# Justice & the Capability to Function in Society

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*Abstract: All over the world, civil legal problems are ubiquitous. But while all groups in every society that has been studied experience civil justice problems, these problems and their consequences do not fall equally. Socially disadvantaged people report more problems, more serious problems, and more negative consequences from them. The lack of legal capability – the lack of the capacity to understand and act on justice problems – plays a key role in creating these inequalities. A growing evidence base should support and enable global, national, and other policy-makers to achieve stated policy goals and enable people to respond effectively to the myriad legal problems that can threaten their aspirations and well-being.*

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We live in a "law-thick" world.[1] Across our planet, everyday life plays out within a complex legal framework extending across almost all activities: commerce, education, employment, the environment, family life, and more. Problems that raise legal issues are everywhere. They are among the "wicked" problems of social policy.[2] Neither abstract nor esoteric, civil legal problems – being unfairly sacked by an employer, injured as a result of someone else's negligence, involved in a divorce, or facing eviction from your home – contribute to the harshest episodes of people's lives. They can diminish people's capability to function effectively in society. This makes access to justice – the just and efficient resolution of civil legal problems in compliance with human rights standards and, when necessary, through impartial institutions of justice and with appropriate support – a matter of considerable importance. Yet the United Nations Commission on Legal Empowerment of the Poor estimates that four billion of the seven billion people on Earth live outside the protection

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of the law: "the majority of humanity is on the outside looking in . . . on the law's protection."[3]

Global interest in enabling access to civil justice has never been greater. There is increasing recognition that, beyond the constitutionally important function of "allowing people to uphold and exercise their rights," enabling access to justice is also "instrumental in realizing a range of other development goals."[4] Reflecting this, in September of 2015, the UN unanimously adopted Sustainable Development Goal Target 16.3 to "promote the rule of law at the national and international levels, and ensure equal access to justice for all."[5]

Against this backdrop, access-to-justice policy is shifting slowly from a "top-down" institutional perspective, focused on "tip of the iceberg" legal problems that involve formal processes, to a "bottom-up" perspective focused on the ability of individuals to resolve problems. In countries with well-established legal infrastructures – particularly public legal-assistance services – this shift has been borne of acknowledgment that the public's experience of civil legal problems occurs mostly beyond the sight of legal institutions and professionals. In the context of economic development, the shift has also been informed by ideas about "legal empowerment": "the process through which the poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and in the market."[6]

Legal-empowerment efforts often seek to expand people's and communities' legal capabilities: the disparate capabilities required for people to have opportunity to resolve problems fairly, including to make decisions "about whether and how to make use of the justice system."[7] Legal capability can best be understood as an aspect of economist Amartya Sen's idea of capability as "the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles)."[8]

This broader idea of capability can also help explain patterns of civil legal problem experience and problem-resolution behavior.[9] Diminished capability ("unfreedom" in Sen's language) increases vulnerability to problem experience. In turn, problems can diminish capability through their impact. Legal capability is central to opportunities and choices about how to handle problems.

The policy shift and emerging conceptual model just outlined have been informed by a growing base of evidence, including the findings of an increasing number of "legal needs surveys" designed to investigate the experience of civil legal problems by those who face them.[10] The past twenty-five years have seen the conduct of more than fifty large-scale, stand-alone national legal-needs surveys in over thirty countries.[11] Though conducted in different nations and for a variety of purposes, the broad narrative of these studies is remarkably consistent. They have made clear that, to be truly effective, access-to-civil-justice policy must be grounded in an understanding of the many options people face when dealing with civil legal problems, of the reality of people's behavior in resolving problems, and of the reasons for underlying patterns of options and behaviors.

All over the world, civil legal problems are commonplace. Estimates from national legal-needs surveys suggest that between one-third and two-thirds of adults experience such problems over the periods covered by these surveys, which are typically three to four years.[12] This ubiquity of civil legal problems in a law-thick world is not surprising. Nor is it surprising that the relative incidence of different



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kinds of civil legal problems is similar across the globe. Wherever people live, there is much commonality in everyday life. For example, the universality and frequency of commerce means that consumer and money problems are among those most often reported. Similarly, the regularity of interactions among neighbors results in frequent conflicts. Predictably, other common problem types involve employment, family life, housing, public services, welfare benefits, and obtaining official documentation.

Of course, there are exceptions to these truths. The prominence of agriculture in, for example, Mali and Uganda is reflected in problems there frequently concerning land.[13] Such problems often have to do with issues such as access to land, access to water, land-grabbing, and nationalization (such as for agribusiness or mining purposes); these issues are uncommon in rich countries. Conversely, consumer problems are less common in Mali and Uganda. In Mali, after land, the five most common problems concern employment, family, neighbors, housing, and money. Likewise, in Uganda, the most common problems after land concern family, neighbors, money, employment, and public services.

While commonplace, civil legal problems are disproportionately experienced by certain individuals and, importantly, particular social groups. For example, in a recent study in Australia, "nine per cent of respondents accounted for 65 per cent of the legal problems reported."[14] The nature of some civil legal problems links them to particular social groups or stages of life.[15] Problems concerning children are largely restricted to those who have children, problems concerning welfare benefits are largely restricted to those with low incomes, and problems concerning employment are largely restricted to those of working age. Overall, there is also a general tendency for the experience of problems to increase along with socioeconomic activity, which gives rise to the opportunity to experience many types of problems over the course of one's life.[16]

Consistently, also, "socioeconomic disadvantage is pivotal" in determining who faces problems.[17] For example, unemployment and long-term illness/disability have been found to be strongly associated with problem experience.[18] The association with illness/disability is well-supported by the broader social epidemiology literature, which "points to causal connections between legal problems and morbidity/disability; connections that can operate in both directions, and build to perpetuate morbidity and social disadvantage."[19] This chimes with Sen's description of "the conversion handicap" that necessitates greater resources being expended to achieve the same results for those with a disability, and contributes to people with disabilities being "among the most deprived human beings in the world."[20]

Sometimes, gender has also been found to link strongly to problem experience. For example, in some countries, surveys have shown that women's lower level of capability – their "weaker agency and lower social and economic participation" – leads to very different patterns of problem experience from men.[21] For example, the 2017 *Justice Needs and Satisfaction Survey* in Jordan found that a higher percentage of men reported problems concerning land, employment, public services, money, and negligent accidents, while a higher percentage of women reported problems concerning families, children, and neighbors.[22]

Not surprisingly, civil legal problems adversely affect people's lives. For example, 32 percent of Macedonian survey respondents described their justice problems as "destroying my life."[23] The



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impact of such problems on people's capabilities and vulnerabilities "may partly define the dynamics that create and perpetuate poverty."[24] As family medicine scholar Elizabeth Tobin Tyler and colleagues illustrated in the context of the strong links between civil legal problems and ill-health (Figure 1), there are many ways that civil legal problems can contribute to vicious cycles of poverty.[25]

People facing civil legal problems adopt many different strategies for resolving them. Often, these strategies involve little (or no) reference to law. A consistent finding of legal-needs surveys has been the peripheral role of formal justice institutions in helping people address their problems. One-quarter of the fifty national legal-needs surveys conducted around the world over the past twenty-five years have found that 5 percent or fewer of civil legal problems were resolved by courts or tribunals.[26] Formal legal process was generally associated with particular problem types, such as those concerning family breakdown. In some lower-income jurisdictions, traditional dispute-resolution processes are more common than court processes. In Bangladesh, for example, people are more likely to turn to the *Shalish* than to courts.[27] The general picture the world over is that most problems are addressed through informal methods, if addressed at all. Beyond lawyers, common sources of formal help include independent advice organizations, unions, community leaders, public service workers, and public officials. However, the nature of sources of help varies considerably between jurisdictions, reflecting sociocultural differences and differently constituted and regulated legal-services markets.

A significant proportion of those who face civil legal problems take no action to resolve them. Estimates for inaction from national legal-needs surveys range up to 44 percent (although 10 to 20 percent is typical).[28] While there are good and bad reasons for such inaction, reasons provided by respondents "convey, on the whole, a rather negative and powerless quality."[29] Many of those who take no action to resolve problems lack key elements of legal capability: for example, people report taking no action because of a lack of knowledge, time, money, or confidence.[30]

Of those people who do act to resolve civil legal problems, many attempt to do so without seeking help, though increasingly people turn to online resources for assistance.[31] People seek help from a wide range of sources, informal and formal, with many sources appearing somewhat "unpromising" and many people indicating "real uncertainty as to the most effective way of responding to [legal] problems."[32] When people seek help from an inappropriate source, it diminishes the likelihood that they will go on to obtain appropriate aid. The phenomenon of "referral fatigue" means that even those who receive a referral become progressively less likely to act on a referral, the more times they are referred on.[33]

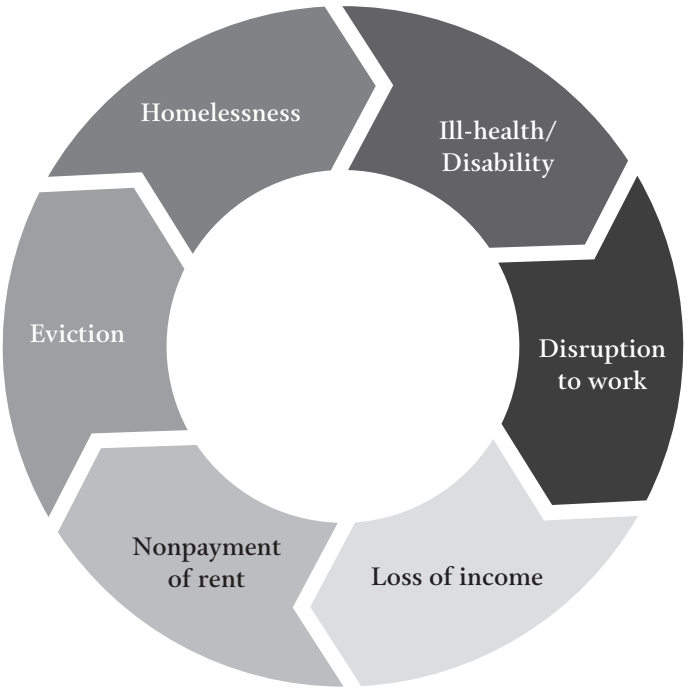
As with inaction, people's reasons for choosing different courses of action indicate that legal capability, or lack of it, lies at the heart of decision-making. People who handle problems alone, rather than with help, most often see no need to obtain help. While people who seek aid often explain that they do so because of "an inability to resolve problems alone."[34] Of course, those who see no need for help make "this judgment without the benefit of any advice."[35] Others who choose to act alone report being unaware of options or having concerns about the time, cost, repercussions, or likely impact of help.[36]

Many challenges face those trying to resolve civil legal problems, requiring many



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*Figure 1*
Vicious Cycle Involving Ill-Health/Disability, Work Disruption, and Civil Legal Problems




Source: Adapted from Elizabeth Tobin Tyler, Ellen Lawton, Kathleen Conroy, et al., *Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership* (Durham, N.C.: Carolina Academic Press, 2011).

capabilities. People require the ability to "name" their grievances, "blame" them on someone, and "claim" some remedy to originate disputes.[37] They may also need to, for example, understand and evaluate the law and sources of help and procedural options, as well as have the confidence to act as necessary, be resilient, communicate effectively, and manage the resolution process.[38] Potentially, "lack of capability poses the most fundamental . . . barrier to access" to a legal solution.[39]

Capability also plays an important role in the use and usefulness of different forms of legal assistance. For example, the ability to recognize the legal dimensions of problems strongly links to the use of legal services.[40] Also, as the 2008 *Legal Australia-Wide Survey* found, "different population groups are associated with different propensities to use the different modes of communication," such as in-person, telephone, or Internet.[41] Men, young people, and those with poor English-language skills, lower levels of education, mental health problems, the lowest incomes, as well as those living outside major cities were more likely than other respondents to use in-person visits as their only means of seeking



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assistance.[42] Other studies have found that services delivered by telephone can be unsuited to people with lower education levels, language difficulties, and lower income.[43] As for the Internet – the source of much hope for the expansion of access to legal-assistance services – research suggests that young people, while heavy users, are not particularly effective users of online legal assistance.[44]

Though legal capability is central to how people handle their justice problems, measures of capability have only recently begun to be included in surveys. To date, attempts have been largely ad hoc, exploring, for example, knowledge of law, awareness of legal-assistance services, and subjective legal empowerment.

Recently, an attempt was made to develop standardized measures of legal capability using modern psychometric approaches.[45] This research focused on "legal confidence," a domain-specific form of "self-efficacy" that is "concerned with judgments of personal capability."[46] This new research yielded three confidence-related scales: General Legal Confidence (GLC), Legal Self-Efficacy (LEF), and Legal Anxiety (LAX).[47] Its broader findings illustrate the central role that legal capability plays in shaping experience with legal problems.

Experience of civil legal problems was not, in itself, related to GLC, LEF, or LAX scores. However, positive or negative experiences of problems, or with lawyers and courts within the previous five years, *were* significantly associated with scores. Respondents who felt that they had achieved fair outcomes to problems tended also to be more legally confident, as did those who were satisfied with their own handling of problems. There were also similar, although not as uniform, findings relating to satisfaction with past lawyer and court use. Higher and lower levels of legal confidence were often, although not always, found to correlate with positive and negative experiences, respectively, of lawyers, courts, and tribunals.

Legal confidence is strongly socially patterned. Respondents who reported that there was someone they could rely on when faced with problems reported significantly higher legal confidence. Higher levels of education were also associated with higher confidence, as measured by the LEF and LAX scales. In contrast, long-term ill-health or disability was associated with significantly lower confidence, as measured by the LEF and LAX scales. Finally, older respondents were more legally confident, as measured by the LAX scale, and men were more confident than women, as measured by the GLC scale.

Bringing together these findings, legal-needs surveys have revealed the inequality of the incidence of legal problems (not every person is equally likely to experience such problems), the inequality of access to legal assistance (not every person is equally able to access the assistance they need), and the inequality of benefits gained from legal assistance (not every person is equally able to benefit from particular services).

At the heart of inequality in experience, diminished capability increases vulnerability to and follows from problem experience. Complex vicious cycles create and compound poverty, undermine socioeconomic development, and contribute to broader social inequality. Enabling people to access justice has benefits well beyond the solution to their legal problem. At the heart of inequality in access to legal assistance, legal capability or the lack of it drives the opportunities and choices of those facing problems. If people require legal assistance, their prospects of gaining it can be undermined by, for example, lack of awareness of services, inaccessibility of services, lack of



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recognition (or misdiagnosis) of legal aspects of problems, lack of confidence, or lack of financial resources. At the heart of inequality of benefits gained, people's capabilities determine the benefits they take from different services.

Changes in access-to-justice policy and practice need to focus on addressing capability deficits. This suggests a need for a rich diversity of forms and channels of legal-assistance service provision to match the diverse legal needs and legal capabilities of the public, notwithstanding that some regulatory environments present challenges to change.[48] This is not easy to achieve, but appropriate approaches to access-to-justice policy are emerging.

For example, in Australia, government and agency policy is now directed toward better targeting legal-assistance services (to reflect patterns of experience and capability), outreach (to enable obstacles to access to be overcome), timeliness of assistance/intervention (to prevent vicious cycles of experience), joined-up services (to facilitate people's journeys to and through assistance services), appropriateness of services (to match legal capability), and community legal education (to increase legal capability).[49] And, in a development context, as noted at the outset of this essay, the concept of legal empowerment drives much of bottom-up policy and practice.

Further insight into the nature and patterning of legal capability will help support moves to bottom-up policy and practice. Development of standardized measures of different dimensions of legal capability, using modern psychometric approaches, provides new insights. However, much remains unknown about the complex nature of legal capability, what lies behind it, and how it affects behavior in resolving problems and in efforts to affirm wider rights. Legal capability is a human capability that can and should be measured. The goal in doing so is to enable global, national, regional, and local policy-makers to achieve stated policy goals and best help individuals, families, social groups, and others respond to the many problems that can squash their aspirations and threaten their well-being.

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