

Trend Report | Summary

Towards Basic Justice Care for Everyone Challenges and Promising Approaches



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 of 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.

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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