



Filling the Justice Capacity Gap

Hiram E. Chodosh, Dean and Professor of Law at S.J. Quinney College of Law <Chodoshh@law.utah.edu>

James R. Holbrook, Clinical Professor of Law at S.J. Quinney College of Law <holbrookj@law.utah.edu>

The world's justice systems are under stress. Political commitments to democratization and human rights protection, private economic transactions, counterterrorism, and globalization impose new burdens on justice institutions for more impartial and transparent conflict resolution. The intrinsic need of a modern state to be both strong and self-limiting requires a strong and independent judiciary to realize these rule-of-law objectives.

Courts are arguably the least dangerous, but most neglected, institutions to deal with these increasing needs for effective conflict resolution capacity. The higher stakes and pressures on judicial decision making have not yet motivated proportionate investment in justice institutions, their institutional independence, transparent procedures, or requisite financial and human resources. Courts remain vulnerable to outside influence. Political interference, corruption, delay, prolonged pre-trial detention, and the use of physical coercion appear to be on the rise, further undermining widely shared rule-of-law goals.

Political processes frequently are dominated by a society's most powerful factions. Social groups may be divided historically and culturally along the fault lines of conflict with the effect of complicating meaningful political reforms. Institutional neglect also is an effect and compounding cause of sustained, armed conflict where people are fighting over longstanding enmities, overlapping claims, contested rights of worship, reparation or punishment for serious offenses, and disputed ownership and allocation of natural resources.

Court systems often belong (or are seen as beholden) to one group over another, or they have too few resources to perform effectively (and must subsist on supplemental income from corruption), or they must rely on other branches of government for their budgets and enforcement of their decisions. Furthermore, zero-sum judicial decisions (win-lose, stay-leave, and get-pay) may be too partial or too absolute to provide a durable accommodation of seemingly irreconcilable and mutually exclusive claims.

Private arbitration (and the corresponding need for judicial enforcement of arbitral awards) provides an imperfect answer to the demands of cross-border conflict resolution, as parties still rely on national courts for confirmation and enforcement of arbitral awards. Arbitration is also equally, if not more, vulnerable to the constraints affecting courts. Mediation or conciliation may be unavailable, underdeveloped, or unacceptable as an option for resolving conflicts, particularly violent conflicts. Criminal justice institutions, too, are often insufficiently financed, depend too heavily on confessions, permit protracted and unjustified pre-trial detentions, and provide limited human rights protection in the absence of available defense counsel or open, public proceedings. To realize our deepest commitments to justice, these gaps must be filled.

The ability to do so, however, is frustrated by a limited capacity to devise and implement effective institutional reforms. Many expensive global justice reform projects administered by international or national institutions or NGOs fall short, and a candid self-assessment provide three starting points for improving performance.

First, foreign experts often lack sufficient appreciation of local needs and constraints. The practical operation of legal systems in their embedded webs of social, economic, cultural, and political realities is complex. Understanding the incentives and disincentives for effective conflict resolution is difficult, even with prolonged study. Any foreign advice carries with it a high probability of inapplicability, regardless of the degree of expertise involved. Therefore, foreign advisers must immerse themselves in humble and open-minded study of local justice systems (and the conditions in which they operate) before trying to assist.

Second, recommended reforms too often are based on generic, untested assumptions that a conventionally accepted formula for reform will generate the desired outcome once implemented. Foreign advisers often assume they have correct answers to fundamental questions, such as: Does judicial self-regulation ensure protection from political interference? Does an increase in judicial salaries eliminate corruption? Does alternative dispute resolution reduce court delay? Does the provision of defense counsel ensure protection of basic human rights in criminal proceedings? Without reality testing whether generic assumptions overcome local constraints, and without applying accurate metrics to assess outcomes, reform efforts are likely to disappoint.

Third, outsiders often bear little accountability for the consequences of their advice in the context of reform. Beyond weak outcome assessment tools, decision-making authority must be politically accountable to the reforming society. Thus, in addition to developing greater accountability for projected outcomes, international or foreign advisers must work jointly with local leaders and experts who will bear the burden of any particular disappointments.

In other words, the overwhelming nature of justice reform challenges is compounded by a second capacity gap—the capacity to gather enough local knowledge,



challenge prevailing theories, evaluate outcomes, and work jointly with sufficient humility toward decision-makers within the reforming society. Closure of this second gap (as key to the first) will require a new brand of global civic engagement, beyond the mere exchange of information, cross-national visits, uncritical recitation of theory, false equivalence of supply-side funding with demand-side success, or the suspension of competing values. Engagement in global justice reform must entail a process of intense social interaction between foreign and domestic legal communities, experts and non-experts, proponents and opponents, top officials and lower-level actors, leaders and followers. This interaction seeks to gain insight into the nature of the problems, the value of the specific tools, and the applicability of those tools in different combinations to identified problems. Engagement therefore requires an intellectual investment in getting familiar with the legal system and the society in which it functions, thinking deeply about the embedded comparative theories in alternative reform proposals, transparently deliberating over value choices that underlie support or rejection of a specific technique or proposal, and creating more sophisticated tools of programmatic outcome evaluation.

Reformers had better intensify their efforts to close the second gap before the world's justice systems have a chance of closing the first.