Access to Justice as a Form of Inequality

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Abstract: The article discusses three approaches to the issue of access to justice: the neoclassical economic theory, critical sociology, and the concept of power triad. Economic approaches highlight the most visible aspect of the problem: namely, inflated legal fees. Critical sociology focuses on the symbolic power of labeling. The concept of power triad serves to explain the problematic access to justice in terms of a particular technique of domination — access control.

Keywords: domination, justice system, power triad

JEL Classification Codes: B52, I38, K41

The study of the judiciary allows us to see an array of both visible and invisible techniques of domination. On one hand, the judicial system serves to legitimate the state’s monopoly of the use of physical force. On the other hand, the operation of the judiciary also involves invisible techniques of domination. In contrast to the visible techniques, the invisible ones are rarely accounted for in public discussions, or subject to criticism. The symbolic power of the jurists (they produce legal definitions as the only acceptable ones) does not exhaust the list of invisible techniques of domination. Access control to justice represents the other major technique of domination. This article applies the concept of power triad to the context of juridical transactions, and explains the inequalities embedded in them with its help.

Access to justice can be defined as “the ability of groups and individuals to be able to bring an alleged rights violation to the attention of a court and to have that court adjudicate the claim in a fair and impartial fashion on the basis of the evidence and according to the applicable rules of law” (Baumgartner 2011, 457). In reality, however, not everyone can successfully bring an alleged rights violation before a court. The outcome of a legal suit depends less on the merits of the case than on how well a party is represented in the court. An unrepresented party — a pro se litigant — experiences court dismissals more often than a party represented by a professional.
lawyer (Hannaford-Agor and Mott 2003, 171). Despite a growing number of pro se litigants — they initiate up to a quarter of all new civil cases in the US (Rhode 2004, 82) — the existing judicial system has an institutionalized bias against them. The existing theories highlight the consequences of the institutionalized bias rather than its origins.

**Economic Approaches**

Economists consider the judicial system as a particular market. The price for a commodity or service (legal advice) that is traded is determined by supply and demand. Litigants need the advice of experts (lawyers), and lawyers charge a fee for offering it. Some people cannot afford legal services as a result (Taylor and Svechnikova 2010; Zorza 2011, 167). The “prohibitive” (for low- and middle-income people) cost of legal advice results from a particular combination of supply and demand.

The specific combination of supply and demand on the “judicial market” results from several factors. First, traditionally, there were more restrictions on ownership and advertising with respect to law firms, which limited competition on this market (Paterson, Farmer, Stephen and Love 1988). Second, and more substantially, the supply is limited by the existence of a monopoly over legal advice. Only accredited jurists (i.e., lawyers admitted to the Bar) can legitimately provide legal advice to litigants.

The monopoly over legal advice is not a natural one. Neither does it exist in all legal systems. On the other hand, even in the countries based on Anglo-Saxon law with the most professionalized judiciary, lawyers held no monopoly over legal advice for long periods of time (Rhode 2004, 74).

Unlike natural monopolies, the production of legal services by a single provider — namely, the Bar — has no advantages in terms of costs compared with their supply by a multiple competitive providers. The existence and stability of the monopoly over legal advice can hardly be explained in terms of transaction costs, or costs related to contract making.

Transaction costs depend on the degree of the specificity of assets involved in the transaction (Williamson 1985), including human asset specificity (one’s know-how specific to the transaction) and procedural asset specificity. The latter type of asset specificity refers to the degree of a provider’s workflows and processes that are customized in accordance with a court’s requirements (Zaheer and Venkatraman 1994, 553). Court documents must be prepared, formatted, filed, and served according to court rules that are notoriously complex and impenetrable. Professional lawyers may outperform non-accredited suppliers of legal advice and unrepresented litigants in meeting specific requirements set by the courts.

A common solution to the problem of the high cost of access to justice — the system of legal aid and assistance — takes the monopoly over legal advice for granted, while trying to mitigate some of its effects. Most countries based on Anglo-Saxon law rely on this system as a unique tool for enhancing access to justice. The British Legal
Advice and Assistance Act (1949) provided people who are unable to pay for legal advice with free legal aid (Sommerlad 2004). In the US, after a ruling of the Supreme Court in *Gideon v. Wainwright* (1963), the right to free legal counsel in criminal prosecutions has been acknowledged and enforced (George 2006, 312).

Civil litigations are excluded, however, from the legal aid system. The right to civil counsel — the so-called “civil Gideon” — is still only being debated (Anderson 2009, 1015). Both in the UK and the US, the government simply helps the least wealthy to pay a portion of their legal bills without questioning the domination of professional lawyers.

Economic approaches do not address the question of stability of the monopoly over legal advice. How can we account for the persistence of requirements so specific that they restrict access to justice for low- and middle-income people? Purely economic monopolies, with the exception of natural monopolies, tend to be unstable (Etzioni 1988, 227). Does political power play a role in establishing and sustaining the lawyers’ monopoly?

Economic approaches also leave the issue of litigants’ interests unaddressed. From an economist’s point of view, lawyers maximize their income by charging high fees for legal services. Why are some litigants prepared to pay them? Neoclassical economists consider preferences as stable and exogenous to their models (Eggertsson 1990, 5-6). The demand for legal mediation and legal services are no exception.

**Critical Sociology**

Probably the most important contribution of critical sociologists to our understanding of how the judiciary works refers to their attempt to make supply and demand endogenous. Instead of taking the interests of professional lawyers and litigants for granted (both presumably maximize their utility), critical sociology assumes that the interests of professional lawyers and litigants evolve in the process of interactions between them and with representatives of the state.

Critical sociologists use conflict as a starting point in their analysis. In contrast to economists, who consider mutually profitable (win-win) transactions as prevailing on the market, critical sociologists see conflicts everywhere. People disagree over everything: from the distribution of household chores to who has control of an organization, or a state. A solution to these disputes can be found in court.

From this perspective, the transaction as an elementary form of interaction is seen as a site of power struggles. The parties to a transaction attempt to impose their wills on the opposite parties. The parties do not differ in kind. The party that is currently more successful in gaining control over the transaction may be relegated to a subaltern position next time, and vice versa. Everything depends on the distribution of resources in a particular situation and the strategies chosen by the parties (Ailon 2006, 776).

The litigants’ interest in having their disputes resolved in a peaceful manner is subsequently reshaped by professional lawyers. Using their power of labeling, they appropriate the right to decide which disputes can be brought before a court and
which cannot (Bourdieu 1987, 833). Only disputes that can be expressed in specific terms proposed by professional lawyers have a legal solution in these circumstances. This means that by bringing a case before a court, the litigant agrees to have it reformulated in the specific terms proposed by professional lawyers, and accepts their domination.

One strategy for making disputes suitable for legal solution refers to rationalization. The rationalization of legal arguments is intended to reduce the personal or emotional dimensions of a conflict. The jurists argue that the unrepresented litigant is unable to get rid of what is personal or emotional, which justifies their involvement.

As a result of a power play regarding dispute resolution, the judicial system is transformed into a particular field of power—a juridical field. “The juridical field is the site of a competition for monopoly of the right to determine the law” (Bourdieu 1987, 817). Litigants occupy a subaltern position within this field.

The weaknesses of critical sociology are the flip-side of its strengths. Critical sociologists explicitly assume that both litigants and professional lawyers seek power. The latter simply turn out to be more successful in the circumstances. An exclusive emphasis on power plays overshadows all other reasons for using the system of justice. In critical sociology, the eventual connection between the law, legitimate interests, and plans disappears. Rational considerations emerge as a by-product of “translating” initial claims into legal (“rational”) terms, instead of being their eventual source.

**Power Triad**

The concept of power triad allows, on one hand, an analysis of the interplay between two motives—utility maximization and the desire for power and, on the other hand, shedding light on access control as a technique of power, and its role in establishing and sustaining the lawyers’ monopoly. As stated before, interactions within the justice system involve at least three parties: two opponents and a “judge, priest, chieftain, paterfamilias, arbitrator” (Commons 1959, 67). The involvement of three parties is not, however, sufficient for the emergence of a power triad. The existence of the power triad requires the interactions to be structured in a particular manner—namely, in a chain of domination, and a party in this chain to perform a specific function—namely, gatekeeping (Oleinik 2010, 145-163).

The triad existing within the justice system includes actors of three types: judges (C-type actors), professional lawyers (A-type actors), and unrepresented litigants (B-type actors). The judge plays a central role in the justice system. The judge’s power has several sources. Some of them take manifest forms and are commonly acknowledged. For instance, the judge’s decisions are believed to derive from legal authority. The judge has the ultimate right to apply and to interpret (in common law) the law in keeping with the circumstances of a particular case (Weber 1968, 217).

This ideal-typical description of the judge’s behavior lacks important nuances. First, the nature of the judge’s power depends on characteristics of the law that underpin court orders. The law may be “good” or “bad” (de Soto 2005). Good laws
facilitate coordination and mutual adjustments. The rule “drive on the left” or “drive on the right” illustrates the idea of a good law in the context of road traffic because it creates certainty as to other motorists’ maneuvers. “Bad” laws create opportunities for extracting rents instead of facilitating coordination. Setting a speed limit when road conditions allow safe driving at a higher speed constitutes a “bad” law.

A simple and most straightforward solution for getting “good” laws involves legalizing customs — that is, giving them the force of law (de Soto 2005). When embedded in customs, “the rules can be justified by reference to beliefs” prevailing in a society (Beetham 1991, 16). Traditions are often inconsistent and contradictory, which requires the involvement of the state or the courts (Commons 1959, 300). By selecting relevant customs, the judge draws boundaries as to what is legal and what lies outside the justice system. This discretion extends the scope of the judge’s power beyond the limits of legal authority.

Second, the circumstances of a case brought before a court are never fully known. The parties involved have different — most often conflicting — takes on what happened. The judge is provided only with bits of the relevant information, which prevents the judge from reconstructing the entire picture. The more limited the information available to the court, the larger the scope of the judge’s discretion.

The parties to a dispute act in conditions of information asymmetry. One party has only part of the relevant information at its disposal. The bits of information possessed by the parties do not necessarily add up, and represent the entire picture because the parties share it with the court in a selective manner (the one that maximize their chances to win). No one, including the judge, knows the truth. A court order represents a best guess at what really happened, at best.

Court rules further restrict the amount of evidence available to the judge. Legally admissible evidence refers to a subset of evidence available to the parties. To be admitted, the evidence must be produced in accordance with specific rules (for instance, “rules of discovery”) and formatted in a particular manner (for example, administered as an affidavit). The judge has the ultimate authority to decide on the admissibility of evidence. The less evidence is admitted, the larger the scope of the judge’s discretion, all other factors being equal.

The judge performs the role of a gatekeeper in several respects. The judge selects particular customs and dismisses others. The judge decides the admissibility of the evidence brought by the parties to a dispute. As a result, one party may strengthen its position in the proceedings. The judge allows the actors to become parties in a dispute (granting them the status of an intervener in the regular proceedings or a class/subclass member in the class proceedings). Gatekeeping in various forms extends the scope of the judge’s discretion.

Litigants, or B-type actors, need the law and the justice system to better coordinate their everyday actions, which prevents conflicts or solves them when conflicts emerge. Some litigants may aim to “get” a particular individual or organization — that is, they seek power, in keeping with the assumption of critical sociology. However, the explanation of power triad in the justice system does not require this assumption without ruling it out. The litigant’s willingness to be “in” —
that is, to be admitted into the justice system — represents the key moment. Litigants believe that the legal recognition and enforcement of their rights helps them better fulfil their individual and group interests.

Access to justice is not free, nevertheless, because of the gatekeeping exercised by the judge, a C-type actor. To be admitted to the justice system, litigants must be able to express their claims in a very particular manner and to produce supporting evidence in keeping with very specific rules. The unrepresented litigant has minimal chances of succeeding.

The chances of the litigant — a B-type actor, to be heard by the judge — a C-type actor, can be increased by involving a professional lawyer — an A-type actor. The A-type actor translates the claims of the B-type actor into the language that is comprehensible for the C-type actor, and gives them the proper format. The judge has a more limited power to restrict the lawyer’s access to justice because the latter normally knows the rules and procedures, and has extensive experience in appearing before a court.

A’s role is far from being purely technical, however. An ordinary translator from one language to the other does not normally gain any power over the individual whose words are translated. The translator is an agent (a B-type actor), not a principal (an A-type actor). Instead of being satisfied with the technical role of an agent, the lawyer de facto performs the role of a principal in relationships with the client, the litigant.

The lawyer’s power to charge high fees for legal advice refers to just one dimension of A’s domination over B. A also makes changes in B’s decision-making sets by suggesting which claims and evidence can be deemed legally admissible and which cannot. If A decides B’s strategy in the proceedings, then A has power over B. As a matter of fact, B has two options: either to see B’s claims dismissed by C or to be heard by C in keeping with the conditions imposed by A.

A has the power to alter the set of opportunities available to B by virtue of A’s preferential access to the justice system. In other words, A’s power over B has a structural nature. B can access justice only by changing the initial claims and accepting A’s conditions, both financial and otherwise. A would not have preferential access to justice without C performing the role of a gatekeeper and without A’s acceptance of C’s discretionary power.

To become operational, a power triad requires a constellation of the interests of all three actors — A, B, and C. C erects barriers (institutional, by setting and enforcing rules and procedures; cultural, by referring to some traditions and excluding the others; and symbolic, by requiring credentials from lawyers), and controls access to the justice system. C provides A with preferential access to the justice system, whereas A accepts C’s discretionary power. A helps B to be heard by C. In exchange, B pays inflated fees and accepts A’s power.

The triad structures its transactions within the justice system in such a way that they enhance C’s and A’s power. Control of access to justice represents a key condition for the operation of the triad in this case. A stratified system emerges as a result. C is on top of the judicial hierarchy, B is on its bottom, and A is in an
intermediate position. C dominates B both directly and indirectly, with the assistance of A. A would not be able to dominate B if access to justice was unrestricted.

B is dominated by both C and A. The power triad produces the drift toward discrimination against unrepresented litigants. C’s and A’s prejudice against them is institutionalized in nature. The prejudice against unrepresented litigants depends less on the good or bad will of a particular judge or lawyer than on the consistent patterns of interactions within the justice system.

Access control sustains the lawyers’ monopoly over legal advice. In other words, this monopoly does not have an economic nature, as economists believe. It cannot be explained exclusively in terms of C’s and A’s desire for power, as suggested by critical sociologists. The monopoly results from a combination of rational interests in the justice system, and attempts on the part of its representatives to enhance their power.

Conclusion

The three analytical approaches to the problem of access to justice depict various aspects of the same phenomena. They all lead to the same conclusion: Access to justice is problematic. However, the economic approach serves to discuss the most visible dimension of this problematic access — namely, excessive legal fees. Critical sociology serves to unveil a less visible technique of domination — the symbolic power of labelling. Finally, the concept of power triad is intended to link the problematic access to the prevalence of access control as one of the most invisible techniques of domination. The concept of power triad also sheds light on how the formal and informal judicial hierarchies are established and reproduced.

References