common barriers to conflict resolution.¹³⁴ Blaming can lead to interactions based on accusations and defensiveness which can become another barrier to resolution.¹³⁵ Also the process is unlikely to be satisfactory if parties lacked the opportunity to address emotions and to listen and respond to each other's perspectives.

So the dispute system can contribute to a setting in which these negotiation capabilities can be enhanced. Mediators, lawyers in specialized in employment and family law practices, and NGOs in developing countries have developed a range of skills that can support this process (see section 4.2 on this Dispute Resolution Know-How). These practices often focus on asking open questions in a non-judgmental way, motivating the parties to be involved in the process, and the promotion of dialogue between the parties in the search for a solutions that fit the needs and worries of both parties. By giving voice, participation and respect to the parties, such processes also enhance feelings of procedural justice, resulting in greater satisfaction with the process.¹³⁶

In formal legal procedures and in negotiation between lawyers, it may be more difficult to achieve a setting in which the parties are empowered to talk and to negotiate. There may be barriers of an official language instead of the native tongue for the procedure, legal jargon or procedural issues.

¹³¹ Shariff, K.Z. Designing Institutions to Manage Conflict: Principles of the Problem Solving Organization, 8 Harv. Negot. L. Rev. 133, 133-57 (2003); Dispute System Design : An Introduction. by Professor Robert Bordone. Symposium. Harvard Law School (2008)

¹³² Lewicki R.J. *Negotiation*, 6th ed. McGraw-Hill (2009); Moore C.V. *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd ed., Jossey Bass (2003) ; Dispute System Design : An Introduction. by Professor Robert Bordone. Symposium. Harvard Law School (2008); Ury W., Brett G.M., Goldberg S.B. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflicts*, Jossey-Bass (1988).

¹³³ Abhijit V. Banerjee and Esther Duflo, "The economic lives of the poor," Journal of Economic Perspectives 21 (2007).

¹³⁴ Arrow K.J. et al. *Barriers to Conflict Resolution*, W.W.Norton (1995).

¹³⁵ Allred, K.G. Relationship Dynamics in Disputes: Replacing Contention with Cooperation. Handbook of Dispute Resolution (ed. M.L. Moffitt and R.C. Bordone) (2005), Jossey-Bass

¹³⁶ Klaming L. & Giesen I. "Access to Justice: the Quality of the Procedure", TISCO Working Papers on Civil Law and Conflict Resolution Systems No. 002/2008

Filing documents in which issues are framed as claims can become more important than dialogue about a fair solution. Judges do not always have the time and skills to sit down with the parties and talk them through the issues.

Some judges do this very well, but other judges see it as their primary duty to apply the law, not to solve the problem as it is perceived by the parties. Judges can be very effective problem solvers if they use their authority to help the parties accept solutions. But if they focus on legal procedures and try to find an objective 'truth', this can stand in the way of interest based negotiation processes, which are more likely to integrate different points of view and differences in how needs and worries are perceived. The legal way of approaching conflicts can have a big impact on the broader setting for dealing with conflicts, because what judges do is likely to serve as an example for lawyers, paralegals and others helping parties to negotiate solutions.

What people do in land conflicts and how they get stuck

In most countries, there is now a basic rule that tenure (occupancy) should be respected. Once people live in a house or work on land for a year or more and improved it in order to serve their needs, they are unlikely to be evicted in the short run.¹³⁷ This protection is usually obtained independent of their formal property rights. Tenure protection is granted irrespective of registration of rights, the way people obtained possession, whether they have a permit for living in this place, or a valid contract for renting the property.

But there may be many exceptions. Tenure may only be respected for a limited amount of time and there can be good reasons to terminate the use of the land.

- Informal settlements are often built very tightly, every small plot being used for a house. When the neighbourhood improves, space is needed for a school, for an access road and for building sewerage or water piping.
- Prior users of the land may have better claims, because they were once chased from the land by a violent gang. In Malawi and other African countries, widows of men who die from aids risk to be sent back to their parents by the brothers of their deceased husbands. Tenure obtained by force may have to be corrected.
- Developers, and local governments may want to demolish low quality houses, in order to build apartments for the middle class on an attractive site.

Land conflicts are complicated because many parties are involved. Often there are competing claims on the basis of different formal and informal legal arguments. Moreover, government officials allocating land rights and documents have a stake as well. Unofficially, if they ask a bribe to issue a document. But also because they need to collect taxes or contributions to public infrastructure from land owners. Issuing documents that improve the position of users of land in return for a fee or taxes, that is part of the business model of most states. So land laws are often organized in such a way that civil servants issue documents which give better protection. This gives them substantial power as an adjudicator between different interests in the land.

Obtaining an official document is one way in which the outcomes of land conflicts can be influenced. The civil servants adjudicating claims in this way often suffer from a similar lack of incentives as judges, however. So they may have backlogs, be formalistic, open to bribes, ask for additional paperwork or information and be not very sensitive to the fairness of outcomes. Because this lack of accessibility, and sometimes also to avoid taxes, many users refrain from registration.

¹³⁷ See the many contributions by Payne G.K., e.g., *Land, rights, and Innovation: Improving Tenure Security for the Urban Poor*, Practical Action (2002)

This makes the registration less useful for others as well, because it does not offer conclusive evidence of the realistic claims on the land. Registrations and land titles are like mobile phones. They have strong network effects: their value increases if others use them as well.

Invariably, private forms of documenting interests in land emerge to meet this high priority need for access to justice.¹³⁸ A common arrangement is that of a written document showing transfer of ownership from one person to another one in the presence of two or three witnesses. This can be organized locally at little cost. Nowadays, the transactions are sometimes even videotaped in order to give extra credibility. Research has shown that these private arrangements may be as effective from the perspective of the owner as official documents. They give a feeling of security, because the documents are generally respected at the site.¹³⁹ Even credit may be available with such unofficial property as collateral. Formal property rights do not tend to increase the rate of mortgage credit substantially.¹⁴⁰

The private arrangements do not have to remain private forever. Many effective private schemes have been recognized in formal legislation, often under strong pressure from the owners of documents issued privately. In this way entrepreneurial activity can kick start public legal services.

One problem with registration authorities and titling is that they tend to allocate rights in an all or nothing way: either you own or you don't. Sometimes registration happens in the name of the man living in the house. Many countries have accepted rules under which the man and the woman living in the house are registered as co-owners, or accepted the possibility of letting a group or a community be the owner.

The relationships may be more complicated, however, with parents, brothers or temporary users of the land involved as well. Moreover, the underlying issue will often be how the land will be used in the future, by whom, when and with what amount of compensation for the ones seeing their use of the land being terminated. Registrars and their procedures are not equipped to sort out these issues.

Another way in which land conflicts are adjudicated is through courts. They may find it difficult to resolve these issues within a reasonable time frame and at reasonable costs. Specialized courts or panels that deal with land disputes seem to be the way forward here. If courts specialize, they become more efficient and effective. A lot of local knowledge is helpful as well.

Demand for land conflict resolution is also likely to vary between neighbourhoods, according to their phase of development. Land conflicts temporarily increase in number if:

- There is an influx of new inhabitants migrating to a site and settling
- There are new opportunities for upgrading official documents that give additional tenure protection or more options to resell the property at higher value
- Programs for upgrading water supply, sewerage, electricity or other public services are implemented
- A site becomes part of a project for new infrastructure or housing development
- Post war and major conflict

So a combination of local capacities and capabilities form mobile courts with experience in settling large numbers of conflicts is likely to be most effective.

¹³⁸ Payne G.K. *Land, rights, and Innovation: Improving Tenure Security for the Urban Poor*, Practical Action (2002); Durand-Lasserve & Selod H., "The Formalization of Urban land Tenure In Developing Countries" in *Urban land Markets*, World Bank, S.V. Lall et al. eds (2009)

¹³⁹ Payne G.K. *Land, rights, and Innovation: Improving Tenure Security for the Urban Poor*, Practical Action (2002)

¹⁴⁰ See the papers of Deininger K. with other authors on land reforms and property rights in India, China, Ethiopia and Uganda.

Another problem can be that the role of the judge is the one of a passive referee, who lets the parties play their game. Rules of procedure may be interpreted as only allowing them to decide on basis of the information that the parties, or their lawyers have brought forward. In many countries it is not seen as appropriate that judges ask additional questions, to uncover underlying needs, or to explore win/win solutions.

However, specialized family courts or judges dealing with consumer issues may have developed good processes for uncovering the needs and interests of the parties and letting the parties negotiate.¹⁴¹ One way to promote this can be the provision of guidelines which require the parties to exchange information before they come to the court itself.

Bargaining Failure: Not Reaching an Agreement About Issues

Bargaining about what is fair compensation, a share in what needs to be done to prevent further harm, or a distribution of assets, is another task that needs to be completed. Distributive bargaining is likely to be disturbed by extreme positions, delaying tactics, commitment to escalation, threats and keeping information secret.¹⁴² In a formal court procedure, or in negotiations preceding this, the parties push for the best deal for themselves by arguing for their position, which often implies that they should be paid a very big amount of money or do not have to pay anything, because a claim is without merit. Many legal disputes get stuck at this phase. People can talk and listen, but they cannot agree on money issues.

One of the tools that can help avoiding this is to have concrete guidelines, schedules, formulas for calculating what is a fair share. Such laws, norms, and concrete information about what others received in similar situations can guide people towards a solution that they can agree on. However, there is often a lack of clarity about what others have agreed upon in the past, or what is normal to receive in a given situation. Laws tend to be unspecific about remedies, often referring to general concepts such as "damages" or "reasonable compensation." In these cases, published guidelines can provide a great deal of assistance by providing such information (see Section 5.2).

No Access to Timely and Low Cost Third Party Decision

If parties cannot agree on a solution, they may need somebody to increase the pressure to make a decision, or someone who can take a decision for them. Taking decision for parties who are unable to find a solution is the core activity of courts. This role in society is very important. But the question whether it is also service effective for Laila who wants a divorce, but needs to wait six years before the decision on her divorce and fair share of alimony will come through? What will she do in the meantime? This problem is common and the lack of capacity of the formal system to provide a threat of a timely decision, forms a large barrier to justice for many people around the world.

¹⁴¹ Casey, P. M., & Rottman, D. B. *Problem solving courts: models and trends*. Williamsburg, VA: National Center for State Courts (2003); Violence allegations in parenting disputes: Reflections on court-based decision making before and after the 2006 Australian family law reforms by Lawrie Moloney, *Journal of Family Studies* October 2008, Vol. 14, No. 2-3, pp. 254-270

Ackerman, M. J., & Pritzl, T. B. . Child custody evaluation practices: A 20-year follow up. *Family Court Review*, 29, 618-628 (2011)

And many more studies in the *Journal of Family Studies* and *Family Court Review*

¹⁴² Muthoo A. "A non-technical Introduction to Bargaining Theory", *World Economics*, Vol 1(2) (2000); Barendrecht, M. "Best practices for an affordable and sustainable dispute system: A toolbox for Microjustice", TISCO Working Paper Series, 003/2009.

"The length of the procedure can take up to 6 years. The husband often does not cooperate and tries to stretch out the procedure. I had a case that took over 12 years"

Facilitator ASK, Dhaka, Facilitators Workshop

"In the Abunzi Committees the problems are solved in 5 days. The longest possible time is 2 weeks. If people need to go to courts, it could take much more time. In the courts there are high fees and long delays."

Chairman of an Abunzi committee in the Karongi region, Rwanda

But access to a court decision, is not the only way out of the situations where people are unwilling to cooperate need some stimulus to do so. What we see happening is that people go and threat to go to a lawyer, or actually hire one. In this way, the threat of an intervention by a neutral (i.e. a judge) gets one step closer. This might be a strong enough incentive to cooperate. However, it is easy to see how lengthy and costly procedures reduce this incentive. If it would take another two years before a case would get in court there is no reason to make a move right now. Hence, the party that benefits from the status quo could still sit back and wait.

This is also the reason why providing mediation is not sufficient for providing access to justice. By itself, it cannot create the pressure on the other party to make the concessions that are necessary to produce a fair settlement. Mediation without the credible threat of adjudication by a third party is only valuable to let people communicate and negotiate, not to produce a fair outcome of the bargaining about distributive issues.¹⁴³

An Effective Third Party Threat?

In Bangladesh, Nagorik Uddyog (The Citizen's Initiative) meet many people who have conflicts. In many of these cases, there are issues that the people involved in cannot agree upon. Issues such as child support payments, divisions of inheritance and access to land. Where there are conflicts, there is little effective threat from a third party.

It is clear to all lawyers, and many lay people besides, and certainly the staff of Nagorik Uddyog, what the law says in each of these situations. The problem, is that there is no effective third party threat. The stronger parties know that if they simply avoid the issue, there is no effective threat. They know that the other party will have to go to the courts to receive a decision. They also know that the courts are not the fastest or most efficient decision makers.

In Bangladesh we have met women who have been waiting over a decade for a decision in straightforward decisions about child support. There is no confusion over the actions that have taken place, or over what the law says. However, with court procedures being heavy in red-tape, and courts receiving far more cases than they can handle, rather than being institutions that rectify unfair situations, they provide an escape route for husbands who do not want to pay child support, or land-grabbers who are evicting families. The threat of courts is both distant and ineffective, and provides a shield to those who wish to hide behind bureaucracy and delay.

¹⁴³ Genn H., *The Hamlyn Lectures 2008: Judging Civil Justice*, Cambridge: Cambridge University Press (2010).

The demand for timely decisions drives the search for new solutions around the world. In Bangladesh the excessive delays experienced by those bringing disputes to the formal system (in many cases greater than 10 years) indicate a clear need for alternative decision-makers that can take over the burden of the courts. In Rwanda, when faced with a similar challenge, the capacity for decision making at the local level has been increased with the implementation of the innovative Abunzi courts.

Not being able to find such a third party who is accessible at reasonable and affordable costs and within a reasonable time frame is the most fundamental barrier to justice that someone with a legal need can possibly encounter. There are many examples of this unfortunate situation around the world.

Reasons can be the costs of access to the formal system or the travel distance to courts. For example, in Mali the geographical distances to courts pose a real and obvious barrier. Alternative services have been set up by organisation who aim to increase access to Justice, yet the outreach and scale of these services is at this stage still small. In Bolivia only 55% of the municipalities have a judge, 22% a prosecutor, and 3% a public defender¹⁴⁴.

No Sufficient Reasons to Comply with the Outcome

The final task that needs to be completed is for the relationship between disputants to be stabilised. Compliance to a decision or an agreement is central to achieving this. In the context of the formal legal system this aspect is organised through the availability of formal pressure instruments. If you don't comply, you can go to jail! Yet in reality these threats often remain unfulfilled. Even from the Netherlands we know that only 74% of people comply to a court decision within reasonable time, and 85% of people comply if they have agreed to the solution voluntarily. Barriers in the area of compliance can be that there many are legal formalities. Every step in the process and every person who has to give a formal authorization can be a point where delay occurs, where there is a lack of personnel, or where a small payment can be asked.¹⁴⁵ Countries have also found it difficult to organize compliance. Some leave it to the police, others to court personnel, others to certified private organizations, and if the government does not take care of this, private arrangements are likely to emerge.¹⁴⁶

"With regards to court decisions in family law, the compliance rate is about 60%. For the other 40%, you have to start a new procedure, which takes about 3-4 years to result in an outcome"

Facilitator ASK, Facilitators Workshop

Research has found that the most important factor that influences people's willingness to comply is that they think the decision is made in a fair process.¹⁴⁷ Moreover, formal courts tend to relate their authority on their access to threat based incentives for compliance. A question is whether the reliance on these instruments makes the formal system blind to more subtle, possibly more effective, measures to organise social pressure that are applied in the informal sector. Informal tribunals in communities can mobilize a lot of social pressure, because people risk their reputation if they do not cooperate. Actions such as a slow publication of parties involvement in a dispute, then the details of the dispute can work to utilise social pressures on uncooperative parties.

¹⁴⁴ Organization of American States, Inter-American Commission on Human Rights, Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia (General Secretariat Organization of American States, 2007), available at: <http://www.cidh.org/pdf%20files/bolivia.07.eng.pdf>

¹⁴⁵ Barendrecht M., van Dijk M., Gramatikov M., Monster J., Porter R. and Verdonschot J.H., Microjustice in Five Developing Countries: Opportunities for Growing Justice Bottom Up, Action Research Oxfam Novib/Tisco with the cooperation of Ain O Salish Kendra (Bangladesh); CEWLA (Egypt); Haguruka (Rwanda); Praxis (Azerbaijan); Deme So (Mali), (2010); Djankov S. et al., "Courts" *Quarterly Journal of Economics* 118.2 (2003): 453-517

¹⁴⁶ Fafchamps, M. and Lund S. "Risk-sharing networks in rural Philippines." *Journal of Development Economics* 71 (2003), pp.261-287; Ouchi, W. G. "Markets, Bureaucracies, and Clans" *Administrative Science Quarterly* (1980). 129-141; Deininger, K. W. "Land Policies for Growth and Poverty Reduction", A World Bank Publication (2003)

¹⁴⁷ Lind, E. A., & Tyler, T. R. *The Social Psychology of Procedural Justice*. New York: Plenum Pub Corp. (1988); Thibaut, J., & Walker, L. *Procedural justice: A psychological analysis*. Hillsdale, NJ.: Erlbaum (1975)

This is well demonstrated by the many television shows that make producers of consumer goods and services comply with reasonable standards for products and fair compensation, but also by the many ombudsman procedures around the world and more recently eBay's conflict resolution centre, where publication of the dispute puts off potential buyers, pressuring uncooperative traders to comply with decisions.

Access to justice in the full meaning of access to a meeting place, good dispute resolution skills, norms which are concrete and easy to apply, a skilled and neutral third party with the authority and resources to find and implement a solution and enough pressure to comply; that is what is needed. Having this all in one procedure is still a rare luxury around the world.

Getting access to justice means improvement on all those aspects. Analysing weaknesses and strengths of justice providers' concrete practices is helpful to diagnose what is going well and what could be better, but it can also support evaluative comparison between practices that are employed by different actors in different localities.

3.4 Towards an Epidemiology of Justiciable Problems

As we have seen in section 3.2, there are clear patterns in justiciable problems across the world. These patterns can be explained by the way human beings cooperate. They form lasting relationships such as families, communities, employment and land use, in which they invest heavily. They also enter into arms length transactions, when they buy goods and services or borrow money. From those governing them, they expect security and appropriate services, in return for taxes and a cooperative attitude towards governance.

Classification: Diagnosing Problems and Comparing Solutions

Similar patterns are likely to be present when people seek solutions for these problems. This suggests that it may be helpful and possible to develop a classification of justiciable problems, that can be used in many different places around the world. The descriptions could fit issues such as theft of a car, relationship breakdown with domestic violence or government officials asking for favours. They would not be new legal definitions, but just descriptions of problems as they are experienced by the persons that take action.

To contribute to solving the most common problems that so many people around world encounter in their life time and to develop an agenda for resolving the most common legal needs in an affordable and effective manner, we still need to know more. A clear systematic analysis of the occurrence of categories of conflicts, their impacts and used approaches to resolve them, can help a great deal to progress on the development of better evidence based solutions.

Towards classification

Legal needs surveys already contain shortlists of problems that raised legal issues. Because respondents could mention additional problems, these surveys have rendered overviews of the most common problems for which people tend to address the legal system. The following list gives an impression:

- Divorce and similar family relationship breakdown (child support, other consequences of divorce; with domestic violence and absence of the husband as complicating/aggravating circumstances)
- Wills and inheritance issues (determining shares, allocating assets)
- Termination of employment and employment conditions (severance payments, notice periods, pay issues, work safety)
- Neighbour problems (nuisance, building issues, border issues, neighbour violence)
- Use of land and housing (tenure protection, maintenance, rent)
- Personal injury (accidents, allocation of responsibility, compensation)
- Consumer problems with the qualities of goods and services (informed consent, product information, defective products and services, repair, replacement, compensation)
- Property rights problems (takings for general interests, compensation)
- Debt collection problems (delivery on credit, payments, insolvency)
- Social security benefits (determination, conditions)
- Complaints about government action (permits, documents)
- Searches (and comparable police activities)
- Detention (defence options, treatment in detention)

Classification will not be easy, because a justiciable event is closely associated with a need for remedies. A victim of an accident usually wants recognition, allocation of responsibility and compensation of damage. So is the problem the accident or the lack of compensation? But this is not unlike other areas of services to the public, such as health care, where a person suffering from a disease is also hoping that the pain will go away, that the disability disappears and that the risks of recurrence of the illness are minimized.

Learning from ISD and DSM

Classifying problems has proven to be very useful and possible in these other fields. The most common medical problems are pigeonholed by the World Health Organization in such a way that their occurrence can easily be compared across borders. The International Statistical Classification of Diseases and Related Health Problems (ISD) contains a classification of more than 12.000 medical problems. For mental health problems, the Diagnostic and Statistical Manual of Mental Disorders (DSM) has been classifying disorders since 1952 and international experts are now working on the 5th edition, due to appear in 2013. Social problems can perhaps not be equated to physical diseases, yet the development of a transparent classification of common problems, following examples from the medical sector such as the DSM standard classification, could make the commonalities and difference between justice problems in different localities transparent.

This type of analysis could structure the complex multiple realities of injustice into a framework in which we can test and seek new practical justice solutions. There is no medicine that promises health, or one pill that cures sickness. Yet, precise data on problems, their occurrence and factors that impact on their effect and social costs, can help to make a meaningful diagnoses and possible remedies. It needs little explanation that it is easier to think about a practical solution to an accurately defined issue than on a broad category such as injustice, unhappiness, oppression or violence. Perhaps a classification will never be perfect, neither in health care this will ever be achieved, but it may give us informed scope to trial new solutions, experiment and work towards better evidence of what is likely to work in practice.

Classification beyond individual problems?

A next, probably much more difficult step could be to identify problems for which people tend to take “collective action.” Many issues of governance are brought forward by groups of people who have similar grievances, for which some kind of representation is organized. Members of parliament, ombudsmen, trade unions, consumer organizations and business interests all need forums where they can ask for accountability on behalf of their constituents. Another direction in which the list could be extended, is the accountability issues in and around the political system. Party financing is an obvious candidate. Although it may be controversial, accountability of the press for the quality of their reporting is a serious issue as well. For courts, some kind of accountability for the way they perform their tasks is also needed. The publications by Wikileaks, and the reactions to it, suggest there may be an accountability gap for foreign relations and diplomacy.

Epidemiology: How many issues to solve?

On the basis of such a classification, it is possible to develop an “epidemiology” of legal problems that need a cure. Starting from justiciable problems of individuals, the list can be extended to common problems faced by owners of businesses. The practice of law firms and commercial courts gives a first indication of such problems: conflicts over supply of goods and services, conflicts in long term relationships (distribution, partnerships, shareholder conflict), intellectual property issues and so on.

As is the case for the health care sector, the incidence of problems would in itself be a first indication of the quality of the rule of law in a given country. Prevention of theft, sexual violence, personal injury and corruption is certainly a goal of any legal system, and lowering the prevalence of such problems thus a good thing. In some areas, however, the number of legal problems may not be so much of an issue. Divorces, terminations of employment and conflicts between owners of businesses are probably inevitable. The challenge is to deal with them in an effective way. Just like diseases have to be treated so that health is restored, legal problems need to be resolved by well functioning mechanisms for accountability.

Severity: What is the burden of injustice?

Another challenge is to find a measure for severity. Currently, legal needs surveys ask about the impact that a problem has had on an individual’s life. Asking about the degree to which a problem occupies the parties gives a good idea of its severity and impact in a particular situation. The impact of a particular problem or problem type can then be established. A similar problem is addressed by the healthcare sector.

The WHO developed a very effective formula to calculate the burden of disease based on a life-time of research. This allowed them to compare the burdens of different diseases. The burden of disease is measured in a unit called ‘Disability Adjusted Life Years’ (DALY). This measure expresses the loss of healthy life years due to early mortality and disability caused by a disease. (WHO updated 2010) The strength of this way of calculating in the burden of all types of diseases in this one unit, is that it allows comparison and can hence inform the debate what policy intervention will have the most health gain as an outcome. What healthcare investments will yield the best results?

Such a clear and analytic unit of analysis as DALY’s may at this stage still be out of reach to measure the burden of conflict on societies. As shown above, we are still in the early stages of gathering data on the basic symptoms of conflicts, such as occurrence and social costs in terms of time, stress and money. However, the more facts we know, and better we get at making evidence based classifications, the more likely it will be that we can make the informed interventions that will impact on this burden. A sharper focus on facts will not only increase the quality of the debate, but it will also help us understand how to get more justice for a dollar.

3.5 Summary

In many countries, there is a substantial access to justice gap. Whereas 6% of people taking no action about a serious justiciable problem could be acceptable, in some countries this is up to 20 or 30%, indicating a clear lack of legal empowerment. Comparative research suggests that it is possible to resolve 70 or probably even 75% of the legal problems through settlement or adjudication. Some countries only reach 40 or 50%. An unknown proportion of outcomes and processes is rated low on satisfaction, fairness and justice, whereas experiences in other countries show that for similar problems higher ratings are possible.

Access to justice is not equal to access to lawyers or to judges: it is mostly a matter of creating fair settlements in a process that has been called trilateral governance. People use many different helpers and sources of information when they seek access to justice. This is understandable, because this process requires a mix of incentives, skills, knowledge about norms and decision making capacity that can be delivered by many different people in different roles, and even by technologies as we will see in the next chapter.

A court or neutral panel that can take a decision within a few weeks or months against costs affordable for the plaintiff is a major incentive to settle in a fair way. Mediation is no real alternative, however. It only creates fair settlements if there is a credible threat of neutral "adjudication".

The best practices for increasing the probability of a fair settlement are developing rapidly. They can be further improved and grow into evidence based approaches. For each common type of problem, terms of reference can be developed in order to focus this learning process.

4. What Makes it Hard To Deliver Justice



As we have seen in Chapter 3, only a small number of justiciable problems are solved through direct interventions from the state justice system. Most legal information, assistance with settlement negotiations and even most third party interventions are delivered by non-state actors. Hence, there is something as a “market for justice”. Friends, family members, publishers specialized in legal information, commercial websites, professional lawyers, trade unions, consumer organizations and legal expenses insurers deliver the bulk of services to people seeking access to justice. Jointly, they provide a place for the parties to meet, a forum in which they can talk, assistance with dividing assets or determining money payments, making decisions, and methods for the stabilization of the relationship. The one aspect in which governmental systems usually remain distinct from traditional forms is their monopoly on violence as a means to enforce sanctions.

On the other hand, providing access to courts and protecting property rights is seen as a core task of the state. The same is true for legislation: setting the rules of private and criminal law that determine a framework for resolving conflicts between citizens. Governments also tend to subsidize legal aid, at least for the most vulnerable people, such as those that are detained. Governments spend substantial amounts of money on this legal infrastructure.

Civil society has a role as well. NGO’s work on legal information and legal aid in developing countries. They play a major role in ensuring compliance with human rights, children’s rights, women’s rights, labour rights and environmental regulation.

People do not depend primarily on the state for obtaining fair outcomes. Every task of courts and legislators can be performed both by public as well as private actors. That is good news. But it is by no means true that the demand for fair solutions in the most urgent cases will be fulfilled by the community and/or non-state actors. Although there is a strong demand for more justice, there is still an access to justice gap.

So why is there no assistance available to help a woman needing child support to get it from the father of her children? Why is there no public or private third party that will help a person to obtain fair compensation if his land is going to be used for building or mining? If many people seek this kind of justice, we would expect that others would start to offer advice on how to negotiate it, we would expect norms to be formed, we would expect accountability to be offered by panels who try to deliver fair solutions, and we would expect people to offer services that enforce solutions.

The question we must ask is: what makes it difficult for lawyers, judges and other people motivated to provide access to justice to provide these services?

4.1 Outdated Regulation of Services

A first barrier to offering services that meet the justice needs may be that it is just not allowed. Legal services are heavily regulated. In many countries, legal advice can only be supplied for a fee by qualified lawyers. Access to courts is even more restrained, because many countries have rules that only allow lawyers as assistants of the parties in courts, or even make the use of lawyer a condition of being allowed to participate in litigation at all.

It is rather obvious that this regulation is a barrier for those wanting to offer legal services, and even more so if they want to do this in innovative ways. They risk breaking the law if they want to sell legal advice via apps on mobile phones, start IT platforms with legal information, specialize in helping to negotiate land conflicts, want to work in many countries, or see an opportunity to scale up their organization by raising capital from the stock market. But before this regulation of the legal profession is condemned, we have to see what are the ideas behind it and how it has developed.

Information Asymmetry

One of the basic ideas behind regulation of legal services is that clients have to be protected. In the language of economics, there is an information asymmetry between clients and lawyers. According to this line of thought, clients lack the knowledge to be able to decide whether a lawyer delivers services of sufficient quality.¹⁴⁸ Clients will therefore not trust their advisers.

They have to be protected against this asymmetric information, so the legal profession has to be regulated and monitored. Only qualified lawyers, their actions being monitored by the state, should be able to give legal advice and assist people in courts.¹⁴⁹ If everybody would be allowed to provide legal advice and to help clients in courts, it would be hard for clients to find the good quality providers. The lawyers having invested in really good skills would be driven from the market by competitors pretending to give good value legal advice.

But more recent studies question whether this restrictive regulation tackles the right problems and uses the best prescriptions. Regulation of the market for legal advice and assistance often gets the form of self-regulation by lawyers. Many types of regulation of legal services have been found to increase the costs of legal services without substantially benefiting the clients.¹⁵⁰

If only people with a legal degree can operate in this market, procedures for settling disputes tend to become more formalistic and bureaucratic and less open to innovation. If access to the market is restricted and costly, many clients cannot afford assistance by a legal professional. This leads to a call for legal aid to be subsidized by governments and NGO's. However, throughout the world governments are cutting subsidies for legal aid, and NGOs are unable to scaling up their activities and take up the slack.

Information asymmetry between customer and supplier is not the only problem. This market is unique in the way the lawyer at one side can create work for the lawyer on the other side, leading to what has been described and modelled as an arms race, a contest, a war of attrition and a lawyer's paradise of spiralling costs.¹⁵¹

Deregulation of legal services

There is an emerging consensus among many economists and scholars that the market for legal services should be deregulated. Widening the scope of suppliers has become a standard recommendation in reports on access to justice.¹⁵² In addition to qualified lawyers, also legal expenses insurers, paralegals, social workers, trade unions, consumer organizations, and means for self-help should be made available to people experiencing legal problems and the people in their direct environment that help them (friends, relatives, employers, etc.).

Quality matters and clients have insufficient information to judge it, but the best way forward is to give clients more information about what they can expect from the services (outcomes, process and even costs). Most economists now advise against restricting access to the market for legal services.

¹⁴⁸ Stephen, F.H. and Love, J.H. Regulation of the Legal Profession, in: Encyclopedia of Law and Economics, 2000, Chapter 5860. Van den Bergh, R. Towards Better Regulation of the Legal Professions in the European Union, RILE research Paper December 2007.

¹⁴⁹ Stephen and Love, see previous footnote.

¹⁵⁰ Hadfield, G. K. "The Price of Law: How the Market for Lawyers Distorts the Justice System." *Michigan Law Review* 98(4): 953-1006 (2000); "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets", *Stanford Law Review*, Vol.60:100-146 (2008)

¹⁵¹ Tullock, G. (1980). *Trials on Trial: The Pure Theory of Legal Procedure*. New York, Columbia University Press. Cabrillo, F. and S. Fitzpatrick (2008), *The Economics of Courts and Litigation*, Cheltenham, UK, Edward Elgar.

¹⁵² Parker C. *Just Lawyers: Regulation and Access to Justice*, Oxford University Press (1999); UNDP, Commission for the Legal empowerment of the Poor, "Making the Law Work for Everyone", Working Group Reports Vol.II (2008), Chapter 1.

They argue that rules allowing only trained lawyers to give legal advice or to assist clients in court proceedings are not necessary to sustain the quality of legal services and have many side effects, such as scarcer supply, higher prices and lack of innovation.¹⁵³ According to one study, in OECD countries, the legal services market is the most heavily regulated one of all professional services.¹⁵⁴ For developing countries, this is often also true.¹⁵⁵

Barriers to innovation in delivering basic justice care: experiences of the members of the International Association of Legal Protection Insurance (RIAD)

"In Europe, and increasingly in non-European countries, legal protection insurers play a substantial role in providing basic justice care. They show how access to justice can be increased when bottom up innovations take place. A critical factor in the success of legal aid insurances was opening the market for legal services. Through little steps like lifting the statutory requirement to be represented by a lawyer in court or for certain types of claims. Or allowing insurers to give legal advice or represent clients in out-of-court settlements so they could develop a broader range of services. In countries where regulations were relaxed, legal aid insurers manage to reach settlement rates between 50-70% (and in The Netherlands even 90%) without referring the case to a lawyer or going to court (and thus reducing costs for clients and society).

As for-profit organizations, they took a leading role in showing how costs for legal services can be reduced through:

- standardization and economies of scale
- specialization and accrued expertise (including dispute resolution skills)
- pooling risks
- early interventions and settlements

The costs for entering the market of legal services for the lower incomes remain very high in most countries. Legal aid insurers are subjected to the regulations and professional requirements of both insurers and legal service providers. And even though practice shows that there are many opportunities for differentiation (different quality levels for different legal problems), many national legal frameworks and legal services regulations still indicate that only lawyers can give legal advice. Access to justice is understood as access to a lawyer or access to courts with even in civil cases 'due process' entailing the right to counsel. Laws are complex. People need somebody for 'translating the linguistic and contextual complexities of the law' to understand its real meaning and value or to apply it to a life situation. This creates uncertainty, which provides a perfect background to call for restrictions of the legal services market and to argue for strengthening lawyers' positions.

RIAD acknowledges the need for quality control and at the same time sees how the current focus on regulating the market of legal services has unintended side effects. Next to prices remaining high due to limited competition and for entering the market is associated with high costs, laws remain highly complex. A combination of radically simplifying procedures, implementing private quality regulation, and abolishing the representation requirement enables new types of legal services organizations to unfold their full potential."

Antje Fedderke, RIAD

¹⁵³ Terry L.S., *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"* (2006); Hadfield (2008) footnote 150; Decker C. & Yarrow G. "Understanding the Economic Rationale for Legal Services Regulation", Regulatory Policy Institute, Report for the Legal Services Board (2010); Winston C. et al, *First Thing We Do, Let's Deregulate All the Lawyers*, R.R. Donnelley, Virginia (2012); Barton B., "Economists on Deregulation of the American Legal Profession: Praise and Critique", *Michigan State Law Review* (2011)

¹⁵⁴ Conway P. & Nicoletti G., "Product Market Regulation in the Non-Manufacturing Sectors of OECD Countries: Measurement and Highlights," OECD Economics Department Working Papers 530, OECD Publishing (2006)

¹⁵⁵ UNDP, Commission for the Legal empowerment of the Poor, "Making the Law Work for Everyone", Working Group Reports Vol.II (2008), Chapter 1.

There have also been examples of a 'mixed' approach, whereby the market for provision of legal services is opened up to a greater number of actors, while maintaining some of the elements of formal regulation. A mixed approach has the potential to address a lack of access to justice, while maintaining some monitoring and control of standards. In this way, it may address problems such as the ones experienced in Latin America where a law degree is relatively easy to obtain but regulation sparse.

Mixed Approaches: Gradual Deregulation

"On the 1st of May, 2007, the Access to Justice Act, 2006, passed into law in Ontario, Canada.¹⁵⁶ This Act entrusted the Law Society of Upper Canada with the oversight of paralegals in Ontario. Subsequently items such as errors and omissions insurance were made mandatory, and paralegal training programmes in colleges must now be approved. The community legal clinic system, which has employed community legal workers for 40 years, is currently exempted from these licensing requirements.

The regulation of paralegals was introduced to both increase access to justice, whilst also addressing historical problems with quality of the service provided by paralegals. It has also reduced the burden on lawyers to supervise Community Legal Workers, as they are now accountable individually to the law society, leading to greater efficiency.

The benefits of such a mixed system are still to be quantified through thorough research, but such an initiative may be an approach that can bridge the disparate aims of increasing access to justice, while maintaining standards and oversight of practices."

Michele Leering, Executive Director/Lawyer Community Advocacy & Legal Centre Belleville, Ontario

Mixed approaches to regulation can easily be a barrier to entry and innovation, though. New delivery models such as web-based advice, telephone help desks, online litigation support systems or legal expenses insurance with in-house lawyers will still have to struggle to be allowed to deliver their services. They need to ask for a change in the regulation, which can take time and may be opposed by incumbents on the market.

4.2 Offering Two Clients with Opposing Interests One Service Does Not Work

If deregulation would take place, the supplier of innovative legal services would still have to find an answer to other problems. The first and foremost problem is well known, but it is much more fundamental than designers of legal systems and other dispute systems tend to assume. Many mediators and arbitrators who set up great new services for assisting clients with their disputes have experienced it and lost a lot of money.

The key point is that voluntary third party dispute resolution is difficult to buy and sell, because cooperation between two parties is needed. Once in a conflict, agreeing on a process is very difficult, almost as difficult as settling the conflict itself.¹⁵⁷ Defendants are unlikely to submit voluntarily to a process and the decision of any third party, especially not if it is proposed by the other side.

¹⁵⁶ Legislative Assembly of Ontario, Bill 14 Access to Justice Act (2006), available at: www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=284

¹⁵⁷ Barendrecht, J.M., & de Vries, B.R. "Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?" *Cardozo Journal of Conflict Resolution*, 7(1) (2005), pp. 83-118

In their celebrated paper on the economics of adjudication, William Landes and Richard Posner have called this the submission problem.¹⁵⁸ If people cannot settle, it is also highly unlikely that they will agree on a process for solving the dispute. In a dispute, each person is likely to make his own moves, guided by its perceived best interests. Because of the submission problem, it does not work to offer people arbitration, mediation and other ADR, if both parties have to agree to it first.

That has nothing to do with the value of these services. The techniques and the quality of these innovative mediation and arbitration services is widely appreciated. But clients from two sides simply do not agree to buy them, so they remain small business in the legal services industry and have little impact on the delivery of justice to individuals. Legal needs surveys show only a minority of around 3% of disputes is solved by official mediation, based on a contract where the two parties agree to "submit" to the mediator.

Most of these cases are referred to a mediator by a judge or by another influential third party, only a very small minority of disputants go to a mediator together, although there is some tendency to do this in long-term relationships, where a clear incentive for cooperation exists that can overcome the submission problem (divorce cases where children are involved, conflicts between employers and employees, or between business partners). Research into arbitration agreements shows similar very low rates of usage.¹⁵⁹

"In ad hoc arbitration, procedures will have to be agreed to by the parties and the arbitrator. This needs cooperation between the parties. When a dispute is in existence, it is difficult to expect such cooperation. In institutional arbitration, the rules are already there. There is no need to worry about formulating rules or spend time on making rules."

Law Commission Of India, Need for Justice-dispensation through ADR etc, Report No. 222, April 2009

How To Overcome The Submission Problem?

Experience in developed countries also shows that ADR can be more attractive once there is an effective back up in the form of letting the case be decided without the cooperation of the defendant. If a third party will decide the issue within a few weeks and without high additional costs, it makes sense for both parties to settle. It then also makes sense for them to use the help of a mediator for this, so they can work out a better way of communication and a better solution than an adjudicator can do.

The submission problem is the reason we need institutionalized courts in the first place. Without this problem, adjudication could easily be offered without the need of state-actor intervention.¹⁶⁰ What is needed to overcome the submission problem, is incentives to cooperate on both parties. It is interesting to note how courts do this. If the plaintiff issues a complaint, the courts force defendants to cooperate by telling them they will give a judgment anyhow, even if the defendant does not submit its point of view. If the defendant does not show up, there will still be an enforceable judgment (a judgment by default).

Mandatory mediation where a plaintiff or a defendant must try it before appear in court can work as well. But it has only been introduced in a few countries and for a limited number of disputes, mainly in the field of family law.

¹⁵⁸ Landes W.M & Posner R.A. "Adjudication as a Private Good", Journal of Legal Studies 235 (1979)

¹⁵⁹ Eisenberg, T. and G. P. Miller (2006). The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts, research paper; Drahozal C.R. "Why Do Businesses Use (or Not Use) Arbitration Clauses?" *Ohio St. J. on Disp. Resol.* (2010)

¹⁶⁰ See footnote 158

Other actors than courts can overcome the submission problem as well. Basically, what is needed is a family member, a government person or an informal leader who is prepared to intervene actively in a neutral manner and sufficient reasons for the defendant to listen to this person and cooperate.

4.3 Insufficient Incentives on Courts, Uncertain Tasks

Assuming that the supplier of innovative legal services has found a way to avoid the submission problem, there is a next issue to address. Once a neutral court like institution has been set up, cases come in and the defendant has been convinced to cooperate, it is not so easy to organize the dispute resolution process effectively.

The difficulties of organizing effective courts services are a key issue in the rule of law literature, and empirical data show the amount of court delay, the high costs of access, and many other barriers. For many common types of problems, there is clear demand for adjudication services, but not sufficient supply.

Employment tribunals may be well organized in some countries, or for some groups of employees (with official contracts, for trade union members), but not in other countries or for other groups (those employed informally). Family courts, or other specialized facilities for divorce and inheritance disputes, exist in many countries. In Indonesia, they are fairly accessible and effective, but a comparative study in Azerbaijan, Bangladesh, Egypt, Mali and Rwanda found that NGO's have developed quite effective services for advice and assistance in family cases, but if the defendant cannot be convinced to cooperate, problems often remain unsolved because obtaining a court decision is extremely difficult and time consuming.¹⁶¹ There are clear indications that this has a negative impact on the bargaining position of clients. In Egypt and Bangladesh informants reported that it is common knowledge among men that it will take their ex-spouses up to four years and a lot of money and effort to obtain a court decision on child support. Lawyers working for NGO's report that they feel they have to take offers from the men, even if they are unreasonably low, because going to court is no attractive alternative, or sometimes even not seen as a realistic one. We can expect this impact on bargaining position to be much bigger in arms length transactions outside the scope of the family between land owners and tenants, employers and employees, or citizens and suppliers of government services.

On the other hand, the negotiation and bargaining game changes if a judge is available who is prepared to intervene quickly and actively searches for solutions. In the shadow of such a form of adjudication, that is reportedly available in some Latin American family courts and in Brazilian employment courts, fair settlements become more likely.¹⁶²

Economic analysis of the incentives on courts has shown that the main reason for this lack of effectiveness is not a lack of funds or trained personnel. The consensus is that judges have insufficient incentives to assist the users of courts in such a way that their problems are solved effectively and timely at low costs.¹⁶³ Although many judges are highly motivated to do their job well, and genuinely want to help people, the system may not reward courts for doing so.

Courts have little reasons to improve their services. Judges are trained to be independent, which is extremely important but also tantamount to being immune to outside incentives. Moreover, judges are responsive to appeals systems which concentrate on quality of legal reasoning and observance of procedural rules.

¹⁶¹ See Section 3.3.

¹⁶² Written communication from Linn Hammergren, expert on judicial reform in Latin America.

¹⁶³ Botero, J., R. La Porta, F. Lopez-de-Silanes, A. Shleifer and A. Volokh, "Judicial Reform", *World Bank Research Observer* 18(1) (2003), Hamnergren L. "Envisioning Reform. Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America" (2007); Cabrillo, F. and Fitzpatrick S. *The Economics of Courts and Litigation*, Cheltenham, UK, Edward Elgar Publishing (2008)

It is considered not the task of appeals courts to monitor whether judges are effective in settling cases, find appropriate solutions, decide their cases quickly or try to do so at low costs for the parties. Thus, unless other incentives are created, the lower courts are likely to focus on applying the law correctly since this is what appeal courts do look at. But the attitude that judges are there to apply the law can be a barrier to developing the best possible processes and solutions for legal problems.

The responsibility for the quality of the procedures is not with judges, but rests with parliament that enacts a code of civil procedure, or with a centralized organization. Updating these rules can be a very difficult process, especially in civil law countries, so new good practices are unlikely to be taken up fast. Finally, funding models are often not linked to the level of services courts give to the public.¹⁶⁴

An additional problem is that there is uncertainty about the role of courts. Seen from the perspective of a complainant, the formal court of justice is mostly just another third party that may help to solve the problem. Most lawyers will file a claim in order to put pressure on negotiations; most people go to court because other options to obtain a remedy are less attractive. Research suggests that litigants and lawyers increasingly expect from judges that they actively manage disputes, de-escalate and work towards settlement, or even a good solution given the interests of all stakeholders. In specialized family courts, employment tribunals and so-called problem solving courts for common crime, these tendencies are much stronger (facilitated by laws that enable courts to focus on interests of children, parents or other people involved).

¹⁶⁴ See footnote above.

The Changing Role of Courts

The court hearing is now the focal point of civil procedures, with high expectations from all participants. Litigants want voice and procedural justice. The hearing is an opportunity for settlement. But it is also a venue for informing the judge about what happened and for debate about the legal merits. The Dutch council for the judiciary funded a number of projects in which 250 hearings have been monitored. Did the parties receive procedural justice, sufficient information and interpersonal justice (respect)? Who talked during the hearing for how long? How did the participants communicate? What, according to each participant, frustrates a good hearing? What are tools to make it go smoothly? Judges also experimented with different ways to manage the hearing.

Cooperation or a battlefield?

Respondents expect respect, voice, neutrality and a judge who listens to them and shows being involved. They are reasonably satisfied with the procedural justice they get. During the hearing, 32% of the cases are settled. Sometimes, participants feel pressed to do so. The results strongly suggest that this type of civil litigation is not seen as a battlefield. Even from their opponents, participants expect a positive attitude, respect, willingness to settle and submitting evidence in time. They see unnecessary accusations and qualifications as disturbances.

Obstacles

Disrespectful (non-) verbal communication was most frequently mentioned as disturbing behaviour. On average, each disturbance is associated with a 12 minutes longer hearing. Judges tend to react to disturbances by structuring the debate, rather than active listening or asking questions. Judges are often dissatisfied with the documents submitted to them. They tend to be irritated if a high number of ancillary issues and (weak) legal points are being brought up. Timing issues are another source of dissatisfaction.

Suggestions for improvement

The project results strongly suggest that hearings will be experienced as more fair and more effective if courts make clear what participants can expect. Guidelines or Q and A forms may help parties and lawyers to submit the most useful information in an organized way. Process descriptions or a video may work to give an impression of what will happen during the hearing. The practices for facilitating fair settlements can be improved as well.

J. van der Linden & M. Barendrecht, Zitten, luisteren en schikken: Rechtvaardigheid en doelbereik bij de comparitie na antwoord, Research Memoranda, nr. 5-2008, Raad voor de rechtspraak, november 2008.

M. Barendrecht, S. van Gulijk, M. Gramatikov, P. Sluijter, De goede procesorde in beeld, Research Memoranda, nummer 1-2011, Raad voor de rechtspraak, juli 2011

On the other hand, there is the view that courts are providers of an authoritative interpretation of the law. If you go to a court, you may not get justice, but a better understanding of what the law says for your particular case. Appeals systems focusing on legal review and the culture of legal scholarship may support this perspective. In this view, judges are not trained in social work, economics or skills of dispute resolution. They should leave that to others. If judges work primarily for the law, their loyalty will not be so much towards clients, but to the legal system that is exemplified by appeals, supreme courts and legal treatises. Deciding cases rapidly is less of a priority (the law can wait a few more weeks) and whether the decision actually provides a workable outcome is not their responsibility. For the clients, these courts act as a kind of helpdesk where you can learn about the application of the law in your particular case.

This perspective still leaves a lot to imagination. There is also that other task of courts, providing an enforceable decision. Courts do not only provide information about the law, but intervene heavily in people's lives and in their relationships. These interventions can easily be criticized if they do not solve the problem in a satisfactory way. So there is a lot of pressure on judges to work on that. And the rules of the law often give them discretion to do that. But it is not what they are held accountable for by appeals courts.

In sum: courts have insufficient incentives and judges receive confusing messages about what they should do. They are at the centre of the dispute system, but it is not easy to be a good judge, to organize a court full of good judges and perhaps even more difficult to be client of a judge.

4.4 A Mix of Private and Public Benefits

Another problem courts and similar adjudication services face is that they provide both private goods and public goods.¹⁶⁵ The solution of an individual dispute is a service that benefits the parties. In principle, it should therefore be paid by them, unless there is a specific reason to offer this service free of charge or at a subsidized rate. But effective courts also provide the threat of adjudication so that other parties can settle their issues. As legal needs surveys show, for each case decided by a court, there may be 5 to 10 cases that settle in the shadow of a court decision. This benefit of having an accessible court as an exit option from negotiations is really valuable. Just by being available, courts create access to justice. But it is hard to make the beneficiaries pay for this service. As an innovative provider of justice services, why would you do something for which you are not paid?

A good financing model for adjudication

Models for financing and budgeting public services are essential, as the debates about the health sector show. A good financing model for courts needs to distinguish between:

- solving individual disputes (helping to settle and deciding issues)
- providing the threat of adjudication (being available)
- providing precedents/guidelines for future cases (useful precedents)

Preferably, the process of solving an individual dispute is paid by the users of the courts. Such costs can be split over each of the parties in accordance with their capabilities to prevent and resolve the issue. A subsidy may be necessary, though. For the availability of the option of calling in the court as a back up in the negotiations, it is difficult to make the clients pay, although an initial filing fee setting in motion a procedure may do this job. Decisions with useful guidelines for settling future cases have benefits for the future users of the dispute system and should be paid by them. But this is even harder to achieve. So NGO's, voluntary contributions out of charity or the state may have to pick up this bill.

Moreover, a financing model has to take into account:

- fixed and variable costs for financing personnel, overhead costs of courts, etc.
- the amount of work to be done by the courts, stages (pay as you go systems)
- costs of accessing courts for citizens, including legal costs, expertise, time spent, etc.
- rules for cost shifting between the parties
- insurance possibilities, or other financing models.

¹⁶⁵ S. Shavell, The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement, International Review of Law and Economics 19:99 -115, 1999.

Courts also provide precedents, which may contain information that is useful for people with a similar dispute. A good financing model for courts therefore needs to distinguish between solving individual disputes (preferably to be paid by the users of the courts), providing the threat of adjudication and providing precedents (public goods, to be paid by the state or by NGO's if there is no way to charge clients settling claims or using this information for this). Once such a good financing model is present, the courts may start to provide more valuable precedents, or new entrants on the dispute resolution market may see an opportunity here.

4.5 Making Money with Legal Information is Hard

Another need of people with a legal problem is legal information. The internet, and other modern communication techniques, have reduced the costs of delivering information enormously. So why do innovative suppliers of legal services not develop websites where everything can be found that an employee, a divorcee or a tenant needs to negotiate a good outcome?

Public Goods and Credence Goods

The newer studies also show that it is not easy to make a living by delivering useful and understandable legal information. As we will see in Section 5.2, people in a dispute need skills to cope with conflict and to negotiate. Besides information about their basic rights, they need information about what a reasonable outcome practically looks like, so they know what to ask and can bring realism to their expectations. Preferably this is information about how other people solved similar problems: legal criteria, rules of thumb. What they also need is information about how to bring a case to an adjudicator if necessary.

Information is difficult to sell, however, so the private initiatives for developing the information needed are extremely scarce. Newspapers, record companies and websites all over the world are struggling with their business models. Economists stress that information is non-excludable and easy to copy.

Once information is given to one client, other clients can get the music, the recipe or the newspaper article as well. It is also credence good. It is difficult to get an idea about the quality of the information before you get it delivered. Therefore clients are not willing to pay much for it upfront because of their fear to get information that is not so useful after all.¹⁶⁶

The result may be that clients would be willing to pay a lot for information that really helps them to settle their issues. But they cannot buy this information because nobody wants to invest in the production costs. NGOs also do not do this on a large scale. And the state primarily limits itself to developing technical legal information, which is difficult for people to understand, let alone use and apply.

¹⁶⁶ Varian, H. R. "Markets for information goods", University of California, Berkley (1998); Stiglitz, J. E. "Knowledge as a global public good." *Global public goods* 1(9): 308-326 (1999)

Models for low cost legal advice

Since 1997, LawGuru has provided an interface that allows its visitors to:

- submit free legal questions to its lawyer members (currently over 6,000 active law firms); and
- search its existing database that houses over 700,000 lawyer-provided answers to more than 500,000 questions.

For free questions, the process is quite simple: visitors submit a legal question via an online interface, along with their email and postal code. The question is then distributed to the lawyers based in that jurisdiction and who practice in that specific area of law. Once answered, the visitor is notified by email and provided a link to the answer. Lawyers can expect to make money from new clients close to them and in their field of expertise if they give valuable answers.

The market for legal information can be seen to adapt to these realities. Information is offered in the form of tailor made advice by lawyers, which makes it more useful, less easy to copy, but also much more expensive. Advice is often packaged with assistance in pursuing the case. Publishers of legal information offer access to large databases of laws, decisions of courts, articles by academics and their books. But they do not process this information to make it understandable and more useful for clients, because this would be an effort of which it is hard to recover the costs. There is some market for legal self-help books, but it is not very thriving, because rules and procedures can be different for each locality.

Other producers of legal information are legal academics, the courts (offering precedents that in some countries are organized in on-line databases) and legislative bodies. The people working here suffer from the same lack of incentives to invest in the production of useful legal information. Legal academics aim their books at law students, or at practitioners of law, not at users of legal information. Courts see precedents as a by-product of their regular work of solving cases, not as a product that has to directly fulfil the information needs of people with justiciable problems. Legislation is an interaction between civil servants at a ministry of justice and members of parliament. Whether laws are easy to understand and useful in the process of settling disputes is not a prominent criterion here. According to Kobayashi and Ribstein, law is almost always produced as a by-product of other activities, because it is hard to recoup part of the benefits of innovative laws.¹⁶⁷

So, as a public good, legal information is not designed to appropriately meet the legal information needs of the public. As a private good, legal information cannot be protected by intellectual property rights that make it interesting to invest in laws that serve the public in a better way.

4.6 Powerful Defendants

Another issue for a person wanting to do more to deliver access to justice is how to deal with powerful defendants. What can be done to help a poor tenant against a mighty landlord or a citizen against a local leader who is not prepared to move an inch?

Generally, people can mobilize quite some countervailing power. More eyes on the street are one of the best antidotes against crime. Information about low quality consumer goods, or badly staffed help desks, is widely shared on the internet. Therefore sellers of consumer products have incentives to solve complaints of their customers fairly and expeditiously.

¹⁶⁷ Kobayashi B.H. & Ribstein L.E. "Law as a byproduct: Theories of Private Law Production", Illinois Program in Law, Behavior and Social Science Paper No. LBSS11-27 (2011)

But there are limits to what private actors can achieve when it comes to compliance. Many husbands escape from their duties to pay child support, so enforcement by an official selling his assets may be necessary. Victims of theft and violence may be left without a remedy and these crimes may go unpunished as well. Whereas activist consumers can easily be recruited from a big pool of unsatisfied consumers, it is much more difficult to find people who rally behind the cause of a specific victim asking for compensation.

When a small sample of individuals in Bangladesh were asked, over a third reported that the main reason the problem was not solved, was because the other party had more power.¹⁶⁸ Undue influence by powerful defendants and corruption may even be a reason why no judgment is rendered at all. An informal tribunal in a village may be influenced by a local leader, or by the vested interests of the male population.¹⁶⁹

There is a limit to the courage and altruism that can be expected from any adjudicator, including a judge. History is full of stories where courts have become accomplices of regimes that abused their power. Access to justice against powerful defendants who do not want to cooperate is a major challenge for every legal system.

4.7 Scaling Up Legal Services and Civil Society Projects is Difficult

Throughout this report, we encountered many situations where civil society contributed to diminishing the access to justice gap. In Dhaka, Bangladesh, individuals, mainly women, queue daily outside the offices of Ain o Shalish Kendra (ASK) to receive free legal aid financed through donor funding to ASK. ASK offers the opportunity to have your problem solved independent of power imbalances, because it has good lawyers and psychologists trained as mediators, as well as a deep pocket to sponsor litigation if necessary. As a result of this ASK helped over 650 individuals through mediation, and 541 people with litigation in 2008.¹⁷⁰

In Dhaka, there are many similar NGO's. Depending on the number of lawyers and other competing services (and the prices they charge), many countries have such NGO's, often working for the most vulnerable groups, such as women, children, people who are detained or migrants from areas of war or from places with little opportunity to make a decent living. These NGO's are moving towards facilitator models (combining the functions of mediator lawyer and sometimes even adjudicator, hence, requiring far less people involved) where they solve problems in a more neutral way, pressing for negotiated solutions that are fair to all concerned (see Section 5.4). They are at the front end of developing good methods of solving disputes. They do a lot to distribute information about rights and how to make use of them. They help many people.

¹⁶⁸ Gramatikov, M. & Verdoschot J. H., "Legal needs of vulnerable people: A study in Azerbaijan, Mali, Rwanda, Egypt and Bangladesh" (2010)

¹⁶⁹ Wojkowska E. "Doing Justice: How Informal Justice Systems can Contribute", UNDP Dec. 2006

¹⁷⁰ Porter R., Verdoschot J.H., Barendrecht M. *Oxfam Novib/Tisco Microjustice Action Research ASK Bangladesh*, TISCO Working Paper Series on Civil Law and Conflict Resolution Systems (2010)

The Biggest Legal Aid NGO in the World

BRAC's Human Rights and Legal Aid Services (HRLS) Programme is dedicated to protecting and promoting human rights of the poor and marginalised through legal empowerment. It operates 537 Legal Aid Clinics in 61 of 64 districts across Bangladesh and is the largest NGO-led legal aid programme in the world. BRAC itself is one of the biggest NGO's in the world, serving people with microcredit and many other community services.

The programme's activities include staff training and capacity building, legal aid service provision via Legal Aid Clinics, an Alternative Dispute Resolution (ADR) mechanism, rescue operational support, counselling, and legal referrals. BRAC's 'Barefoot Lawyers' impart legal literacy and try to spur sustainable social change by raising awareness and informing people of their rights. They operate on a 3P model of 'Prevent-Protest-Protect' and are usually the initial contact points in their communities when human rights violations occur.

The program has provided legal education to 3.4 million women throughout Bangladesh. In 2009, out of a total of 22,629 complaints made, 13,493 have been resolved by Alternative Dispute Resolution. A total of 4,428 cases were filed in court in 2009 on behalf of poor and marginalized clients, 2,909 judgments were given in favour of BRAC clients (BRAC HRLS MIS Report 2009).¹⁷¹

Research found, however, that their operations tend to be rather small scale. This might be partly explained by the absence of an enabling environment. Many countries lack a regulatory framework that helps facilitators to develop sustainable services (for instance, many countries prohibit non-lawyers to charge a small fee for legal services or even prohibit the provision of legal services at all). Another bottleneck is the lack of coordination of funding. As a result, most of the financing of legal aid services is on a project basis, usually for two or three years, with specific targets for the number of people to be helped.¹⁷²

¹⁷¹ Islam S., "Legal Empowerment as a Pathway Out Of Poverty: Examining BRAC's rights strategy in tackling poverty" Ten Years of War against Poverty Conference Papers (2010)

¹⁷² See footnote 145

Legal Representation In Rwanda

“The following bottlenecks make it difficult to scale up legal aid:

- The absence of an enabling regulatory framework; Rwanda has not yet developed a comprehensive legal aid policy and no standard for quality assurance in service provision;
- Funding for legal aid is generally low, uncoordinated and ad hoc.
- The limited number of lawyers and the limited geographic reach and capacity of legal aid service providers; concentration of lawyers in Kigali has a serious impact;
- Limited awareness of available legal aid services by the communities;
- High cost of access to justice for the litigants (the indigent and vulnerable groups): The average cost of legal representation by a lawyer is Rwandan Francs 250,000 while the average income for litigants is 28,000 Rwandan Francs.
- Between 14 – 18 age groups, are the most represented simply because their legal representation is compulsory in criminal matters and subsidized to some extent by the government. Between 51 – 60 age group, they are also more represented because of their higher income and between 22 – 30 age group, they are the worst represented compared to other age groups because they are disadvantaged, with low income.
- Women and children benefit more than men from legal aid services because many organisations target them in their programmes.
- The rate of legal advice is lower in criminal and civil cases compared to administrative, social and commercial cases because of the first attempt of ADR on commercial, social and administrative cases.”

Andrews Kananga, Coordinator Rwanda Legal Aid Forum

Often, these NGO's do many projects for many different groups of people, depending on the opportunities offered by donors such as Oxfam, Open Society, the EU, USAid, Dfid and many, many others. Besides helping individuals to solve their dispute problems, they may have programs for public interest litigation and lobbying towards better legislation.

Access Across America: First Report of the Civil Justice Infrastructure Mapping Project

Rebecca L. Sandefur and Aaron Smyth conducted the first-ever state-by-state portrait of the services available to assist the U.S. public in accessing civil justice. They found a great diversity of programs and provision models, with very little coordination at either the state or the national level. Civil legal assistance is delivered in many different ways. The existing civil legal assistance infrastructure is, in effect, the output of many public-private partnerships, most of them on a small scale.

Publicly supported programs exist to provide assistance in accessing civil justice to a wide range of groups, including the low-income population, the elderly, American Indians, veterans, homeless people, people with disabilities, and people with HIV/AIDS. Some free services are offered to the general public. States exhibit a great diversity of models for delivering civil legal assistance and for connecting with eligible populations. Innovative means of connecting with clients and delivering services are becoming more wide-spread, including co-located services, hotlines, and various forms of court-based limited legal assistance. Funding for civil legal assistance comes from a wide range of public and private sources.

However, the NGO's do not yet have sustainable models for financing their operations in solving the problems of everyday life. They tend to offer their services for free to clients and cover the costs by attracting donor funding.

One of the possible draw-backs here is that they crowd out individuals and organizations that want to start legal services for people needing access to justice in a more entrepreneurial manner. As many other NGO's in developing countries, they face the dilemma between providing emergency relief, catering to immediate needs, for which it is easy to get funding, against achieving sustainable changes in the way access to justice is delivered.

4.8 Many Policies Did Not Work As Expected

If access to justice is described in terms of assisting the parties to negotiate, with the option of involving third parties, and we take into account the difficulties in the preceding sections, it also becomes clearer why some strategies to improve access to justice have failed to produce lasting results.

Training and More Resources for Courts

In the early days of law and development projects, training of lawyers and judges was one of, if not the, most frequently used strategies. The idea was that providing training in topics such as human rights and court management would lead to an increase in the quality of the judiciary. This increase in the quality of the judiciary was seen to be the vital step in providing access to justice. Without a high quality judiciary dispensing justice, there was nothing to provide access to. This approach was applied for many years, with little improvement in access to justice for the vast majority of the individuals who were hoped to be helped. Investing money and other resources in courts has had mixed results.

It is unclear, however, how better trained judges will provide more settlements, more useful criteria for dealing with issues, or lower cost and more timely court interventions based on the law. The effects of training on these outcomes is - at best - indirect, and - at worst - negative because extensive legal training of judges may make them more oriented towards applying the right rules and less focused on solving people's problems.

Several studies show that increasing budgets of courts and numbers of judges also does not improve their performance.¹⁷³ This is not so surprising. Policies strengthening the court infrastructure do not address the fundamental problem of incentives on third party adjudicators.

Of course the argument is not that courts are unimportant: third party adjudication is a very essential element of access to justice. But investments in courts should go hand in hand with organizational models that guarantee that the resources go to what the clients of courts need most. This may imply that incentives should stimulate adequate problem-solving rather than merely application of law.

Civil Legal Aid on An Individual Basis

Likewise, providing comprehensive, individual civil legal aid has not become the favourite solution.¹⁷⁴ Legal advice is certainly very valuable as a source of information, as assistance in negotiation processes and in mobilizing a court decision. But it does not make court procedures more accessible or court decisions timelier. Without being in the shadow of a well functioning court system, even the best lawyer cannot guarantee a fair outcome of a settlement. Especially when there are big power imbalances between the parties. Moreover, the broad availability of legal aid also diminishes the need for courts to adjust their services so that they can be addressed directly by clients. We do not know of research that confirms this, but if more lawyers are available, this may well work against simplifying procedures.

¹⁷³ Beenstock, M. and Y. Haitovsky. "Does the appointment of judges increase the output of the judiciary?" *International Review of Law and Economics*: 351-369 (2004); Choi, S. J., G. M. Gulati, et al.. "Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate." *The Journal of Legal Analysis* 1(1): 47-117 (2009).

¹⁷⁴ Parker C. *Just Lawyers: Regulation and Access to Justice*, supra p. 32-35.

Moreover, supplying individual legal aid has proven to be a rather expensive strategy.¹⁷⁵ Countries are increasingly moving away from comprehensive legal aid programs and most of the recent access to justice strategies do not mention it as a core policy to follow anymore. Governments that do include legal aid as a main policy, often fail to secure the necessary budgets for this.

Alternatives to legal counsel according to the US Supreme Court

In a recent decision, the US Supreme Court showed that there are alternative safeguards that can be as appropriate. In *Turner v. Rogers*, the issue was whether a father could be detained for not paying child support to his ex-wife and children. In the US, 50.000 men are detained on any moment because they show contempt of court by not living up to their duty to pay. In their defence against this, do they have the right to a lawyer? Sure, the Court said that a state must provide safeguards here. Yet not necessarily through a right to a lawyer.

The Supreme Court justices warned against the lawyer making the procedure more formal and less speedy. If a lawyer would always have to be present as a requirement of due process, this can also make the procedure less fair, because the family needing child support would need a lawyer as well. Due process does rarely entails a right to counsel in civil cases.

A better procedure and more information for the parties may be a substitute safeguard in child support enforcement cases. The defendant could be notified that his "ability to pay" would be the critical issue. A form asking the right questions would also help linked to an opportunity at the hearing to respond to statements and questions, as well as a duty of the court to rule on this issue explicitly. Assistance by a social worker who is aware of the basic rules of the particular procedure is another alternative.

Mediation Is Not An Alternative For A Court

Many governments have invested in promoting mediation. As we have seen, mediation can add capabilities to the system. Providing assistance to the parties in their negotiation process, enriching the skill set in communication and negotiation that is available between them, is a valuable service. Letting one person do this, as a specialized neutral provider of such services, is more effective than both using a lawyer or another person well versed in negotiation.

But as we discussed in Section 4.2 research shows that mediation is a rare event. Even in the United States, where mediation has professionalized quickly and court annexed mediation programs proliferated, only 800 mediations per million people take place each year,¹⁷⁶ compared to perhaps 150.000 new conflicts and disputes (see Section 3.2). The submission problem is a first reason for this. People are unlikely to choose together to go to a mediator. The idea of ADR may have spread across the world, but because of the submission problem it only attracts a relatively small portion of clients considering the frequency of legal problems, unless there are sufficient reasons for both parties to cooperate (like reputation incentives that make informal tribunals effective).

Some ADR programmes are successful in circumventing the submission problem, because a person can go there with a complaint and can then be reasonably sure that the other party is induced to cooperate.

¹⁷⁵ Parker, *Just Lawyers*, supra p. 34.

¹⁷⁶ Wall, J.A. & Chan-Serafin, S. (2009). Processes in civil case mediation. *Conflict Resolution Quarterly*, 26(3), 261-291 estimate 250.000 mediations take place every year in the US. The US population is presently 313 million.

Villager's Committees in rural China provide an example of this, and attract a substantial share of problems, especially in neighbour disputes.¹⁷⁷ They use mediation methods, but are not waiting until both parties have signed a mediation agreement before they start working on the problem. In Section 5.4 we will see how facilitator programs build on this insight, using mediation techniques to enhance the quality of the negotiation process, but also using the skills of lawyers to press towards a fair solution.

Moreover, mediation does not help against powerful parties and in other situations where a defendant can be expected to have to give in substantially in order to obtain a fair result. Without an effective threat of adjudication, mediation is not likely to produce fair results. So mediation is not an alternative to courts, it is a useful add on if the option of a third party decision without prior consent of the defendant is already available.

4.9 Implementing Good Access to Justice Policies is Difficult for Governments

In such a complicated environment, where suppliers of access to justice face so many difficulties, it is not surprising that governments find it difficult to select and implement the most effective policies for access to justice. Ideally, they would help suppliers of justice to overcome the submission problem, develop programs with more incentives for judges, consider ways to deliver better legal information, or provide a better back up when a person has a problem with a powerful defendant. But that is not what they actually do.

Governments tend to have different departments or agencies that deal with codification, financing and monitoring the judiciary, regulating the market for legal services and legal aid. There is a fair amount of self-regulation by lawyers in developed economies, but less so in other countries, where regulation tends to be in the hands of governments (with lawyers as a powerful interest group). Courts, being independent, have their own ways to organize themselves, nowadays often through councils for the judiciary. There is no such thing as an independent supervising body or regulator for the enormous variety of services that together must provide access to justice.

Organizing access to justice is even more complicated because the desire to organize it effectively and efficiently is not the only goal. Access to justice is strongly connected to values, as is beautifully illustrated by the quotes below. If access to justice becomes connected to debates about values, it may become more difficult to change the system.

¹⁷⁷ Read B.L. and Michelson E., "Mediating the Mediation Debate, Conflict Resolution and the Local State in China", *Journal of Conflict Resolution* 2008, 773-764.

"Let not the hatred of any people swerve you away from justice. Be just, for this is closest to piety."

Qur'an: al-Ma'idah 5:8

"There is no doubt that justice is the cornerstone of the rule of law and Arab regimes' failing to provide security and justice for their own citizens is a major factor that led protests and ignite revolutions. The Arab Spring illustrates how Arab people aspire to win their freedom and achieve justice and prosperity within democratic regimes governed by the rule of law.

However, within the justice sector, Arab people come to believe that inefficient justice administration and delay will drain even a just judgment of its value. Accordingly, during the major transition, which the Arab world is witnessing now, we must take a comprehensive approach to justice. We must also bear in mind that emerging regimes in countries like Egypt, Libya and Tunisia (which were able to put an end to authoritarian regimes) signal the rise of Islamic movements.

Justice is one of the highest values in Islam and that the daily life of Arabs suggests that they have in deep roots the basis of values reflect the elements of the justice which find their origins in the historical evolution of the Arab world, in which Islamic Shari'a played a great part in shaping it. This will require us to amplify the core values of Islamic Shari'a that represent justice and reflect the rule of law. This will enable us to help emerging regimes in the Arab world in building their justice institutions and reforming their legal systems by employing those values.

According to my own experience in many Arab countries, the lack of coherent and coordinated strategical action in the justice sector constitutes an impediment to achieve justice. It also hinders justice sector institutions in their planning and prioritisation of the use of the limited resources available to them. Therefore, an important modality to assist the Arab justice sectors is to adopt comprehensive reform strategies and action plans. However, it is important to note that justice does not come from the outside, it should come from the inner values of the people and hence any type of justice reform should be developed by the Arabs themselves. There can be no doubt that self-reform stemming from open, scrupulous and balanced self-criticism is the right, if not the only alternative to efficient justice reform."

Judge Adel Maged, Supreme Court Egypt, Durham University

Legislation and Precedents As Tools

Moreover, the primary way in which access to justice is organized by governments is still legislation and distributing funds. States develop codes of civil and criminal procedure, or have separate organizations that set rules of procedure. These institutions are staffed by lawyers who tend to work with codes, rules and a body of precedents, in particular from the highest courts in the country. They make laws that regulate the organization of the judiciary and the bar. The underlying philosophy is that citizens will apply the law to create access to justice, corrected by courts if necessary. As a group, the lawyers have a vested interest in keeping their place in the process.

We have seen that the actual process of solving justiciable problems involves much more than applying the law. Mostly it is negotiation between the parties, bargaining towards a settlement in the shadow of adjudication by courts or similar interventions by other third parties as influencers. Actual interventions by the courts are an exception and many other third parties can be involved as well.

Many of the reasons why people fail to settle are very hard to manage by legislation or by court precedents. The Table in Section 3.3 illustrates this, mentioning issues such as shame, embarrassment, a perceived power imbalance, lack of incentives to cooperate for defendants, differences in perceptions, failure to address emotions, legal jargon, extreme positions, delaying tactics, court delay, high legal costs, lack of alternative adjudication mechanisms or late settlement during procedures.

Better laws are also unlikely to be a solution for the submission problem, the lack of incentives on courts, or the problem of insufficient incentives to publish useful legal information.

Budgets Dedicated to Courts and Legal Aid

With respect to budgets, most of the government money for access to justice tends to go to courts and to legal aid, as well as police and prosecution. In essence, these are subsidies to keep the existing system going. There may be some additional money for mediation, legal information or specialized tribunals, often on a project basis. Separate budgets for ensuring good quality legislation and monitoring of the systems are not common. There are no budgets available for the systematic improvement of the setting for communication and negotiation, including an effective threat of a third party decision.

The challenges discussed in this chapter suggest that governments should concentrate on key tasks that the market finds difficult to provide. First would be ensuring access to a timely and affordable third party decision. Next would come providing the legal information that is most relevant and useful for end users so that they can solve their problems with this guidance. Ensuring compliance by powerful defendants is another task where governments can make a big difference. A government would be unwise to concentrate on the formal system, because private initiatives and informal systems contribute a lot to access to justice, but face some complications which can be addressed by providing public goods. Perhaps these building blocks for a strategy can be helpful for countries wanting to reshape their own institutions, because they are independent of particular substantive laws or sources of such laws.

4.10 Summary

Providing courts, providing legislation, regulation of legal services in order to protect the consumer against unskilled lawyers: these have been the traditional tasks of governments in order to support access to justice. Not satisfied with the results, both governments and NGO's have developed new access to justice policies: providing more legal aid, alternative dispute resolution, improved legal information and deregulation of legal services.

Starting from the problems people actually experience and their own capabilities to solve them, these are understandable priorities. But it also led to contradictions: citizens are now asked to solve their own problems and use courts as a last resort, although the credible threat to go to a third party is an essential tool for reaching a fair settlement. Legal aid budgets and budgets for courts tend to expand. Most countries in the world are unable to provide substantial legal aid for civil cases, whereas courts struggle to manage their caseloads without delay. So it is worthwhile to analyze more in detail what is difficult for people to organize themselves.

In the field of access to justice, these are the major challenges for governments, NGO's and innovative providers of services wanting to serve the justice needs of clients in a better way:

- The submission problem: it is almost impossible for two people in a conflict to agree on a procedure that provides them adequate support to come to a fair outcome. They are likely to go their own way or settle on the steps of the courthouse (with the high risk of outcomes reflecting power differences to a large extent).
- This is both the reason courts (and tailgating these: enforcement systems) exist and the reason they (and other third party adjudication processes) are so hard to organize. Courts do not get clear signals from clients whether what judges do helps to solve problems. So from that side there are no incentives, which is – as another part of reality – not sufficiently compensated by monitoring mechanisms (review in appeal). Giving judges the task of (just) applying the law and procedural rules can be an additional barrier to good, affordable and effective processes and solutions, because if this is what they get evaluated on, this is most probably where they will focus their efforts, whilst much more is needed to provide a good setting for solving conflicts.

- Courts, and other adjudicators, deliver solutions of individual problems (private goods), but also an option of adjudication as a threat in settlement negotiations, guidelines for future decisions (public goods). Better funding models for these tasks and monitoring models are needed.
- Providers of access to justice want to serve people with the legal information they need to solve a dispute. But it is very hard to make money from such legal information services, although they have a high value for citizens. So people have to hire a lawyer on an individual basis for consultation, but this is not affordable for many people in many frequent and urgent legal problems.
- Supplying access to justice against powerful defendants can be very difficult. Mobilizing people, professional helpers and even judges to take action is a major challenge.
- Scaling up paralegal and other legal aid services has proven to be difficult, adequate funding models, using economies of scale, have to be developed.

In the next chapter, we will see which innovative approaches are developing that provides answers to these challenges on the way to providing basic justice care for everyone.

5. Promising Approaches



In this Chapter, we discuss the main approaches that are currently believed to be able to improve access to justice. We show how these beliefs are grounded in the literature and on data collected. We demonstrate the potential of these strategies by giving examples, and show how these strategies:

- assist people in their communication and negotiation processes (with a realistic option of adjudication), which are needed to solve justiciable problems; and
- overcome the challenges for providers of justice services as discussed in Chapter 4.

So we focus on strategies that are both helpful and realistic. In particular, innovative approaches will have to deal with the problem of having to involve two clients, of which one may be unwilling to cooperate. They also have to incorporate good incentives, especially for neutrals such as judges. Somehow, innovative approaches will have to cope with the challenges of providing both private goods (solutions) and public goods (precedents, laws and other useful legal and non-legal information). And innovative approaches can only succeed if they can be integrated with other services in the supply chain of delivering access to justice.

5.1 Specialisation and Setting Concrete Goals For Procedures

It is very hard to improve things when the direction of travel is uncertain.¹⁷⁸ One of the core lessons from the innovation literature is that innovation is best started with the result in mind.¹⁷⁹ Access to justice and the rule of law are no exception to that.¹⁸⁰ So what we need is more concrete goals, and these goals should be translated into terms of reference. What is an adequate process for a conflict about the use of land for mining purposes? When is a divorce a good divorce?

Terms of reference can be part of the answer to a lack of good incentives. Without such terms of reference, monitoring judges and others involved in the administration of justice makes little sense, and there is a common understanding that monitoring and systematic evaluation is essential. A UNDP report regarding access to justice in Kosovo asked for "robust civil society and media oversight of the administration of justice".¹⁸¹ The 2011 UN Report on Women's Justice made tracking court decisions and monitoring courts as one of its 10 recommendations.¹⁸² Even more important, terms of reference can help to design good procedures. They can be used by those responsible for developing rules of procedure, but also in court management and by lawyers or paralegals involved in handling specific cases.

Terms of reference, are now being formulated on the level of access to justice in general, as guidance for policy makers (see box below). Courts start to use terms of reference for disposition times.

¹⁷⁸ Borins, S. "Public Management Innovation." The American Review of Public Administration sector: A systematic review of the literature from 1993-2003." *Technovation* 26(5-6): 644-664 (2001); Baxter, D., M. Schoeman, et al. *Public sector innovation: The role of commercial partnerships* (2010); Hartley, J. "Innovation in governance and public services: Past and present." *Public Money & Management* 25(1): 27-34 (2005); Mulgan, G. and Albury D. "Innovation in the public sector", Strategy Unit Cabinet Office 31(1):5 (2003).

¹⁷⁹ Drucker, Peter F., "Innovation and Entrepreneurship: Practice and Principles", University of Illinois at Urbana-Champaign's Academy for Entrepreneurial Leadership Historical Research Reference in Entrepreneurship (1985) Available at SSRN: <http://ssrn.com/abstract=1496169>; Utterback, James M., "Mastering the Dynamics of Innovation: How Companies Can Seize Opportunities in the Face of Technological Change" University of Illinois at Urbana-Champaign's Academy for Entrepreneurial Leadership Historical Research Reference in Entrepreneurship (1994) Available at SSRN: <http://ssrn.com/abstract=1496719>

¹⁸⁰ Pistor K., Keinan Y., Kleinheisterkamp J., West M.D. "Innovation in Corporate Law", *Journal of Comparative Economics*, Vol. 31, pp. 676-694, (2003)

¹⁸¹ UNDP Kosovo, Assessment Report on Access to justice in Kosovo, p.5, available at: http://www.ks.undp.org/repository/docs/Eng_UNDP_Access_to_Justicereport.pdf

¹⁸² UN Entity for Gender Equality and Empowerment of Women, "2011-2012 Progress of the World Women in Pursuit of Justice" (2011), p.120, available at: <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>

A Strategic Framework for Access to Justice in the Federal Civil Justice System

The Taskforce for the Australian Attorney General designed the following approach to assist policymakers to translate the Principles into action (p. 64).

- Enabling people with information, so that they understand their position and know what they can do;
- Early intervention so problems and escalation can be prevented;
- Triage, so the most appropriate route to a solution is identified;
- Fair and equitable outcomes;
- Proportionate costs;
- Resilience, that is providing the skills to deal with disputes;
- Inclusion, directing attention to the real issues that people who experience legal events have.

But these terms of reference are still rather open ended. What are proportionate costs and what is sufficient resilience? Average disposition times for all civil cases do not give incentives to deliver a solution to a neighbour conflict in a few weeks, or to solve a commercial conflict between a year. The literature on court reform suggests a way forward here. It calls for specialization and simplification of procedures and assigning resources proportional to the case demands.¹⁸³ Specialization should not follow legal issues, but the problems as they are experienced by people. The most frequent conflicts, such as divorce, a land conflict, or a number of issues between employee and employer should ideally be managed by one specialized court in one specialized procedure. Negotiation and adjudication processes interact, and thus should be facilitated in a coherent way.

So a next step can be to develop terms of reference for access to justice processes for specific problems. For instance, it is possible to develop specialized treatments for personal injury cases, for social security matters or for access to other government services. This has been done by the pre-action protocols developed by English courts. However, these protocols still tend to focus on the more technical legal issues and on the option of adjudication. Ideally, they should also enable negotiation. Divorce processes, for instance, need some kind of deeper understanding about what went wrong before people are ready to talk about good arrangements for the future. Reaching that stage could be a benchmark for a good service for divorce.

¹⁸³ See literature in footnote 30.

Targets for Disposition Times

Court organizations now increasingly use targets for the percentage of cases that have to be resolved within a certain number of months:

2012 California Rules of Court

(f) General civil cases-case disposition time goals

The goal of each trial court should be to manage general civil cases, so that they meet the following case disposition time goals:

- **Unlimited civil cases:**

The goal of each trial court should be to manage unlimited civil cases from filing so that:

- 75 percent are disposed of within 12 months;
- 85 percent are disposed of within 18 months; and
- 100 percent are disposed of within 24 months.

- **Limited civil cases:**

The goal of each trial court should be to manage limited civil cases from filing so that:

- 90 percent are disposed of within 12 months;
- 98 percent are disposed of within 18 months; and
- 100 percent are disposed of within 24 months (...).

Source: http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=standards&linkid=standard2_2

In consumer problems, capacity is needed to establish the quality standards that the buyer could expect, which warnings from the seller would have been appropriate and how to calculate damages. The following box shows how this can be translated into terms of reference for a consumer procedure. The right hand columns gives an indication how a procedure could be designed that meets these points of reference, or how these can be used to evaluate an existing procedure.

Task	Terms of Reference for Procedure Regarding Consumer Complaints About Products and Services	Possible Procedure that meets these ToR
1. Meet	Sufficient incentives for both consumer and supplier to participate in procedure	Consumer gets option of due process and good enough remedies against low costs; Supplier gets fair outcome, is rewarded for cooperation, no penalization. If no cooperation, supplier risks judgment by default which is enforceable.
2. Talk	Support negotiation about usual interests in such cases: Working product or service for consumer, or adequate compensation; High customer satisfaction; Minimized reputational damage for supplier; Minimized costs of remedies for supplier. Core issues well defined Provide skills and setting for problem solving negotiation to solve the issue	Core issues well defined: Which quality and risks could consumer expect on the basis of specifications in contract and on basis of marketing? What was the actual quality and risks of the products/services delivered? In case of a mismatch: how much can be attributed to the supplier (failure to inform or to warn) and to the consumer (ignorance about facts generally known, failure to take adequate precautions)? Skills and setting for communication and negotiation provided by online platform, leading the consumer and supplier to a number of questions. Helpdesk at court for 20% of consumers. Lawyer assistance for 10% of most complex cases and for aggregated cases (class actions).

Task	Terms of Reference for Procedure Regarding Consumer Complaints About Products and Services	Possible Procedure that meets these ToR
3. Share	Guidelines for attribution of % of damage to consumer and supplier Guidelines for calculation of damages	Formula's and schedules developed by academics in consultation with stakeholders Schedules developed by (group of lower court judges
4. Decide	Third party decision within 3 months from filing at costs for consumer of maximum 10% of the value of the goods/services; In maximum 5% of cases expert evidence available within 4 months from filing and final decision within 6 months from filing at no costs for consumer.	On line information and negotiation exchange can be accessed by judge or magistrate; option to ask additional information; option of a 30 minute hearing. Decision added to the online system by judge. Mostly funded by supplier (including legal costs) who can spread these conflict resolution costs over all sales. If evidence on actual quality or risks of product/service needed, and judge cannot decide on this, one expert is involved (or, if supplier pays: two experts, followed by Australian procedure of "hot-tubbing"). Appeal possible for supplier if the decision is relevant for a big number of similar cases, but has to pay the individual consumer who started the action in conformity with first instance decision. Besides appeal, systematic monitoring of all decisions by higher courts in yearly feed-back report and by yearly customer satisfaction survey on 7 factors of outcome justice and procedural justice + 3 cost factors
5. Stabilize	Format for agreement and decision on interests, facts and remedies available; Incentives to comply with decision	High reputational risk for not complying with decision of court; Back up of forced sale of assets

At first sight, this may seem a strange idea. Isn't the legal system already full of benchmarks? Human rights have to be observed. Outcomes conform to the law. Procedures have to be in accordance with the principles of due process and with rules of criminal and civil procedure. The law gives rules for the investigation of a murder and it may determine the minimum and maximum number of years a murderer has to serve in prison. But laws do not formulate terms of reference for a procedure that deals with manslaughter in such a way that it is satisfactory for the victims, acceptable for the accused and restores trust in the community.

Terms of reference such as these often seem overly complex. But they reflect the complexity of the task. Many capabilities are needed and there is much to be organized quite well, before you have an adequate system for dealing with consumer conflicts. One of the challenges is of course to organise such information into benchmarks that are easily understood and interpreted by users of justice services.

UK Pre-Action Protocols

In the UK, pre-action protocols have been developed to provide guidelines to practitioners in a range of different kinds of civil case. These describe concrete actions and processes that are expected to be carried out in each of the different situations. The protocol for personal injury claims is summarised below:

Letter of claim: This must be sent from the claimant to the defendant. It "...shall contain a **clear summary of the facts** on which the claim is based together with an indication for the **nature of any injuries** suffered and of **any financial loss incurred**". A standard format is provided, and concrete deadlines are provided for response and investigation.

Documents: If liability is denied, the defendant must provide with the letter of reply, "**documents** in his possession which are **material to the issues** between the parties, and which would be likely to be ordered to be disclosed by the court" during pre-action or proceedings. Again a (non-exhaustive) lists of documents are provided. It is also clarified that no charge can be made for providing documents under the protocol.

Special damages: "The claimant will send to the defendant as soon as practicable a Schedule of Special Damages with supporting documents, particularly where the defendant has admitted liability"

Experts: Before instruction of experts, one party must provide the names of one or more experts who they consider suitable to instruct. The other party may object to the experts within 14 days, and the first party should then instruct a mutually acceptable expert. If all experts are objected to, parties may instruct their own experts, and the court will then decide if either party acted unreasonably. "If the **second party does not object to an expert nominated**, he shall not be entitled to rely on his own expert evidence" unless "the first party agrees, the court so directs, or the first party's expert report has been amended and the first party is not prepared to disclose the original report". Again, there are clear rules on the bearing of costs related to experts.

Protocols such as these exist for conflicts as diverse as construction and engineering disputes, defamation and disease and illness claims. In each case, they provide concrete benchmarks that need to be fulfilled by both parties, and which make the process more transparent, easy to follow and fair.

For large scale land conflicts, designing terms of reference for what is needed will be more complicated, reflecting the complexity of these problems.

Possible Elements of Terms of Reference for Land Conflicts

The box in Section 3.3 suggests that land disputes at least need the capacity to:

- identify different claims and usage patterns of different people in relation to the contested piece of land;
- give effective and immediate protection against eviction (tenure protection);
- protect the persons with legitimate claims on the land by interim measures;
- to establish compensation in accordance with adequate and published standards;
- to determine the value of different parts of the land and of different types of use;
- to establish future entitlements and property rights of all individuals and groups concerned and to publish these;
- to allocate value and future property rights between individuals (family members) and within groups;
- to determine adequate alternative housing or farming options;
- to establish fees or funding models for government services to the users of the land;
- to cope with pressure from users and future users of the land, which is likely to be high, given the high stakes;
- all within a time frame of a year or less.

Such specific capabilities can be turned into terms of references for this specific type of conflict.

An important benchmark is arguably how a process succeeds in fulfilling the needs for justice of the people involved. Is their problem solved? How do they rate the solution and how did they experience the process? A long tradition of social psychological research identified criteria that people use to evaluate the fairness of procedures.¹⁸⁴ Restorative justice theory provides several criteria, and the same is true for distributive justice.¹⁸⁵ Procedures may be experienced as unfair or too burdensome. For instance, when people feel they do not get enough opportunity to express their feelings and worries during the handling of a personal injury claim, they experience a lack of voice. This negatively affects their experience of fairness of procedure.

Other studies identified different cost categories that enable evaluation of the money and time people spend on getting solutions to their disputes. Also costs in terms of emotions are taken into account.¹⁸⁶ These help to benchmark paths to justice and evaluate whether access to justice is in fact affordable.

¹⁸⁴ Murphy, K., Tyler, T. R. and Curtis, A. "Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?" *Regulation & Governance*, 3: 1–26 (2009); Hollander-Blumoff R., Tyler T.R. "SYMPOSIUM: Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" *J. of Dispute Res.*, Vol 1 (2011) and "Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative Potential", *Law & Society Inquiry*, Vol. 33(2):473-500 (2008)

¹⁸⁵ Gramatikov, M.A., Barendrecht J.M., Laxminarayan, M.S., Verdonschot, J.H., Klaming, L., van Zeeland, C.M.C., *A Handbook for Measuring the Costs and Quality of Access to Justice*, MAKLU Apeldoorn | Antwerpen | Portland (2010)

¹⁸⁶ Gramatikov M. "A Framework for Measuring Costs of Paths to Justice", *The Journal Of Jurisprudence*, Vol. 2, p. 111, (2009)

Benchmarks for Experiences of People Seeking Access to Justice

The following criteria have been used to survey users of procedures, both complainants and defendants (see Gramatikov et al, 2010 A Handbook for Measuring the Costs and Quality of Access to Justice).

Quality of the Procedure

- Procedural Justice (how fair the procedure was)
- Restorative Justice (to what extent harm was restored)
- Interpersonal Justice (to what extent parties were treated with respect)
- Informational Justice (to what extent parties received appropriate information)

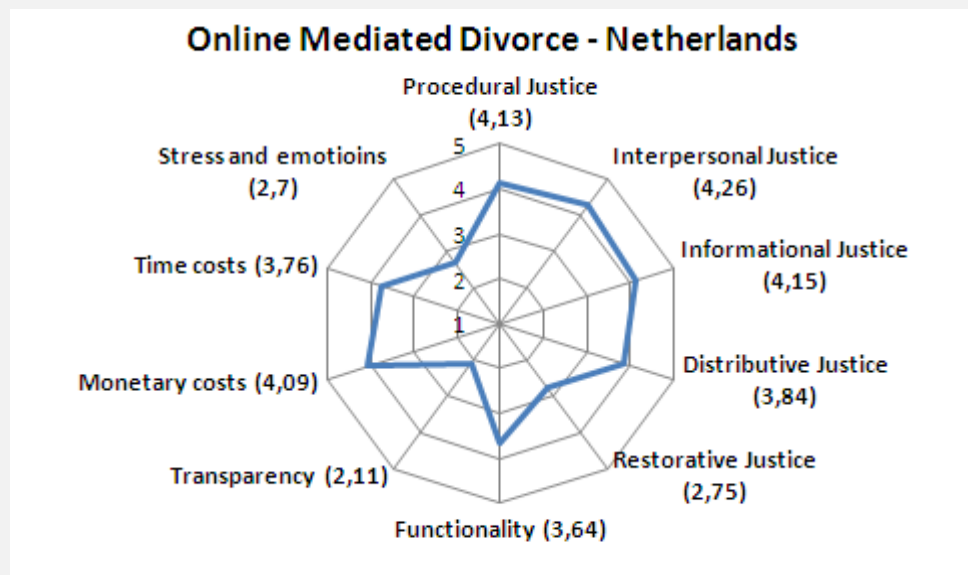
Quality of the Outcome

- Functionality (how effective the outcome was in solving the problem)
- Transparency (how clear was the reasoning, and how comparable the outcome)
- Distribution (to what extent the distribution (of value, damages, punishment) was fair (equal, contribution, need)

Costs of Justice

- Monetary Costs (how much money was spent to achieve the outcome)
- Opportunity Costs (what income/opportunities, time were lost through the process)
- Intangible Costs (what were the costs in terms of emotions and stresses)

Each of these have been used to measure justice and create benchmarks in relation to many different justice procedures. Data can be collected by surveys, through focus groups of clients, or by other methods. The results look something like this:



This 'justice scan' provides benchmarks for each of the 10 identified criteria. In this case it is in relation to online divorce mediations in the Netherlands. The different scores indicate different performance (the closer to 5 the better the score), allowing the provider of the process to highlight the areas on which there is most scope for improvement.

Benchmarks for the way specific problems can be solved help to address some of the fundamental challenges discussed in Chapter 4. Judges, lawyers and providers of similar services can use them as benchmarks. Clients will know better what to expect and can give better feed-back on whether they got what they needed. That “informational justice” has proven to be valuable to them.

Clear descriptions of what legal service providers do for people, will probably also help them to “sell” their valuable services. One way or the other, the services have to be paid for. Either by clients, by governments or by NGO’s that want to improve access to justice.

5.2 Legal Information Targeted on Needs of Disputants

Workshops with women sharing experiences and learning how to cope with domestic violence, radio programs discussing justice issues, low cost copies of legal texts, stories and comics illustrating human rights, soaps on television, websites, help desks at courts, community justice centres, telephone hotlines, and now increasingly websites, text messaging and smart phone apps. The many initiatives for disseminating legal information show that the value of legal information for access to justice is widely acknowledged.¹⁸⁷

Research indicates that there is still a lot of potential for improvement, if informing people about processes and reasonable outcomes became more focused on their problems and their needs. Innovations in the type of legal information that is disseminated and how this is done can improve the effectiveness and reduce the costs for production and distribution dramatically.

At the same time, we saw in Chapter 4 that it is very hard to find a good funding model for developing the most useful criteria and for disseminating legal information. NGO’s and social entrepreneurs who try to do this have a hard time, but they are making progress.

Patterns of Searching and Supplying Information

Governments, interest groups, legal aid NGOs, advocacy groups. There are many different actors focusing on making people aware of their rights. A study among five legal aid NGOs found that all of them adopted about five or more different initiatives in disseminating legal information.

Azerbaijan	Bangladesh	Egypt	Mali	Rwanda
Leaflets	Handbooks	Documentaries	Handbooks	Handbooks
Internet (inc. Internet Q&A)	Training paralegals	Training for local cadres	Paralegal training	Paralegal training
Workshops	Workshops	Self-support groups	Workshops	Dissemination of Printed Materials
Printed Documents	documentaries	Workshops	Radio Broadcasts	Record Keeping
Meetings with Public Officials	Individual Consultations	Individual consultation	Printed Materials	Individual Consultation
Individual Consultation			Mediation Sessions	

¹⁸⁷ Barendrecht M. “Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared”, Global Jurist (2011)

There is an emphasis on information about human rights. Information on this is mostly tailored towards a target group (women's rights for women, workers' rights for workers, land rights to rural communities) and some of the strategies aim at informing people about how they can solve their legal problems. These might tell them where to go and what to bring along, or they might provide some basic information about dispute resolution skills, usually through self-help groups. They all also provide information about fair outcomes in concrete cases, but this is typically done on a one on one basis.

It is interesting to compare the way in which legal information typically is delivered (leaflets, rallies, radio, booklets, trainings, etc.) with where people go and seek information and support (see the next Table). People generally shop around in their social network, looking for information and people that can help them.

	Azerbaijan	Mali	Rwanda	Egypt	Bangladesh
Family members, friends, colleagues;	23%	48%	31%	57%	43%
Municipality	11%	4%	7%	3%	7%
Central public authority	24%	-	13%	-	7%
Police	13%	8%	14%	-	2%
Employer	4%	6%	2%	3%	9%
Village elder	-	-	2%	25%	9%
Professional association	1%	15%	9%	-	18%
Politician	-	-	-	6%	-
Internet	-	-	-	-	4%
Newspapers/press	4%	-	2%	-	-
Court/other dispute resolution mechanism	18%	15%	16%	-	-
Did not look for information	1%	4%	5%	6%	-

Legal needs studies show that in high income countries most people who take action after they experience a legal problem also seek advice and information among their friends and relatives. One study in Canada found that for many people friends and family are the only source of information they consult (43,1%), whereas 16,8% looked for information on the internet. This behaviour was evenly distributed across people from different social economic categories.¹⁸⁸

These data show that dissemination of legal information by means of legal advisers or general awareness campaigns is not the only way. Informal sources (networks of people like family, friends, meeting places) are at least as important to target. Informal mechanisms and sources of information offer opportunities to spread legal information among vulnerable people (CLEP 2008).

What Information Do People Need? Some Practices

But what information is most valuable and should be delivered as a priority? In the literature about this, which is still rather limited, seven characteristics of legal information have been suggested that are said to make it more useful for end users of the justice system (see box).

Promising approaches have been developed that compare well to these criteria. Women's rights organizations have had general campaigns aimed at making women aware of the fact that domestic violence is a crime, that they have a right to divorce, or that they should not be kicked off of a plot of land, but now increasingly combine this with practical information delivered to people who are actually experiencing such a situation.

¹⁸⁸ See above footnote 47

Big investments in informing people about new legislation (for instance, the Kenyan government widely disseminated the text of their new 2010 Constitution among its citizens), or spreading basic information about procedures (how to enter them, which forms and documents are needed) may be less helpful from an access to justice perspective. It is unlikely that people will take note of this information, unless they are actually involved in a problem.

Criteria for Targeting Legal Information

Understandable | First of all, the information should be presented in a form that is understandable for the clients without having to consult an expert.¹⁸⁹ It should be easy to read and use. Thus, the information should be “translated” in a fashion that enables lay people to be properly informed by it. Technical concepts need to be redefined in an understandable manner and wording should be carefully chosen. To this end, information can also be conveyed through other information carriers than text. Illustrations, comics, videos, or even video game like formats, etc. can be more effective for people. Especially if they are not literate.

Tailored to the problem at hand | Although general information about rights or the legal system helps people to develop a general understanding and recognize legal problems, it may be of limited use when people actually experience a legal problem that they have to cope with. Focusing on the issues most frequently occurring and offering information about a limited set of scenarios is more useful when people experience a legal problem.

Just in Time | Informing people about rights and possibilities through general public awareness campaigns is probably not enough. Legal information is much more effective if it arrives or at least is accessible just in time, i.e. when it is needed to act upon.¹⁹⁰ When people actually experience a legal problem, such general information obtained in the past, might not be helpful. They might not remember, or not rely and act upon the information previously given. Furthermore, people typically do not go around and look for information about how to solve legal problems until they actually experience one. What they need is information about actions they can take and how to go about at the moment they really need it.

Sufficient to cope with the problem for self-reliance¹⁹¹ | What issues have to be dealt with, what are steps in the process, where to find more information, where to find assistance, what outcomes can they expect. For instance, informing a woman that wants a divorce about her right to child support in general will help, but she probably wants to know how to determine the amount that is reasonable in her situation. She would also like to be broader informed about the issues she will need to deal with (child support, custody, visiting arrangements, who can stay in the house, etc.), how she can do this and where to find assistance. Information about the different steps in the process of divorce and what to expect from it in terms of money, time and things she needs to do probably also helps her and might slightly reduce the stress she probably experiences.¹⁹²

¹⁸⁹ Buck, A., P. Pleasence, et al. "Do Citizens Know How to Deal with Legal Issues? Some Empirical Insights." *Journal of Social Policy* 37(04) (2008), pp.661-681

¹⁹⁰ Lawler M., Giddings J. "Maybe a Solicitor Needs to Know That sort of Thing but I don't' – User Perspective on the Effectiveness of Legal Self-Help Resources", in *Reaching Further: Innovation, Access and Quality in Legal Services*, Published by TSO (2009)

¹⁹¹ See previous footnote.

¹⁹² Van Wormer N.I. "Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon", *Vand. L. Rev.* No 60:983 (2007)

Limited options | Too much transparency is no transparency at all if there is no guidance through the information. This also is valid for legal information. Information that is not absolutely necessary should be excluded. Lawyers often tend to think in terms of the exceptions rather than in terms of “standard” cases. However, for effectively delivering legal information to people, it seems that bringing back the information to its bare essentials works better. The options provided to the information seeker thus should be limited¹⁹³ and the need for people to make decisions themselves should be reduced.

Practical | Providing general information about rights is important for acknowledgement of the fact there are legal remedies at hand for a given problem, but also information about ways to deal with differences, i.e. negotiation skills, about dispute procedures and what to expect from it (this can be step by step descriptions but also indications of the money and time involved and about the way other people have solved similar problems in a fair manner (sharing rules) should be provided.

Assurance | People need assurance when they face the stress legal problems normally bring forth. Thus, information provided in writing or online can probably best be combined with a help desk, support groups of people in similar situations, or some other form of personal assistance as a back up, so that people can get confirmation that they have understood the information in an appropriate way.

When a person is facing a legal problem, the first task they might undertake could be to find the applicable law, which might provide a ready answer to the problem. The difficulty is that it is not always easy to find the right piece of legislation, protocol, or legal decision. The issue that triggers the conflict may be addressed simultaneously in several different legal acts, case-law decisions, or legal doctrines. Needless to say, it is difficult for the vast majority of people to even know what to look for, before they have to think about where and how to look. In addition the specific language and often a large volume of legislative acts contributes to the confusion. The biggest challenge is to find all the legal norms that are relevant for the specific case. If the person is able to do that, the law may provide guidance for appropriate behaviour, and a quick solution to the conflict.

¹⁹³ Lawler, Giddings et al. 2009, see footnote above

Smart way of looking for the relevant law – Indian Kanoon

Indian Kanoon tightly integrates central laws, court judgments, constituent assembly debates, parliamentary debates, law commission reports and law journals in a way that allows automatic determination of the most relevant clauses and court judgments. These innovations allow people to easily obtain the position of the law on a wide variety of issue. It allows people to browse across the legal corpus very easily, and significantly simplifies how sections of law have been interpreted in court judgments, in journal papers, or how a constitutional article was debated in the constituent assembly.

Beside providing a comprehensive and fresh Indian legal data source to the people, it also provides a state of art search functionality. Indian Kanoon also brings in a number of technological innovations that address the problems faced by common people. The first problem is that acts are very large and, in most scenarios, only a few section of laws are applicable. Finding the applicable sections from hundreds of pages of law documents is too daunting for most people. Secondly, laws are often vague and to use them, it is necessary to see how they have been interpreted by the judicial courts. Currently, the laws and judgments are separately maintained and it is difficult to find judgments that interpret certain law clauses.

Indian Kanoon removes these structural problems by breaking law documents into the smallest possible clauses and by integrating laws and statutes with court judgments. A tight integration of court judgments with laws and with other court judgements allows automatic determination of the most relevant information to a particular search.

Sushant Sinha

So there is a huge gap between what the market offers and what users of the legal system need. NGO's and in some countries government organizations try to fill this gap by offering first line legal advice by telephone, e-mail or in community justice centres. Recently, several new business models have emerged for delivering useful legal information over the internet.

Reasonably fair and just outcomes are definitely part of the desired result of the justice system. Even though there is broad consensus about this objective, there is surprisingly little information available about what justice may look like in daily life. How much compensation is fair for a 20-year-old student from Paris who suffers from whiplash acquired in a car accident? What is a reasonable amount of child support for a family with an average income and three children in Phnom Penh? How exactly can a reasonable compensation for a family living in an informal settlement in Kampala be determined in case of eviction?

Innovative ways to inform clients just in time

Courts in California have developed self help websites, where people are guided through processes on a problem by problem basis, www.courts.ca.gov/selfhelp.htm. They also give workshops where clients get help to file documents at the court, so that they can move their case forward.

www.legalzoom.com specializes in legal documents. It is a great example of a website that utilizes the internet to bring legal support close to home with a smart sustainable business model. It offers a wide range of legal documents that have been trial tested in all American states. For an affordable fee, the client gets the documents at home with all personal details and necessary customization. So the forms used by legal zoom cannot that easily be copied between users. Additional, personal advice and assistance can also be requested online, so it delivers on assurance by having an option of personal advice and a helpdesk. In its documents, options are limited. Self reliance is promoted.

www.lawguru.com succeeds in just in time delivery, by having a large audience of lawyers working at their platform, who react fast to requests for information, sometimes even competing between them to be the first. A challenge for these models is to ensure that the advice given is sufficient, tailored and practical.

www.justanswer.com is another example of an innovative web service that increases access to legal information on the basis of a sustainable business model. Here people can post legal questions and ask experts for advice. They pay a refundable good faith deposit to the service provider. When people are happy with their answer, they click accept and the expert will be paid from the deposit.

Sharing Rules

It will be difficult to provide these questions with straightforward answers. In a way, we know relatively little about the concrete results we want to achieve with the justice system. Legal information as conveyed through codified rules is usually technical and remains abstract. This information primarily focuses on rights, obligations and on substantive and procedural requirements and as such sets the stage rather than indicates the concrete outcomes we envisage people to get. For concretely determining what a fair amount of child support is, these sources are less useful.

This is not surprising, given the fact that they deliberately leave a lot of freedom for judges to make it all more concrete. Judges are trained to arrive at just outcomes on a per case basis. Mostly, their decisions do not provide us with information about desirable results. Case law is tailored to a large extent, mentioning circumstances and a decision, but not explicating the underlying sharing rule.

In civil law systems, the legislators is supposed to have this task. But civil codes seldom give formulas, schedules or other concrete criteria for calculating remedies. This makes it difficult to learn about envisaged outcomes for a given issue, beyond the given case with the specific circumstances and facts.

Increasingly, sharing rules are developed. In some countries, child support guidelines are very clear for determining concretely what the just amounts are.¹⁹⁴ Most countries also have a clear formula for a fair amount of severance pay (See text box below) and for damages for non-contractual responsibilities.¹⁹⁵ A good criminal justice system nowadays needs sentencing guidelines.

Sharing rules that clearly indicate what people can expect as an outcome (how much compensation they get, what behaviour they should refrain from in the future, what they can expect the other party to undertake) are useful in helping to determine what we want to achieve. A first step to explicate our ideas about fair outcomes can be to make an inventory of the outcomes that are obtained in practice.¹⁹⁶

A Sharing Rule for Severance Pay

Work and Business > Dismissal > Notice & Compensation

Azerbaijan

Sharing Rule

Redundancy indicates the situation in which employees cannot be utilized for work anymore (when business is going badly, for instance, or the work activities the employee undertook are no longer part of business activities). In situations like these, the employer notified the labour office and the employee gets severance pay.

Severance pay is 15 days pay for every year worked plus one month's wages (because there is no notice period). All accrued leave payments and benefits are due.

Praxis Associated Lawyer, Azerbaijan

Besides delivering on information needs, sharing rules can also provide benchmarks: they provide yet another term of reference for evaluating whether outcomes obtained in practice are fair.¹⁹⁷

Such sharing rules drastically reduce outcome variance and, hence, assure people that they get an outcome that other people get in similar situations, i.e. get an outcome that is normal.¹⁹⁸

Fair and just outcomes cannot be found by soul searching alone. Although people tend to have reasonable ideas about fairness, they often disagree what is appropriate and they have every reason to disagree if it is about an extra \$1000, or a month in prison that they have put up with.

¹⁹⁴ In the USA, easily accessible on-line at <http://www.supportguidelines.com/main.html>; in Canada, the Federal Government adopted and disseminated detailed comprehensive guidelines on Child Support in 2011, available at <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/pub/guide/pdf/guide.pdf>

¹⁹⁵ For Latin America, see Pagés-Serra C. & Heckman J.J., "The Cost of Job Security Regulation: Evidence from Latin American Labor Markets," RES Working Papers 4227, Inter-American Development Bank, Research Department (2000); Holzmann R., Vodopivec M. "Reforming Severance Pay: An International Perspective", World Bank (2011), gives an overview.

¹⁹⁶ Results of efforts to do such can be found on www.microjusticeworkplace.net and www.echtscheidingswijzer.nl.

¹⁹⁷ Yeazell S.C., "Transparency for Civil Settlements: NASDAQ for Lawsuits?", UCLA School of Law, Law-Econ Research Paper No. 08-15 (2008)

¹⁹⁸ Barendrecht, M., & Verdonchot, J. H. (2008) 'Objective Criteria: Facilitating Dispute Resolution by Information about Going Rates of Justice' Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1246697

Dividing the pie is difficult, in particular in relationship conflicts, where household tasks, salaries and rents have to be adjusted to changing circumstances, and where assets have to be divided in case of divorce, or termination of a long-term contract. Settling distributive issues is difficult in any negotiation, but is especially problematic in disputes, because both parties do not have the alternative of going to another buyer or seller for a similar transaction. If you think the price they ask for a second hand car is too high, you go somewhere else. But there is only one place to get compensation from after a road traffic accident.

“Verdicts of lower courts are not published. There is no rule about that from the Supreme Court, but there is a kind of understanding about it. It probably would help to have these published in order to reduce corruption. Also, rules are rather vague and open ended here, so it would help if law would be defined in a concrete way.”

Lawyer in Baku, Azerbaijan

External criteria have to be available. It can be legal precedents, but in practice distributive issues are mostly solved with the help of formulas, guidelines or ranges of outcomes that have proven to work in earlier, similar cases. During the last decades, these guidelines and formulas have been developed in many places. This is a promising approach that can be further extended.

Standardized Information for the Most Urgent Issues: Effectiveness

It is interesting to analyze what the impact of an investment in targeted legal information can be if we compare it with other ways to spend access to justice budgets. Legal aid is expensive, because it serves one person at a time, and in the absence of easy access to a neutral forum, it cannot guarantee just outcomes. In the Netherlands, €1000 is typically spent on subsidized legal aid per client. Investing money in a procedure before a neutral body is probably more cost effective. For every problem solved by a court (which in the Netherlands costs €1000), there are perhaps 3 to 10 solved in the shadow of the court's intervention. Hence, €1000 invested in a court procedure may improve the lives of many clients.¹⁹⁹

Legal information can be delivered at low cost if it can be general, which for the bulk of legal problems seems to be the case. The costs of providing legal information are primarily the costs of collecting the information and presenting it in an understandable form. Once the information is presented, distribution costs are the costs of one extra download, one more printed copy brought to a client, or telling the story again. So economies of scale can be huge. For €100.000 it may be possible to present a guideline leading clients through a common legal problem, such as divorce, neighbour problems, or an eviction case. If this guideline helps 10.000 people in this situation every year over a period of 5 years, the costs per person served drop to €2 plus distribution costs per person. There is an economy of scale here. Furthermore, legal needs studies show that people massively consult their social network when they experience a legal problem, so collateral advantages can be huge.

Such networks can also be organized around particular access to justice issues. The box about SEWA in India shows that self help groups can integrate legal information and assistance in a much broader setting of services.

¹⁹⁹ Barendrecht, J.M. “Legal aid, accessible courts or legal information? Three access to justice strategies compared”, *Global Jurist*, 11(1) (2011)

SEWA (Self-Employed Women's Association of India)

"Perhaps the best illustration of original and effective self-help for informal workers, SEWA, established in 1972 and representing some 300,000 workers, is as much a union as it is a mutual aid society. It provides its members with a variety of services including banking, childcare, legal aid, vocational training and insurance. It empowers its members, in so far as it enables them to change their behaviour as economic agents.

SEWA's strategy is non-confrontational. Instead of exclusively struggling for higher wages or better conditions, SEWA seeks to reduce women's vulnerabilities by enhancing their employment opportunities. Their example has inspired workers in other countries. In South Africa, for example, SEWU (Self-Employed Women's Union) is a self-help organization that endeavours to improve the working facilities of its members, as well as their literacy, negotiating and lobbying skills. Self-help is also the main pillar of a wide range of savings and credit cooperatives established by micro and small enterprise workers in countries such as Tanzania, El Salvador, Singapore, Kenya and the Philippines."

Julio Faundez, Warwick

The scope and organizational models of such organizations are interesting, because they package legal protection with services that are needed on a more regular basis. When they empower their clients, information is key. They deliver essential and practical legal information about employment issues, but also skills in negotiating better outcomes.

Upgrading Codes of Law to Online Catalogues of Effective Solutions

It is interesting to spend a few moments on where we come from in the area of legal information. Throughout the recorded history of law, we see law-makers using state of the art technology to reduce the costs of production and dissemination of legal norms. Hammurabi's code, from c.1700BC, was aimed at creating transparency of the law. It consisted of clear and understandable rules that were chiselled in rock. This rock was placed in the market or at the palace of the king so it could be consulted. The concreteness of the rules meant that everyone could know the laws. At least in theory. In practice hardly anyone could read, leaving the law to members of the elite. Another problem was that the very concrete rules in the code quickly showed unforeseen gaps, and risked becoming outdated pretty fast, making the (re-)production costs rather high.

Sample law in Hammurabi's code

"If any one loses an article, and find it in the possession of another: if the person in whose possession the thing is found say "A merchant sold it to me, I paid for it before witnesses," and if the owner of the thing say, "I will bring witnesses who know my property," then shall the purchaser bring the merchant who sold it to him, and the witnesses before whom he bought it, and the owner shall bring witnesses who can identify his property. The judge shall examine their testimony - both of the witnesses before whom the price was paid, and of the witnesses who identify the lost article on oath. The merchant is then proved to be a thief and shall be put to death. The owner of the lost article receives his property, and he who bought it receives the money he paid from the estate of the merchant."

[The law seems to assume that the merchant obtained the item unlawfully and consciously, but what if the merchant would also have witnesses a lawful purchase?](#)

Later, the drafters of the Codex Justinianus developed a solution to the high production costs. Instead of working with concrete rules, they drafted a more abstract code. Law became a system of more general rules that offered principles for concrete cases, but no criteria for concrete outcomes. The code was more durable, and reduced production costs due to longevity, but decreased the application of the law as a guideline for an outcome for a particular case. This approach was also followed by the drafters of the Code Napoléon. But now the invention of the printing press had made it possible to dramatically reduce costs.

Each of these codifications used the state of the art available. Now modern information technologies offer great opportunities to reduce the costs for dissemination. Nowadays, and for many countries the codes, and even sometimes case law, are accessible online. But in many countries case law and codes are still very difficult to access. Regarding what is produced, however, not much has changed. We still draft codes and design systems of rules that are aimed to last, and this means norms are often open ended.

“In Mali, case law is very difficult to obtain. Judges usually decide orally and if you want them to write down their decision, you need to pay them.”

Lawyer in Bamako, Mali

The current tables for determining child support, formulas for calculating severance pay, grids for guiding claims in case of personal injury and other sharing rules are very detailed, taking many contingencies into account. What they took from Justinian and Napoleon is the general principles and guidelines behind the rules, as well as the flexibility. This flexibility was reintroduced in a new form, however. Where traditional codes offer flexibility through the use of words such as ‘reasonable’ or ‘appropriate’, which allow for interpretation, flexibility is now created by seeing the rules not as legally binding, but rather as guidelines that are used by judges, lawyers and other dispute resolution professionals.

It is also interesting to note that major codification projects have occurred only at very specific moment in history: as an ambition of one powerful leader or during the birth of nation states in the 19th and 20th century. They are very costly projects, and usually needed many, many years to complete. Once they were done, they proved immensely valuable, and are used to this day as repositories of useful rules.

We may be heading for a new era of codification, having much better technologies available, and knowing much better which information is most useful. The only thing that is lacking is a sustainable way to fund such a development. This is a major challenge for social entrepreneurs.

As yet, there is no central platform to bring together all these rules, and codification 2.0 may be a much more decentralized venture, perhaps borrowing elements from Wikipedia. But it is not difficult to imagine what a website like this could look like.

Codification 2.0

- www.supportguidelines.com gives an overview of child support guidelines in US states, England, Canada and New Zealand, and the many sites that offer this information.
- The basic criteria for determining severance pay in 183 countries have been collected in a database of World Bank researchers.²⁰⁰
- Important criteria that help to settle frequent consumer disputes from Korea are shown on www.microjusticeworkplace.net together with other sharing rules.

²⁰⁰ Holzman R. et al., *Reforming Severance Pay (eBook). An International Perspective*, World bank Publications (2011)

An underlying vision would be to create a place where people easily can access the clear rules that matter most for them. Not a comprehensive system for all disputes, but the 3 or 4 criteria that are most relevant for the 10 most frequent problems. No rules emerging from a court procedure and hidden in a judgment, but simple criteria just three clicks away. Not drafted by a small legislative commission working on it for years but with input from professionals and experts that work with these criteria on a daily basis. So they can stay up to date.

5.3 IT Platforms Supporting Negotiation and Litigation

When you search "online legal services" in google, over 1.2 million hits pop up. Among these are mostly services for contract drafting, which are primarily designed for entrepreneurs, although they also offer services regarding divorce, sales of property and documents for identification.

Basically, the idea here is that people who know where they want to go, or need to choose from a limited number of options without an underlying conflict, can obtain the document against limited costs. Legal Zoom, which was discussed in the preceding section as well, shows what the challenges for service providers are in this area. They focus their services on one client, the person needing the document. They avoid the submission problem by assuming this person will interact with the other parties involved. So they do not have to ask all people involved in the transaction or in the conflict to log in on their website to work on the document. But overcoming that challenge may be the next step.

Legal Zoom – Online legal document services

Every year, Americans spend millions of dollars on routine legal needs, from incorporations and trademarks to last wills. Others put off creating essential legal documents because of the inconvenience and high fees. As attorneys, we knew there had to be an easier, more affordable way to take care of common legal matters.

Our founding vision was for an easy-to-use, online service that helped people create their own legal documents. We brought together some of the best minds in the legal and technological fields to make this vision a reality. The result is LegalZoom, the nation's leading online legal document service.

From the beginning, our mission was to set new standards for convenience and service in an industry not typically known for great customer care. We believe it should be easy for anyone to create a last will, incorporate a business, trademark a name or take care of other common legal matters. For us, the goal is not simply to provide a smart, cost-effective alternative—it's to make sure everyone gets the legal protection they need.

Since opening our virtual doors, LegalZoom has rapidly expanded to become the premier online legal and business destination. But as the company continues to grow, we're careful to hold true to our original vision. For us, putting the law within reach of millions of people is more than just a novel idea—it's the founding principle.

Brian Liu, Brian Lee, Eddie Hartman & Robert Shapiro
Co-Founders (<http://www.legalzoom.com/about-us>)

Other innovative services are aimed at providing a first layer of legal information and referral to organizations that can help with dispute resolution. They tend to have options for contact by e-mail, over the phone and in person. Increasingly they also have facilities for assembling letters and documents. The most sophisticated of these are attracting large numbers of users, and high satisfaction rates.

At the other end, the procedures for obtaining documents, permits, licenses and other authorizations from government organizations have moved online. The process of interaction between citizens and large organizations is highly streamlined through online interfaces, online information and FAQ databases. Hot lines and telephone helpdesks have proliferated, because telephone companies also help to collect charges for the use of these facilities, so they can be based on a more sound business model. NGO's in developing countries now also start using hot lines for services in the area of domestic violence, building on the rapid expansion of mobile telephone services.²⁰¹

Online Dispute Resolution Platforms

The submission problem has to be tackled head-on to let a very promising development fly. For the most frequent disputes, interfaces are being developed where both parties can interact. Websites offer dispute resolution support where people can exchange information, build up a case file with data, exchange points of view from both sides, submit offers and counteroffers to see whether they match, get help to calculate compensation, or can interact with a mediator through chat boxes.

Dispute Resolution Wikibox – IT platform for building a case file

"Excessive or repetitive information makes it hard for a judge or a mediator to find the essence of the conflict. The unnecessary details may become distractions that waste the mediator's time and make it more difficult to resolve the conflict. It is important to reduce the amount of information submitted to a case file, without sacrificing any important facts.

The Dispute Resolution Wikibox lets each of the parties in conflict explain their side of the issue and stipulate the facts they agree upon in an efficient manner that also makes it easier for the mediator to hone in on the core of the disagreement. The DR Wikibox is an online space that can be accessed by both the parties and the mediator. Each party creates their own Consolidated Opinion (CO) page where they set out their side of the disagreement.

By comparing the two CO's, the mediator can quickly identify the heart of the conflict and begin prompting the parties to focus their attention on specific subjects under dispute.

This online dossier can make the mediation process vastly more simple. Currently, the parties to a dispute can have an incentive to include unnecessary information to distract the other party or the mediator in the hopes of obtaining an outcome that is more than equitable. Also the process is done online, decreasing the costs in time and effort for both the parties and the mediator."

Bernard Hulsman, Executive Director Wikiation

²⁰¹ UNIFEM (2007) 'Ending Domestic Violence in Southeast Europe and Turkey: Towards a Regional strategy for Action' Unifem Central and Eastern Europe, Bratislava.

In 2011, the European Union took the movement towards Online Dispute Platforms a step further. Acknowledging the fact that consumer disputes are currently the most frequent type of dispute in the EU (just like family and land disputes are in developing states), the Commission tackled the issue by proposing a new regulatory framework for their resolution. The new legislation consists of the proposal for a Directive on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and the Regulation on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR).²⁰² As Commission puts it, “[h]andling the entire process online would produce the time-savings and ease communication between the parties”.²⁰³ Now that the Commission sets the standard, it may well be that courts will really start using the latest online dispute resolution technologies.

Almost all adjudication processes are still paper based. The instructions of how to conduct a court procedure have to be extracted from laws. And while these rules of procedure are not regularly updated when case law has an influence, citizens in a procedure are still expected to know about the changes, which have to be collected through painful scanning of many court decisions.

In the mean time, internet plays a key role in almost every service. Sure, not everyone has access to the internet, and in large rural parts of Africa, Asia and Latin America this is still not available against reasonable costs. But smart phones and broadband connections are changing this rapidly. The majority of the world population now has at least one person in close vicinity that is able to assist, and has access to the internet. Reports on access to justice all agree that on line information systems are part of the future.²⁰⁴

Stimulating Courts To Go On Line With Integrated Negotiation and Adjudication Platforms

It is very likely that the lack of good incentives on courts plays a role here. Judges, only supervised by appeal courts, do not have reasons to use the latest technologies that best serve the needs of their clients.

If this incentive problem can be solved, breakthroughs can be expected. Many types of legal and similar processes, such as tax matters, issuing building permits, buying financial products, houses and cars, and even psychotherapy have been brought online. Dispute resolution can be supported online through a question and answer format, while an online, interactive, environment is also very appropriate to inform people about options, to give them feedback on the information they provide, and to upload evidence. A help desk can give further support, and if needed a professional can help to upload information. A mediator or adjudicator can enter the online environment, and help to resolve the conflict on line, or use the platform to organize an offline meeting rapidly.²⁰⁵

If necessary, an adjudicator can enter his decision on the platform, referring to the information the parties have submitted by hyperlink, instead of having to repeat the allegations of the parties in his own judgment. One step further lays the possibility to increase the transparency of legal decision by sharing outcomes online and making reasons about what norms are applied and why public, open to scrutiny and subject to peer review.

²⁰² Alternative Dispute Resolution and Online Dispute Resolution for EU Consumers: Questions and Answers, Commission Memo 11/840, 29.11.2011, available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/840>

²⁰³ COM(2011) 794 final Proposal for a Regulation on online dispute resolution for consumer disputes, 2011/0374, 29.11.2011

²⁰⁴ See Section 1.3.

²⁰⁵ Rule, C. et al., Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS* Developments, Research Paper 2010.

The Resolution Center (eBay/PayPal)

This online dispute resolution centre resolves 60 million disputes in 16 different languages around the world each year, in areas as diverse as payment for the goods sold, item receipt, and condition/quality. Buyers and sellers who have never met each other face to face can use the Resolution Center process to reach amicable agreements, and if necessary, to have them mediated and adjudicated. The Resolution Center facilitates dialogue between buyer and seller. More than 90% of the disputes filed are resolved without requiring the intervention of a third party to render a decision. Thus, the system saves time, money, and increases customer satisfaction. Crucially for eBay, it increases trust in transactions.

How eBay's Community Court Works

If a seller on eBay India feels that he has received a bad review from one of his buyers that he did not deserve, he can log into the Community Court and explain why.

Once inside the platform, the seller has the ability to upload images, text or whatever else he thinks best illuminates his perspective. Once he is finished making his case, the Community Court automatically contacts the buyer and provides her with the same opportunity. The buyer has the benefit of seeing the seller's submissions, and the buyer can offer whatever text or images the buyer feels are relevant to backing up the feedback she left. Once the buyer's submission is complete, the seller has one final opportunity to rebut the buyer's points, in text only.

Once the submissions from the buyer and seller are complete, the Community Court puts the case in front of a randomly selected panel of jurors. Jurors in the Community Court are eBay members who have previously applied to be jurors and met the fairly stringent eligibility criteria (e.g. a significant period of time on the eBay site, a positive feedback rating, and ample transactions as either a buyer or a seller). Each juror reviews the information submitted by the seller and buyer in its entirety before making their decision. The juror is merely asked if he or she agrees with the buyer, with the seller, or if they feel they cannot make the decision.

One of the issues that should be addressed is how courts can be incentivized to use the best available technologies. This is rapidly developing. eBay and PayPal have a dispute resolution system in place that now processes 60 million disputes between buyers and sellers each year, within and even across borders.²⁰⁶ Research has shown that online formats for dealing with common disputes have a potential beyond being a substitute for offline processes. The forums can help people to state their issues in a non-confrontational way, and avoid the escalation that may be occur if they meet in person and have to respond immediately.²⁰⁷

These technologies can be used by courts anywhere in the world. eBay resolves disputes in 16 different languages around the world, in areas as diverse as item payment, item receipt, and item condition. Buyers and sellers who have never met each other face to face can use the Resolution Center process to reach amicable agreements that are enforced immediately. More than 90% of the disputes filed are resolved without requiring the intervention of a third party to render a decision. This system saves time, money, and increases customer satisfaction and trust in transactions.

²⁰⁶ Cooper S., Rule C. & Del Duca L.F., "From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross-Border Redress Systems", *Uniform Commercial Code Law Journal*, Vol. 43 (2011)

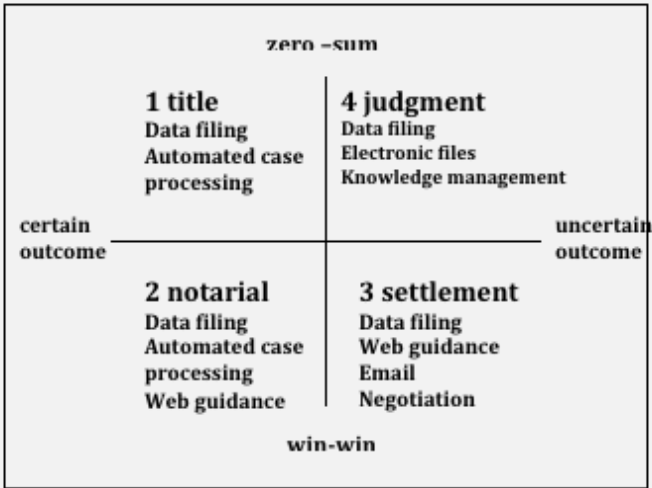
²⁰⁷ See above footnote 35 and 36.

It is interesting to look at the incentives. eBay and PayPal are uniquely positioned in global commerce. eBay sells nothing, and holds no inventory – its job is to keep the marketplace running smoothly. As such, it is a very effective neutral third party – it has relationships with both the buyer and the seller, and has no interest other than ensuring issues are handled quickly and painlessly.

This positions eBay perfectly to appreciate the value of online dispute resolution, and as such eBay has been the leader among high tech companies in ODR ever since. The Resolution Center is by far the largest ODR system ever constructed, and it is arguably the only adjudication systems in the world that handles more than a million similar disputes in a year. To date, it is one of the few systems that has automated so successfully, which enables faster and more effective resolutions that can scale down to very low value disputes.

Investing in a program or an online interface for dispute resolution, from the first written exchange of information, onwards through negotiation support, towards adjudication by a court or perhaps a tribunal of neutrals selected by the disputants from online profiles; it is beginning to look like an interesting proposition. It could become a new worldwide standard for procedures.

1. Information technology for courts



2. The matrix displayed above is a tool for improving court performance using information technology. It visualizes how court cases actually differ, distinguishing four types of case processing: title provision, notarial processing, settlement and judgment. Cases in the title group are simple and routine. Case handling in this group is a good candidate for on line data filing and automation, as it can speed up processing. Web guidance functionality for public information and electronic forms support the notarial group, where courts have the role of preserving documents that make entitlements transparent. Cases in this group involve routine examinations of proposed settlements. Web guidance and email or other software supporting negotiations can support processing specifically for the settlement group. Thus, parties wanting to settle their dispute can benefit from information on court policies and on general trends in judicial decision making. Electronic files and knowledge management are the main tools specifically for complex cases, particularly in the judgment group.²⁰⁸

²⁰⁸ Reiling D., *Technology for Justice, how information technology supports judicial reform*, Leiden University Press (2009); Reiling, D., "Understanding IT for dispute resolution", International Journal for Court Administration (2011)

New forms of private courts have developed as well (see box). They have found ingenious ways to overcome the submission problem. Defendants cooperate in the eBay dispute resolution process, because they do not want to be held back in their sales or buying through the platform. E-court in the Netherlands has a model in which a procedure before a formal court is mimicked to a large extent, so that the defendant's first reaction is to participate in the e-court proceedings. But he has the option to opt-out, and then there will be a procedure before a normal court.

This is perhaps one of the reasons why the system has been heavily criticized, but another way of looking at it is that the systems gives more access to justice, because it gives plaintiffs choice, without compromising the choices of the defendant. At the same time, E-court shows that there is a dire need for independent supervision of private dispute resolution processes. The extended battle about the merits of mandatory arbitration in standard employment or consumer contracts is another signal of this need.²⁰⁹ Such mechanisms give more choice and more access to justice, but just like other adjudication systems, they need monitoring.

In the US, mandatory arbitration is criticized heavily because it is sometimes used for other reasons than providing better access to plaintiffs and less costly dispute resolution for defendants. It can also be a tool for avoiding high awards and class actions in courts of law. By allowing plaintiffs choice, this criticism can be neutralized, however.²¹⁰

E-Court, the first online private court:

E-Court is an online private court for civil disputes; the legal proceedings are designed to last 8 weeks at an affordable cost. This private court generates its own verdicts, which have the same legal force as a verdict of the public courts.

It is the first time that the monopoly of public court proceedings ("rechtspraak") has been brought to an end on a massive scale for the general public by a private initiative. This is possible because e-Court by itself generates a title for execution of the verdict, in the same manner that the public courts do.

In addition, certainty and prediction are also unique features:

- It is the first time in history that court proceedings take a predetermined amount of time (no delays are granted to the parties, nor to the court).
- It is the first time in history that it is clear to all involved what will happen during each week of the proceedings.

Transparency by virtue of online exchange of pleadings and documents, as well as information about the professional background of the e-Judge. Very high efficiency and productivity by smart use of computers and knowledge.

e-Court has now had almost 1.000 legal proceedings and many to come. Now that we have overcome the resistance, things go very fast, because the need for e-Court is clearly available. We managed to find some frontrunners in each legal field (public judges, lawyers, notaries, scientists, court bailiffs) and with joint forces we managed to persuade the conservative legal experts.

Henriette Nakad
Founder E-Court Foundation

²⁰⁹ Schwartz D. "Mandatory Arbitration and Fairness" *Notre Dame Law Review*, Vol. 84(3) (2009)

²¹⁰ Sternlight J.R. "In Defense of Mandatory Arbitration (If Imposed on the Company)" *Nevada Law Journal*, Vol. 8 (2007), p. 82,

Notwithstanding all the positive developments, the usage data and the resistance against these innovations show that this development is still in its early stages, and the scope of these innovations are still rather limited. Fundamentally, access to justice is still low-tech. This becomes apparent when we look at two major components of the delivery system of justice: the process of delivering legal information and the legal procedures for dispute resolution.

Resistance to innovative online services

"Change is hard because people overestimate the value of what they have - and underestimate the value of what they may gain by giving that up."

James Belasco and Ralph Stayer, *Flight of the Buffalo* (1994)

"The legal profession is an old profession and one that has been slow to adopt innovation and technology. Because of this, there is often a cultural resistance in adopting new techniques and processes. LawGuru, being one of the pioneers in online legal solutions, has faced considerable resistance from lawyers who were concerned about the ramifications of participating in this type of service."

Bahman Eslamboly, President LawGuru

"Potential customers seek certainty (do not want to be first-mover) before crossing a chasm to an innovative product that is not yet proven-product."

Willem Wiggers, Founder Weagree B.V.

5.4 Facilitators Leading Parties Towards Fair Solutions

Another way to overcome the submission problem is rapidly evolving. In many forms, and in many countries, a new type of legal service provider is appearing. Perhaps this problem solving lawyer has always existed, but enabled by the newest mediation skills, the facilitator is about to change the roles of lawyers, mediators and judges in a fundamental way.

Combining Roles of Lawyers, Mediators and Judges

One of the first things we can learn through interaction with NGO's, law firms serving the poor and organisations who carry out dispute resolution throughout the world, is that many of them are now working in an entirely different way than the zealous litigators that were the dominant image of a 20th century lawyer.

We will use the word facilitator, though we want to make clear that this type of service is still very much developing, that there will perhaps never be one way to do this, and that we are not promoting the creation of yet another legal profession. What they have in common, is that they combine some or all of the skills and roles of a lawyer, mediator and judge as defined in a more traditional way. These people operate under different names.²¹¹ In villages, it is common for one person to take on the role of a 'problem solver'. This person will be approached by parties when there is a conflict, and he will find a resolution. There is often no payment made up front, but problem solvers may be given gifts or tokens of gratitude following a successful resolution.

²¹¹ Barendrecht M. "Best Practices for an Affordable and Sustainable Dispute System: A Toolbox for Microjustice", *Tilburg University Legal Studies Working Paper No. 003/2009*

Individuals fulfilling this combined role also go by the names of mediators, lawyers, paralegals, and facilitators. As a typical example, in a village justice type setting, one individual will:

- Act to provide guidance in the form of the knowing the local law or custom (lawyer)
- Try and find a mutually acceptable solution between the two parties (mediator)
- Grow with the parties towards a decision upon issues which they cannot agree on (judge)

Facilitator: Combining Roles of Mediator, Lawyer and Judge

KBH Lampung are a legal aid NGO in Indonesia. They frequently see people like Isadora (all names have been changed). Isadora approached one of KBH's 'Poskos' because they are known in her village for finding solutions to conflicts. Isadora came to Farid, a KBH facilitator, with her problem. She has a conflict with her brother over some inheritance from their parents. Both her parents died last year, and in their will gave all the land they owned to both Isadora and her brother (Ishmael). However, Ishmael has rented out all of the land to another man, including a section that Isadora had been cultivating to grow some produce.

Farid first listens to Isadora's story. He then fulfils the first of three roles, similar to that of a lawyer, by providing Isadora with information about the law that applies to inheritance (which is complicated), and also about other people who have been in similar conflicts who came to him. After hearing this, Isadora thinks that she would like to try and sort out the problem by working with Ishmael, rather than going to court.

Following this first meeting, Farid asks both Isadora and Ishmael to come to a meeting to try and sort out their conflict. Here, he acts in the second of his roles, that of a mediator. He listens to both Isadora and Ishmael, and encourages them to listen to each other. He helps them develop potential solutions, and to establish what the real needs are behind the problem. As a result of this process, it is agreed that Isadora should continue to cultivate the small section she is already working (and that Ishmael will sort this out with the renter). They also agree that Isadora should receive some of the income, but they cannot decide how much.

At this point, Farid takes on his third role, that of an arbitrator. Isadora and Ishmael may not formally agree to abide by his decision, but they at least make clear that they will attach value to his opinion about what should happen. In this way he is encouraged to make a judgement about what is a fair amount of the rental income for Isadora to receive.

While combining the roles of lawyer, mediator and judge is actively avoided in many developed countries, due to concerns over biases, a process that involves multiple people, stages or layers will by its nature take longer, be more complex, and cost more. In situations where costs of access to justice are too high for many, these multiple roles can present a financial barrier to access to justice.

Individuals who provide solutions naturally take on the role of information-provider, giving information on the legal situation to both parties as well as often providing information on what is 'normal' in the circumstances. In situations where there is limited access to the law or to formally trained lawyers, this information may be expanded to include advice for both parties regarding their particular situation, as well as previous decisions and their implications. Indeed in many locations, facilitators act as human and civil rights ambassadors, highlighting rights issues within conflicts. In this role they highlight the 'fairness' or 'unfairness' of practices or expectations, and allow the parties to negotiate from their perspectives on this.

Timap for Justice (a paralegal program linked to lawyers)

"Timap's frontline is made up of community-based paralegals rather than lawyers. Paralegals address justice issues using a flexible, heterogeneous set of tools. For individual justice-related problems (e.g., a father refuses to pay maintenance), the paralegals provide information, mediate conflicts, and assist 'clients' in navigating authorities. For community-level problems (e.g. domestic violence is prevalent in the community, or a mining company unlawfully acquires villagers' farmlands), they engage in community education and dialogue, advocate for change with authorities, and organize community members to undertake collective action.

The paralegals are supported by lawyers. In severe and intractable cases, the lawyers employ litigation to address injustices which the paralegals cannot handle on their own. Because litigation or even the threat of litigation carries significant weight in Sierra Leone, our capacity to litigate adds strength to our paralegals' ongoing work as advocates and mediators. The programme strives to solve clients' justice problems—thereby demonstrating concretely that justice is possible—and at the same time to cultivate the agency of the communities among which it works."

Simeon Koroma, Founding Director

The communication facilitation role is one which is utilized in the most circumstances. As previously noted, interest-based negotiation provides the best opportunity for a sustainable solution to a problem. Accordingly negotiation assisted by a facilitator, so that it becomes mediation rather than outright adjudication, is the preferred method of reaching solutions worldwide. The degree to which facilitators fulfil the western definition of a mediator varies from place to place, but the essential element of providing assistance for the parties to come to a solution themselves is preserved to a great extent.

As arbitrators, these individuals often have no formal authority whatsoever. However, in the context of scarce resources, formal authority is often entirely absent, expensive to access, or for sale and open to bias. In these scenarios, individuals gain authority through one of two mechanisms. Firstly, they can gain authority through their position in the community. Often, the facilitator will have been a respected person in the community before they became a facilitator, and therefore, decisions which (s)he makes will have the 'authority' of the community behind them. Respect and wisdom are not very tangible things, but we know that all around the world people with good practical reasoning skills, with a good memory of the history of the community and the capacity to use language to give meaning to facts, events, feelings and future directions, stand out in communities and take on a role in dispute resolution. If this person is capable of engaging with internal values and motivations of the community, people are likely to accept the authority of their decisions.²¹²

It is clear from this combined role of the facilitator, that there are a number of conditions which must be satisfied before the process will have any chance of working. The facilitators must have many skills and abilities which are common to almost all conflict resolution processes. They must be good communicators, treat information with confidentiality, be neutral and trustworthy, and be able to maintain focus on achieving a solution. In addition to these skills however, there are skills which are particularly pertinent to the context of scarce resources and a lack of a strong formal system. The facilitators must always be pressing for a fast and fair solution, as speed is often of crucial importance to the effectiveness of any solution, and perhaps most importantly, they must be expert at motivating unwilling parties to engage in the process.

²¹² Tyler T.R., & Huo Y.J., *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*, Russell Sage Foundation (2002)

Concerns and Ways to Address Them: Strengthening Facilitation Processes

Throughout the world, many thousands of individuals are fulfilling all of these requirements. Informal methods of facilitated conflict resolution likely outstrip all of the formal systems combined in terms of the numbers of conflicts solved, and they are usually low-cost, fast and accessible. Yet, of course there are also concerns; many of the traditional methods of dispute resolution contain elements that are contrary to international and national standards of fairness (as articulated in both international and national anti-discrimination legislation for example). Many traditional systems of conflict resolution have been charged with perpetuating gender discrimination as well as re-enforcing the status quo of power relationships.

The core question is what can be done to strengthen these people in their role to provide these services as fairly, unbiased and neutrally as possible? And, in complex power directed worlds, with sufficient authority to achieve compliance? Authority can be based on the use of work methods that support procedural and outcome justice. Sharing knowledge on what works to provide fair solutions, can empower people to use the best methods to work towards results.

As we know from legal needs studies, more conflict resolution is delivered in the world by people without a legal background, than by lawyers and judges. Just as communities have always had money lenders, they also have informal dispute resolution providers: village elders, people's courts, or informal mediators. And just as has been the case with money lenders, their dispute services vary in quality and in price, meaning they are not accessible for everyone. Microcredit reinvented the profession of the money lender, by taking apart the tasks of lending, funding, monitoring, and securing payment. In addition, it found low cost best practices for each of them by utilizing the capabilities of communities themselves. A similar innovation process is possible for services that aim to help people with solving their disputes.

In this view, that is widely shared by experts, the way forward is not reducing the role of the informal dispute resolution providers, but supporting them and helping them to improve their services where they are open to this.²¹³ The challenge is to increase the fairness of outcomes where necessary, linking them to basic notions and criteria of fairness of outcomes and procedures (such as equal opportunity to present evidence, and the testimony of men and women carrying the same weight), so they become better providers of justice. The literature points to risks such as capture by elites, or a bias against certain population groups, but it also suggests ways to remedy these risks. For instance, it has been demonstrated to be possible to let the insight grow with village elders that they will no longer allow property grabbing, and make a public statement about that.²¹⁴ We will now look closer to different strategies for upgrading and strengthening these services.

Facilitators As Helpers Of Judges

There is a major distribution network available that can be tapped into. Indeed, several successful programs that work with a facilitator that does not have a conventional role (representing one of the persons involved, or taking an passive, neutral position). In Central America, many people find justice through the Facilitadores Judiciales Rurales Program, which has operated in Nicaragua since 1998, and have now been expanded to Ecuador, Panama, Paraguay, Guatemala and Argentina.

²¹³ Ubink J., "Customary Justice: Perspectives on Legal Empowerment", Legal And Governance Reform: Lessons Learned. No. 3 (2011), p. 32

²¹⁴ Ubink (see previous note) reports that self statements by traditional authorities that they will not allow property grabbing from widows, works better than legislation, p. 139

Facilitadores Judiciales in Nicaragua and beyond

Linking the facilitator services to the court system is one option. An example of this is the Inter-American Program of Judicial Facilitators (Facilitadores Judiciales), winner of the first Innovating Justice Award 2011, presented in The Hague's Peace Palace. The program was set up by the Organization of American States and provides access to justice to hundreds of thousands of individuals. With over 2,500 facilitators, elected by the community, and spread throughout rural Nicaragua, the NGO provides access to justice for over 350,000 individuals. With smart methods and limited resources, the NGO increased access to a third party intervention, by creating a network of facilitators under the supervision of local judges.

The costs and time involved in bringing the problem to a third party forum have been decreased. The available data suggest that this actually leads to a decrease in the access to justice gap. Inaction, unsuccessful attempts to solve the problems and unfair solutions are likely to become more of an exception under such a scheme.

The next step was to integrate it formally in the court system. This ensured regular funding and ownership by an organization in Nicaragua. There also risks involved, however. European justices of the peace, working and living in communities, have faced a constant pressure to become a more regular part of the court system. Whether this increased their effectiveness is questioned by many commentators.

In the mean time, the system was expanded, both to urban regions in Nicaragua, and now gradually also to five other Latin American countries: Ecuador, Guatemala, Panama, Paraguay and now also Argentina. This clearly shows that good innovations can be used across borders, and that scaling up rapidly is not impossible.

Paralegals Working Under The Supervision of Lawyers

In Sierra Leone, and in many other African countries, paralegals are providing similar services, although there is great variation in what they do and some paralegal programmes focus on help with court litigation. Here the basic model is that they work under the supervision of specialized lawyers, who can take on the most difficult cases.

Networks of paralegals

Namati.org is a Global Legal Empowerment Network that seeks to strengthen dialogue among legal empowerment practitioners worldwide, focusing on strengthening paralegal programs. The network provides a platform for the sharing of resources and experiences, such as paralegal instruction materials, monitoring and evaluation tools, case management systems, and advocacy strategies

Global Map of Network Organizations



These individuals conduct this role because their position in the community makes them respected and authoritative, and often because they also have a track-record of producing results. When an individual approaches a dispute resolution process they are mainly concerned with achieving an outcome, and these individuals provide such an outcome with great regularity. How these individuals carry out these conflict resolutions can still provide a lot of valuable information to help us to develop better, more effective, conflict resolution processes.

“Both were happy over the result and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men’s hearts. I realised that the true function of the lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.”

Mahatma Gandhi

Lawyers Reaching Out To Needs of The Other Party

Professional lawyers are also increasingly using mediation techniques, taking the role of problem solver more seriously and more actively, as some of them have always done (see the box with quote above). In many countries approaches are developing where lawyers do not take their traditional roles as advocates for one party, usually operating in an adversarial way, but operate more neutrally. Family lawyers lead the way in integrating mediation skills in their working methods, but the same is true for employment law and other areas where relationships have to be preserved, funds for legal services are limited, and solutions that are seen as fair to both parties are more sustainable.

“Collaborative Law”

The “collaborative law” (CL) idea suggests that the lawyers and clients agree to negotiate from the outset of the case using a problem-solving approach.

“CL practitioners seek to provide a more civilized process than in traditional litigation, produce outcomes meeting the needs of both parties, minimize costs, and increase clients’ control, privacy and compliance with agreements. CL lawyers and parties negotiate primarily in “four-way” meetings in which all are expected to participate actively. Lawyers are committed to keep the process honest, respectful, and productive on both sides, while the parties are expected to be respectful, provide full disclosure of all relevant information, and address each other’s legitimate needs. CL theory provides that each lawyer is responsible for moving parties away from artificial bargaining positions to focus on their real needs and interests to seek “win-win” solutions”²¹⁵

In 2001, the American Bar Association Section of Family Law published a CL manual with practice forms.²¹⁶

Typically, these lawyers try to build a bridge towards the other party, stay away from judgments about right and wrong and use mediation techniques. At the same time, they push for a solution, because they know that they get paid to help their clients. In that sense they remain advocates. They are interested in achieving results. Understanding that getting buy-in from both parties increases the effectiveness of solutions, they may suggest solutions that can work for both parties, promote dialogue or pave the way to a third party to which both parties will listen.

Wanted: A Good Business Model for Facilitators

To strengthen the independence and availability of services, what is lacking for many facilitators worldwide is a business model that enables them to be adequately paid for their services to encourage these activities, without harming notions of integrity. In many situations, volunteers take on the role of facilitator in addition to the activities they conduct to make their living. Most of these facilitators hesitate to ask for money for services, because they feel it undermines their neutral and trustworthy position.

The question is, does this need to be the case? A doctor gets paid for a consultation. Does it harm his or her integrity to ask money for his service? If we want services to be more widely available, what type of model will enable a suitably minded individual to become a full-time facilitator?

Interesting models are being tested in the market. In many European countries, the legal expenses insurance model works for many disputes, but not yet for access to justice for defendants in criminal matters and for family disputes. Another development is that legal service providers are starting to offer facilitator type of services for a fixed fee that is affordable for middle to lower income groups (see box). If the supplier of these services has a reputation to lose in the market, this can perhaps create sufficient trust in the quality of these products.

²¹⁵ Lande, J. “Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering”, Ohio State Law Journal, Vol. 64, p. 1315 (2003).

²¹⁶ In Florida, the Florida Bar Association’s Family Law Section reports that its ADR Committee (its “fastest growing committee”) is focusing on CL. Florida Bar Association, Annual Report: Sections And Divisions, 76 FLA. B.J., June 2002, at 14, 25

Prepaid Direct Legal Assistance and Legal Insurance

Legal expenses insurance services gain increasing popularity among individuals. An insurer such as DAS Rechtsbijstand resolves up to 80.000 disputes per year, with over a million people insured just in The Netherlands. Legal insurances now offer different types of coverage, including consumer disputes, employment disputes, tax matters, etc. Those are the areas most legal problems emerge in. Being insured means that these problems will be taken care of professionally and will not cause additional unpredicted expenses.

DAS, a European leader within the legal expenses insurance market (active in 17 European countries, Canada and South Korea) offers a new experimental product of Prepaid Legal Assistance. It includes a number of affordable services customer can opt for at a fixed price: legal advice (€135), drafting and filing legal documents to relevant authorities (€135), conducting negotiations with the other party (€405), bringing and handling the case at the court on behalf on the customer (€810).

Source: www.das.nl

Governments and NGOs are also have a role here, as well as a responsibility. In some countries, legal aid programs work with fixed fees for lawyers, partly paid by the government and partly by the user of the services. NGO's in developing countries almost all offer their services for free, trying to meet the most urgent needs for access to justice. But by not asking any money at all, they may crowd out private facilitator services. And in this way, they growing and becoming sustainable will be an ongoing challenge.

5.5 Creating a Choice of Adjudicators

As we have seen, the access to a third party decision forum is essential to any conflict resolution system. But whoever wants to provide this type of access to justice, needs to ensure both parties participate, which is hard, and also has to think about a setting with sufficient incentives to assists the disputants in an optimal way. These are major challenges for innovations by judges, arbiters, specialized tribunals, online platforms and every other adjudication service.

Before we list the most promising approaches, it is good to reiterate what the essential role of adjudication is in creating a setting where problems are resolved fairly and expeditiously (see box below).

The Many Effects of Having Adjudication Available

1. The threat of involving third parties makes people aware of the need to reach an agreement. If they do not reach an agreement, then somebody will make a judgement for them.
2. So the adjudication option encourages parties to reach an agreement between themselves, in an environment where they have a greater degree of control over the outcome than through a third party.
3. It promotes reasonable offers. Where going to the third party is a credible threat, it places pressure to make reasonable offers to the other party, and provides weaker parties with the opportunity to 'hold out' for a fair solution from stronger parties.
4. If negotiations get stuck, the judge (or any other adjudicator) can assist the parties in communication and negotiation, taking on a facilitator role, and lead them towards a decision.
5. Finally, if the problem can still not be resolved by the parties themselves, the adjudicator can take the decision for the parties. Ideally, the adjudicator then imposes a decision that is maximally fair, fits the issues and the needs for resolution and is most likely to be acceptable to both parties, or at least to the broader community. Both in formal legal systems and in informal processes, a decision that can be explained from norms that are generally accepted as relevant and applicable will have greater legitimacy.

A Credible Option of Intervention

In order to be a credible option, the third party decision must be fair, fast, affordable, and its decisions must be likely to be complied with. The challenge for third parties is to meet all of these criteria.

Research has started to make clear what works here and what does not. The literature on litigation and settlement tends to suggest that a threat with extensive litigation would do the job. Scared by the prospect of having to spend many days in court, the parties would each give in and settle in a reasonable way. During the process of litigation, they learn more about each other's case. The asymmetry in what they know about the facts will gradually disappear.²¹⁷

But one of the problems here is that the threat of extensive litigation is not credible if one of the parties lacks the money and resources. An extensive program of financing litigants with little money becomes necessary: legal aid, no-win no-pay arrangements where the lawyer takes a large percentage of the award, legal insurance or pro bono lawyers. If there is no such arrangement available, the party with the most resources has a much more credible threat to litigate than the other party and he will end up with a much better settlement.

Another issue not captured by these economic models is that a rational defendant will start with a low offer. Why would he offer a reasonable settlement if he knows that the other party still needs to go through a long process before the court will render a decision? The rational defendant (and some defendants may be on the stubborn side of rationality) will foresee that there are many opportunities to settle in the future. There is even a probability that the plaintiff gives up entirely.

This may be the explanation that many law suits settle on the steps of the courthouse.²¹⁸ At that time, settlements are more likely to be as fair as the expected outcome if the court decides. But just before the hearing in court, most of the legal costs have already been paid and the parties have already waited a long time for a resolution of their conflict.

²¹⁷ Daughety, A. F. and J. F. Reinganum (2008). Settlement. Discussion Paper prepared for inclusion in the Encyclopedia of Law and Economics (2nd Ed.), Vol. 10: Procedural Law and Economics, Ed. by Chris William Sanchirico to be published by Edward Elgar in 2012. Spier, K. Chapter 4: Litigation, in: A. Mitchell Polinsky & Steven Shavell, Editors, The Handbook of Law & Economics (2007), p. 259.

²¹⁸ Spier, K. E. (1992). "The dynamics of pretrial negotiation." Review of Economic Studies, p. 93-108

Most law and economics analysis does not take minimizing dispute resolution costs and disposition times as a goal, but focuses on fairness, legal quality of outcomes and the production of useful precedents.²¹⁹ Empirical studies of court procedures tend to be driven by the desire to prove the effects of certain legal innovations proposed by judges, rather than a systematic evaluation from the perspective of the needs of the users of courts.²²⁰ So these cost issues and the dynamics of settlement and litigation are disregarded.

This is likely to be the reason that the law and development literature on judicial and civil procedure reform goes in a different direction. It tends to recommend measures that enable disputes to be adjudicated faster and at lower aggregate costs. For the provision of basic justice care, this is an important perspective. According to this literature, key ways to achieve speedier and lower cost adjudication are: monitoring and better incentives, specialisation for the most frequent and urgent disputes (not “legal specialization” see section 5.1), creating a choice of court and alternative adjudication procedures and more simple procedures.²²¹

Choice: Judges, Informal Tribunals, Involving the Community and Broader Public

The third party adjudicator does not have to be a formal court. He can of course be a judge, but also an arbitrator or an informal tribunal. The process can also be more complex, where more people who are relevant to the parties are gradually involved and give feed-back on what is an appropriate solution. There are many shades, options and stages between an individual judge, a tribunal from and watched by the community and involvement of the press and what is now often called the “court of public opinion”.

But the essence of access to justice is that at least one option of third party resolution should be available, affordable and with the expectation of a sufficiently fair outcome.

²¹⁹ As is the case with most literature by legal scholars on specialization of courts.

²²⁰ Menkel-Meadow, C. and Garth, B., *Civil Procedure and Courts*, in: Cane, P & Kritzer, H. (Eds.) *Oxford Handbook Of Empirical Legal Studies*, Oxford University Press, 2010, p. 679.

²²¹ See the literature in footnote 30 and 162. For an interesting strategic view at judicial reform in India see: Kanwar, Vik et Al., *Recommendations for Legal and Institutional Reform, Justice without Delay*, Discussion Paper 2010, O.P. Jindal Global University

Abunzi: Locally Elected Courts in Rwanda

"The plaintiff sends a letter or goes to the secretary of the committee and lodges a claim. This can be verbal or written. The secretary informs the president and invites the other members for a plenary meeting, where the committee decides on its competence.

If the committee finds itself accessible, both parties are invited to choose one person from the council to be mediator. Together, these two choose a third person. The three people will form the reconciliation committee for the case.

The plaintiff makes his statement and the other party gets the opportunity to defend himself. The public is free to add information and to get involved in the discussion. The committee functions as a judge and listens to all the information. The committee has an active role and researches the case by asking questions and visiting the site, interviewing people, etc.

After this opening meeting, the committee retreats and prepares a solution. The aim is not to apply law but to find a just solution. If the committee members do not agree, they decide by majority and the person who disagrees makes a statement to prepare the court case as evidence."

Chief of an Abunzi committee in the Karongi region in Rwanda.

"After the Gacaca success, we thought that these kinds of practices could also help us to provide cheap and effective access to justice for minor private disputes. So, the practice of the Gacaca is the basis of the Abunzi. It is based on trust and aims to encourage people to settle a dispute. Without wasting time and money. The formal system does not only solve but also creates disputes because it requires involvement of parties over time and raises anger. Reconciliation is better and restores relationships."

Senior official of the Rwandese Ministry of Justice

In order to ensure this option, many jurisdictions now offer more choice. Rwanda set up a system of community courts, next to its formal justice system. It includes a smart way to overcome the submission problem: each party can choose one adjudicator from a panel of more than ten local, trusted conflict resolvers elected by the community; together they appoint a third one. In Indonesia, people wanting a divorce can either go to the religious courts or to the state courts.

If the person initiating the action has this choice, there will be a higher probability that he has a credible threat of involving a third party and that he can actually afford a procedure if settlement negotiations break down. Moreover, the incentives on the third party to provide a good, speedy service, with reasonably fair outcomes, are likely to increase. There is now a competitor who may become a threat to the existence of the court, or at least another benchmark how such cases can be handled.

Choice can also be productive within the court system, depending on the way it is financed and how tight the procedural rules are. If different courts have jurisdiction, and they can compete sufficiently for clients by varying the costs and quality of their procedures, the clients needing an accessible forum may benefit from this.

Another avenue is to improve the access to interventions from government agencies and local officials. These often have a major role in resolving issues, through formal processes, but also informally. If they are more responsive to problems as experienced by citizens (if necessary under the pressure of administrative review procedures) they can be an alternative third party option.²²²

Accessible Governance: Administrative Processes and Review

Public administration agencies deal with every-day issues such as tax collection, licensing of businesses, managing official registries and land titles, education, health, etc. As such, they are the principal interfaces between the state and the individual, and the 'quality' of their services is critical for the protection of basic rights and liberties, including access to justice. For public administration and administrative justice, supporting procedures that are easy to use, accessible, and affordable can contribute to empowering individuals experiencing problems relating to property rights, ID birth certificates and public services. By situating the public administration within a rule of law framework, the 'users' of the system become rights-holders, able to legally claim services of a certain quality. This is particularly important for members of weak and vulnerable groups, such as women, IDPs and children.

In many countries there is often a disproportionate gap between the vast number of administrative acts taken by public authorities, and the relatively low number of administrative reviews handled by courts and tribunals. One reason for this is the costs and length of proceedings. A second is the lack of information and understanding by individuals how administrative justice works. There seem to be generally less awareness and understanding of fair trial standards in administrative justice compared to criminal or civil law proceedings. The lack of awareness is compounded by the fact that these proceedings place greater responsibility on the individual to initiate appeals, often without access to legal aid.

Richard Zajac Sannerholm, Folke Bernadotte Academy, Stockholm

We should never give up on the basic idea of courts as third party adjudicators, but create a variety of options for adjudication. Choice is the best protection against slow and costly litigation. Ideally, these options must be present for all of the most frequent and urgent problems. Just offering the possibility of ADR, or specialized courts only for small money claims, is not going to provide relief for people seeking basic justice care.²²³

Simple Procedures Are Providing Effective and Fair Adjudication

In order to provide basic justice care for all, it is vital that there is at least one effective adjudication process available. It should be available at low cost for normal cases. More extensive services can be made available for complex problems, but for an effective system, 80 or 90% of the problems need to be solved by adjudicators quickly, close to the source of the problem.

²²² Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone II 2008, Chapter 1

²²³ See for the failure of just opening up ADR to provide more effective access to justice in the US, Menkel-Meadow and Garth 2010, footnote 220.

Properties of Dutch Employment Termination Procedure	
Time from filing to decision	4-8 weeks
Format procedure	Written request, written defence, hearing
Expectations as to communication and negotiation	Communication between the parties, negotiated settlement in 80% of cases, cooperative behaviour in court procedure, reasonable offers when bargaining
Hearing	30-60 Minutes; settlement talks; questions by judge; views from parties and lawyers
Issues at the heart of the procedure	Reasons for discontinuing the cooperation, consistent feed-back and training by employer, efforts by employee to improve performance and skills, efforts by employer to find another job for employee within own organization, opportunities for employee on the labour market.
Fact-finding	Judge takes parties' views on problem as prima facie evidence; tests how each party contributed to preventing and solving the problem; option to hear witnesses, but this almost never happens
Criteria used for distributive issues	Statutory rules on notice period Formula for severance payment, depending on years served (1/2 to 2 month salary per year) + correction for each party's contribution
Legal assistance	No obligation to use a lawyer admitted to bar. Every helper allowed, in practice mainly lawyers trained in employment law and human resources (members of specialized bar, lawyers employed by trade unions, legal expenses insurers, etc.)
Court fee	In the 100s of €
Lawyers fees	€500-€3000, employee's fees often paid by employer + option of legal aid
Appeal	No, except for failure to observe Art. 6 European Convention Human Rights (due process); almost never happening

Many courts and tribunals across the world succeed in offering such a deal, although there is not much literature and research documenting court performance for specific categories of basic justice care issues. Experts recognize, however, that most countries have at least one part of the basic justice care system that works well. In Brazil, social security small claims courts are quite effective, as are administrative courts in many other countries. Indonesian family tribunals are seen as quite effective as well. Other countries developed fairly effective specialized courts or informal tribunals for neighbour disputes, consumer conflicts, debt problems, drug crime, or employment issues.²²⁴ If the fastest and fairest of these processes would become the worldwide standard, the access to justice gap could be closed much more rapidly.

The basic working methods for such tribunals providing adjudication are available and straightforward. The procedure that effective courts follow typically starts with a simple document from one party in which the problem is described to which the other party responds. A decision is taken within a few months, on limited evidence, after a hearing of 30 minutes to a few hours. This is in line with the findings in one leading review of empirical civil procedure research, concluding that fixing a trial date early on and limiting discovery early makes procedures more efficient.²²⁵

²²⁴ See for overviews of court specializations: Barendrecht, J.M., Kamminga, Y.P., & Verdonchot, J.H. (2008), Priorities for the justice system: Responding to the most urgent legal problems of individuals, p. 13 (relating them to the most important justiciable problems), Dory Reiling, Court Specialization or Special Courts?, A Toolkit for Development, Working Paper 2007; Zimmer, M.B. Overview Of Specialized Courts, Journal of Court Administration (2009).

²²⁵ Menkel-Meadow and Garth 2010, see footnote 220.

These courts use standards for decisions (see Section 5.2 on sharing rules) that are known to the users of their courts. These judges expect the parties to settle their case. They ask questions and are available for what is needed to get the settlement process going again. Sometimes these courts and tribunals help claimants with simple forms to start a procedure, or with a court clerk who writes down oral complaints.²²⁶ The best practice seems to ask claimants to answer a number of questions in their own words and to submit some information. Similar questions can be asked to the other party. Within this general model, specialization towards the most frequent and urgent problems is needed (see Section 5.1). Once such a specialized procedure has been developed, it can be used in different places and by different types of tribunals. A local, informal court can adapt the procedure in order to deal with family cases or neighbour disputes on this basis.

Building and Monitoring Capacity for Resolution

The capacity of such courts can be increased if they are linked to the approach of using facilitators (see Section 5.4). Working with paralegals, facilitators, bare-foot lawyers, or any of the other names that are given to such valuable providers of justice, a single judge can provide solutions in thousands of cases, in less time than it currently takes to solve hundreds.

Such a model allows the facilitator (with appropriate training) to act as the judge's representative in a community. In Nicaragua's judicial facilitator programs, periodic visits by the judge, combined with record keeping by the facilitator, allows for basic quality control, and judicial oversight. 80% of cases can be resolved in such a way, because (as indicated earlier), common problems share a great deal of characteristics, as do the desired solutions. The solutions are provided close to the source of the conflict, while providing quick and direct access to a more powerful decision-maker in complex or particularly contentious cases. In a one-day visit to a facilitator, a judge can provide the volume (and quality) of decisions s/he might normally provide in a month.

There is more potential here for innovation. Combined with modernising court processes (standardising intake procedures, court application formats, and providing help-desks) to provide more understandable, effective services, such innovations can produce a great reduction in the case-load of a judge and increase his scope. The effect of which is to allow judges to apply their extensive experience and expertise where it is most needed: in the small proportion of cases which require a greater degree of attention and consideration.

These modernised court procedures are predominantly aimed at creating solutions to problems at an earlier point. Avoiding costly and time consuming hearings through the use of smarter intake procedures, encouraging hearings based on dialogue between the parties and the generation of a solution which is acceptable to both, can reduce the time it takes for a case to go through the court procedure. Further, it ensures that the time spent by the judge is spent generating a solution to the problem, their area of expertise, rather than on investigating matters of fact or standpoint which can be determined prior to hearings.

The other aspect of modernisation relates to how improvements in court procedures can be made a part of the institution. A one-off examination and improvement of procedures will create improvements, but better still is an ongoing and systematic process of evaluation and response. Courts (and other decision making bodies) can be motivated to improve their services through the use of evaluation procedures. Asking parties, lawyers, representative agencies and judges about their experiences of court processes provides the basic information that is needed to improve those services. In European court systems, this type of feed-back is starting to become part of quality programmes.²²⁷ This information can be used to motivate judges, arbitrators, mediators and others to continually improve their service, and to address issues that are preventing the fast and effective resolution of problems that are brought before it.

²²⁶ As in Brazilian small claim courts, see footnote 229.

²²⁷ European Commission for the Efficiency of Justice (CEPEJ), see footnote 41.

5.6 Using Reputation to Induce Compliance

A just agreement or decision is not enough; the ultimate goal of any access to justice intervention is that something changes: behavior, control over goods, remedying harm done or compensation paid. So, basic justice care also means ensuring project developers actually compensate the informal settlers they are chasing from their plots of land. Or making sure fathers do indeed take financial responsibility for their children after divorce. Compliance with judgments or agreements is crucial, and it may be more difficult to achieve if defendants are more powerful? What are the most promising approaches in this area?

Effectiveness of Legal Sanctions

Judges and lawyers are associated with sanctions. With fines for wrongful behaviour, prison sentences because of non-payment of child support, selling of property to make people pay their debts. This is how the legal system tries to induce compliance.

When we look at the data on compliance that is available, a different picture emerges. One study in the Netherlands found that the compliance rates after three years for default decisions were just 31%. For judgments decided after a full procedure with participation of the two parties, this was 74% and for negotiated settlements even 82%.²²⁸ In Brazil, the average compliance rates for cases going through small claims courts was 45%.²²⁹ These figures contradict the assumption that sanctions are crucial to compliance.

Procedural Justice, Social Norms and Publishing Usual Outcomes

The differences in figures suggest that the level of involvement in the process seems to affect compliance. This is in line with procedural justice theory showing that the level of participation people experience in the procedures that lead to the outcomes has a strong impact on the compliance.²³⁰

Research on social norms confirms that sanctions play some role in compliance, and the threat of sanctions such as sequestering bank accounts certainly explains – say – taxpayer compliance. However, what the mere fact that others in similar situations perform certain behaviour, i.e. get a similar outcome and comply with it, might have a strong impact on compliance as well.²³¹ Thus, making it possible, and easy, for people to develop a clear and concrete picture of what others do and get, represents a complimentary approach to sanctions. This same literature brings forth research that implies that focusing people on norms also induces compliance.²³² Thus, we can expect that making known what are normal outcomes of frequent disputes can be a powerful driver towards compliance. This is one of the possible effects of better legal information in the form of schedules and other sharing rules (see Section 5.2).²³³

²²⁸ Eshuis R., *De daad bij het woord*, Sdu juridisch (2009).

²²⁹ Leslie S. Ferraz *Evaluating the effectiveness of Brazilian Justice: An Empirical Analysis of Small Claims Courts*, Research Paper, 2011

²³⁰ Tyler T.R., *Why people obey the law*, Princeton University Press (2006)

²³¹ Bicchieri C. & Xiao E., "Words or Deeds? Choosing What to Know About Others", *Synthese* (2011)

²³² Cialdini, R. B., Reno, R. R., & Kallgren, C. A. "A focus theory of normative conduct: Recycling the concept of norms to reduce littering in public places", *Journal of Personality and Social Psychology*, 58(6) (1990), 1015-1026.

²³³ Verdonshot, J.H. "Delivering objective criteria: Sources of law and the relative value of neutral information for dispute resolution", *TISCO Working Paper Series*, 001/2009

Acting as a middle-man

In some cases, creating a middle-man can have advantages. For example, in Bangladesh, Ain o Salish Kendra (ASK) utilised a middle-man payment system. When one of the many abandoned wives who attend at ASK's offices reach an agreement with their husband regarding child support payments, they can still be unsure of receiving the money. What can help convince the husband to continue to pay?

ASK found that having the husband pay the money to an ASK account, and then the money being moved on to the wife provided two-fold incentives. Firstly, ASK felt that the husband was slightly happier (and so more likely to continue) paying money to them, rather than directly to their wife. Secondly, ASK could provide a monitoring service. Through their involvement, they would become aware of non-payments very rapidly. This enables them to use all the mechanisms at their disposal, both legal and reputational mechanisms, to encourage the husband to pay.

Action Research at Ain o Salish Kendra²³⁴

Reciprocity

Another explanation for the higher compliance rates for settlements as compared to court decisions is that of reciprocity. Parties who receive some act of perceived kindness (such as a concession in pursuit of a settlement) are more likely to respond positively in response.²³⁵ As influence guru Robert Cialdini indicates, the marketing tactics of giving free samples is based on this principle. Similarly, a person who has seen the other party comply with his part of the agreement of judgment, is more likely to comply with his part.

Reputation Mechanisms: Involving the Community

The most promising approaches to increasing compliance are nowadays based on what we may call reputation mechanisms. The threat of blaming and shaming in front of a larger public is key here. Consumer complaints about a specific product or service might be too small to go to court for and it might be difficult for individual consumers to trigger producers to offer them a remedy. But when these are bundled and communicated in a consumer interest television show, or through online media, and thus have real impact on reputation, producers become more willing to find a solution quickly²³⁶.

NGOs, the press and many websites use these mechanisms to focus attention on certain legal problems: child labour, human rights abuses or land rights issues. These approaches overcome the submission problem, by not waiting for the defendant to cooperate. The person against whom the complaint is directed is perhaps asked for comments, but has not agreed to enter into such a procedure. For issues of corporate social responsibility, enforcing legal norms is not the main way to ensure compliance anymore. Publishing the track record of companies is thought to be more effective. For powerful defendants such as companies, the costs of non-compliance increase dramatically if their performance is published.

Involving the community is an established way of ensuring compliance in dispute resolution as well. That is one of the reasons why informal justice processes often involve members of the community and why court procedures take place in public. With reputation going on line, it becomes much more easy to mobilise the community.

²³⁴ Oxfam Novib/Tisco Microjustice Action Research: ASK Bangladesh Tisco Working Paper Series on Civil Law and Conflict Resolution Systems (2010)

²³⁵ Falk A. & Fischbacher U. "A theory of reciprocity", Institute for Empirical Research in Economics University of Zurich Working Paper Series, ISSN 1424-0459 (2000)

²³⁶ UK Television programme 'Watchdog' was one of the first to adopt this public naming and shaming approaches. In the UK, there are now even specialised shows focusing on builders or plumbers.

Using Reputation Incentives to Increase Compliance

Online dispute resolution platforms can show progress on compliance. If one of the parties does not comply, this can be shown on the website after a certain period of time. Starting with a simple indication of the non-compliance with the name of the person involved, the intensity of the exposure can be increased gradually. Giving more details, giving the non-compliance more prominence, or communicating the non-compliance to a broader public, this can all easily be organized on an online platform.

As the need for eBay's community courts (see box in Section 5.5) shows, reputation sanctions can be unfair, however. So some form of redress is needed if conflicts about compliance come up.

www.ipaidabribe.com uses maps on which people can indicate where they paid a bribe and to what type of authorities. Rapidly, clusters of places where bribes are frequent become visible, making it more easy to fight corruption in a target way; this approach is now also used in Kenya www.ipaidabribe.or.ke and many similar sites can be found through the platform www.community.usahidi.com/deployments/

Similar off-line reputation mechanisms can be introduced in local communities, although they may not work in situations where people fear a powerful party will retaliate.

The resources for the methods that are outlined above are low compared to the costs of organizing effective legal sanctions. Publicising adherence to, or an unwillingness to comply with, a decision or settlement is thus an important tool for providers of basic justice care.

5.7 Sharing Best Practices and Creating Evidence-based Protocols

A final promising approach supports all these innovative avenues towards basic justice care for everyone. It is the development of systematic knowledge about what works in solving different kinds of disputes.

Evidence From Research

Contributions come from disciplines such as negotiation theory, conflict studies, micro-economics, institutional economics, and (comparative) legal research. There is extensive research available on negotiation, on distributive bargaining, on mediation techniques, and on effectiveness of third party interventions. Gradually, this is beginning to find its way into legal dispute resolution processes and the new discipline of dispute system design. Many judges, lawyers and other dispute professionals have now been trained in mediation and negotiation skills, which are based on this research.²³⁷

For adjudication, there is an increasingly rich body of research and best practices regarding the skills of conducting a court hearing, where Germany and the US are among the leading jurisdictions.²³⁸ The following box gives an impression of the types of best practices that are now being developed, evaluated and tested.²³⁹

²³⁷ See Section 1.6 for an overview of the literature.

²³⁸ Denlow, M. (2000). Breaking impasses in settlement conferences: Five techniques for resolution. *Judges Journal*, 39, 4-10; Denlow, M. (2006). Settlement conference techniques: A judge's opening statement. *Judges Journal*, 45, 22-27; Parness, J.A. (2006). Improving judicial settlement conferences. *University of California Davis Law Review*, 39, 1891-1909; Trossen, A. (2009). *Wege zur Kooperation. Über die moderne Führung von Vergleichsverhandlungen im streitigen, zivilgerichtlichen Verfahren*. Altenkirchen: Win-Management GmbH; Van der Linden, J. *De civiele zitting centraal: informeren, afstemmen en schikken*, 2010;

²³⁹ Centre for Court Innovation, *Best Practices in Adult Drug Courts: What Does the Research Tell Us?*, Research Paper, accessible at www.courtinnovation.org

Best Practices Collected by the Centre for Court Innovation

Innovative adjudication practices are tracked by the Centre for Court Innovation in New York. In the US, many experimental courts have been set up by entrepreneurial judges. These innovations are known under names such as community court, domestic violence courts, drug court and housing courts. Problem solving is key to these approaches. Best practices are being collected and effectiveness of these types of adjudication are systematically evaluated.

Adult drug courts, for instance, seem to fulfil their promise of increased treatment retention rates and reduced recidivism. Because the innovations may be triggered by early charismatic judges and other staff, there is a need to analyze which specific components are truly essential. Research showed that bi-weekly judicial supervision before the drug court judge works especially well with “high-risk” participants, and that supervision that includes a great deal of positive feedback from the judge is particularly effective. Ninety days in treatment came out as a critical minimum threshold, while on the other end of the spectrum, imposing excessive graduation requirements that keep participants in treatment far beyond one year may be counter-productive. A graduation process is another key element.

At the same time practitioners working in NGO’s in developing countries collect and develop additional skills. Often working under difficult circumstances, with very limited resources, they cannot rely on the back up of sophisticated legal information systems and accessible courts with standardized procedures. They have to be very creative in the way they organize dispute resolution.

Integrating Knowledge from Research with Best Practices

Cross border learning and exchange of practices has great potential to increase the number of justiciable problems that are resolved in a fair way. Practices can be compared with the results of empirical and analytical research, in order to explain why they work, do not work, or may work with some adjustments.

Again we can learn from other fields, such as the health sector, the broader field of development economics and engineering.²⁴⁰ In the health care sector, and perhaps in the future also in the justice sector, randomized trials, or as close as is practically possible, are probably the best way to find out what works.

Right now, there is at least the possibility that a common understanding is developing between experts on what is good practice; what is uncertain; and what are inappropriate interventions. Engineers without borders is a web-based network of engineers exchanging best practices in order to benefit poor communities, whilst being informed by the latest technical knowledge that these engineers are provided with by university research and the knowledge platforms of the world’s engineering giants. That type of understanding among experts, fed by published research from many disciplines, is a first step on the way to evidence based best practices that is now within reach for the justice sector. A few examples may illustrate this.

²⁴⁰ Banerjee A. & Duflo E., *Poor Economics. A Radical Rethinking of the Way to Fight Global Poverty*, PublicAffairs (2011)

Sharing knowledge: The challenges and the opportunities

Learning from one another and within and across systems can be challenging. Many factors can inhibit our learning not the least of which is the lingering effects of legal education pedagogy and being taught to “think like a lawyer” often to the detriment of building our reflective capacities. Building the capacity of legal professionals to become reflective practitioners, engaging in reflection on their practice (skill), to engage in critical reflection (knowledge), and to reflect on their role as professionals (values, including access to justice orientations) can help to create a stronger learning culture within individual organizations and foster innovation. There are many possible ways to do this and this is worthy of further investigation.

Peter Senge’s (1990) description of a “learning organization” and the five disciplines it requires provides guidance on new capacities that need to be developed to foster innovation: shared vision, personal mastery, challenging mental models, team learning, and systems thinking. There are also many practical tools available to build this capacity. I have adapted some of these for the legal clinic in which I work, and for my work in the provincial legal clinic system of 75 clinics. In my experience, communities of practice (Etienne Wenger, 2000) made up of practitioners voluntarily participating build trust, foster dialogue, share lessons learned, and are a good seeding ground for innovation.

In my experience project-based learning has been an important contributor. Valuing work-based learning which is essentially learning from experience is also critical. We need to get much more strategic by encouraging and validating reflection; encouraging Appreciative Inquiry approaches—building on the best of what is, focusing on strengths and positive values and behaviours as opposed to exclusively problem-solving approaches (David Cooperrider, 1999); and, building our capacity for dialogue. Another fruitful avenue of exploration is evaluation capacity building as it can also contribute to a stronger learning culture, particularly where mistakes are seen as an opportunity to learn rather than as evidence of failure (another possible legal cultural norm to overcome—extreme fear of making mistakes.)

Michele Leering, Executive Director/Lawyer Community Advocacy & Legal Centre Belleville, Ontario

Optimizing Incentives to Participate

In the context of a dispute, coping with conflict cooperatively requires interaction between the parties. They have to sit at a table, speak on the phone, write each other e-mails or meet in a court house under the supervision of a judge. Some form of centralized information processing is necessary.²⁴¹ The parties require a meeting place or communication channel where both are present and willing to communicate about the conflict. Basic cost versus benefit thinking can help to uncover what is needed.

Basically, both should have sufficient incentives to enter into the problem-solving process and not just to maintain the status quo. Hence, for both of them, the net benefits and costs of meeting must be higher than the net benefits and costs of non-cooperative strategies, such as fighting, or avoiding. In practice, dispute resolution providers work hard to create such a place. In Egypt at the office of CEWLA, a legal aid and women's support NGO in Cairo, the facilitators developed the art of engaging angry or abusive husband in a conflict resolving dialogue aiming to reconcile parties and concentrate on a positive future, rather than only supporting litigation to get divorce. In Cambodia dispute resolution providers know quite well who to talk to if they aim to get influence over an unwilling party to make him or her participate in a process. But if their efforts are not yet successful, it may help them to research the reasons why disputant tend to stay away: is it shame, fear of violence, insufficient trust that a fair solution will emerge, lack of time, the travel costs, delaying tactics or what else? Some of these factors can be influenced and there may also be positive incentives for the defendant: finally finding somebody who listens to their perspective or the perspective of a more favourable or fair outcome, without the risk of a loss of reputation. Calibrating these incentives may make a huge difference in the effectiveness of such dispute resolution services.

Microjustice Toolbox

NGO's Cewla (Cairo), Praxis (Baku), Deme So (Bamako), Wildaf (Bamako), Haguruka (Kigali), , Lawyers for Justice and Peace In Egypt (Cairo), The Cambodian Human Rights and Development Organisation (Phnom Penh), KBH Lampung (Sumatra), Cord (Kep province, Cambodia) and Kituo Cha Sheria, (Nairobi), supported by Oxfam Novib (The Hague), Das Rechtsbijstand (Amsterdam) and Tisco (Tilburg) worked together to share best practices. They planned to develop 20 tools, but ended up with 34 descriptions of ways to cope with common situations in a dispute resolution process, see www.microjusticeworkplace.net. Each of these tools has its basis in practice, but is also compared with findings in the research literature, in order to develop a first tier of evidence about the plausibility of this way of solving disputes.

Building on this shared knowledge base, every partner is invited to make their own set of tools that match the needs and challenges of the local context. Successful innovations that work in one place can be adopted and adapted by others to seek together for improvements that will generate more effective and fair outcomes for people in the community.

Knowledge About Ways to Uncover Interests

One of the key aspects of creating effective dispute resolution services is that the solution must solve the underlying problem as experienced by the people involved, not simply provide an adjudication of right and wrong. Here, interests, emotions, and basic human needs play a huge role, and there is extensive knowledge from many fields of research that is useful for practitioners. Similarly, practitioners all over the world use communication and negotiation techniques that are rather similar and have been studied as active listening approaches.

²⁴¹ Shariff 2003, see footnote 131.

This developed in clear best practices that are now used by many dispute resolution professionals: listening without giving judgments, summarizing, looking for the issues that really triggered the conflict, then searching for key needs and concerns and, if possible, obtaining recognition of these by the opponent. Only if this recognition is achieved, the majority of disputants will be ready to develop a number of possible solutions.

Moving Disputes, Moving on in Life in Cambodia

Nak Sotheap is a chief of a village in Ratanakiri in North East Cambodia. He has seen many regime changes in his life time. In 1975, the day that Pol Pot called the revolution he was 12 years old. Just too young to be a soldier. He lived with his aunt and grandmother and listened often to his grandmother talking to guests who came to ask her advice on all sorts of issues. Sometimes they brought a chicken or a jar of palm wine to thank her for her help. Now he is a chief himself and applies the skills that he has learned from his grandmother, when someone comes to ask him for help when there is conflict in the community. Sometimes he struggles to get both parties together. But he knows that if he succeeds and he can get them to talk, a solution is within reach. To put some pressure on a unwilling party, he sometimes contacts parents or other influential family members so that they will motivate the person to come and join the meeting.

People such as Sotheap solve the bulk of conflicts around the world. Jointly they know the tricks and triggers that help parties to overcome their dispute and to search for workable solutions that can help them to move on with their lives. Their experiences in what works in dispute resolution are very valuable, and should be shared. But they can also benefit from knowledge developed in research, if a way can be found for this knowledge exchange.

Other methods for uncovering interests have been standardized as well. In his leading handbook on mediation, Christopher Moore mentions them all.²⁴² This and related knowledge has been structured and tested in the literature on integrative negotiation and mediation techniques. It has already been made accessible for practitioners that have the means to take note of the scientific literature.²⁴³ It is used in training programs in many parts of the world. Legal aid providers, police officers and judges practice it and try to learn more about it. This knowledge has become the golden standard for dispute resolution, but it has not yet been fully integrated in the practices of judges, lawyers and paralegals, however.

Moreover, it can be made available to the broader public, so that people are reassured that the negotiation methods that are successful in everyday life are also the ones that can be used in the face of the most difficult crisis between people. Although applying them in these circumstances may be much harder.

²⁴² Moore C.V. *The Mediation Process: Pactical Strategies for Resolving Conflict*, 3rd ed., San Francisco: Jossey Bass (2003)

²⁴³ Moffitt, M. L., and Bordone R.C., eds. *The Handbook of Dispute Resolution*. San Francisco: Jossey-Bass (2005); Deutsch M., Coleman P.T., and Marcus E.C., eds. *Handbook of conflict resolution: Theory and practice*. 2d ed. San Francisco: Jossey-Bass (2006); Oetzel J.G. & Ting-Toomey S., eds. *The Sage handbook of Conflict Communication: Integrating Theory, Research and Practice*, Thousand Oaks, CA: Sage (2006)

Through working together on www.microjusticeworkplace.net, a variety of organisations contributed to a guideline for mapping a dispute. Creating a map helps facilitators to see the needs and interests of the parties quickly. It also allows them to see who influential third parties might be.

Basic Mapping Blocks

- The parties in the dispute (including husbands/spouses or other people in the background)
- Basic problem and three or more major issues: land, compensation, violence that occurred etc.
- At least two or three needs, wishes and fears (interests) of all parties.
- A list of possible solutions.
- A list of what has been agreed.
- A list of what still has to be decided.

More Detailed Blocks

- Timeline: what were the three or more most important things that happened? Who? When? What? Where? Why? When? How?
- Relationships between parties (marriage, landlord/tenant, business).
- Power relations: What is position of each party when no solution is reached? What is each party afraid of that another party will do (if this can safely be shared)?
- Influential third parties who are or have become involved.
- Laws and sharing rules that can be helpful to decide on the issues.

Mapping Style

- Visible for the parties. So they can see everything that is relevant and what they have said is taken into account.
- On paper, whiteboard, black board. Or even online.
- Use symbols.
- Pictures for different types of interests, solutions

Other examples in relation to a good agreement, or format for collecting the basic agreement, have also been developed. All are freely available on www.microjusticeworkplace.net.

Specific Evidence Based Best Practices for Each Problem Category

The next phase is to go from this generalized know-how towards specific practices for each problem category. Gradually, this can grow into evidence based best practices for each type of problem. Starting from the terms of reference described in Section 5.1, a step by step protocol for solving an issue such as termination of employment can be developed. Some elements of this protocol would depend on the specific legislation, but the basic interaction between employer and employee, the issues to be negotiated and the barriers to settlement will be similar in different countries. Such protocols can also be developed for divorce cases, differentiating between cases where the couple has children, and for cases where there is a problem of domestic violence to be addressed as well.

If evidence based practices can be developed, which are validated by experiences from across the world and supported by research, this would be good news for the sector. Both commercial providers of justice services and NGO's can improve their effectiveness. It would also enable them to show progress and another option to benchmark their work, now against worldwide professional standards.

This process is in its early stages, so there are many questions about the realistic possibility of exchanging practices between one place to another and the scope for change and innovations. Yet only trial and error can provide evidence of what works.²⁴⁴

²⁴⁴ Berman C. & Fox A., *Trial and Error in Criminal Justice Reform: Learning from Failure*, Urban Institute Press (2010)

It is a given that culture and practices are not static but permeable and changeable over time. This process can likely be supported by increasing internal reflection and critique and offering examples from other places.

It is not suggested that these working practices can be lifted from one context and/or culture and applied instantly, without adjustment, in a new one. However, the process of amending and contextualising working methods is a far quicker method of producing high quality processes, than beginning from scratch. Working from the knowledge of others enables the practices to be improved and contributed to at each implementation, creating better, more rounded tools, that others can pick up and use and improve in turn.

5.8 The Risks of Increasing A2J

We have now investigated seven promising approaches for innovation, all directly relevant for the negotiation and adjudication processes that have to deliver basic justice care. Before investing in these approaches wholesale, risks have to be assessed carefully. What could be risks attached to fully embracing the approaches discussed in this report?

Some people may associate access to justice with too much law and bureaucracy. Don't we all hate the endless rulebooks and fine print that come with everything we buy or download? Or they may think of overly assertive citizens, claiming damages for every small misfortune that occurs to them. According to some studies, giving patients more rights makes doctors overly cautious, leading to them to order unnecessary medical examination and treatments. Consumers and shareholders may bring claims that can make the life of entrepreneurs miserable.

There have been complaints that strict product liability stifles innovation, creates drag on development cycles and ultimately raises the price that consumers pay for products and services. It is easy to find examples of dubious legal actions, only intended to harass people or to extract money from them.

In this section we consider the side effects of access to justice. What we have to ask is: can the vision for basic justice care threaten legitimate values and norms? What would happen if the transaction costs of obtaining fair outcomes would be closer to zero? Will all couples split up when they are provided with an inexpensive, effective and fair divorce mechanism?

Distinguishing Between Costs of The Process and Fairness of Outcomes

We first need to make an important point here. The approaches discussed in this report are all about enabling better processes towards more fair outcomes. This report does not argue for particular rights, types of remedies or sanctions. On fairness, it merely makes the point that fairness can be measured more objectively, by asking all people involved to evaluate outcomes and procedures, referring to issues that are known to be important dimensions of justice.

So what is the likely consequence of processes that are more accessible and fair? They are likely to improve the situation for people who need a remedy for (say:) their marital problems but did not seek this, because of inaccessible procedures.

At the same time, they will make it more likely that people get a remedy. Some people may be opposed to better access to justice, because they want to discourage one particular outcome, such as a divorce as the solution for marital problems, or a high damages award. But if a society or community wants to encourage or discourage divorce, it is better to do this directly, by changing the substantive rules, or informing people about the possible consequences of divorce for them and their children.

Tax rules, levels of child support, rules for dividing property, waiting times before a divorce is possible, social security benefits for divorced people, information about impact on children, skills of coping with marital conflicts and religious norms; these are all ways to influence decisions whether the couple wants to stay together. In a good procedure regarding marital problems, all these options will be on the table, and separation will only be one possible outcome. Inaccessible procedures are only an indirect ways to influence decisions, and both the people who urgently need a divorce and those who should try to make their marriage work again suffer from them.

Another way to look at it is to ask the counter question - how much is too much claiming? If there are X number of work related accidents what is the moral and ideological support to a claim that only a certain proportion of these accidents have to be resolved? If the main reason brought forward to limit access to justice is that sorting out claims is too costly and time consuming, than the more obvious way to limit these costs is by simplifying procedures and deciding issues more quickly.

A final approach is the one of pricing. If bringing forward too many small claims would be a problem, it is now possible to allocate the costs of this much more precisely. Helpdesks of sellers of consumer goods charge for time spent on the telephone discussing complaints. Courts have arrangements where they can let losers pay costs, especially if they would bring forward unfounded claims repeatedly. Instead of letting access to justice be distributed by random procedural barriers, it seems more fair to do so by letting people pay for this service: by using court fees that cover costs, and by allocating the costs of litigation fairly between the parties.

Defensive Practices

Defensive medicine is the practice of exercising excessive protection measures against the risk of negligence claims. Physicians who perceive increased risks of being sued for medical malpractice may tend to prescribe unnecessary tests to their patients. If this were true, at the end of the day, the excessive costs are born by the patients themselves - either as higher insurance premiums or in the form of extra tax. Many observers claim that the practice of contingency fees coupled with unpredictable jury awards have driven up the costs of medical health care in the US. In states like Florida, New Jersey, New York, Nevada, and West Virginia obstetricians and other more risky specialists are said to be closing their offices, pressed by surging insurance costs. Empirical studies suggest that even the American tort system, a popular synonym of wild litigiousness, is much more balanced than it appears, especially for the kind of problems that are most frequent and most urgent for individuals. At least, big class actions and high jury awards have little to do with the problems that an ordinary person can run into at home, at work and in the local community.

“Empirical studies typically show [that] Americans rarely take their disputes to court. Of every one hundred Americans injured in an accident, only ten make a liability claim, and only two file a lawsuit. Of every one hundred Americans who believe they have lost more than \$1,000 because of someone else's illegal conduct, only five file a suit. . . . Far from a nation of litigators, the United States seems to be filled with “lumpers,” people inclined to lump their grievances rather than press them. . . . Some researchers even believe that Americans are no more innately lawsuit prone than the Japanese, the supposed saints of nonlitigiousness.”

Hyman and Silver, 2006, p. 1089²⁴⁵

²⁴⁵ Hyman D.A. & Silver, C. “Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid”, *Vanderbilt Law Review*, (2006), p. 1085; for a more nuanced and neutral view see the contributions of Kritzer and Fenn in Cane, P & Kritzer, H. (Eds.) *Oxford Handbook Of Empirical Legal Studies*, Oxford University Press, 2010.

If the available data are assessed carefully, it seems unlikely that improving access to justice will lead to unbearable levels of claiming. Working dispute resolution systems simply deliver solutions as they are supposed to do, encouraging settlement or using a low cost form of adjudication.

Litigious behaviour, to the extent that it exists, is not likely to be caused by better access to justice in this sense. It is more likely to occur if there is something else to gain than a fair outcome. Litigation can have collateral benefits for the parties, for the lawyers or for others involved. These incentives are more likely to be rooted in substantive law, or in the dynamics of high profile cases. If large awards are obtainable, for instance through rules regarding punitive damages, or if there are other rewards for the parties or for lawyers (e.g. free publicity) this can certainly attract claims.

But there is no evidence from any country that this is a systematic problem associated with granting access to justice as such. Even the best performing countries in the world on access to justice according to the WJP Rule of Law Index 2011 (Norway, Germany, Netherlands) are not suffering under extreme costs of dealing with disputes. They tend to deliver justice rather effectively and efficiently.

Overburdening Courts

Courts, prosecution offices, enforcement agents and police have limited capabilities to process caseloads. Is it possible that widening access to justice will bring the official justice institutions to a halt under the pressure of the tens of millions of people who rush to exercise their right to access to justice? Such a scenario appears every now and then when the scope and coverage of legal aid systems are being discussed. The concern is that if too many lawyers file cases the legal system will collapse, in particular if they are paid with tax payers' money.

But the number of divorces, accidents, terminations of employment and other serious disputes is not unlimited. At least there will be diminishing returns for people filing claims for less important issues. Moreover, most of the most frequent and pressing legal problems that people experience can be solved in a fair manner in the shadow of effective adjudication. A minority of the disputes ever escalates to court cases, and for each frequent and urgent types of problems it is also possible to set up alternative adjudication mechanisms. It is to be expected that an increased access to justice would create an increase in the number of cases reaching courts, but creating faster and more efficient processes, as well as encouraging early settlement can re-dress this balance. If the remaining procedures are effective and in proportion to stakes, they can be offered at cost price to litigants.

Moreover, and perhaps more surprisingly, the evidence tends to show that courts perform better if they have to deal with high caseloads.²⁴⁶ If courts know that they can expect to deal with a large number of cases, as happens in family courts and employment tribunals, they tend to become more efficient in their processes dealing with the cases. Specialization and doing many cases of one type makes them more effective, as they will look for an efficient division of labour between judges, administrative support, lawyers and parties submitting information.

5.9 Summary

What needs to be done in order to achieve basic justice care for everyone? There is no definitive answer to that. But in this chapter we showed basic technologies that are promising and have not yet developed to their full potential:

²⁴⁶ Botero, J. C., La Porta R., et al., "Judicial Reform", The World Bank Research Observer 18(1) (2003);

- Using benchmarks, making clear what is expected of dispute resolution processes (negotiation and adjudication) is essential. Access to justice is still often defined in terms of following the law, but the law usually leaves much room for interpretation, or formulates broad aspirations in rather open ended terms. Concrete performance targets and dispute resolution capabilities a procedure should have (terms of reference) make it possible to show improvement. They provide a direction for innovation. It is best to set concrete targets for each category of problems. Terms of reference can be formulated for a good process for a termination of employment, for a consumer conflict or for a case of manslaughter.
- Providing people with legal information empowers them. Research shows people want more information about the process of access to justice and about the outcomes people in similar situation got. There is not yet much research into the effectiveness of current legal information programs. But the gap between what happens in practice and what research says about useful information is big. So there is a considerable potential here. Providing incentives to publish and distribute the essential legal information and dispute resolution information in a way that is understandable for the general public, is a main bottleneck, however.
- Access to justice is still low tech. Information technology cannot only help to spread relevant information, it also has a huge potential to facilitate dialogue and information gathering and decision making. Providing justice can be seen as letting participants work on answers to questions. That process can be supported on line.
- In many countries and in many settings, a new type of legal aid provider is emerging. Instead of being merely an agent of one party, he works towards a solution that is acceptable between the parties. He is using mediation and dispute resolution skills, but is also determined to reach a solution within a reasonable time, involving third parties if necessary. Having one professional involved instead of two opponents can lead to important cost savings. The risk of escalation and protracted conflicts diminishes. Solutions built by the two parties with a third party in facilitating mode are more sustainable.
- We should never give up on courts, but try to improve them and offer a greater variety of adjudication options. A third party such as a court is indispensable. The option of low cost and speedy adjudication, which can happen in many forms involving people with many different backgrounds, is necessary to create fair settlements. Experiences in specialized courts and an extensive body of research suggest that effective third parties are prepared to intervene and do that quickly and against low costs. If courts would not see themselves primarily as decision makers applying laws, but as providers of an optimal climate for settlement, growing with the parties towards a decision, and taking that decision for them if necessary, that would make a huge difference.
- Access to justice can be improved by allowing private, (non-voluntary) accountability and even adjudicative mechanisms to develop, in particular if state sponsored courts fail to create affordable and timely access to fair solutions; supplying third party adjudication is a task that governments have outsourced to independent courts, but they should allow other providers to show that they can beat the courts on effectiveness, fairness and justice. Forum-shopping by people with grievances is a natural thing to do and creates competitive pressure. Ensuring neutrality and quality of courts/panels/forums can be achieved by supervision and providing Terms of Reference, legal information (norms/criteria for fair solutions), evidence based approaches (protocols) and measurement of justice experiences of clients.
- There is much more than sanctions to induce compliance. The potential of using these other methods is big. Research has shown that more participation in the outcome increases compliance. If the outcome is felt to be fairer and the procedure more just, that also helps. In an increasingly transparent world, reputation become a very important reason to act in conformity with what has been decided.

- Dispute resolution know-how has developed rapidly over the last 30 years. It can be further integrated into work processes of paralegals, lawyers, judges and other professionals. It can also be made available to the people involved in conflicts directly, and to the people around them. Good practices for solving particular types of problems can be collected. If they are brought together, and become part of a standard treatment, these practices become testable against terms of reference. In this way it becomes possible to distinguish more effective from less effective working methods. Gradually, this can grow into evidence based approaches and protocols for solving the most urgent and common conflicts.

Delivery of justice is complicated. It involves many steps; each of them is part of a supply chain. Each component needs to function well. Legal information is not worth much without the threat of a neutral intervention; adjudicators will not be trusted if the criteria under which they work are vague, unclear or unjust; if compliance is low, people will not seek access to a mechanism.

But in the same way, these components reinforce each other.²⁴⁷ The current chapter showed many examples of that. Once compliance improves, it will be easier to convince the defendant to participate in the first place. If it is transparent which norms an adjudicator uses in order to decide a case, the negotiations between the parties will become easier, and the threat of a third party intervention more effective.

²⁴⁷ See Barendrecht M., "Understanding the Market for Justice", Tilburg University Legal Studies Working Paper No. 009/2009, discussing the complementarities between these different services.

6. Concluding Remarks: Caring for Justice Needs



This report assessed what is needed to ensure basic justice care for everyone and which approaches are promising to achieve that goal. The analysis suggests the following conclusions:

Most justice problems are human problems: similar across the globe

The commonalities in the most frequent legal needs around the world, such as good solutions for divorce, inheritance and land disputes, are larger than the differences. This is both true for the typology of the problem and for the solutions that work. The best way forward is through a path of collaborative learning and sharing experiences. We have relied on normative approaches in the study of law and legal conflicts for a long time. Now the biggest steps forward can be made by sharing sound, evidence-based methods to solve the problems that every person on earth is most likely to encounter in the relationships that matter most.

Problems are mostly local and relational

The problems with the highest impact tend to come up in key relationships between people living or working together for a long time and investing much in these relationships. In a group of a 1000 adult people, 300 problems per year may be expected. There could be between 10 and 30 family issues (divorce, inheritance) coming up each year and around 20 neighbour problems. In developed economies, 30 to 60 such problems related to employment (termination) can be expected to show up. In poorer countries less people report such conflicts, but land and housing issues (property rights, tenure, eviction) are more prominent. The more vulnerable the people are, the greater their reliance on these close relationships, and the greater the impact of such conflicts on their lives. Even violence often occurs in these key relationships: domestic or between neighbours.

Access to documents proving identity, and access to government services, are also frequent and rather urgent problems, as are theft and debt problems. In groups and countries with higher incomes, consumer issues about goods and services purchased are the most frequent problems (50-100 of the 300 problems each year), but they do not disrupt lives as much, and resolution is slightly less urgent. Access to health care issues, accidents and victimization by major crimes are less frequent (around 10 of the 300), but have a high impact everywhere.

Relying on existing capabilities: when people ask for justice and when they try to deliver it.

The most urgent justiciable problems are thus connected to life events. They are often local and related to unexpected change, long existing patterns of interaction and escalation. Solving them requires more than applying existing norms to facts that have happened in the past. The solution has to be accepted and integrated into the mostly local relationships.

So it is not surprising that people take local action on these problems. Most problems are solved through communication and negotiation. With help available in their vicinity, people settle. If they do not succeed in this, or if they fear the confrontation, they ask third parties to intervene. Addressing a formal court of law is only one of the options, but the availability of third parties who can induce the other party to cooperate to a fair outcome is crucial.

The rule of law and access to justice are better served by improving concrete practices than by taking on the legal system as a whole. People are already working on improvements, very hard, and in many ways. Lawyers and many others contribute. They do this because there is an enormous demand for access to justice. Where there is demand, mechanisms to supply will be developed. These processes should be nurtured, helping to overcome the many challenges. Justice partly consists of public goods, yet private actors are often in a position that they can act more quickly and learn faster. These private processes can generally be trusted, although both private processes and those supported by public money should be monitored independently.

Knowledge how to support and evaluate negotiation and adjudication is available

These interactions are now well researched. Sound theoretical models for negotiation and bargaining have been developed by social psychologists, economists and dispute system experts. They have been tested in the laboratory and increasingly in practice. Mediation and adjudication techniques have been developed to address the psychological and tactical barriers to settlement. Informal justice providers, paralegals, lawyers, judges and many other helpers use these skills in their daily practice. Evaluation research and other data suggest that using these skills increases the number of settlement and the satisfaction of their clients. Best practices are increasingly shared across borders.

Monitoring and evaluation of processes is now possible on the basis of justice research. Social psychologists discovered the type of processes people like to be in when they have a serious conflict. Voice, respect, participation, neutrality, trust in the third party and information about the process are the most important factors explaining satisfaction. Outcome satisfaction can be explained by distributive justice (according to needs, contribution or equality), restorative justice (reparation of harm), retributive justice (just deserts) and perceived effectiveness of the solution. Costs of the process, disposition times and capabilities to deal with standard issues can be benchmarked and evaluated as well.

Plausible, enabling approaches are good enough

This report highlights approaches that can strengthen the negotiation and adjudication processes that are at the heart of access to justice. We called these approaches 'promising'. They are targeted on more solutions, more fairness and lower costs. Bits of evidence suggest that they work. We can show they are plausible, given the challenges of negotiating and adjudicating fair solutions. We can assess whether experts and policy makers believe in them and whether this makes sense given the number and type of problems and the local capabilities. More evidence needs to be gathered. Ideally, every major tool or method should be assessed regularly in the local setting, because all problems have local versions and local capabilities can be different. That is why we make a strong case for measuring access to justice experiences and for evaluating against clear benchmarks.

Although some commentators would like to see more evidence first, there are good reasons to move forward on these approaches now. They are not high risk, because they have an enabling character. The approaches highlighted in this report do not impose specific solutions to legal problems. They do not favour one category of suppliers above others. We do not argue that courts, lawyers or codes of law are doing a bad job or that mediation is the panacea. We do not argue for abolishing informal justice systems. We leave to others to take a stance on which norms are better: the local, informal justice ones; the many different norms defended on the basis of shari'a law; the ones derived from fundamental human rights; the precedents of common law; or the rules implemented in Napoleon's civil codes. We do not prioritize legal solutions based on rights or the win-wins of alternative dispute resolution. Whether procedures are criminal, administrative or civil in nature is not our point. Negotiation and adjudication towards workable solutions that are reasonably fair in the eyes of all people affected can happen in many ways. It can be supported and made more effective in many ways as well.

Plausibility is also enough to invest in these innovations, because they compare favourably to alternative ways to spend resources for access to justice. We do not have to wait for randomized controlled trials to see that some of the current interventions are not doing a great job. In the US, litigants and courts are voting with their feet against traditional litigation before a jury. Comprehensive legal aid by individual lawyers in all civil, criminal and administrative court cases is unsustainable. Prescribing traditional court procedures, where judges are almighty decision makers would go against many trends. Developing mediation next to and isolated from litigation has not worked, because of the submission problem and the lack of access to adjudication.

This report is not an appeal to spend more, but to use efforts and funds in a smarter way, and that of course will have an impact. This probably means less local projects helping a few thousand people for a few years, but more sustainable improvements in the way the most frequent and urgent problems are solved. Perhaps highlighting these approaches will lead to less spending on legal aid subsidies, but more on knowledge and tools for legal services that actively strive for a neutral and fair solution. It is at least plausible that costs of legal information and advice can drop in this way and more people can pay for their own assistance. Perhaps the approaches described in this report will require fewer subsidies to courts, but more pay as you go and more informal and new innovative or improved procedures. If the strategies described in this report are followed, perhaps less will be spent on jurisdiction issues, procedural issues, court buildings and redoing issues in appeals, but more on monitoring and measuring clients' satisfaction and experiences of justice.

What We Have Not Covered And Do Not Yet Know

Although these approaches have a sound basis in research from many disciplines about what works in the justice sector, there is also a lot we do not yet know. One example is how to finance courts and other third party mechanisms in a sustainable way, providing sufficient incentives. Good models for this have to be developed. The same is true for developing good organizational models for delivering key legal information.

In this report we did not cover criminal justice systematically. We have not looked for innovations dealing with armed robbery, looting or crimes by strangers. We only briefly discussed the developments towards problem solving courts for drug and alcohol related crime and youth crime. In areas with large scale civil conflict, we noted that displacement, intimidation, torture, disappearances, summary executions, theft and destruction of property come on top of the usual justiciable problems. Our analysis did not cover these topics in depth, but we suggest that common categories of crime are also better tackled from problem to problem. And we note that dealing with crime has many elements that require some form of negotiation in the shadow of adjudication: plea bargaining; cooperation by perpetrators in rehabilitation and treatment; options for victims to be heard and to interact with the person that committed the crime; truth and reconciliation approaches to violent conflict.

Access to justice can be seen as facilitating a problem-solving process.

Communication, negotiation and adjudication have to be integrated. This is what justice providers all over the world are finding out. The problem solving process can be supported in many ways: by self help tools, assistance from friends, professional advice, standard forms and documents or online dispute resolution. If the process is supported by a person, think of a neutral facilitator, determined to bring about a fair solution. Here a very interesting model of a hybrid professional is developing, who combines the attitudes and the skills of a lawyer, a mediator and a judge. Stimulating this market by building brands may help. New, trustworthy "business models" for paid legal advice and third party services can be developed and should be a priority. This may include insurance mechanisms, as well as subsidies.

Sharing rules (criteria, schedules) empower clients, facilitators, lawyers and courts.

Knowing what others got as an outcome of a dispute gives very useful information about what is fair. It can be more helpful than the letter of the law, which often uses rather general language. Solutions are often rather similar in different countries and cultures. Showing people possible solutions, giving them an anchor point when bargaining, works better than trying to tell them what the right solution is. In the setting of globalization, multi-layered court systems with competing precedents and legal pluralism, it is better to show the different possible outcomes than to suggest that there is one final answer. Once such essential legal information is on a website, it is realistic to hope for legal information providers and legal services to distribute it from here by SMS, print, print on demand or face to face advice. Suppliers of justice services can use this information. It increases their credibility and trustworthiness. It limits their costs and enables them to provide higher quality.

Best practices and protocols for the most urgent problems can be developed.

Specialize not generalize, that is what can be learned from the best legal services. Specialization allows standardization. Incremental 'step by step' innovation of best practices, on the basis of evidence on what works well in the eyes of clients, is a promising long-term approach to increase the quality of justice services. Justice care through negotiation and adjudication can be more similar to health care. Knowledge can give people the tools to strengthen their own justice system.

Competing forums, within a court system or outside of it, increase choice and access to justice

If third party adjudicators are available, affordable and useful for plaintiffs, the incentives to settle in a fair way are improved. It is better not to wait for defendants to agree to a forum, because they hardly ever have sufficient reasons to do this, but to protect their legitimate interests by monitoring fairness of procedures and outcomes. By allowing forum shopping by plaintiffs, people do not only satisfy their justice needs; they also stimulate forums to be more helpful. Forums can develop more accessible processes by using self help and support by online facilities, working cross border, specializing and creating economies of scale.

Compliance can be organized by mobilizing the community in non-violent ways

More compliance with the outcomes of fair processes is another challenge. Sanctions may be needed, but often it is sufficient to increase the pressure gradually. If a problem remains unsolved, a person can be held accountable for this, gradually having to answer more questions from more people why they have not yet cooperated with the solution. The press, social media and the community can take on this role as long as they use transparent methods and accept accountability. Gradually introducing the threat of boycott and ostracism as methods of inducing compliance has always been an effective way to ensure cooperation. Using force should of course be left to the state, which can use it sparingly in the most frequent and urgent disputes.

Courts and other adjudicators are essential: they need encouragement and monitoring

Fairness and access to justice cannot be achieved unless people can rely on a third party to intervene and to work towards an acceptable solution. Being a judge or a third party is both hard and important work. Judges and other panels do not get clear feed-back from their clients, however. Encouraging independent monitoring and measuring can help them. Terms of reference can be helpful for this, so that people can benchmark and criticize them, but also show that they are satisfied with how they were helped to solve their problem. Third parties can be assisted with better organizational and financing models as well.

HiiL is an independent research and advisory institute devoted to promoting a deeper understanding and more transparent and effective implementation of justice and the rule of law, worldwide. It pursues this mission in several ways. First, it conducts both fundamental research and empirical evidence-based research. Second, it serves as a knowledge and networking hub for organisations and individuals in both the public and the private sector. And third, it facilitates experimentation and the development of innovative solutions for improving legal systems and resolving conflicts at any level. HiiL aims to achieve solutions that all participants in the process perceive as just. In line with its evidence-based approach, HiiL is non-judgemental with regard to the legal systems it studies.

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