



National Center *for* Access to Justice

AT FORDHAM LAW SCHOOL

Concept Paper for the Event

Unifying the Global & US Access to Justice Movements: The Judicial Perspective - A Panel Presentation -

Sponsored by:

Center for Race, Law & Justice
Feerick Center for Social Justice
Leitner Center for International Law & Justice
National Center for Access to Justice
and the
Access to Justice Initiative

at

Fordham Law School
150 West 62nd Street, New York City
5:30 to 8:30 pm, March 21, 2017

Featuring:

Welcoming Remarks

Matthew Diller

Dean and Paul Fuller Professor of Law, Fordham Law School

Panel Discussion

Hon. Jonathan Lippman

Of Counsel, Latham & Watkins

Chief Judge, New York Court of Appeals (2009-2015)

Hon. Willy Mutunga

Distinguished Scholar-in-Residence,

Leitner Center for International Law and Justice, Fordham Law School and
Chief Justice and President, Supreme Court of Kenya (2011-2016)

Prof. Rebecca L. Sandefur

Faculty Fellow and Founder, Access to Justice Research Initiative
American Bar Association, and Associate Professor of Sociology and Law,
University of Illinois at Urbana-Champaign

Moderator

David Udell

Executive Director, National Center for Access to Justice

Introduction

Unifying the Global and US Access to Justice Movements: The Judicial Perspective is a panel presentation sponsored by the Center for Race, Law and Justice, Leitner Center for Institutional Law and Justice, Feerick Center for Social Justice, and the National Center for Access to Justice, all based at Fordham Law School. It is hosted by the Access to Justice Initiative at Fordham Law School.

Following remarks from the Dean of the Law School, Matthew Diller, welcoming the audience and introducing the event, the leading social scientist in the field, Rebecca Sandefur, will join Kenya's former chief justice, Hon. Willy Mutunga, and New York's former chief judge, Hon. Jonathan Lippman, in a panel discussion moderated by David Udell, executive director of the National Center for Access to Justice.

The panelists will discuss ideas and exchange observations comparing, contrasting, and commenting on, for their respective countries and for the world: a) the access to justice problem, b) the access to justice solutions, and, c) the access to justice reform agenda – questions at the leading edge of the movement.

The public is invited. The event will be recorded. CLE credit will be awarded (NJ & NY; 1 hour professional services; .5 hours ethics).

A. The Access to Justice Problem

In countries around the world, including in the United States, many people struggle with civil legal problems and also become caught up in the criminal justice system.

People in all countries lose custody of their children, suffer chronic hunger, face the loss of their homes and savings, go without medical care, remain trapped in abusive relationships, suffer inferior schools and lost educational opportunities, forfeit property and inheritance rights, experience theft of identity, endure exploitative conditions on the job, and face racial and ethnic discrimination in high stakes settings. Much of this occurs in the justice system. Much of it is potentially preventable.

Access to justice can make the critical difference in everyday lives, bolstering personal well-being and physical and emotional security, and protecting such basic human rights as individual freedom. It can enable a domestic violence victim to gain independence from her abuser. It can enable a tenant to successfully protect a home against a coerced eviction. It can protect a student from bullying and intimidation. It can sometimes be the difference between a productive life, a life on the streets, and a life in prison. In some instances, it can be the difference between life and death.

Conceived as part of a movement for “legal empowerment”, access to justice can enable individuals to learn to confront powerful individuals and institutions, hold them accountable under the law, and begin to re-shape communities.

But access to justice and legal empowerment are hard to come by. A first consideration is that many people do not necessarily know that their problems may be legal in nature or amenable to legal solution. Research is showing that the expense of legal representation is just one among many barriers to access to justice. Some people hold the mistaken belief that their problems are their personal fate. Convinced they have no recourse in conflicts with opponents more powerful than themselves, or naive about their options, they sometimes pursue none.

For people marginalized in their societies, access to justice can be especially elusive. Some may be reluctant to assert their rights, or unable to do so effectively, because they are members of persecuted racial, ethnic, religious, LGBT or immigrant minorities. Women may experience particular vulnerability. A recent study with African-American focus groups in the United States found that some subjects conflated their bad past experiences in the criminal justice system with their expectations of the civil justice system, prompting them to avoid the civil and criminal justice systems altogether.¹ People in remote rural areas may find that the burdens of travel make courts practically inaccessible.

Poverty is important in this context. People may lose their homes because they are unable to pay their rent, or may face incarceration for theft of food or of transportation services, or for other crimes of subsistence. The poverty that prompts some encounters with the justice system may also complicate the proceedings that ensue. Many people are unable to afford the cost of counsel and also unable to pay the expenses involved in civil litigation and in a criminal prosecution. In civil matters, free civil legal aid lawyers are limited in number. In criminal matters, a right to counsel is available in most countries, though it is often poorly effectuated and does not extend beyond defense of the crime to collateral matters. For example, the fees and fines imposed in criminal matters, if left unpaid, can lead to subsequent proceedings (civil or quasi-criminal under the law) in which warrants will be issued and in which incarceration is an end result, but in which there is no right to counsel.

Courts and legislatures prevent access to justice in additional ways. Simply maintaining public courts is a cost to the state, and in some jurisdictions the court system cannot afford to fill vacancies in judge and clerk positions. Courts may also fail to pay for interpreting and translating services. Or, they may close early and reduce their overall hours of service. They may increase the cost of filing fees, photocopying fees and more.

Courts and legislatures also establish doctrines that limit the jurisdiction of courts to hear people's cases. Doctrines that include standing, immunity, exhaustion, and attorneys' fees restrictions, all operate to prevent lawsuits from moving forward.

Corruption is also a factor that in many parts of the world will interfere with the availability and reliability of justice.

¹ Sara Sternberg Greene, Race, Class & Access to Justice, Iowa Law Review (2016), http://scholarship.law.duke.edu/faculty_scholarship/3450/

Finally, for many people and in most countries, disputes that are legal in nature may never reach the courts because they are addressed in informal ways. Sometimes people will seek to negotiate solutions to disputes without ever going to a court. Sometimes people turn to other institutions of government that are charged with enforcing rights. Sometimes, people will look to more established but still “informal” systems of justice that involve mediation or arbitration. But these various systems can vary in quality. They tend to reward repeat players. They also operate without the disinfectant of sunlight. They fail to generate predictable precedent. And, they may not offer viable methods for enforcing their results. Pressure to compromise rights in “alternative dispute resolution systems” through mediation (including through assistive technologies such as *rechtwijzer*²) or through mandatory arbitration, can be in tension with efforts to make justice public, appealable and fair. Mandatory arbitration is accompanied by additional concerns over the compromise of judicial review, jury review, attorneys’ fees, participation in class actions, and more.

B. Access to Justice Solutions

In the global arena, institutions that include the UN, the World Bank, the Organization for Economic and Co-operative Development (OECD), the Open Society Justice Initiative, many nations of the world, and many individuals around the world are advancing the view that access to justice is essential to fostering prosperity and to developing civil society.

The UN’s 2015 Sustainable Development Goals, at Global Goal 16, call on all countries of the world to draw on the power of “the data revolution” to track and promote the expansion of access to justice for their residents. The SDGs emphasize the importance of justice throughout, observing that justice is a key to reducing poverty. Many countries are beginning to implement the SDGs, including Global Goal 16.³

James Goldston, Executive Director of the Open Society Justice Initiative has explained: “When both government and civil society groups support people to understand and claim their legal rights, development processes are not only more inclusive and equitable, they also drive better health, stronger educational outcomes, and wealthier communities.”⁴

The access to justice reform movement in the U.S., led at times and in important ways, by the judiciary (which has reaffirmed its commitment to assuring 100% meaningful

² <http://www.hiil.org/project/rechtwijzer>.

³ *Fact Sheets, Everywhere Justice: Delivering Community Justice Services at Scale: [Indonesia](#), [Moldova](#), [Ontario](#), [Sierra Leone](#), [South Africa](#), [Ukraine](#)*, Open Society Foundation (September 2016), <https://www.opensocietyfoundations.org/fact-sheets/everywhere-justice-delivering-community-justice-services-scale>.

⁴ <http://www.opensocietyfoundations.org/publications/arguments-justice-development>.

access to legal assistance for all in a 2015 Resolution published by the State Court Chief Justices and State Court Administrators⁵) is making progress on multiple fronts:

- *New models & technologies* - States are testing new policy models intended to make civil court proceedings more fair. These include new codes of judicial conduct that authorize judges to go beyond the role of passive referee, allowing them to notify litigants of the key issues and essential evidentiary materials in a case. States are also relying on new technologies, for example, software that allows litigants to file court documents via the internet or that uses “avatars” to help people to craft their individualized pleadings. Important: the performance of many of the models recommended by experts has not been evaluated in a rigorous way, and so the effectiveness of these models has not yet been established.
- *More civil legal aid attorneys* - Communities are working to strengthen civil legal aid, with chief justices stepping up their role as champions of lawyers for the poor. A movement to establish a civil right to counsel has gained momentum in recent years, including with a commitment by New York City’s mayor in February 2017 to appoint a free lawyer for every tenant with income beneath the federal poverty level who is facing eviction.
- *More involvement of law schools and law students* – Communities are asking schools and students to expand pro bono service. Some of the new initiatives include programs that offer an early bar exam date to students who perform substantial public service, rules that condition bar admission on completion of public service, programs that draw law grads into “incubator” firms that provide legal aid to low income clients at reduced fees, and clinics that offer practical training to students who handle otherwise unmet legal needs.
- *More non-lawyers* - A legal empowerment movement is relying on “non-lawyer” advocates -- including “community based paralegals”, “navigators”, “limited licensed legal technicians”, social workers, and paralegals – to help people secure their rights and protect their interests.
- *New settings for legal assistance* - Diverse institutions, including libraries, hospitals, courts, schools, and law schools are expanding their capacities to help people secure access to justice.
- *Movement lawyers* - The role of lawyers – human rights lawyers – in securing rights for people engaged in political expression has taken on increased

⁵ Conference of State Court Chief Judges, Conference of State Court Administrators, *Reaffirming the Commitment to Meaningful Access to Justice for All* (2015), http://www.ncsc.org/~media/microsites/files/access/5%20meaningful%20access%20to%20justice%20for%20all_final.ashx.

importance in an era in which marches, demonstrations and other forms of protest are organized and frequent.

- *Interpreting and translating services* – The courts in recent years have increased their commitment to interpreting and translating. Some are now providing both services in more languages than before, and doing so at clerk’s desks rather than exclusively in the courtroom.

New efforts are also being made through research to understand the interaction between poverty, the civil justice system, and the criminal justice system. The resurgence of debtors’ prison has been a revelation in the United States, where the rioting in Ferguson, MO, and the release of the U.S. Department of Justice’s report on that crisis, revealed municipal courts imposing fees and fines to excess, sometimes enforcing them as civil judgments, rarely providing counsel to defend against them, and prompting arrests and time in prison. In the best-selling 2016 book, *Evicted*, author Matthew Desmond established through research that it is not poverty that always causes homelessness, but sometimes the reverse: the loss of an apartment causes a broad array of collateral consequences, including poverty.

Last, a new global access to justice research movement is drawing social scientists around the world into the tasks of determining i) unmet legal needs in the society, ii) effects of civil legal aid in improving case outcomes and life outcomes, and, iii) best performing models (in addition to legal representation) for closing the justice gap. Research is contributing to new indexing systems, like the World Justice Project’s Rule of Law Index (<http://worldjusticeproject.org/rule-law-around-world>) and the NCAJ’s Justice Index (<http://justiceindex.org>), that compare and promote progress to expand access to justice in countries around the world and in the United States. The OECD is conducting a substantial research initiative on access to justice. <http://www.oecd.org/gov/access-to-justice.htm>. Much of this research, including work encouraged by the US government, is aligned with Global Goal 16.⁶

Notwithstanding the efforts made, the gains realized, and the research conducted, problems remain in virtually all societies, compounded by cycles of retrenchment and backsliding. Periodic attacks on civil legal aid, on programs that support the poor, and on public policies that expand the economy are factors that force people into more intense contacts with the justice system. Progress to increase access to justice is often reversed. It is not assured.

⁶ *Efforts to Identify National Indicators on Access to Justice*, White House Legal Aid Interagency Roundtable, Working Group on Access to Justice Indicators and Data Collection (January 2017) <https://www.justice.gov/atj/file/926686/download>.

C. The Access to Justice Reform Agenda - Questions at the leading edge of the movement

How similar or different are the global and the US access to justice crises and the responses to those crises? Is there reason to work to unify these movements? Our panelists bring different perspectives to the discussion as a consequence of their respective roles as a former Chief Justice of Kenya, a former Chief Judge of New York, and a law professor and social scientist. Each is knowledgeable about access to justice concerns in the US and abroad, the similarities and differences that exist here and there, and the policy models that hold promise as solutions. Discussion questions are set forth below, followed by recommended readings (with links):

**I.
Need**

1. What are the types of problems that cause people to contact the justice system?
2. Do people have different levels of knowledge of the law, of their rights, and of the operation of the justice system, depending on where they live?

**II.
Quality**

3. How different are the courts in the respective countries?
4. How different is the availability of legal assistance in Kenya, New York, and around the world?
5. What are the strengths and weaknesses of informal dispute resolution systems.

**III.
Solutions**

6. How much of a difference do we expect from the new models that are being tried across the US, and are these models useful in Kenya and other countries?
7. What are the prospects for global and domestic reform?

**IV.
Larger Questions**

8. How strong is the rule of law in the respective countries
9. Is access to justice important to societal stability?
10. Do certain populations have particular access to justice needs?

Readings

1. Concept Memo, for *Unifying the Global & US Access to Justice Movements: The Judicial Perspective*, by National Center for Access to Justice (3-10-17)(the within memorandum)
2. *How Baltimore is using the Sustainable Development Goals to make a more just city*, by Cary I. Biron, Citiscope.org (3-9-17), <http://citiscope.org/story/2017/how-baltimore-using-sustainable-development-goals-make-more-just-city>.
3. *Special Rapporteur's Report on Extreme Poverty & Human Rights*, Magdalena Sepúlveda Carmona, transmitted to the General Assembly by the Secretary General (8-9-12), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf>.
4. *Leveraging the SDGs for Inclusive Growth*, Organization for Economic & Co-operative Development & Open Society Foundations (2016), <http://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>.
5. *Fact Sheets, Everywhere Justice: Delivering Community Justice Services at Scale: [Indonesia](#), [Moldova](#), [Ontario](#), [Sierra Leone](#), [South Africa](#), [Ukraine](#)*, Open Society Foundation (September 2016), <https://www.opensocietyfoundations.org/fact-sheets/everywhere-justice-delivering-community-justice-services-scale>.
6. *Efforts to Identify National Indicators on Access to Justice*, White House Legal Aid Interagency Roundtable, Working Group on Access to Justice Indicators and *Data Collection* (January 2017) <https://www.justice.gov/atj/file/926686/download>.