

Five Strategies Towards Basic Justice Care for Everyone

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Abstract

Ensuring the rule of law means people have access to justice. In a recent report, HiiL and its network of rule of law experts and innovators reviewed the state of the art. Legal needs research has shown that civil justice and administrative justice are delivered by a great many providers of services: public courts and private legal services; formal procedures and informal ones; traditional processes and innovative approaches. Together, these services provide access to justice, but providers of such services face some major challenges. Innovative approaches reveal five main strategies to overcome these challenges. The UN and other policy makers can play a major role in supporting these strategies.

Keywords: basic justice care – legal empowerment – bottom-up justice – access to justice – innovation in rule of law – courts – paralegals – legal information – IT and rule of law

Many people do not get basic justice care...

When having serious problems at work or home, with neighbours, about land, housing, money, crime or with how their local community is governed, people need fair, workable solutions. With no trustworthy third party they can turn to, they are frequently left at the mercy of the powerful or stuck in conflicts. This causes stress, insecurity, health risks, damaged relationships, economic costs and an increased risk of violence.

The Innovating Justice Forum 2012 assessed how people's basic justice needs are protected and what are the trends in delivery of legal services to meet these needs across the world. A Trend Report surveyed research that shows how 10 problems are responsible for most of the injustice experienced by individuals. In many places, less than half of these problems are solved in a fair way. When best practices are used, solving over 70% is possible. Globally, the estimated "access to justice" gap consists of 200 million unsolved problems. Each year. That is a lot of injustice.¹

The question is, if there is such a demand for justice, why it does not create sufficient supply. Across the world, lawyers, NGOs, project leaders, public administrators, judges and entrepreneurs are working hard to improve access to justice. But there are major challenges they face.

Challenges to delivery of justice

Legal needs research has shown that civil justice and administrative justice are delivered by a great many providers of services: public courts and private legal services; formal procedures and informal ones; traditional processes and innovative approaches. In most countries, no single state institution or private service provider has an overall "market share" of more than 10%. People go to lawyers, paralegals, informal problem fixers, traditional leaders, religious leaders, informal tribunals, specialised committees, shop between different courts, or ask for help from the police, the mayor of their town, a social worker, a doctor, a journalist or the presenter of a television show.

Even in criminal justice, where the state is most heavily involved, the private sector is indispensable for prevention, and many crimes are solved by journalists. Enforcement and the use of force is ultimately the prerogative of the state, but compliance to norms and outcomes of dispute resolution processes is also a matter of people wanting to keep up a reputation in the community, in the media or on the internet.

There is a pattern in all these processes, though. Most problems are solved through interaction between the parties involved, in negotiation or similar processes. Only a small minority is actually decided by third party decisions (from courts or other persons whose authority is respected). Still the threat of involving a third party is indispensable: it guarantees fair, effective and speedy when people bargain about solutions.

According to the literature, the three main challenges to delivery of adequate services granting access to justice are the following:

- Courts (and other third parties) have insufficient incentives to deliver good quality interventions on time.
- Legal information, knowledge about best practices and neutral court interventions are difficult to sell for a price.
- Laws often prescribe in a detailed way who may deliver services, how they should organise themselves and which procedures they should follow. These rules are difficult to change, which is a barrier to innovation.

Promising strategies

Innovation is changing the delivery of justice in fundamental ways. During the Innovating Justice Forum 2012, experts from all over the world prioritised five strategies for this innovation.

1. Legal Information Targeted on Needs of Disputants

Research clearly shows that about half of legal problems are solved by communication and negotiation between the parties. Settlement is the rule; a decision by a judge or another adjudicator is exceptional (typically around 5% of problems). Therefore, empowering people to negotiate fair solutions is key. Increasingly, legal information is distributed through websites, telephone lines, help desks at courts, community justice centres, leaflets and media. In many places, people see law as something threatening and complicated. Law should help them to communicate, negotiate and cope with problems. Legal information is most useful if it is understandable, tailored to the problem at hand and arrives in time. Ideally, it is sufficient to cope with the problem, offers limited options, and is easy to put into practice. When working with the information, people tend to need reassurance from a helpdesk or a support group.

A key element is learning about concrete solutions that worked for others. People need information about remedies that were accepted as fair by others empowers people (child support guidelines, schedules for calculating damages, guidelines for sanctions). This protects them from agreeing to unfair proposals. Their demands will become more realistic.

2. Facilitators and Paralegals Working Towards Fair Solutions

Many people rely on customary justice processes, informal interventions by local leaders, and similar arrangements in neighbourhoods. Because of their focus on conciliation and dialogue, such interventions now integrate modern mediation techniques and dispute resolution know-how. In developed economies, employees of legal expenses insurers and providers of legal aid are observed to work in a similar way.

Lawyers and judges increasingly use mediation skills, whereas mediators focus more on fair outcomes. Hybrids of the traditional professions – that is the future.

3. **Sharing Practices, Evidence Based Protocols**

As we have seen in health care, quality can be assured when information about the best treatments is made available to general practitioners working in a local context. 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. Within the next decade, this knowledge may develop into evidence based protocols for solving the most frequent justiciable problems.

4. **Choice of Third Party Adjudication Processes**

If the settlement process through negotiation stalls, people need the option of a third party to decide with them and for them, without the consent of the other party. *This is the only known way to guarantee the fairness of outcomes.*

When a court procedure takes three years and costs a fortune, the option of adjudication is not effective. Availability of legal aid, mediation or lawyers financing claims on a no-win no-pay basis does not really change this. A far more effective way to enhance access to justice is to create alternative adjudication mechanisms which the plaintiff can address. Throughout the world, courts and similar tribunals create easy-to-use procedures (designed for use without a lawyer). The most effective courts specialise: in family issues, land conflicts or other urgent problems.

Competition between third party adjudicators gives choice and increases incentives to be really helpful. Monitoring processes and outcomes can protect the legitimate interests of defendants.

5. **IT Platforms Supporting Negotiation and Litigation**

Resolving conflicts 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 reach, eventually, decisions on these issues. This flow of information can be supported by forms and standard documents that ask the right questions.

Websites supporting online negotiation, mediation and adjudication are rapidly becoming available. Information submitted by the parties is organised issue by issue. Eventually, judges, arbiters or jury members can log in and get easy access to all information submitted. They can contact the parties, or ask them to come to a hearing, and even give their decision online.

What the UN and other policy makers can do

These five strategies are tested and state-of-the-art. Taken together, they may not solve every justiciable problem. But they can bring basic justice care within everybody's reach.

The UN and other policy makers can play a major role in supporting these strategies. They can help to reinforce the underlying vision and reframe access to justice into access to fair solutions to urgent and frequent problems that people can encounter in their relationships to others. Policy makers can also make a difference by setting goals and terms of reference for procedures, by creating a level playing field, by stimulating choice and variety, and by monitoring quality of outcomes and processes.

Endnotes

¹ See Hiil Trend Report, *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches* (2012), www.hiil.org/publication/Basic-justice-care.