



# **International Access to Justice: Barriers and Solutions**

## **Bingham Centre for the Rule of Law Report**

**October 2014**

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**About the Bingham Centre for the Rule of Law:** The Bingham Centre was launched in December 2010. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. The Bingham Centre is an independent research institute devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law, considering the challenges it faces, providing an intellectual framework within which it can operate and fashioning the practical tools to support it. Email: [binghamcentre@biicl.org](mailto:binghamcentre@biicl.org). Web: [www.binghamcentre.biicl.org](http://www.binghamcentre.biicl.org).



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# Executive Summary

The International Bar Association (IBA) is an organisation of legal practitioners, bar associations and law societies whose mission is to provide assistance to the global legal community with the aim of influencing the development of law reform and promoting the highest professional standards and the rule of law throughout the world. As part of that mission, the IBA Access to Justice and Legal Aid Committee ('the Committee'), formed in 2013, has undertaken its first research project, 'International Access to Justice: Barriers and Solutions', which is the subject of this report. The Bingham Centre for the Rule of Law conducted the research and wrote this report with contributions and comments from the Committee at different stages.

This report explores obstacles to achieving access to justice across jurisdictions and practices that have sought to overcome these barriers. Access to justice is fundamental to establishing and maintaining the rule of law. It enables people to have their voices heard and to exercise their legal rights, whether those rights derive from constitutions, statutes, the common law or international instruments. Access to justice is an indispensable factor in promoting empowerment, in securing access to equal human dignity and achieving social and economic development. It is almost certain to be included in the forthcoming United Nations (UN) post-2015 Sustainable Development Goals.

This report adopts a comprehensive concept of access to justice, which covers different stages of the process of obtaining a solution to civil or criminal justice problems. It starts with the existence of rights enshrined in laws and with awareness and understanding of such rights. It embraces access to dispute resolution mechanisms as part of justice institutions that are both formal (ie, institutions established by the state) and informal (eg, indigenous courts, councils of elders and similar traditional or religious authorities, mediation and arbitration). Effective access includes the availability of, and access to, counsel and representation. It also encompasses the ability of such mechanisms to provide fair, impartial and enforceable solutions.

Accordingly, while acknowledging the fundamental importance of lawyers and courts in ensuring access to justice, this report adopts a broader approach when thinking about barriers and solutions. Barriers originate from within and from outside formal justice institutions. The strategies that ensure and improve access to justice for communities and individuals engage groups from across the full spectrum of civil society and the state. The legal community is well placed to contribute strongly, not only in formal legal frameworks, but beyond those into multi-stakeholder and interdisciplinary initiatives.

This report is divided into three sections. Each section addresses groups of barriers to access to justice and related examples of projects and best practice adopted to surmount these barriers.

The sections cover the following areas:

- *Societal and cultural barriers*, including literacy, education, poverty and discrimination.
- *Institutional barriers*, such as insufficient governmental resources to guarantee or facilitate access to justice, inadequate organisational structure of justice institutions, limited legal assistance and representation and the lack of enforcement of decisions.

- *Intersectional barriers*, where societal and institutional barriers overlap, such as lack of trust in lawyers and judges, and corruption.

As most justice initiatives are inevitably localised, those looking for examples of good practice may often only look locally or regionally, rather than across national borders. Even though barriers to access to justice will always be connected to specific national contexts, the data and examples in this report point to the possibility of drawing on strategies from a global range of good practice.

Examining access to justice at an international level, and conceptualising the way that barriers operate, provides a basis on which links may be drawn across jurisdictions because there is a degree of universality about the nature of barriers. There are, however, two important cautions: first, no barrier operates independently of another – rather, they interact with reciprocal effects that intensify their impact – and secondly, no single strategy will be sufficient by itself to overcome barriers to access to justice.

The research suggested that access to justice strategies are widely pursued and widely varied. However, there is some discernible common ground:

- The legal profession plays a crucial advocacy role for changing regulatory instruments that operate as obstacles to access to justice, especially in using the law to combat social and cultural barriers.
- The legal profession is ideally placed to raise awareness about legal rights so that the needs of vulnerable or disadvantaged groups are met (eg, rural communities, prisoners, women and children). The profession can also effectively promote the study of law in jurisdictions that lack sufficient numbers of qualified people in the profession.
- Civic education programmes, both governmental and private, are increasingly provided to target all groups of society, including children.
- Digital technology has been increasingly employed to disseminate general legal information, provide informal legal education, improve transparency, facilitate access to court decisions and reduce court backlogs. However, the success of such strategies is strongly related to the availability of and access to technology in specific countries and/or areas.
- Broadening legal standing criteria can permit civil society organisations and national human rights institutions to raise representative claims on behalf of vulnerable individuals. This can be an important strategy in overcoming socio-cultural barriers to access to justice.
- Appropriate and continuous training for judges and administrative staff is increasingly acknowledged to be essential for addressing barriers to access to justice.
- Promotion and recourse to alternative dispute resolution (ADR) is increasingly identified as a principal strategy in reducing access to justice barriers.
- There is broad acknowledgment of the importance of oversight mechanisms for promoting the transparency and accountability of the justice system – whether formal (eg, ombudsman) or informal (eg, social media).

The Committee sees this report as a starting point for ongoing activities that will:

- Raise awareness of different types of barriers to access to justice and of different ways of addressing those barriers.
- Provide a valuable tool for lawyers, practitioners, civil society organisations and others who are engaged with the design of reforms, projects and programmes – including in the context of the UN post-2015 development agenda – that address key problems affecting access to justice, thus ensuring that rights are enjoyed in practice.
- Prompt further discussion and research into how the legal community, working with civil society and governments, can be involved in maintaining or improving access to justice, especially in times of austerity.

**Available online: The report and examples of practice**

This report and the examples of access to justice practice are available online from:

- IBA Access to Justice and Legal Aid Committee  
[www.ibanet.org/PPID/Constituent/AccessToJustice\\_LegalAid/Default.aspx](http://www.ibanet.org/PPID/Constituent/AccessToJustice_LegalAid/Default.aspx)
- Bingham Centre for the Rule of Law  
[www.binghamcentre.biicl.org/publications](http://www.binghamcentre.biicl.org/publications)



# Chapter 1: Introduction

## 1.1 Access to justice

The importance of access to justice cannot be overstated. Access to justice is fundamental to the establishment and maintenance of the rule of law, because it enables people to have their voices heard and to exercise their legal rights, whether those rights derive from constitutions, statutes, the common law or international instruments. Access to justice is an indispensable factor in promoting empowerment and securing access to equal human dignity. Moreover, a mutually supportive link exists between, on the one hand, improving, facilitating and expanding individual and collective access to law and justice, and, on the other hand, economic and social development. This link is recognised internationally with access to justice likely to be included when the Member States agree on the UN development agenda for 2015–2030.

International efforts to improve access to justice require sharing information, raising awareness and spreading good practice. To those ends, this report explores obstacles to access to justice across jurisdictions and practices that have sought to overcome these barriers.

The concept of access to justice adopted in this report is a comprehensive concept, which covers different stages of the process of obtaining a solution to civil or criminal justice problems. It starts with the existence of rights enshrined in laws and with awareness and understanding of such rights. It embraces access to dispute resolution mechanisms as part of justice institutions that are both formal (ie, institutions established by the state) and informal (ie, indigenous courts, councils of elders and similar traditional or religious authorities). Effective access includes the availability of, and access to, counsel and representation. It encompasses the ability of such mechanisms to provide fair, impartial and enforceable solutions.

Accordingly, while acknowledging the fundamental importance of lawyers and courts in ensuring access to justice, the report adopts a broader approach when thinking about barriers and solutions. Barriers originate from within and from outside formal justice institutions, and the strategies that ensure and improve access to justice for communities and individuals engage groups and individuals from across the full spectrum of civil society and the state. The legal community is often well placed to contribute strongly, not only in formal legal frameworks, but beyond those into multi-stakeholder and interdisciplinary initiatives.

## 1.2 The IBA Committee on Access to Justice and Legal Aid

The International Bar Association (IBA) is an organisation of legal practitioners, bar associations and law societies whose mission is to provide assistance to the global legal community, with the aim of influencing the development of law reform and promoting the highest professional standards and the rule of law throughout the world.

As part of that mission, the IBA Access to Justice and Legal Aid Committee ('the Committee'), formed in 2013, has undertaken its first research project, 'International Access to Justice: Barriers and Solutions', which is the subject of this report. The research was undertaken for the Committee by the



Bingham Centre for the Rule of Law. The Committee also participated directly in the research. Under the research brief, the Bingham Centre designed a survey (in consultation with the Committee), the Committee distributed it to garner responses and the Centre analysed the data. This report has been written by the Bingham Centre, with the Committee commenting on drafts.

The Committee's goals in undertaking and presenting this work are to:

- Raise awareness of different types of barriers to access to justice and of different ways of addressing those barriers.
- Provide a valuable tool for lawyers, practitioners, civil society organisations and others who are engaged with the design of reforms, projects and programmes that address key problems affecting access to justice, thus ensuring that rights are enjoyed in practice, rather than existing solely on paper.
- Provide a basis for further discussion and research into how the legal community, working with civil society and governments, can be involved in maintaining or improving access to justice, especially in times of austerity.

The Committee sees this project as a starting point for ongoing activities that will gather, publicise and coordinate information from around the world on barriers to access to justice in different jurisdictions, and ways in which these barriers can be overcome.

## 1.3 The aims of the research

The research aims were twofold: to identify barriers to access to justice across a range of jurisdictions internationally and to draw together strategies that have been used to overcome those barriers.

The core objective was to provide insight into examples of good practice that may be transferable internationally, and to inform access to justice practices and policies elsewhere.

## 1.4 The structure of the report

This introduction explains the project context and aims. Chapter 2 outlines the methodology, the data gathered and issues relating to the interpretation of data.

The next three chapters comprise the core of the report. Each addresses groups of obstacles to access to justice, and related examples of projects and best practice adopted to surmount them. Each chapter identifies common trends, approaches and solutions for achieving and improving access to justice by eliminating, reducing or side-stepping the identified obstacles. In order, these chapters examine:

- *Societal and cultural barriers*, including literacy, education, poverty and discrimination.
- *Institutional barriers*, such as insufficient governmental resources to guarantee or facilitate access to justice, inadequate organisational structure of justice institutions, limited legal assistance and representation and the lack of enforcement of decisions.
- *Intersectional barriers*, where societal and institutional barriers overlap. These include lack of trust in lawyers and judges, and corruption.

These delineations and categorisations are somewhat theoretical and artificial. However, we employ them in order to situate barriers to access to justice within wider structures of society, culture and economy, and to capture the complexity of the different obstacles. In practice, of course, barriers operate simultaneously and have reciprocal effects on each other that intensify their impact.

The concluding chapter, ‘Access to Justice Internationally: Directions and Pathways’, draws together the research findings and identifies ways that, given its goals, the Committee might continue to contribute to international access to justice through research and knowledge-sharing on the most appropriate methods and instruments to tackle access to justice barriers.

## 1.5 The accompanying website and further resources

This report will be available online from:

- IBA Access to Justice and Legal Aid Committee  
**[tinyurl.com/Accessstojustice](http://tinyurl.com/Accessstojustice)**
- Bingham Centre for the Rule of Law  
**[www.binghamcentre.biicl.org/publications](http://www.binghamcentre.biicl.org/publications)**

The IBA Committee’s site will provide further resources relating to access to justice work that is referred to in the examples cited in this report. The Committee intends that the site will be updated on an ongoing basis, serving as a hub that will provide information and resources about access to justice internationally, with a particular focus on the role of the legal profession.

# Chapter 2: Methodology

The aim of the research was to identify barriers to access to justice across a range of jurisdictions internationally and to draw together strategies that have been used to overcome those barriers. The core objective was to provide insights into how examples of good practice may be transferable internationally, to inform access to justice practice elsewhere.

## 2.1 Research methods

### *Survey*

The survey was the primary component of the research the IBA Committee sought to carry out. The survey was designed by the Bingham Centre for the Rule of Law in consultation with the IBA Access to Justice and Legal Aid Committee, and with review of a draft by an independent expert. The survey asked 30 multiple choice and open-ended questions, structured in seven sections:

1. Introduction and general information.
2. The legal framework and awareness of rights.
3. Access to legal advice and representation.
4. Access to dispute resolution in civil and criminal matters.
5. Due process, fair procedures and the judiciary.
6. Enforceable decisions.
7. Access to justice – barriers and change.<sup>1</sup>

The survey was designed to take 30–40 minutes to complete with responses submitted online using SurveyMonkey. The intended respondents were legal professionals who were targeted via the IBA Committee's networks. With the exception of one compulsory question that required participants to state their country, all questions were optional. Responses could be made anonymously.

The survey was distributed by the IBA Committee, which asked its affiliated bar associations, law societies and regional committees to forward it on to country experts who would be well placed to complete the survey. The survey was available for just over a month. It was available in English only.

When data was returned, it was analysed by the Bingham Centre.

### *Desk-based review of existing data and examples*

A review of access to justice literature was undertaken with three particular aims:

1. to inform the design of the survey;

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<sup>1</sup> The survey and other project material will be available at the IBA Access to Justice and Legal Aid Committee homepage [www.ibanet.org/PPID/Constituent/AccessToJustice\\_LegalAid/Default.aspx](http://www.ibanet.org/PPID/Constituent/AccessToJustice_LegalAid/Default.aspx). All URLs are current at 1 September 2014.

2. to gather data about access to justice, particularly in relation to countries represented in the survey responses, focusing both on justice issues and the wider social, legal and economic context; and
3. to gather further examples of how barriers to access to justice have been addressed, both in countries represented in the survey responses and in countries where there were no survey responses. This data would provide additional and complementary examples to encompass a broader range of samples than could be captured by the survey.

### *Expert workshop*

The Bingham Centre hosted an expert workshop on 2 July 2014, entitled ‘International Access to Justice: Barriers and Solutions’.<sup>2</sup> Four presenters from non-governmental organisations (NGOs) spoke of work in Rwanda, Sierra Leone, Burundi, Tanzania, Zimbabwe and the Philippines. The chair and moderator was a former High Court judge. The event aimed to gather and discuss examples of best practice, their effectiveness and the portability of such solutions in other jurisdictions and/or circumstances. Over 70 people attended, many of whom had engaged with access to justice work internationally.

## **2.2 Survey data and interpretation**

There were 60 responses to the survey, representing 26 countries. There was a very good response rate from some countries, though most had only one or two responses.

**Table 1: Survey responses by country**

Country	Number of responses
Nigeria	12
Australia United Kingdom	7
Canada Germany New Zealand	3
Argentina Colombia India Sweden United Arab Emirates	2
Austria Denmark Finland Hungary Japan Latvia Malawi Mexico Mozambique Netherlands Serbia Switzerland United States Venezuela Zimbabwe	1

<sup>2</sup> The event programme and materials are available on the Bingham Centre website at [www.biicl.org/event/1047](http://www.biicl.org/event/1047).

The respondents generally had substantial experience in the law; almost 50 per cent had over 20 years' experience and a further 22 per cent had over ten years' experience. Just 13 per cent had less than five years' experience. Men and women were equally represented among respondents.

In interpreting and using the survey data we have primarily focused on the examples provided by respondents. These have been useful both of themselves and as indicators of the kinds of access to justice work we have sought to identify in desk-based research. Where possible, we have verified the respondents' examples by checking against sources in the public domain. We have not made generalisations based on the quantitative data – the survey responses simply do not provide an adequate basis on which to do so – but we have been alert to the ways responses offer insights into the environment in which access to justice work is undertaken, especially where those responses are consistent with data available in the literature.

## **2.3 The survey data and the complementary research**

The distinctive contribution of this report lies in the identification of approaches to facilitate and improve access to justice through providing a compilation of case studies of effective approaches and best practice. This contribution draws on the survey, the complementary desk-based research and the workshop.

# Chapter 3: Societal and Cultural Barriers

Access to justice will be affected by the social and cultural characteristics of jurisdictions, including, of course, economic factors. Characteristics may include: average income, inequality gaps, economic structure (eg, extent of industrial base), urbanisation, the homogeneity/heterogeneity of the population on the basis of ethnicity, nationality or religion, model of familial structure and levels of literacy and education. Although these elements may often operate in a composite manner, poverty, illiteracy and discrimination are widely identified as critical obstacles to access to justice.<sup>3</sup>

## 3.1 Poverty

Poverty is both a cause and a consequence of inadequate levels of access to justice. On the one hand, reduced financial and human resource allocations to justice institutions produce failures in the justice system. These failures in turn have a disproportionate impact on the poor, precisely because of their lack of individual economic resources enabling them to overcome systemic failures. On the other hand, when equal access to justice is denied, people living in poverty are less able to enforce their economic and social rights, including property and labour rights, and to avoid exploitation. Moreover, poverty as a barrier to access to justice is exacerbated by other structural and social obstacles generally connected to poverty status, such as reduced access to literacy and information, limited political say, stigmatisation and discrimination. Poverty may affect large portions of populations, but some groups will be disproportionately represented among the poor. Socially marginalised and otherwise disadvantaged people will be more seriously affected than the general population. Ensuring access to justice for these groups is a key focus of poverty eradication and empowerment.

Acknowledging the importance of access to justice as a ‘fundamental tool for tackling poverty’, the UN Special Rapporteur on extreme poverty and human rights recommended its inclusion as a standalone goal or as a target in the post-2015 development agenda.<sup>4</sup>

Combating access to justice failures that affect the poor is crucial because poverty is deeply embedded in some countries. Survey respondents regularly cited it as one of the key factors affecting access to justice and one that is least likely to change in the next ten years.

### *In focus: legal identity*

Survey respondents consistently indicated that poverty has a high impact on access to justice and affects it in many ways, including in:

- awareness of legal rights;
- physical access to counsel and tribunals; and
- economic accessibility of legal representation and judicial services.

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3 M Sepúlveda, Report of the Special Rapporteur on Extreme Poverty and Human Rights on the Right to Participation of People Living in Poverty (UN Human Rights Council 2013).

4 M Sepúlveda, ‘Equality and Access to Justice in the Post-2015 Development Agenda’, c2013.

Promoting and guaranteeing full understanding of legal rights and awareness of the available means of enforcement are crucial prerequisites to providing access to justice. One of the main obstacles in this regard is the non-recognition of legal identity.

Legislation may negatively affect the rate of birth registrations.

- In Uzbekistan parents must pay a fee to register a child.
- In Bhutan children whose father is unknown cannot be registered in the civil registry.
- In Nicaragua women living in consensual unions can only register their children temporarily, if the father has not signed the birth record.
- In Sierra Leone legislation does not allow for the registration of children born outside marriage.

Source: UNICEF, 2013, pp 12–13.

Legal identity is a stepping stone to breaking cycles of poverty and denial of access to justice. Recognition and proof of legal identity are frequently required if individuals are to claim entitlements, such as access to healthcare and education. They are required to purchase land, open a bank account, obtain a licence to practise a profession or secure a loan to start a business.

A major cause of non-recognition is the lack of birth registrations. UNICEF reports that, globally, the births of nearly 230 million children under age five have never been recorded.<sup>5</sup> This problem predominantly affects those in poverty, and is particularly acute in rural areas

(where home births are more frequent), with almost twice the number of births going unrecorded in rural areas as in cities.<sup>6</sup>

The interrelationship between legal identity, on the one hand, and poverty reduction, legal empowerment and human development, on the other, has been acknowledged in recent discussions about the priorities to be included in the UN post-2015 development agenda. Notably, providing by 2030 ‘legal identity for all, including birth registration’ is factored as Target 16.9 in the final version of the Sustainable Development Goals to be considered by the General Assembly in its 69th Session in September 2014.<sup>7</sup> Legal identity for all and birth registration contribute to the achievement of Sustainable Development Goal 16, which is to ‘Promote peaceful and inclusive societies for sustainable

The distribution and location of registration offices and the use of technology may play an important role in birth registration rates and the ability to access identity data.

- Papua New Guinea has just one birth registration site serving a population of roughly seven million people spread across more than 460,000 square kilometres, including 600 islands.
- Myanmar has no electronic record of registered children. Data are only stored as paper copies at the local Township Medical Office. Moreover, at the national level, forms are discarded after two years.

Source: UNICEF, 2013, p 12.

The rate of birth registrations may be positively affected by incentives to register or penalties for failure to register.

- In Liberia parents will be fined if children are not registered within 14 days of birth.
- In Ukraine a lump-sum childbirth grant is paid by the government as an incentive for timely birth registration.

Source: UNICEF, 2013, p 12.

development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.

Moreover, and quite importantly, the achievement of high birth registration rates is not necessarily related to levels of per capita income.<sup>8</sup> The survey and the related research suggest several approaches that could reduce the number of people who lack secure legal identity and consequently are hindered from obtaining access to justice.

5 United Nations Children’s Fund (UNICEF), *Every Child’s Birth Right: Inequities and Trends in Birth Registration* (2013).

6 *Ibid.* See also Sepúlveda (2013), above n 3, para 33.

7 UN Open Working Group, Outcome Document on Sustainable Development Goals, 19 July 2014. See also High-level Panel of Eminent Persons on the Post-2015 Development Agenda, Report: A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development, target 10a ‘Provide free and universal legal identity, such as birth registration’

8 UNICEF, *Every Child’s Birth Right*, above n 5.



Civil society organisations may have a significant role in lobbying governments to increase the political and legislative commitment on birth registrations, including through reduction or abolition of birth registration fees and through adoption of incentives for timely registrations.

Where communications infrastructure allows, use of mobile phones or web-based tools to transfer birth data from local registration agents to a central digital database can reduce the barriers to registration, such as large distances between communities and registration centres, high costs involved in registering a child and complex paper-based processes and bureaucracy.

Physical access to birth registration services, and to legal counsel and judicial remedies more generally, can be increased and facilitated with the use of mobile registration units. These can reach people living in hard-to-access areas, enabling them to register at a convenient place within a particular timeframe. Mobile registration units may also increase awareness of the importance of birth registration.

UNICEF reports an increased use of mobile communications technologies, including mobile phones, to improve birth registration rates.

- In Nigeria, text messaging is used to gather registration information from around the country on a two-week basis, enabling the National Population Commission to introduce timely interventions in low-performing areas.
- In Albania, Kosovo and Pakistan (among other countries) 'geo-mapping' technologies have facilitated the collection and visualisation of birth registration data, allowing government officials to easily identify problem areas.
- In Namibia, the government, with UNICEF support, has set up annual mobile registration campaigns in the most remote communities.

Source: UNICEF, 2013, p 8.

## 3.2 Discrimination

Discrimination is an obstacle that can affect all aspects of access to justice – from awareness and understanding of legal rights, to access to counsel and to dispute resolution mechanisms, and finally the achievement of fair, impartial and enforceable solutions. While **de jure** discrimination can be repealed through laws, elimination of *de facto* discrimination requires additional positive strategies. Importantly, in times of economic downturn discrimination tends to persist or reappear and so measures aimed at combating inequality and exclusion in the long term are important.

### *In focus: migrants, women and indigenous peoples*

Discrimination affects certain groups of society more extensively, by reason of their structural and inherent characteristics. Ethnic and racial minorities, migrants and indigenous peoples often face additional obstacles in claiming and enforcing their rights because of both formal legal discrimination and informal discrimination or stigmatisation in practice.

Survey responses from Nigeria, Colombia, Canada and the United States reported that formal legal discrimination in these countries has a negative impact on access to justice for migrants and members of minorities or indigenous peoples. Irregular migrants, in particular, face an important contradiction in relation to their access to justice. On the one hand, interacting with the justice system inevitably uncovers their status and exposes them to sanctions and/or deportation. On the other hand, this poses a particular problem because by choosing to preserve their irregular status they become subject to increased practices of abuse, injustice and exploitation.

Austerity measures can create discriminatory barriers to access to justice. For example, UK survey

responses drew attention to a residence test that is proposed for the grant of legal aid, which it was said will ultimately discriminate against immigrants. A Nigerian response noted that women and children are disproportionately subject to discrimination in accessing justice mechanisms, and that gender issues are peripheral concerns when it comes to government budgets. As the previous section noted, some aspects of birth registration laws or practices may have a discriminatory effect on children, especially for indigenous peoples in remote communities. Moreover, some individuals are vulnerable to discrimination on more than one basis; for instance, women in indigenous communities or children of irregular migrants or asylum seekers may suffer quite severe levels of compound discrimination.

Challenging discrimination requires not only the elimination of formal legal discrimination, but also the empowerment of vulnerable groups through awareness-raising and acknowledgment of their rights.

There are barriers in rural and remote areas that limit the effectiveness of using the media to raise awareness about rights.

- In India rural villages may be isolated, with limited exposure to the media or to the wider country or the world. Even television, which has generally permeated through to the village level, does not necessarily have an impact on the lives of people in many rural areas when it comes to awareness of legal rights.
- In rural Tajikistan attempts to raise women's awareness about rights through television or radio are strongly limited by electricity shortages. Tajiks in those remote areas receive only one to two hours of electricity per day, so few women can watch television or listen to the radio during this time.

Source: IBA Survey; ABA ROLI, 2012, 11.

Groups that are most likely to experience discrimination are also the ones that are least likely to know their rights and the existing remedies.

Even simple strategies can be effective.

- In Spain, Pro Igual has developed anti-discrimination 'crisis cards' that provide key information for migrants, ethnic minorities and other groups that are victims of discrimination. The cards detail steps to take if they experience discrimination or harassment from public or private entities. The 'crisis cards' are the size of an average credit card and are available in different languages.

Source: 'Pro Igual' project website.

Empowerment to combat discrimination that affects property rights can have long-term economic benefits.

- In Colombia indigenous people are not consulted in a free and informed way before investment projects are authorised in their ancestral lands.

Luis Carlos Perez Lawyer's Collective (Corporación Colectiva de Abogados Luis Carlos Pérez, or CCALCP) - an organisation of female human rights lawyers - endeavours to raise awareness of people living in small rural areas on their legal rights in relation to communal land and natural reserves, with the aim of preserving lands against intrusion from coal mining companies or palm oil production companies. CCALCP also focuses on legal aid and political advocacy.

Source: IBA Survey. See also Peace Brigades International website.

### 3.3 Literacy and education

Literacy and education empower individuals, increasing their capacity to understand and insist on the enforcement of their rights. Low levels of literacy and education reduce access to economic resources and the capacity to understand and enforce rights, resulting in lower levels of access to justice.<sup>9</sup>

#### *Infocus: legal information*

Survey responses confirm the importance of literacy and education for individuals' access to justice. A majority of respondents said low levels of education and literacy have a very high impact on awareness

<sup>9</sup> M Anderson, 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs', IDS Working Paper 178 (2003).

of legal rights and a more moderate but still high effect on access to legal advice and representation. Consistent with the literature, respondents indicated that the most affected groups are minorities, indigenous peoples and people living in rural areas. Of particular note, migrants, minorities and indigenous peoples face a significant access to justice barrier where in multilingual and multi-ethnic societies they have insufficient knowledge of the language in which legal information is available. For instance, a 2007 report on the rule of law in Timor-Leste points out that the language used in court proceedings is Portuguese, which is spoken by less than seven per cent of the population.<sup>10</sup>

While acknowledging the crucial importance of literacy and education in relation to access to justice, survey respondents reported a mixed perception of the potential for change with regard to this barrier in the coming ten years. In some countries respondents reported that poor levels of literacy and education were among the top-three barriers most likely to change in the next decade, while others (even from the same country) thought this was one of the barriers least likely to change. Some optimism may be justified as the UN General Assembly will in 2015 evaluate a proposal to include in the post-2015 development agenda that by 2030 Member States will ensure:

- inclusive and equitable quality education and promote life-long learning opportunities for all;
- that all youth and at least x per cent of adults, both men and women, achieve literacy and numeracy.<sup>11</sup>

The survey provided some examples of the ways in which awareness of legal rights could be raised, even where there were substantial literacy and education barriers, such as by using radio and television programmes that do not presuppose literacy. It also raised issues that highlighted the limitations on using these approaches (see example box above in 3.2 on India and Tajikistan).

Radio has been used to good effect in some countries to raise awareness about rights where there are low levels of literacy and education.

- In Nigeria, although national laws are not designed to discriminate, in the northern Muslim part of the country women are frequently not allowed to go to school and are married early, often without consent. As part of their policy campaigns and legal sensitisation activities on issues affecting women, children and family in general, members of the International Federation of Women Lawyers (FIDA) take part in radio programmes which aim to educate women and the general public about their rights and the available remedies.

Source: IBA Survey.

Many attempts have been made to improve legal knowledge by targeting children and young people through education in schools. Some of these programmes bring lawyers into schools, some create curriculum materials for students to use, and others concentrate on educating teachers.

Examples of the many approaches to legal education in schools include:

- An Argentinian NGO, Foro de Estudios sobre la Administración de Justicia (FORES), led a civic education initiative to create curriculum and training programmes for teachers. As a result of the programme, curricula on the concept of the rule of law and civic engagement were created and integrated into 25 schools to reach youth in marginalised communities. An estimated 40,000 students were educated on rule of law concepts.

Source: FORES website.

<sup>10</sup> Freedom House and ABA ROLI, *Rule of Law in Timor Leste* (2007), pp 30–31.

<sup>11</sup> UN Open Working Group, Outcome Document on Sustainable Development Goals, above n 7. The “x per cent” is in the proposed goals as it will also be the subject of debate

- The Citizenship Foundation in the United Kingdom has successfully lobbied to maintain citizenship on the national education curriculum and helps teachers to introduce young people to the law, politics and democratic life. The Foundation's curriculum materials have been used by over 80 per cent of UK secondary schools and 50 per cent of primary schools.

Source: Citizenship Foundation website.

- The Law Society of Western Australia provides a unique range of interactive and participant-focused legal education programmes for school and community groups. Through the Francis Burt Law Education Programme (FBLEP), qualified education officers organise: court visits (Supreme Court, District Court or Magistrates' Court); mock oral and scripted trials based on fictional scenarios and historical West Australian cases; professional development workshops for teachers; and interactive mock trials competition for secondary students.

Source: IBA Survey.

New technologies are increasingly being used to raise awareness of legal rights.

'Apps' for mobile phones have been used in several countries.

- In Nigeria, Pledge 51 developed a free mobile phone app that provides access to Nigeria's amended constitution with options to search for topics. A second version of the app launched in 2012 includes a legal directory and discussion forums. The app continues to be downloaded and a demand has emerged for other Nigerian legal documents to be made available in a similar format.
- Similar apps have been developed for the constitutions of Zimbabwe, Ghana, India and Kenya.

Source: Indigo Trust Foundation website.

At the same time as new technologies emerge, traditional methods of face-to-face engagement have continued. They have been particularly successful where target groups go on to train others.

Traditional training methods have been used to good effect with both lawyers and paralegals, in reaching onwards to local groups.

- In Rwanda, Penal Reform International (PRI) launched a pilot project to develop paralegal services for detainees to reduce pre-trial detention, improving access to justice and supporting the right of detainees to a fair trial. Preliminarily trained paralegals were involved in both informing detainees of their rights, so that they were better equipped to monitor their own cases and represent themselves in court, and in liaising with the prison administration, the police, prosecution service, and the judiciary.

Source: IBA/Bingham Centre workshop.

- In Myanmar the Bingham Centre for the Rule of Law with the Myanmar Lawyers Association toured ten cities to run workshops on constitutional reform. They facilitated the writing by local groups of more than 500 submissions on the reform of the Myanmar Constitution that were then delivered to the parliamentary committee as part of the reform process.

Source: Bingham Centre for the Rule of Law website.

### 3.4 Reducing societal and cultural barriers: possible reform strategies and solutions

The survey and the related research have suggested a number of policies and/or strategies that could contribute to addressing socio-cultural barriers to access to justice. Even if such barriers are inherently connected to specific national contexts, the strategies listed below are flexible enough to be transferred and employed in other jurisdictions, as shown in the reported examples. Yet none of these strategies is sufficient by itself to overcome barriers to access to justice. Barriers need to be tackled through a combination of solutions operating at the level of both legal reform and the de facto implementation of laws.

- Advocacy for changing legislation is a straightforward approach to reducing socio-cultural obstacles, if these patterns are reflected in the legislation, or if societal imbalances are not adequately addressed in domestic laws through 'positive discrimination' provisions.

- Awareness raising of legal rights and judicial information more broadly has been carried out through campaigns and programmes usually provided for free and made available in multiple formats (newspapers, radio, television, theatre) and languages. These programmes are shaped differently to meet the needs of the targeted group (eg, rural communities, prisoners, women and children).
- Digital technology has been increasingly employed to disseminate general legal information and to provide informal legal education. However, the success of this solution is heavily dependent on the availability and access to such technology in specific countries and/or areas.
- Guaranteeing legal standing without discrimination as to gender, legal registration or migration status is a first step towards promoting access to justice for all. Moreover, enactment of *locus standi* criteria that allow civil society organisations and national human rights institutions to raise representative claims on behalf of vulnerable individuals can be a valuable measure for overcoming socio-cultural barriers to access to justice.

# Chapter 4: Institutional Barriers in Justice Systems

The capacity, structure and operation of a country's justice system all impact access to justice. Shortcomings in justice systems will create barriers to access to justice. Among the factors that may create institutional barriers are: inadequate physical infrastructure; administrative structures without sufficient capacity to manage systems; limited judicial capacity and a legal profession that is unable to service the full population. Among the survey respondents there are notable examples of functioning systems; however in many countries the establishment and development of justice institutions are severely affected by economic capacity.<sup>12</sup> For individuals and communities engaging with justice systems, institutional barriers will be most difficult to overcome for those who are already most affected by social and cultural barriers.

## 4.1 Resourcing justice systems

Insufficient financial and human resource allocations to justice institutions create shortcomings in the effective functioning of the justice system and seriously affect access to justice. Institutional capacity will be affected by the formal independence of the judiciary – a precondition for quality justice institutions to be capable of providing fair solutions to justice problems – and the practical capacity of judges to exercise that independence. That capacity will be affected by resourcing of the administrative systems that support the judiciary and justice institutions. Three examples illustrate the types of institutional barriers that exist in poorly resourced justice systems:

1. insufficient and unequal geographical distribution of justice institutions affects physical access to the delivery of justice;
2. failure to record the commencement of action (sometimes referred to as a failure to register complaints), which often affects the most vulnerable groups and has the consequence of validating impunity for offenders, while victims of injustices are either disregarded or mistreated; and
3. judiciaries may be inadequately trained or qualified, with the result that independence is compromised and decisions are poorly reasoned, inconsistent or biased.

### *In focus: courts and administration*

#### PHYSICAL ACCESSIBILITY

Access to justice is affected by the physical accessibility of justice institutions. Where justice institutions are physically remote, the barriers to justice will be greater especially if transport is poor or unaffordable. As survey responses confirmed, these effects will be felt more acutely by people living in rural areas.

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<sup>12</sup> The World Justice Project's *Rule of Law Index 2014* provides rankings on various measures. Norway, the Netherlands, Germany, Denmark and Sweden are listed as the top five countries in access to civil justice.

Mobile courts have operated successfully in several countries.

- In the Philippines, the Justice on Wheels programme takes mobile courts outside urban areas to conduct brief trials, or to facilitate settlements by making ‘the wheels of justice move faster’. Modified buses serve as mobile courts with two sections: a courtroom and a mediation room. The programme has resolved over 16,000 cases that were congesting domestic courts all over the country.

Source: Innovating Justice website.

- In remote rural areas in eastern Democratic Republic of Congo, mobile courts help victims of gender-based violence, who would otherwise not be able to travel to a court to obtain justice. These mobile courts have been established by local civil society groups and are officially recognised by Congolese law.

Source: ABA ROLI, 2012, p 24.

An Indian respondent reported that while the country has a robust district court system, which is fairly widespread among villages or areas of habitation, ‘there are some exceptional areas where access to justice is almost impossible, especially due to a poorly functioning administrative system, lack of resources and distance [of the Court] from the claimant’s ordinary home’. Where courts have a special and exclusive jurisdiction over certain issues or crimes (eg, Les Tribunaux de Grande Instance in eastern Democratic Republic of Congo with regard to sexual crimes) then remoteness problems may be exacerbated as those courts will inevitably be fewer in number.<sup>13</sup> For both general and specialist courts one way of delivering services to rural areas with poor transport is to use ‘travelling’ or ‘mobile courts’, especially (though not only) where disputes do not involve complex legal issues.

A second strategy for addressing geographical inaccessibility of formal court services is alternative (ADR) and/or informal dispute resolution.

While widely used in some jurisdictions, such approaches are less familiar in others.

A Nigerian respondent commented that a few courts there have tested ADR and it ‘significantly improved access’. Responses reported only occasional use of informal and/or community justice mechanisms to proceed against the offender in criminal matters. ADR and customary or traditional justice systems were most frequently used in family law matters and civil law disputes involving contracts, debt or property.

The use of ADR continues to increase.

- In Nicaragua a volunteer network of mediators has been successfully engaged in settling property disputes, family law matters and cases of violence. Mediators are elected by the local community, report to a local judge and undergo regular training.
- In Germany a 2013 mediation statute was enacted to promote agreed resolution of disputes instead of judgments. Many judges and lawyers have undergone additional training to become qualified mediators.
- In Nigeria judges and lawyers are trained in ADR processes and techniques at Settlement House in the capital, Abuja.

Source: ABA ROLI, 2012, p 17; IBA Survey.

Recourse to informal dispute resolution mechanisms has both positive and negative implications. As the UN Special Rapporteur on extreme poverty and human rights has recently noted, although such procedures facilitate access to justice, especially for disadvantaged groups, by providing fast, relatively inexpensive and socially relevant solutions, informal justice systems may not always offer fair and equal justice.<sup>14</sup> For instance, collection of evidence may be unreliable or not balanced, there may be no due process guarantees, sanctions may not be proportionate, or victims may not be adequately protected.<sup>15</sup> The same report also observes that a gender bias against women often characterises

13 American Bar Association Rule of Law Initiative (ABA ROLI), *Access to Justice Assessment Tool: A Guide to Analysing Access to Justice for Civil Society Organizations* (2012) (ABA ROLI), p 23.

14 Sepúlveda (2013), above n 3, para 86, citing UNDP and Oslo Governance Centre, *Doing Justice: How Informal Justice Systems can Contribute* (2006), p 5.

15 *Ibid* para 88.



these procedures. Such bias may have a particularly significant effect if family and property disputes are frequently resolved using these methods, because those areas of law are especially important for the physical and economic security of women.

Informal dispute resolution can draw effectively on traditional community dispute resolution processes.

- Traditional alternative dispute mechanisms in India, such as the Panchayat – an assembly of five (ie, ‘panch’) elders chosen by a village community – were given statutory recognition in 1992. Panchayats handle some minor disputes, mostly by consent of the parties, and also coordinate some aspects of rural life.
- India also has non-adversarial ‘Lok Adalats’, or peoples’ courts, now under the authority of the Legal Service Authority Act of 1987. Retired judges and government officials volunteer to hear disputes and to try to reach a compromise between the parties. The procedure is significantly faster than the formal process: parties plead their case themselves and no fees are levied.

Source: IBA Survey.

Alternative forms of dispute resolution have been developed in creative ways, often driven by a combination of new legal problems and new technologies. One example of creative new approaches has been prompted by the need to define land boundaries where titles have not previously been formally recognised.

Land boundaries and title disputes have been settled in rural communities using mobile phones, GPS and SMS technology.

- In Bolivia, the 1996 Law of Agrarian Reform formalises land titles so that title is attributed to owners. Communities are required to define boundaries by consensus and then boundaries will be formally recognised by government. However, disputed boundaries, large numbers of landowners and long distances make the procedure time-consuming and costly.

In 2009, Mercy Corps, an international development organisation, together with Fundación Tierra, a non-profit organisation working on land rights in Bolivia, launched an innovative project in seven target communities. SMS technology allows communities to use mobile phones to send GPS points to map land boundaries. Once GPS mapping information has been recorded, community members can gather to view the map on a large screen and discuss the boundaries. The project has reduced costs and litigation, but challenges arise because of differing levels of computer literacy and irregular mobile phone service. Additionally, indigenous languages are often only spoken and not written, making SMS text messages a ‘one-way road’. To address this, a user-friendly and toll-free support line has been also created.

- Similar programmes have been implemented in Kenya, Uganda and Indonesia.

Source: Reinventing the Rules website.

## RECORDING THE COMMENCEMENT OF ACTION

The effective operation of justice institutions requires administrative systems that ensure matters work their way through the various steps of dispute resolution processes. Barriers arise when, for instance, there are too few administrative staff, processes are unreliable or inadequate, staff and judiciary do not have suitable training, facilities are not suitable or equipment does not function properly.

Problems can arise at the very earliest stage of the legal process with a failure to register the commencement of an action. If systems fail at this early stage then there is a high risk that legal rights will not be enforceable, as later stages will depend on registration.

To address these problems, technology has been important in developing systems to ensure registration. Responses to the survey

Radio has been used to highlight process failures and to press for accountability.

- In Nigeria, Brekete Family Radio is a ‘reality’ radio programme that uses a public complaint forum or people’s court model. People call in to report on issues of impunity and the panel sitting in the studio discusses the issues and invites the public to give advice to the complainants. In a country where institutions of accountability are severely impeded, Brekete Family Radio has become one of the last resorts of the average Nigerian. It has succeeded in holding a large number of public officers to account and has achieved significant results – both real and perceived by those in the community – in combating impunity.

Source: Reinventing the rules website.

point to increasing use of computing and IT systems in processing the case log and recording data. This may certainly have a positive impact on overburdened justice systems. An Indian respondent cited the use of IT processes as a step taken to speed up the country's slow judicial systems but cautioned that while 'some courts have too many administrative and support staff, many don't have sufficient facilities and/or trained staff to handle computers to safely store files in proper filing cabinets, to use computers effectively and to handle IT systems'.<sup>16</sup>

Technology may provide long-term solutions but what is the position of those who have been let down by the system?

Use of media (such as radio or television) may enhance the visibility of process failures and the abuses or impunity that can follow as a consequence, especially where failures lie with government officials or judicial officers.

The most vulnerable groups may face particular difficulties in commencing legal action in the ways formally required. This will be especially so where complainants have language difficulties or are members of a group commonly subject to discrimination. Several respondents highlighted the importance of training and sensitisation of administrative officials and judges in facilitating access to justice for vulnerable people. A British respondent underlined the increasing importance of an interdisciplinary approach when dealing with legal problems. For example, understanding health and education needs and circumstances may be particularly relevant in relation to matters involving families, violence against women, applications for asylum or offences committed by migrants and asylum seekers.

## JUDICIAL INDEPENDENCE, QUALIFICATIONS AND TRAINING

Independence of the judiciary is vital for a functioning justice system. It is crucially important that when carrying out their judicial function judges are free of any improper influence. While pressures could come from outside (eg, litigants, pressure groups, the media), the constitutional and administrative balance between the executive, legislature and judiciary will be of fundamental importance in judges' ability to discharge their responsibility to provide fair and impartial justice.

Generally, survey respondents reported that, in the jurisdictions they spoke for, the independence of the judiciary is guaranteed by law. However, that does not necessarily ensure independence.

A Nigerian respondent saw the executive as having substantial influence on the judiciary through appointment processes and controls on funding. The respondent noted, however, that new rules are being enacted to deal

- The IBA Human Rights Institute (IBAHRI) and the UN have developed a training manual for judges, prosecutors and lawyers, called Human Rights in the Administration of Justice, which has been produced in English, Arabic, Portuguese, Russian and Spanish which is used in training around the world. The IBAHRI has also produced training manuals and curricula on international criminal law, human rights and the role of parliaments, and torture prevention.

Source: IBAHRI.

- In Uganda, the increasing number of environmental cases shed light on the need to improve the application and enforcement of environmental laws. Advocacy NGO Greenwatch Uganda conducts training for judges on environmental law issues. This training is now included on the Ugandan Courts Annual Judicial Training Calendar.

Source: Greenwatch Uganda website.

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<sup>16</sup> The Indian respondent refers, among other things, to a proposal to computerise lower courts, as part of a general package of reforms in the judiciary: <http://lawcommissionofindia.nic.in>.

with appointment and corruption. A New Zealand respondent saw the New Zealand appointment processes as lacking in transparency and impartiality, reporting that judges in New Zealand are appointed by one person, the Attorney-General, with the consultation of only one or two other people (usually the Chief Justice and Solicitor General).<sup>17</sup> At 2008, nine out of 130 district court judges in New Zealand were of non-European ethnicity.<sup>18</sup>

A strong, independent and efficient judiciary requires judges that continuously enrich their knowledge, maintain their skills and acquire new ones. This need is even more stringent today, where increasingly complex and sensitive issues arising in litigation processes require judges to adapt their knowledge to meet new challenges.

## 4.2 Legal assistance and representation

Legal representation is traditionally at the heart of access to justice. Without it there are high risks that there will not be equality of arms between parties, trials will not be fair and/or legal rights will not be adequately protected or enforced. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) obliges states to provide free legal assistance in criminal proceedings for individuals who do not have sufficient means to pay for it. States are also encouraged to provide free legal aid in relation to civil matters for individuals in economic need.<sup>19</sup> This is important in many civil disputes, such as those on property, contracts and debt, labour exploitation and workplace discrimination, and in judicial review of governmental administrative decisions on immigration and asylum. These disputes have profound effects on the economic well-being of individuals. In many countries legal aid is inevitably limited owing to resources constraints. When economic conditions deteriorate governments may reduce the resources committed to legal assistance.

The Malawi Law Society conducts career guidance talks in schools with the aim of encouraging students to engage in law studies. An increased number of qualified lawyers and judges is expected to reduce barriers to access to justice.

Source: IBA Survey.

### *In focus: free and low cost legal assistance*

Survey results confirm that free legal aid and representation are very likely to be available for criminal defendants, but are less frequently available for civil actions. Of note, a majority of respondents reported that actions against the government will not attract legal aid. A UK respondent added the caution that overly formalistic means tests for the determination of legal aid eligibility fail to take into consideration wealth distribution within the household; this in turn creates a serious obstacle to access to justice for women, and especially those who are victims of domestic violence.

While paying for legal assistance may be an option, a large majority of survey respondents reported that the high costs have a ‘very significant’ impact on the ability of the general population to appoint a lawyer at their own expense. Maximum fee rates for lawyers established by law may contribute to guaranteeing affordable justice. These are employed, for instance, in Germany, which also ranks

17 The Courts of New Zealand, Appointments, [www.courtsofnz.govt.nz/about/judges/appointments](http://www.courtsofnz.govt.nz/about/judges/appointments).

18 *The District Courts*, New Zealand, 2008, [www.courtsofnz.govt.nz/district/district/role/District\\_Courts\\_of\\_NZ\\_web.pdf](http://www.courtsofnz.govt.nz/district/district/role/District_Courts_of_NZ_web.pdf).

19 Human Rights Committee, General Comment No 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para 10.

third regarding access to civil justice in the most recent World Justice Project (WJP) Rule of Law Index<sup>20</sup>. However, different solutions may be necessary to trigger competition in performance in systems suffering from a shortage of qualified lawyers. For lower-income groups – especially minorities, indigenous peoples and persons living in rural areas – state-funded aid is obviously crucial.

For those going to court, self-representation may be a technical option, but it may not be a practical one. Survey respondents often pointed to the complexity of the legal language and process as obstacles on this path. These difficulties may be compounded where a person is held in detention. For instance, in some jurisdictions, such as Australia (reported one survey respondent),

The Malawi Law Society runs street law clinics with the aim of providing free legal advice to people in townships, who in most cases do not know where to go or whom to approach for legal redress.

Source: IBA Survey.

In the United Kingdom a consortium of law and development NGOs has put a proposal to the UK Department for International Development (DFID) to establish and fund a programme that from 2014/15 will foster, support and facilitate international pro bono work by UK judges and lawyers in DFID priority countries.

Source: IBA/Bingham Centre Workshop.

mandatory detention of irregular migrants can inhibit them from obtaining legal advice and representation.

Despite the many obstacles highlighted, the majority of survey replies indicated that access to legal advice and representation has slightly improved in the last ten years for women, minorities and indigenous peoples, people living in rural areas and migrants. If this perception is correct, it may be the result of increased specialist legal advice being provided pro bono or at low cost through civil society or community-based services, including the provision of

legal advice and support from legal clinics established by law schools using the skills of law students.

In India the National Legal Services Authority (NALSA) runs legal aid programmes that include schemes to provide services for:

- The rescue and rehabilitation of child labourers and for the prosecution and punishment of employers and traffickers.
- Seasonal workers outside the organised sector, to protect their rights and secure entitlements. It is estimated that these workers account for 60 per cent of the national economy.
- Persons with mental illness or disability and victims of disasters or atrocities.

Source: IBA Survey.

## 4.3 Fairness, openness, enforcement and compliance

Access to justice requires that parties have the opportunity to present their case effectively, that procedures will be fair and that parties will know the case against them. Justice should ordinarily be done in public so that legal processes can be scrutinised, which in turn helps to ensure fairness. There should also be mechanisms in place that ensure the prompt enforcement of decisions, including the release of a defendant or the carrying out of sentences at the conclusion of criminal proceedings. Where these are not characteristics of justice systems, access to justice is inhibited. The scope of these issues is so wide that just a small snapshot of them can be provided here.

### *In focus: fair procedures and enforcement*

In the survey responses there was much to suggest criminal proceedings were fair in the countries covered. The majority of respondents reported that a defendant in criminal proceedings has a genuine prospect of acquittal if evidence is inadequate and/or if there was a procedural irregularity.

<sup>20</sup> World Justice Project, Rule of Law Index 2014, Washington DC 2014, <http://worldjusticeproject.org/rule-of-law-index>

Respondents also indicated that an interpreter will usually be made available to ensure that the defendant is able to understand and participate in the proceedings.

Where informal justice institutions such as religious bodies, indigenous tribunals or councils of elders exercise judicial or quasi-judicial functions, survey respondents generally reported that participants are able to present their case effectively. A majority of those respondents also indicated that decision makers regularly explain the

reasons for their decisions. However, it was noted by respondents that proceedings are frequently only partly open to the public and there is often inconsistency in decision-making.

With regard to enforcement of decisions, there are usually a range of mechanisms that provide for enforcement and which seek to ensure that parties comply with decisions. Effectiveness, however, will vary. The survey respondents reported that there was generally compliance with court decisions and that penalties would be imposed where there was a failure to comply. However, there are undoubtedly problems in enforcement, not least when judgments are made against the state. For example, a Nigerian respondent reported that enforcement is less likely in judgments against the police, or where a court orders reinstatement after wrongful termination of employment of a government employee.

Where informal institutions operate, social or community sanctions may ensure compliance and enforcement. However, where non-state systems are recognised by the formal justice system, they may also benefit from the enforcement mechanisms available to state justice institutions.

In civil proceedings, processes will vary across countries and with the types of cases.

- In the United Kingdom the Justice and Security Act 2013 provides for the use of 'closed material procedures' in any civil proceedings where national security issues arise. Under these procedures a non-state party may not be told the details of the state's case. Instead, a 'special advocate' will be appointed to represent them with regard to the non-disclosed issues. The security-cleared special advocate will see the materials but will not be able to communicate with the client or their lawyers to verify or disprove the veracity of the non-disclosed material.

Source: Justice and Security Act 2013.

- The South African Constitution (section 112) requires the courts to apply non-state laws, provided they are not in conflict with other parts of the Constitution.
- In Indonesia traditional religious Adat law has a prominent role in dispute resolution. It governs the distribution of marital property, even in state courts.
- In parts of Australia there are courts of summary jurisdiction where elders from local indigenous tribes sit with magistrates.

Source: ABA ROLI 2012, p 5; IBA Survey.

## 4.4 Reducing institutional barriers in justice systems: possible reform strategies and solutions

Institutional barriers within justice systems can be identified with more precision than societal and cultural barriers to access to justice. They can also be targeted more directly and, moreover, the legal profession is well placed to provide some solutions to the problems. However, the lack of resources may be a serious obstacle in addressing these barriers, especially as those same resource issues prevent societal and cultural barriers being addressed, and many countries face significant issues of capacity within their systems. As such, policies and strategies that address institutional barriers in ways that take account of disproportionate effects on particular groups may be very important. Approaches in different jurisdictions have included both private and state-based initiatives such as:

- The use of mobile courts, one-stop justice shops, street clinics and the like to overcome barriers to accessibility to courts, especially in rural and remote areas.

- Appropriate training for judges and administrative staff.
- Promoting the study of law may be necessary in jurisdictions that lack sufficient numbers of qualified people in the profession.
- Increased computerisation of court procedures and data storing to improve transparency, facilitate access to court decisions and reduce court backlogs.
- Formal legal recognition and promotion of ADR and traditional forms of justice.



# Chapter 5: Social and Institutional Intersections

Whereas some barriers to access to justice are clearly one aspect of wider social and cultural structures, and some are more specific to justice systems, there are other barriers that are less clearly attributable to one or other category. Rather, they are more accurately characterised as operating at the very intersection of societies and their justice institutions. The survey responses highlighted two such barriers in particular: the distrust of formal justice systems, including lawyers and judges, and corruption. These obstacles to access to justice underscore the complexity of how barriers operate in practice, which, in turn, has an impact on the types of measures that can be adopted to facilitate access to justice.

Strategic litigation, or public interest litigation as it is sometimes called, is a well-established approach to securing rights through judicial rulings in test cases. However, there are barriers arising from social and institutional intersections where litigation is either unsuitable or will be most effective when combined with other strategies.

Strategic litigation addresses critical human rights issues and, if successful, establishes legal precedents and may also have important effects in terms of policy changes or legislative reform. Public interest litigation may be a particularly useful strategy to address societal barriers that are reflected in the way judicial institutions provide justice in practice.

- In Europe, London-based NGO Interights took a case to the European Court of Human Rights (ECtHR) concerning the protection of migrant domestic workers from abuse and exploitation amounting to forced labour, domestic servitude or even slavery. Throughout Europe this is a social problem not matched by adequate legislation to combat the phenomenon. The ECtHR took a position on states' obligations in this regard and, as a consequence, in 2009 the UK modified its legislation to bring it in line with the human rights obligations under the European Convention on Human Rights.

Source: Interights website.

## 5.1 Distrust of justice systems

Individuals who have been subject to discrimination and abuse by the police forces or other state authorities, or have experienced unjust outcomes from the justice system, may choose not to rely upon formal legal procedures for the solution of their justice problems. Distrust of the courts is a particularly challenging obstacle because it undermines the chances to resolve disputes within the law, whether those disputes are between private parties or with the government.

- Training of the police in the investigation and prosecution of domestic and gender-based violence is being undertaken in Sierra Leone.
- In Nigeria the police force is setting up gender desks in police stations in order to aid more sensitive and timely treatment of complaints by women.

Source: IBA Survey.

### *In focus: lawyers and judges*

A distrust of lawyers and judges may be widespread and general in some jurisdictions. However, distrust may affect specific parts of the justice system (such as criminal justice) or may predominate only in certain groups (such as minorities). Survey respondents reported that a lack of trust in lawyers has a particularly detrimental effect on the extent to which people living in rural areas and migrants are able to access the justice system. A Nigerian respondent stated that distrust arises from the concern that frequent use of formalism and legal technicalities are intentionally employed to hamper comprehension of the problems and to frustrate the cause of justice.

The compound nature of this barrier suggests that patterns of distrust in the justice system are



connected to both real and perceived shortcomings, and to the values and social characteristics of the group concerned. Some survey responses noted, for example, that migrants and asylum seekers may hesitate to approach those working within formal justice systems for a range of reasons, including their cultural values and traditions, their immigration status or because of a perception of the way the justice system operates.

Legal systems and culture interact in complex ways. Immigrants may take their concerns about the deficiencies of the justice system in their home jurisdiction and apply them to the justice system of their new host country. The performance of an unfamiliar justice system is not readily discernible and so the caution applied in the past will not be easily displaced. At the same time, justice sector personnel may bring to their interactions with immigrants the discriminatory patterns of the host society, failing to take into account the needs, concerns and even fears of vulnerable groups. Accordingly, facilitating access to justice in such cases requires measures that affect both the socio-cultural dimension of the barrier and the failures of the legal-judicial system.

Stigmatisation can be an acute problem for women, particularly in gender-based violence cases.

- In rural Tajikistan the American Bar Association's Rule of Law Initiative reports that 'women are extremely reluctant to bring cases of sexual assault before the non-state or state justice system. Complainants are likely to be wrongly held responsible for the assault taking place and, as a result, alienated or ostracised from their community.'

Source: ABA ROLI.

## 5.2 Corruption

Corruption of state authorities and of justice sector personnel represents a serious barrier to access to justice. It undermines the entire reliability of the judicial system, generally reinforcing discrimination and disadvantage for the poor and other vulnerable groups, preventing them from enforcing their rights against the state or more powerful private parties. Corruption may be driven by economic factors, including underfunded justice systems with poorly paid staff, and by cultural practices embedded in societies.

Civic education programmes can address citizens' fear of public institutions by explaining the process of using a justice institution and allaying concerns about the possible negative consequences of interacting with the justice system.

- The Law Society of Zimbabwe conducted training in the rural community in Rusape on local authority and government functions, explaining citizens' obligations and rights, and how people could enforce their rights.
- In the Philippines, International Justice Mission's 'Project Lantern' is aimed at reducing the number of women and children exploited in commercial sex establishments and street prostitution. To achieve this, the project involves both training and professional support for police officials and judges on dealing with victims and witnesses, and victim aftercare. The latter involves mentoring by former victims to denounce traffickers, gathering of information and compiling affidavits to support prosecutions, and psychological support, as well as training programmes to achieve economic self-sufficiency upon reintegration in the society.
- In Western Nigeria (Osun State) the Public Defender and Centre for Citizens Rights (PD&CR) provides free legal representation for women, children and the poor. It also uses radio and television programmes to educate the public about their rights. Over 400 people have accessed the PD&CR office. However, in a state of four million people, the office is small (with just six lawyers) and litigation is costly.

Source: IBA Survey; IBA/Bingham Centre workshop.

## *In focus: justice sector personnel and the administration of justice*

The survey responses clearly identify corruption as one of the main barriers to access to justice. It not only hampers the fair resolution of disputes for those that cannot afford the economic costs of bribes but also, because of the fear of unfairness, discourages individuals from using justice institutions to resolve disputes.

Although the integrity and independence of judges are vitally important, corruption in the judiciary is not necessarily the most significant corruption issue in justice systems. The majority of survey respondents, for example, reported that judges in the jurisdictions surveyed are not corrupt. There were exceptions, including Nigeria and Mozambique, and established analyses of corruption indicate that there are problems or perceived corruption problems in many countries.<sup>21</sup>

Corruption at the lower levels of justice sector personnel can create barriers to access to justice. It is especially important because it is at lower levels that everyday contact occurs. Before a matter reaches a judge there will have been many dealings with administrative staff. If these staff are poorly paid then that may facilitate corrupt practices.

Classic measures aimed at eliminating corrupt practices include enactment of legislation criminalising all forms of corrupt acts, improving working conditions and salaries of staff and promoting the transparency of judicial processes and public services more broadly.

Corrupt practices occur in everyday settings, long before a matter reaches a court.

- In Sierra Leone, when a complaint is made to the police, complainants have been asked to 'buy pen and paper'. Where the demand was not met the complainant would not be taken seriously and a police report, if required, would not be issued.
- Similar experiences have been reported in Nigeria and Ghana, where it has been found necessary to 'motivate' or 'mobilise' the law enforcement agents when complaints are made.

Source: Okoroafor, 2010.

After political upheaval an examination of the suitability of judges for office may be required. This can be beneficial for the justice system and the community.

- In Kenya, the severe violence that followed the disputed 2007 presidential election highlighted, among other things, the courts' inability to prevent and address election fraud and widespread corruption in the judiciary. A vetting board was established in 2011 to evaluate whether the judges in office were suitable to continue serving in accordance with the values and principles set out in the new Kenyan Constitution of 2010. The board dismissed four of the nine Court of Appeal judges for conduct that had damaged public confidence in the judiciary. The board is now vetting lower court magistrates.

Source: Judges and Magistrates Vetting Board website.

New technologies, including apps for mobile phones, have been adopted to tackle corruption.

- Ukraine ranks 94 out of 99 countries on the level of corruption in the World Justice Project's Rule of Law Index 2014 and only a small percentage of citizens report such practices. In 2013, a city council in Western Ukraine launched a project for the creation of a free mobile app to improve service delivery and collect feedback on satisfaction with service delivery. The app enables corruption to be reported and provides access to local, regional and national anti-corruption hotlines, and to a telephone directory of contacts at public authorities.

Source: Ursu, UNDP, 2014.

Corruption can occur in court processes.

- In the Democratic Republic of Congo (DRC) many criminal judgments are not enforced because the enforcement procedure provides a clear opportunity for official corruption. Bail money is deposited with the court and where a person absconds following conviction, 'a judge who sees an opportunity to keep the bail money for himself has little motivation to ensure that a [criminal] sentence is enforced'.

Source: ABA ROLI, 2012, p 39.

<sup>21</sup> For the leading analysis of perceptions of corruption, see Transparency International's annual Global Corruption Barometer: [www.transparency.org/research/gcb](http://www.transparency.org/research/gcb).

### **5.3 Reducing barriers embedded into social and legal intersections: possible reform strategies and solutions**

In addition to the strategies reported earlier, the following measures have been successfully employed to address socio-legal barriers to access to justice:

- Civic education programmes targeting all groups of society, including children.
- Mechanisms for oversight of the legality and reasonableness of administrative decisions – whether formal (eg, ombudsman) or informal (eg, social media) – have been successfully employed to investigate and remedy abuses in the enforcement of laws and to promote the transparency and accountability of the justice system.
- Access to justice can also be facilitated through strategic (public interest) litigation, where enforcement of laws can be claimed and discriminatory laws and policies can be repealed. Similarly, class action suits or other legal mechanisms can address socially relevant judicial decisions, so that even those that do not have access to courts can reap the advantages of such litigation.

# Chapter 6: Access to Justice Internationally: Directions and Pathways

The scope of efforts to improve access to justice is remarkable. In many respects, this should not be surprising, for there are countless people in the legal profession, governments and civil society organisations and in wider communities for whom justice is a personal and professional commitment. However, as most justice initiatives are inevitably localised (if not in conception or principle then usually in application as they seek to reach into local and national communities), those looking for examples of good practice may only look locally or regionally, rather than across national borders. Even though barriers to access to justice will always be connected to specific national contexts, the data and examples in this project point to the possibility of drawing on strategies from a global range of good practice.

Examining access to justice at an international level, and conceptualising the way that barriers operate, provides a basis on which links may be drawn across jurisdictions because there is a degree of universality about the nature of barriers. In examining the strategies that are used to tackle different types of barriers there are two important cautions:

1. No barrier operates independently of another. Barriers interact with reciprocal effects that intensify their impact.
2. No single strategy will be sufficient by itself to overcome barriers to access to justice. Strategies need to take account of different barriers and their interaction. Multiple strategies will be needed, operating across the spectrum of formal legal change, through implementation of laws, to work directed at the practices and contexts that affect access to justice for communities and individuals.

## 6.1 Directions

The research suggested that access to justice strategies are widely pursued and widely varied. However, there is some discernible common ground in both barriers and practices employed to overcome them:

- The legal profession plays a crucial advocacy role for changing regulatory instruments that operate as obstacles to access to justice, especially in using the law to combat social and cultural barriers.
- The legal profession is ideally placed to raise awareness of legal rights so that the needs of vulnerable or disadvantaged groups are met (eg, rural communities, prisoners, women and children). The profession can also effectively promote the study of law in jurisdictions that lack sufficient numbers of qualified people in the profession.
- Civic education programmes, both governmental and private, are increasingly provided to target all groups of society, including children.
- Digital technology has increasingly been employed to disseminate general legal information,

provide informal legal education, improve transparency, facilitate access to court decisions and reduce court backlogs. However, the success of such strategies is highly dependent on the availability of and access to technology in specific countries and/or areas.

- Broadening legal standing criteria can permit civil society organisations and national human rights institutions to raise representative claims on behalf of vulnerable individuals. This can be an important strategy in overcoming socio-cultural barriers to access to justice.
- Appropriate and continuous training for judges and administrative staff is increasingly acknowledged as essential in addressing barriers to access to justice.
- Promotion and recourse to ADR is increasingly identified as a principal strategy in reducing access to justice barriers.
- There is broad acknowledgement of the importance of oversight mechanisms for promoting the transparency and accountability of the justice system – whether formal (eg, ombudsman) or informal (eg, social media).

## 6.2 Pathways

The IBA Access to Justice and Legal Aid Committee sees this project as a starting point for its work. Looking to the future, how might the IBA and its members use the Committee's work in this area?

First, the Committee is clearly well placed to make a valuable contribution to the ways that good practice in access to justice work around the world might be identified and disseminated to an international audience. This is a path it should pursue, especially as the Committee is a conduit for the combined knowledge and ingenuity of the IBA membership in matters relating to access to justice and legal aid. In light of the experience and findings of this project, the aims and methodology should focus less on building major quantitative data collections – the resources required for that are unlikely to be feasible – and should focus strongly on the gathering of examples from the widest possible range of countries. This would sit well with both the IBA's aims and the strengths of its committees and networks.

The gathering of examples could be done in ways that focus on particular issues from time to time – for example: property, family law, prisons, victims, enforcement strategies – which should enable a more targeted set of responses and wider collection of examples. Quantitatively, this approach could produce data about what types of work are being done and whether some areas are being neglected.

While a survey instrument is very important in undertaking the research, it should always be done in conjunction with desk-based research that seeks to identify examples that are not in the survey responses and to verify or document examples that do come from the survey.

The recording of examples could (as planned for this project) be effectively done on the IBA website. A standardised format with a searchable database that uses simple keywords could be very effective for recording good practice and categorising it across multiple categories, so as to make it widely available to those seeking ideas for tackling the problems faced in their own jurisdiction. There is also the possibility of encouraging the recording of initiatives that have not succeeded. The lessons learned from those disappointments have great potential to assist the successful development of other initiatives.

Secondly, with the possible scope of access to justice barriers and strategies to tackle them being very wide, there is a need to take account of the IBA's core strength and its constituency: the legal profession. The Committee clearly has the potential to tap into vast expertise and to activate that expertise in raising awareness and helping to develop ways of overcoming barriers to access to justice. This will require profile building and will take time. However, based on the responses to this survey, there is good reason to think there is great potential for mobilising a wide international constituency from the legal profession.

Finally, this work comes at a time when access to justice has a particularly significant role in the UN post-2015 development agenda. Its importance has been strongly emphasised in the recent document delivered by the General Assembly Open Working Group, where access to justice features as Goal 16 of the proposed Sustainable Development Goals submitted for consideration to the General Assembly in September 2014. The IBA's work in this area will be an extremely valuable contribution in achieving the objectives set out in the post-2015 development agenda.

# Chapter 7: References and Resources

## Selected literature and official documents

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## **Selected websites and sources for examples**

*The websites below are mostly referred to in short form with the title reference corresponding to the source cited in examples in the report. Where there is a link to a specific page, that is provided. In other circumstances the organisation or project home page is provided.*

### ***Web-based sources for examples in Chapter 3***

Pro Igual: <http://proigual.org/projects/anti-discrimination-crisis-cards>

Peace Brigades International: <http://bit.ly/1rOruon>

FORES: [www.foresjusticia.org.ar](http://www.foresjusticia.org.ar)

Citizenship Foundation: [www.citizenshipfoundation.org.uk/main/page.php?59](http://www.citizenshipfoundation.org.uk/main/page.php?59)

Indigo Trust Foundation: [www.indigotrust.org.uk/2013/04/25/lessons-from-africas-tech-scene](http://www.indigotrust.org.uk/2013/04/25/lessons-from-africas-tech-scene)

Bingham Centre for the Rule of Law: <http://bit.ly/1lCBEuf>

### ***Web-based sources for examples in Chapter 4***

Innovating Justice: [www.innovatingjustice.com/innovations/legamedical-justice-on-wheels](http://www.innovatingjustice.com/innovations/legamedical-justice-on-wheels)

Reinventing the Rules: <http://bit.ly/1taXHZI>

Greenwatch Uganda: [www.greenwatch.or.ug](http://www.greenwatch.or.ug)

### ***Web-based sources for examples in Chapter 5***

Interights: [www.interights.org](http://www.interights.org)

Judges and Magistrates Vetting Board (Kenya): [www.jymb.or.ke](http://www.jymb.or.ke)

UN Development Programme: <http://bit.ly/1n0gErE>

*Selected web resources supporting comments in survey or workshop*

Brekete Family: [www.breketefamily.com](http://www.breketefamily.com)

Conflict Gateway: [www.conflictgateway.com](http://www.conflictgateway.com)

FIDA Nigeria: <http://fida.org.ng/index.php/program-activities>

International Justice Mission, Project Lantern: <https://www.ijm.org/projectlantern>

Law Society of Western Australia: [www.lawsocietywa.asn.au/education](http://www.lawsocietywa.asn.au/education)

Mercy Corps: <http://bit.ly/1lK1LQ3>

National Legal Services Authority (India): <http://nalsa.gov.in/schemes.html>

Open Society Foundations: <http://osf.to/1t4jMXF>

Penal Reform International, Paralegals in Rwanda: <http://bit.ly/YpRT3p>

Timap for Justice (Sierra Leone): [www.timapforjustice.org](http://www.timapforjustice.org)





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