

# How to Measure the Price and Quality of Access to Justice?

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**Abstract:** *Citizens need access to a private or public mechanism that induces government officials and other citizens to respect their rights. They need 'paths to justice'. Walking these paths is costly. Disputants, for instance, spend money, time and effort when they bring their case forward in negotiations, in a court action, or in other dispute resolution procedures. In this paper, which presents the first results of a project aimed at developing tools for measuring access to justice, we explore how the price and quality of access to justice can be determined. We identify the issues that have to be resolved, and select a number of options to deal with these issues. Furthermore, we explore some of the difficulties that will arise during the development of an actual measurement framework.*

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## I. INTRODUCTION

Access to justice is a broad concept. It refers to the methods by which individuals are able to get legal information and legal services and to resolve disputes. It includes access to a court procedure, to legal aid and to extra-legal mechanisms to resolve conflicts. Often, access to justice is seen as problematic: procedures that protect certain rights do not exist, or are not accessible for claimants with limited resources. Socio-legal research commonly distinguishes five attempts to improve access to justice: improving access to legal aid, public interest law, informal justice such as mediation, competition policy and requiring organizations to create access to justice mechanisms for their customers, employees, and other stakeholders (Parker 1999).

For economists, access to justice – and thus private enforcement of property rights and contractual rights in particular - is an essential condition for well-functioning markets. Access to justice, especially for the poor, is also an issue in the study of economic development (De Soto 2000, UNDP 2004, World Bank 2006). Organizations like the World Bank, UNDP and the Open Society support programs to improve access to justice in developing countries. These programs aim to improve legislation, to increase legal awareness, to develop legal aid institutions for the poor, to train judges or to set up systems of alternative dispute resolution (UNDP 2004). They usually arise from a needs assessment, and then try to develop or to reinforce institutional capacities that are thought to meet these needs. This approach is very similar to the one followed in developed economies. If participants in the justice system complain, or obviously lack sufficient access to justice, procedures are changed, or additional resources are made available to suppliers of justice or to users of the justice system. For instance, a form of legal aid might become available for those who wish to take action in civil litigation that is too complicated for lay people.

Globalization poses new challenges for access to justice. The number of cross-border interactions between people increases. This also increases the number of instances where different jurisdictions interact, compete or conflict with each other. Moreover, national laws and national procedures may be applicable in addition to international regulation and procedures. This may enhance, but also complicate access to justice for the users of the multilayered legal system.

What lacks, until now, is an all-embracing systematic way to assess (all) the barriers that people experience when they seek access to justice (Carfield 2005). What are these barriers exactly? How big are they (in costs)? The goal of this paper is to explore how access to justice can be measured. Our approach is simple. Access to justice implies a (natural) person who accesses some sort of procedure in order to solve a conflict. This procedure is costly. What do these costs add up to? And does the procedure ultimately lead to justice?

### *A. Earlier Attempts to Measure Access to Justice*

The usual approach to issues of access to justice is qualitative. Granting access to justice can basically be described as opening a procedure that gives access to a court decision, or as access to legal aid (see, for instance Cappoletti & Garth 1978). Legal scholars have revealed procedural hurdles that hamper access to justice, but have not yet developed a broader encompassing theory regarding access to justice (see, for a recent example, Mattei 2006). Sociologists presented all-embracing models of access to justice in the seventies and eighties, showing, for instance, that access to justice is more problematic for one-shotters than for repeat players (Galanter 1978). This line of research slowed down in later years (see for a recent overview McDonald 2003).

More recently, surveys were undertaken to explore which “paths to justice” people experiencing legal problems follow. These surveys also tested the hypothesis that the users of mechanisms weigh the costs and benefits of the different interventions they have access to (ABA 1994, Genn et al. 1999, Van Velthoven & Ter Voert 2004, Lünemann, Boutellier et al. 2005).

Negotiation theorists have stressed the importance of the settlement as a means of achieving justice. The choice between a settlement and going to court has been studied theoretically and empirically (Shavell 2004). Just how difficult it is to achieve a court intervention, however, hardly plays a role in this literature (see, however, Hirshleifer and Osborne 2001 for a theoretical model).

Psychologists have researched the value people attach to procedural and distributive justice (Tyler 1997, MacCoun 2005), but not the various psychological and relational costs attached to obtaining justice. Victimologists have researched victims’ needs (Fattah 2000) and can contribute to establishing the emotional costs of obtaining access to justice.

Until now, access to justice has barely been modelled by economists, who usually take for granted that a court intervention is costly and that rational parties will try to save these costs through a settlement. There have been, however, some attempts to establish the transaction costs (administrative costs) of components of the legal system, in particular the tort system (Weterings 1999, Towers Perrin 2003, Barendrecht & Van Zeeland 2004). This line of research shows that recovering one dollar in tort damages negotiations and proceedings may cost up to 1.2 dollars in expenses for the participants in the average case. Similar studies have been undertaken for the criminal justice system (Cohen 2005, Cohen 2000 and Cohen 1998).

The statistics on the justice system are improving (see, for instance, CEPEJ 2005 and CEPEJ 2006). Comparative statistics on the number of judges, the number of claims, the number of lawyers, and the resources that are spent on legal aid, courts, or legal services may reveal disparities that stand for different levels of access to justice. Such numbers are, however, notoriously difficult to explain. A high number of judges per 100.000 inhabitants, for instance, may signal good access to courts, but also complex and time-consuming court proceedings, or a lack of mechanisms that enable disputes to be settled outside the court. On the basis of such statistics, some economists (mostly those connected to the World Bank) have made an attempt to develop

indicators for the level of access to justice in countries around the world (see Djankov et al. 2003 and Ranis et al. 2005).

Some economists have researched the actual costs of a number of specific interventions in developing economies (property right protection, setting up of small businesses). De Soto and Djankov et al. assessed procedures by measuring the out-of-pocket expenses of users of the procedure, as well as the number of discrete steps in the procedure, and the number of days the procedure takes (De Soto 1989 and Djankov et al. 2003).

### *B. Our Approach*

In this paper, we will discuss how access to justice can be measured in a more systematic manner. We explore the possibilities of a framework in which the costs and quality of access to justice can be determined and where costs are not merely measured in terms of money, but also in terms of time and emotional costs (e.g. stress).

Our exploration of such a framework is the first step in the process of setting up a research group that will develop ways to measure access to justice (compare the suggestions in this direction of Ranis et al. 2005 and Carfield 2005). This paper is the starting point of our research and deals with the preliminary issues that arise when trying to measure access to justice. In paragraph II we discuss how access to justice can be seen as following paths to justice. We will explain what such paths look like on closer inspection, and which difficulties a surveyor of these paths is likely to encounter. In paragraph III, we discuss the perspective of various participants: claimants, defendants, other participants (witnesses, victims in criminal proceedings), professionals involved in the procedures, the judiciary, the state and other stakeholders. In the next paragraph (IV) we go into the details of costs and quality of access to justice, and the problems that arise in the process of assessing these variables. In paragraph V, we proceed to the complexities and practicalities of actual measurement. Different ways to quantify access to justice are explored, as well as the availability of data. Moreover, the impact of individual differences between users (skills, other resources) is discussed. Paragraph VI deals with the possible uses of a measurement system for access to justice. Paragraph VII concludes.

## **II. PATHS TO JUSTICE**

### *A. Complex Processes, Many Participants, Countless Choices*

Imagine the simple case of a shopkeeper who catches a shoplifter red-handed. The shopkeeper may be able to deal with this issue together with the shoplifter. They take some time to talk, and come to an agreement. This will cost both of them time, during which the shopkeeper is unable to sell his merchandise. For both, but in particular for the shoplifter, such a conversation will be stressful. They may need to listen to a customer who saw what happened. Alternatively, the shopkeeper may call the police. He and the shoplifter will now have to make statements, which is time-consuming. It will cost the police time and money to travel to the shop in order to deal with the case at hand. The shoplifter may need legal aid, which comes at a cost. If the case is brought before a criminal court, an attorney for the state, a judge and court personnel

will become involved. Up to 10 or 15 individuals may have a role in resolving the issue, each spending time and money.

Another example of how complex access to justice is can be found by looking at international laws. These laws confer many rights upon individuals. Trade and investment laws, for example, protect the rights of investors. Their assets cannot be expropriated without compensation; their intellectual property rights ought to be protected. International treaties, on the other hand, grant individuals protection of their basic human rights. Victims of crimes against humanities, war crimes, or genocide have more specific rights. Pursuing one of the above mentioned rights, however, is highly complicated. Claimants may first have to exhaust national remedies, before gaining access to an international court. Thus, they must travel the long road through the different levels of the national court system, which necessitates the help of specialised lawyers, may take years, and requires a substantial investment of money and time that could otherwise have been used more productively. In the international arena, the procedures are likely to be difficult to understand and the travelling expenses are high. Language problems have to be overcome by hiring interpreters. Such a process of access to justice may involve several hundreds of people. During the process, a claimant encounters a considerable number of choices: a settlement or continuation of the proceedings? An appeal or living with the initial judgement? Settlement discussions assisted by lawyers or by a mediator? Hearing more witnesses or hoping that the court will find that the evidence presented until now is sufficient? Other players will have similar choices: the accused can defend themselves, or remain absent; the witnesses and experts can co-operate, or wait until they are forced to do so; courts can request additional information from an expert, or make an immediate decision without such information.

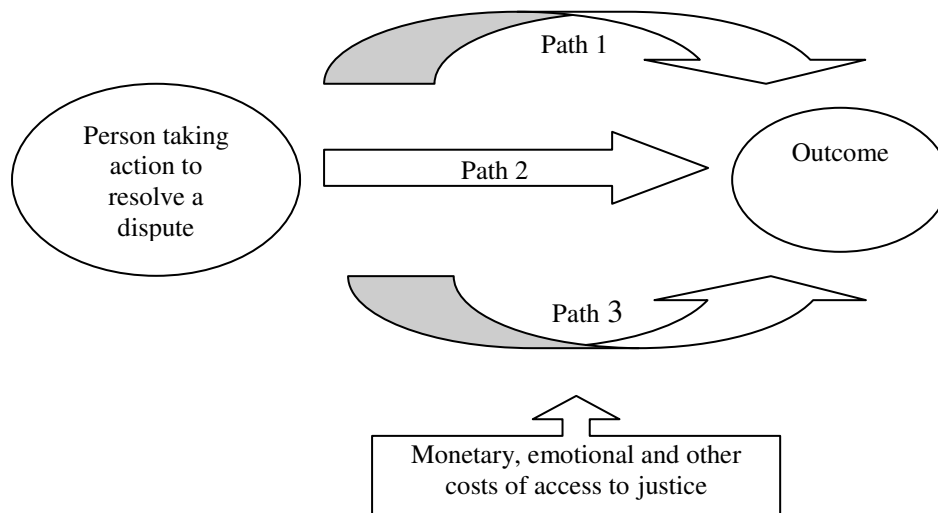
In short: access to justice is often a highly complicated process; it involves various different actions of many different people, who all have numerous choices to make. So what exactly can we measure?

#### *B. A Claimant Travelling Paths to Outcomes*

In line with Hazel Genn's (1999) famous metaphor, the process of access to justice can be seen as a path that is travelled by a person who experiences a problem in his relation to some other individual. For example, the above mentioned shopkeeper, who has a problem with a shoplifter. In order to solve the problem the shopkeeper can bargain with the thief, he can call the police, do nothing etc. These different ways to a solution can be seen as different 'paths to justice'.

Figure 1 shows the concept of paths to justice graphically: a client with rights (a claimant) enters the system (starting point) to follow a procedural mechanism in order to obtain an (fair) outcome (end point).

Figure 1



As we observed, a claimant has to make investments to reach an outcome at the end of a path; travelling a path takes time, costs money, and may require resources the claimant does not possess, so he needs the help of lawyers, interpreters, or other persons he will have to pay to accompany him. We also observed saw that others parties have to invest too: witnesses invest time for their testimony, judges and the police spend time and money to solve disputes etc.

In theory at least, the costs for travelling a certain path can be measured. But before we start measuring costs, we need to know where a path begins. Furthermore, we need to choose which of the endless range of possible paths to justice we wish to measure. Finally, it is necessary to know more about the possible outcomes at the end of each path.

### C. *The Start of a Path to Justice*

Where does the process of access to justice begin? A lead in the right direction might be the naming, blaming and claiming theory of Felstiner et al. (1981-81). This theory distinguishes five transformations: the first states that a particular experience has been injurious (naming), then holding someone else responsible (blaming) and asking for a remedy (claiming); when this claim is rejected, the claim transforms into a dispute and when it is impossible to solve this dispute together, the ultimate transformation takes place: a dispute becomes a lawsuit.<sup>1</sup>

Although it is interesting to look at access to justice in this way, it is virtually impossible to study all the transformations Felstiner et al. distinguish within one model. As the authors themselves say; it is hard to detect, diagnose and correct the costs in the first stages (the naming, blaming and claiming phases) of the process (Felstiner et al. 1980-81). Deep psychological knowledge would be required. Moreover, the costs of the first stages will probably be rather limited, considering the fact that these entail psychological decisions of an individual, without involvement of

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<sup>1</sup> Felstiner et al. do not distinguish lawsuits from other types of (third party) dispute resolution in their model. We do not follow their example; a path to justice can describe all possible types of dispute resolution. See paragraph II E.

other parties. So for practical purposes, it may be preferable to disregard this preliminary phase and start measuring at the dispute transformation phase.

A natural starting point would then be the first contact with a dispute resolving professional; a person professionally engaged in solving or at least temporarily ending (legal) problems or disputes. This person could be a lawyer, a mediator, or someone at the entry point of other types of dispute resolution services. Placing the starting point of a path to justice here seems logical because by doing so, a (semi-)official way towards a (semi-)official solution (be it to settle, win or lose) is set in motion.

However, the claimant might be inclined to see the starting point of his path at an earlier stage. After all, before actually getting in contact with a dispute resolving professional, he personally decided to start looking for professional help of some sort. Because it may take some time to find professional help, from a few hours to even a few days or more, the claimant already starts to invest in taking a particular path. This time investment is what economists call 'searching costs'. Due to these costs, it might be more accurate to regard the moment at which the decision to take action is actually made as the starting point of a path to justice.

#### **The Starting Point of a Path to Justice**

- Include psychological costs of deciding to take action?
- Include searching costs?

Options:

- The moment of seeking professional assistance for the first time?
- The entry point of a specific procedure?

#### *D. The End of a Path to Justice: Just an Outcome or a Just Outcome?*

Measuring access to justice by means of paths to justice implies that the outcomes of a path are just. But are they really?

All attempts to discern just outcomes from less just outcomes of procedures in any meaningful way are likely to bring us in the direction of very fundamental and hard-to-solve issues of 'Justice'. After all, who knows the answer to the question: What is justice?

A practical first approximation of a just outcome is any final outcome on the merits that results from any procedure. Initially, the path to court will end with the judgement of the court and a path of mediation with a mutual agreement. Whether the disputants are satisfied with this outcome, and whether it is objectively 'fair' or 'legally sound', whatever that may be, is not taken into account.

In this way, we assume that judgements and settlements are generally fair and just (see for a similar approach Griffiths 1983 and Van Velthoven & Ter Voert 2004). There may be errors in judgements or settlement agreements, but we presuppose these are infrequent. So, as a rule, claimants do not have to appeal, or to enforce the outcomes through lengthy additional proceedings. In other words: their expected average outcome is a just one, and the probability and consequences of an unjust



outcome play out in such a manner that they only slightly influence the pay-off at the end of the path.

In some situations, however, this assumption is problematic. The access to justice issue may arise in the first place because certain procedures clearly do not lead to just outcomes. Judges may be corrupt. Settlement outcomes are sometimes skewed in favour of one category of disputants, because the dispute resolution costs are higher for one party (for instance the “one-shotter”) than for the other (the repeat-player). Moreover, disputants may have reasonable needs or concerns that are not recognised by the legal system. This is often the case with victims of crime, for instance. What they are able to get out of criminal proceedings or a civil proceeding against the perpetrator, is often not in line with their needs. In Paragraph IV we discuss how measurement might take place if we want to let the quality of the outcome be part of the analysis.

#### **Just Outcomes?**

- What if a procedure only leads to partial relief?
  - What if outcomes are often unjust?
    - Corruption
    - Systematically skewed settlements
    - Bad fit between legal system and legitimate wishes and concerns of disputants
- Options:
- Outcome is any final outcome on the merits that results from any procedure
  - If this assumption is clearly unfounded, include quality of outcome in measurement

#### *E. The Average User of a Path*

Justice may be obtained in many different ways. During the procedure, many different choices exist. Each of these choices has consequences for the costs: hiring a specialised lawyer or doing without any professional help at all; a settlement, or rather costly proceedings; confronting the other party with a formal letter, a claim in court, or the freezing of his assets may provoke different reactions, which may in turn necessitate responses with different cost patterns. The idea of a path to justice may become problematic, just like the idea of a footpath may become problematic in a meadow with a myriad of little pathways, or in fresh snow, where the trail still has to be laid.

The endless possibilities for a hiker notwithstanding, it is helpful if at least the main footpaths are measured. Any hiker will be happy to see a road sign showing the distance to a destination in kilometres, or the number of hours the average hiker following that path will need to reach his destination. This will of course not represent the actual costs each individual hiker will experience. The time and effort he spends on the road depends on his own fitness, the weather conditions that may work against him, the shortcuts he discovers and the distractions on the way.

So what can be measured are the average costs of following the procedures, encountered when the claimant stays on the main trail. Similarly, the most useful point of reference seems to be that other participants behave in a normal (average)

way. The costs can be measured for the case where the claimant encounters an average defendant in this type of situation, gets the help of an average lawyer, and sees his case dealt with by average judges, court administrators and other officials.

In some situations, however, the specific position of certain users may require particular attention. A path may be easily accessible in general, but not so for users who do not understand the language, or lack other skills. We will come back to this later.

#### Which Paths?

Options:

- The procedures that are most frequently used?
- Measure costs for the average claimant?
- With average resources?
- In average circumstances?
- With average opposition by the defendant?
- With average assistance?
- With average cooperation from judges and other officials?

#### *F. Cooperative Paths in the Shadow of Non-Cooperative Paths*

In relation to access to justice, one complication is particularly pertinent, and here the metaphor of a footpath breaks down. In many cases, disputes are resolved with the cooperation of the opponent; without any neutral intervention, the defendant agrees to an amicable solution.

The problem is, however, that these cooperative solutions only work because of the threat of a non-cooperative solution. A settlement takes place, as the saying goes, in the shadow of court action. In many cases, a rational defendant would not agree to a settlement, or only offer a low amount, if the threat of some kind of court intervention did not exist. Access to justice is thus not about letting all disputants actually access courts, it is about inducing them to reach settlements that are fair reflections of their legal rights, in the shadow of non-cooperative enforcement by courts or other neutrals.

The relationship between the occurrence and quality of settlements on the one hand, and the costs of paths that offer access to justice if the disputants do not co-operate on the other, is not yet fully understood. It is likely that high costs of court action induce disputants to agree to a settlement. But this settlement may not be a fair one, in particular when the costs of accessing the court are higher for one party than for the other. Sometimes, repeat defendants can extract favourable settlements because they are able to spread the risk of losing court proceedings over many different files, whilst the plaintiff is dependant on the outcome of this one court action (Galanter 1978). Sometimes, plaintiffs can burden defendants with high costs of proceedings. A claim may even have nuisance value only: it is worthless on the merits, but the costs of defending are so high that a rational defendant will pay anything to get off the hook (Bebchuk 1998).

At this stage of our knowledge, what should we measure in situations where most people use the cooperative path to an outcome, and only some cases follow the non-

cooperative path? A cautious approach seems to warrant that we should measure both. The costs of following the cooperative path are what most users of the system will experience, thus these give a realistic picture of what goes on. The costs of the non-cooperative one may be instrumental in keeping the majority of disputants on the cooperative track, and they are what users will experience when cooperation breaks down: one of the parties is not willing to agree to a settlement, or the settlement negotiations fail. Since these costs (of non-cooperation) are the price that the parties may have to pay to force the other party to choose the cooperative approach, they are highly relevant.

But this does not yet solve our problems in this respect. In practice, several degrees of non-cooperation exist. Some defendants will simply defend themselves in court, because they are not willing to talk. Others may use every possible defence, even the most far-fetched. They want to take the case to appeal if they lose, and then as high up as possible. After that, they may resist enforcement of a judgement against them. The extent of their non-cooperation, will have a huge impact on costs for the claimant.

A possible option is to measure the costs of an enforceable decision on the main issues in dispute in first instance. Assumptions underlying this option are that the average non-cooperative defendant will not go further than this - on average only X % of court cases is appealed – and that this is also what happens most frequently when settlement negotiations break down.

#### **Cooperation and Non-Cooperation**

- Measure the costs of cooperative solutions?
- Measure the costs of non-cooperative solutions?
- The degree of non-cooperation?

Options:

- Measure costs of cooperative solution and costs of non-cooperative solution if cooperation breaks down?
- Costs of an enforceable decision on the main issues in first instance?

### **III. WHOSE COSTS?**

Generally, obtaining access to justice is a rather complex matter. Actually, that is one of the reasons why it is so difficult to provide it effectively. Many participants are involved in the supply chain granting access to justice, and all those actions have to be coordinated. During this process, each of these participants will incur costs. So, whose costs are we looking at? And whose costs are passed on to whom?

#### *A. Primary Cost Bearers*

Costs are primarily born by the claimant and the defendant. That is easy to deduce from statistics regarding the market for legal services and regarding government investments for courts and legal aid. In the Netherlands, for instance, the costs of civil law courts are in the range of € 300 million, from which some € 100 million is recovered by court fees (Justitiebegroting 2006). The total turn-over of law firms ('advocaten') is in the range of € 3 billion (Statistics Netherlands 2006). Our estimation is that one third of a lawyers income comes from dispute resolution, and

that legal costs are only a proportion of the total costs born by the parties; we may assume that legal and other costs born by private parties are typically five to twenty times higher than the costs of the neutrals that deal with their disputes: courts, mediators and arbitrators. So, the bulk of the costs of access to justice are born by the disputants themselves.

But this does not apply to all costs. The criminal justice system hardly ever allows its users to contribute to the court costs. Civil justice systems in countries such as the US, the UK and Germany on the other hand, have policies stipulating that the disputants cover all the court costs. In practice, though, the civil and administrative dispute resolution systems of most countries are not fully funded by user fees. Subsidies in the form of legal aid, mediator assistance, or lower court fees for poor people are common. Most countries also stick to general policies to offer access to courts at lower rates than the actual costs.

### *B. Other Participants*

Other participants in the supply chain of justice do not incur ‘real’ (economic) costs. The time and money spent by lawyers, for instance, can be passed on to the parties they are working for. The same applies to the judiciary; their costs are passed on to the state, or to the users of the system. The fact that costs like these are passed on, makes them transfers and not ‘real’ costs.

Some participants, however, cannot recover all their costs from the disputants or the state. Witnesses and members of juries will only be able to recover a small amount of their actual costs. Lawyers doing pro bono work, or volunteer mediators, also fall into this category. Measuring their costs may be useful, but these are not central if we are interested in access to justice. Information about these costs may become relevant, however, if these players are essential for the supply chain, and have to be induced to play their part. Without effective legal aid, for instance, access to justice in complicated international proceedings for victims of genocide will be illusory.

### *C. Priorities*

Whose costs are most urgent from the perspective of access to justice? If claimants and defendants bear most of the costs, the choice is not a hard one. Moreover, access to justice is created in order to help people solve their disputes and other problems, and so it is interesting to study the barriers they have to overcome.

Compared to defendants’ costs, claimants’ costs are probably a more urgent problem. The access to justice literature discusses the situation of the latter in particular. Typically, complainants need access to justice to change the status quo. Having been treated unfairly, they need to take action to induce others to compensate them, or to improve their position in any other way that is in accordance with their rights. If the paths they have access to are too burdensome, their rights will not be enforced.

This is not to say, however, that defendants’ costs cannot be problematic as well. Consider, for example, commercial litigation in the US, the costs of which are a serious consideration for companies that want to set up a business there. Nonetheless, we choose to focus on the claimant’s perspective for the rest of the paper.

### **Participants and Their Costs**

Primary cost-bearers:

- Complainants (claimants in civil disputes, victims of crime)
- Defendants
- State (in situations where the dispute resolution system is not fully funded by user fees; subsidies or general policies to offer justice at lower rates than the actual costs)

Options:

- Concentrate on primary cost-bearers?
- Concentrate on costs for the complainant?

Secondary cost-bearers (participants who are not fully compensated for their services or costs):

- Lawyers (in pro bono practice, legal aid)
- Witnesses
- Members of juries, councils, etc.
- Volunteer mediators etc.

Participants who generally can pass on all their costs to primary cost bearers (including the State):

- Judges, Mediators, Arbitrators
- Experts
- Lawyers
- District Attorneys
- Police

## **IV. WHAT CAN BE MEASURED?**

### *A. Types of Costs of Travelling the Path to an Outcome*

The costs a claimant encounters on a path to justice can be very diverse. For a claimant living in the countryside, for instance, it can take quite some time to get to the nearest city/village where a mediator, lawyer or courthouse is located. In court he will have to pay court fees and the bills of his lawyers. Furthermore, explaining the problem (again) and confronting the opposition can cause emotional stress. These are just a few examples of the costs that can be encountered.

There are several ways to categorize these costs. In Table 1, we give one type of categorization. This distinguishes between out-of-pocket expenses, the costs of time spent, costs of delay and emotional costs.

<b>Table 1. The Types of Costs of a Path to Justice for the Claimant</b>		
<i>Type of costs</i>	<i>Most important categories</i>	<i>Remarks about factors determining costs and measurement</i>
<i>Out-of-pocket expenses</i>	Fees for authorities (filing fees, document fees)	Depend on: <ul style="list-style-type: none"> <li>- the (range of) issue(s) involved</li> <li>- the value in dispute</li> <li>- the amount of information needed for a decision on each issue</li> <li>- the difficulty of (re)producing this information</li> <li>- the structure of the proceedings.</li> </ul> Relatively easy to calculate from official sources, bills, etc.
	Fees for legal assistance, lawyers' fees	
	Court fees	
	Fees for experts, witnesses, translation, bailiffs, court reporters, etc.	
	Travelling expenses	
<i>Time spent by claimant and other persons addressed by him</i>	Costs of searching for an (legal)adviser	Depend on: see above
	Interaction with the other party	Estimates on the amount of time spent can be obtained through survey research and then be valued at opportunity costs: <ul style="list-style-type: none"> <li>- labour costs</li> <li>- value of leisure time for non-professionals.</li> </ul>
	Consultation (family, friends, etc.), seeking legal advice, deciding on strategy	
	Interaction with authorities	
	Instructing lawyers	
	Collecting evidence	
	Attending hearings	
	Amount of time spent travelling	
<i>Costs of delay</i>	Devaluation of assets in dispute	Depend on: <ul style="list-style-type: none"> <li>- the issue involved</li> <li>- the value in dispute</li> <li>- the duration of the dispute and its proceedings.</li> </ul>
	Loss of opportunities because of uncertainty regarding future of relationships	
<i>Emotional costs</i>	Stress, fear, sadness, loss/change of relations etc.	Depend on: <ul style="list-style-type: none"> <li>- the issue involved</li> <li>- the value in dispute</li> <li>- the duration of the dispute and its proceedings.</li> </ul>

Another type of categorization departs from the different stages of the path taken. Starting with search costs, the typical complainant will then encounter the costs of contacting the other party, negotiating, consulting a lawyer, collecting information and evidence in order to file a claim, costs of filing a claim in the appropriate forms and documents, costs of studying evidence and defences, costs of travelling to the lawyer and to the court, costs of preparing and attending the hearing, and costs of enforcement measures. Of course, if done in this manner, in the end the same costs as mentioned in the Table above are encountered.

Several ways to breakdown the costs may have to be attempted and may be more or less appropriate for certain paths. In order to be able to compare the cost structures of the various paths, however, it is necessary to find a sufficiently general way to categorize costs.

### Cost Categorizations

Options:

- Types of costs
- Stages of typical paths/interactions

#### *B. Quality of Outcomes: The Costs of Error?*

As a first approximation, we may assume that the outcome of a path that gives access to justice is also a just outcome (see paragraph IID). But how to proceed if it is not, as in the case of corruption, unfair settlements, or paths that do not meet the reasonable needs and concerns of complainants? Does the path to a criminal court lead to justice for a victim of crime, if he or she has more complicated needs and concerns than just wanting to see the offender punished? Unfortunately, most of the time it does not; the criminal justice path can be very disappointing and even re-victimising (see, for instance, Wemmers & Cyr 2004).

There are several alternative ways to include the quality of outcomes in a measurement framework for court procedure and other paths to justice. For instance, the quality of outcomes might be measured separately. Much like a consumer survey does for, say, insurance products or banking services, the price of the path to justice can be measured next to different aspects of the quality of this service. Or, the lack of quality of the outcome can be seen as a cost. In law and economics literature, paths are sometimes evaluated in a framework that aims at minimizing the sum of decision and error costs (Sunstein 2006).

However, measuring an error assumes that we can objectively distinguish a “right” outcome from an “erroneous” outcome and that we also have an objective idea of the magnitude of that error. A way to approach this is to consider “the legally sound decision a fully informed and objective court would reach” as the point of reference. In theory, this works for errors arising from corruption, or for settlements that are biased. It does not work, however, for ‘regular’ day-to-day errors that occur in deciding cases. Neither does it work for informal paths such as mediation, where different needs or concerns can be met, which may be neglected in court proceedings. A more qualitative criterion, like some reference to the manner in which the expected outcome will reflect the legitimate needs and concerns of the complainant, might be preferable. But how can this be established objectively?

Competing criteria from other research traditions for an ideal, neutral solution that have to be considered may be efficiency, conformity to social norms, or acceptance by the parties. This of course brings us into the realm of the normative question of what could be regarded as a ‘fair’ or ‘just’ outcome, a question that would then have to be answered in accordance with the different legal, economic and psychological theories regarding “fair” outcomes (see Konow 2003).

### **Including the Quality of Outcomes**

Options:

- Not to be measured (in situations where average users obtain satisfying outcomes)
- Measure separately
- Include as a cost (the costs of error)

Possible points of reference:

- The legally sound decision a fully informed and objective court would reach
- Will the expected outcome reflect the legitimate needs and concerns of the complainant

### *C. Procedural Justice and Other Qualities*

Quality as in procedural justice is also important (Tyler, 1997). After all, studies show that claimants are not only motivated by economic concerns like dollar outcomes and transaction costs. Three decades of socio-legal research have demonstrated that citizens also care deeply about the process by which conflicts are resolved and decisions are made, even when outcomes are unfavourable or the process they desire is slow or costly. So not only time and money are important, things like lack of bias, thoroughness, clarity, voice (the ability to tell one's story) and a dignified, respectful treatment are at least as important (MacCoun 2005).

Probably, the metaphor of the hiker on the trail still works to clarify this, and will also show the difficulties involved in measuring these aspects of a path. The hiker is not only motivated by the desire to get to his destination, but also wants a hike with good views, a comfortable walk over a path that is well kept, with signs pointing him in the right direction, sightings of interesting animals and flowers, good weather conditions, and a path which is safe. Some of these aspects can easily be translated into costs: a worn path, without appropriate signs, will certainly increase the time and effort involved in travelling that path. But is it useful to count absence of good views and good weather as costs?

This is even more relevant for more distant by-products of paths. How does one deal with the affects of access to justice mechanisms such as empowerment, autonomy, or resilience? Or with more common by-products such as precedents?

These procedural justice characteristics can sometimes be measured quite easily. Courts now routinely do client surveys, with questions that refer to the way they are treated in court hearings. Certainly, this information is relevant for the user of the path to justice, in particular if he has realistic choices between different paths. Just like the hiker who is sometimes offered a choice between a scenic route and a direct, but less attractive one.

Although measuring the 'price' of a path is in itself an important step forward, implementing the value of how people are treated along the way, will give a more complete picture. Measuring procedural justice clearly has some independent and additional value. To deal with this while measuring access to justice, one could categorize the requirements of a just path as different types of outcomes. In this case, the outcome of a path should not only be, say, a damages award, but also respect,



voice and neutrality. In the next paragraph we will offer suggestions as to the way in which procedural justice aspects can be measured.

#### **Including Procedural Justice and Other Effects**

Options:

- Not to be measured
- Measure separately
- Count absence as a cost

## **V. ACTUAL MEASUREMENT**

In the preceding paragraphs we explained what complications may arise when we want to measure the costs and quality of access to justice. In this paragraph, we will explore what a measuring model could look like. Issues of measurement are the work of specialists, and we have not yet consulted experts in the field of the technology of performance measurement. So this part of our research is in an even more preliminary stage.

### *A. Selecting Variables*

First of all, the variables that determine costs and quality have to be determined. Table 1 gives an overview of the possible costs. For the quality of the path and the outcome, similar variables have to be determined.

An important point when choosing variables is their level of generality. Paths to justice can range from formal to informal; from between party paths to paths with a neutral decision-maker; from local to international; from one level to multiple layers. Ideally, the variables should be the same for every path to justice and for any kind of claimant. From a practical point of view, however, it may be necessary to develop separate lists of variables for different paths or different categories of claimants.

### *B. Concrete Indicators*

For each of the variables, reliable and valid indicators have to be chosen, which are also practical and which can be established in a rather straightforward way (Campbell et al, 1998, Marshall et al, 2003). Out-of-pocket expenses can be measured quite easily: court fees and lawyers' fees can be ascertained, however, it may be more difficult to directly measure the time spent on the path. Generally, disputants do not record the number of hours they spend on the issue. It may be necessary to develop a general way of dealing with these costs, for instance as a mark up on lawyers' fees or on lawyers hours, if recorded, that represent the overall effort to be spent on the case, or to find other indicators, such as the number of meetings with other participants, or the number of written communications. For the costs of delay, the number of days between the starting point of the path and the outcome is the usual indicator. The number of discrete steps (notifications, exchanges of documents, actions by bureaucrats, hearings, notifications) during the path may also be established quite easily (De Soto 1989 and Djankov et al. 2003).

Using several different indicators, however, may cause problems in relation to the interdependency of some indicators, or even the variables themselves. It is likely that

the level of stress one experiences, for example, is (at least to some extent) related to the amount of money and time spent during the process of following a path.

### *C. Scale*

An appropriate scale to rate all these variables will be necessary. Otherwise it will be difficult to compare the costs and quality of different paths (see paragraph VI).

First of all, one could take an economic (cost-benefit-like approach) and try to calculate the monetary value of all variables. For example, an hour spent on a case can be seen as a lost opportunity to work, and so the price of a ‘case-hour’ gets the price of an average ‘work-hour’. A disadvantage to this approach is that it is difficult to measure emotional factors like stress or fear in terms of money.<sup>2</sup> Another problem is whether or not it is possible to estimate variables like the time spent by the claimant in an appropriate way.

A second possible approach is to score the variables in a qualitative way. For instance, variables could be scored on a scale from 1 to 5 (where 1 stands for no travelling expenses and 5 for very high travelling expenses). In the case of variables that are hard to put a price on, like the emotional ones, this can be a good way of scaling. The point system provides insight in the level of costs incurred, for instance the level of stress that occurs whilst following a path: whether there is none (1), some (2) or a lot (5).

It is also possible to develop a system which combines these two approaches. Some variables are measured in money terms, others in points on a scale.

When developing a scale, another issue is how to take into account the relative level of costs in relation to the value or the importance of the stakes in the dispute. The costs involved in divorce proceedings differ to those made in a dispute involving a simple consumer claim, or a multimillion Euro claim against a big company. Moreover, when comparing different levels of costs amongst different countries, a correction may be necessary to count for the differences in average income of the complainants. Imagine one wants to compare the costs of a simple divorce case in the Netherlands with one in Poland. Corrections for average income and possibly, price levels in both countries may have to be made.

### *D. Collecting Data: By Whom and Where?*

A framework for measuring access to justice will have to be easily applicable. The measuring tools should at least be applicable by people with some, not too extensive training.

Where to collect the data is another matter. Some data that are already collected by others may be useful. If data are not available, it is possible to survey users of a path

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<sup>2</sup> Economists have developed four methods to measure non-financial variables through things that can be priced: stated preference, revealed preference, costs of damages and the ‘costs in anticipation/to avoid’-method (Koopmans, 2006 and Pearce & Howard, 2000). In our case, however, it seems difficult to relate variables like stress to something you do to avoid (there is no such thing as stress-insurance) or to specific costs that are incurred by stress. Asking people how they value stress (stated preference method) on the other hand, is too complicated in a study like ours. All things considered, it is questionable whether these economic methods can be applied in a study like ours.

for their estimates. However, they may not be aware of all the costs, because these may be borne by others such as their insurers, or providers of legal aid. Data on some indicators, like number of days from filing of claims to outcome, or the number of discrete steps in a path, may also be gathered from suppliers. The reliability of the estimates will critically depend on the number of persons interviewed. An alternative to interviewing a large number of users is to supply the first estimates and present them to a group of experts for comments. Certainly, the methodological challenges will be tremendous.

#### *E. From Simple to Complex*

Having read the preceding paragraphs, it will have become clear that there are many questions to answer and problems to resolve before one can start measuring access to justice. This is why we think it is wise to start with relatively simple paths to ‘test’ the framework. There are paths for which the starting points and the end points are relatively easy to establish (see the example of Djankov et al. 2003 who started with debt collection procedures and procedures to evict tenants). In a later stage, the model can be extended towards more complicated mechanisms, and more complicated behavioural assumptions.

### **VI. WHAT IS THE USE OF ACCESS TO JUSTICE MEASUREMENT?**

Measurement is time-consuming and costly in itself. Is measuring the costs of access to justice worth the effort? We think it is. In the following we describe for which purposes measurement tools can be useful.

#### *A. Improved Choice for Users of Paths*

First of all, using measurement tools may offer insights in the costs and quality of a particular path to justice. Users that have more information about these factors will be able to make better choices. Lawyers, for instance, could more easily advise (potential) clients. At some stage, suppliers of paths could even be stimulated to disclose the likely costs and other burdens of the path at the entry point.

Various choices may be improved by better information about the price of paths to justice. Users can sometimes choose several different legal proceedings. They may be able to choose different courts (forum shopping, if allowed of course). They may have a choice between a settlement and court proceedings. Choices between court proceedings and alternatives, such as arbitration and mediation, may be improved as well.

#### *B. Feed-back to Suppliers of Access to Justice*

There are many stories about time and money consuming trials, but reliable data are often lacking. Measurement tools can help to determine whether access to justice problems are serious enough to warrant action. If measurement tools are sufficiently precise, these can also provide feed-back on the type of action that is likely to be successful. If high costs of lawyers are the problem, or the travelling expenses for the plaintiff, educating judges may not be the first action to take.

Once programs to improve access to justice are set in motion, it will be possible to set priorities and to assess the effects of improvements. Many programs are initiated, but until now their impact has mostly been measured at the level of institutions on the

supply side of the justice market: Did the capabilities of the judicial system improve? Do we now see lawyers specialised in this area of law? In an approach like ours, improvements in access to justice can be measured from the demand side.

But feedback on the financial costs, effort, delays and psychological costs that users of paths experience may have more immediate effects on the quality of proceedings. Judges, lawyers and other professionals that help to provide access to justice have interests to provide good quality services. The more they know about the impact of paths on their clients, the more they can do to improve their services and to alleviate the burdens of these paths.

In some situations, new paths need to be set up. More information about the likely costs will be helpful to assess the practicability of certain procedural arrangements. In situations of limited resources (low salaries for judges and other neutrals such as police; scarcity of manpower) and high exposure to corruption, it may be helpful to have tools to establish which elements of an access to justice mechanism are essential for the users, and which ones are of less immediate concern. In particular, in post conflict situations, where improvement of state institutions or preventing their collapse is warranted, and where access to justice will be one of the essential guarantees for establishing the rule of law and good governance, such information may be helpful.

### *C. Comparing Paths*

Another advantage of obtaining cost and quality information is that paths can be compared. Big differences in the price of, say, divorce proceedings between courts, between countries, or between legal systems of different origins will require an explanation. Benchmarking will become easier, and the incentives on suppliers of proceedings to improve these proceedings are likely to increase. In order to be used for comparative purposes, however, the measurement tools will have to be sufficiently independent in relation to legal culture, local preferences, and local resources. This may be hard to achieve. The value of money, of time, and of “a day in court” may vary across countries.

A next area of possible application is the interaction between private and publicly provided mechanisms. Access to the formal legal system may crowd out private mechanisms – such as social norms, alternative dispute resolution, guilt – or strengthen them. The relative prices of such mechanisms will be an important factor in this process.

### *D. Comparing Users*

A measurement framework could primarily be used for establishing the costs and quality for the average user of a path to justice. It may also be interesting to compare different categories of users of one particular path. Language skills, cultural differences, gender, experience, and communication skills may, or may not have a big impact on the price of justice.

For instance, it may become possible to explore the difference in costs that one-shotters and repeat players are subjected to. In an age of globalization, there will be a need for new paths for new groups of users. An evaluation framework may be helpful to assess the suitability of paths for users with different needs, values, income levels,

or lifestyles (for the poor, for migrants, for traders, for consumers in cross-border transactions, etc).

#### *E. Predicting Use*

A more distant prospect is that a measurement tool could provide input for theories that predict the use of paths. Governments, judiciaries, and other stakeholders in access to justice mechanisms may want to predict the future workflow. This may enable them to train sufficient judges, to better allocate money for different dispute resolution services, or just to improve the financial management of their institutions.

Better information on the costs of proceedings for the users may also be helpful for other theoretical purposes. We may assume that users make a rough cost-benefit analysis before using paths. But their decision-making may be systematically less than completely rational. What types of costs are most influential? What is the price elasticity of the use of proceedings in relation to different types of costs (Klijn 1991)?

### **VII. CONCLUSIONS**

Measuring access to justice is a challenge. In this paper, we have tried to identify the main obstacles in developing tools that enable this measurement. The focus was on the preliminary issues: What exactly do we want to know? The costs of what? The costs for whom? The types of costs? We mostly identified the issues that have to be resolved, and selected a number of options to deal with these issues. Our more concrete results are as follows:

It makes sense to measure the average costs for the average user of paths to justice that are frequently used. If done, users of specific types of paths to justice will generally be able to estimate their specific costs. Measuring the costs of claimants seems to be the first priority. We also argued that both the costs of cooperative paths and the costs of paths in case cooperation fails, or one of the parties (usually the defendant) refuses to cooperate, should be measured. Generally, measurement of costs (the price of justice) is sufficient. These costs can be categorized according to type (out-of-pocket expenses, costs of time spent, costs of delay and emotional costs), or according to source. If the quality of outcomes of paths is systematically found to be inadequate, however, the users of paths will make trade-offs. In this case, measurement of quality will be meaningful, if not necessary. This is true for outcome quality, but also for procedural quality (procedural justice).

Furthermore, we explored some of the difficulties that will ensue during the development of an actual measurement framework. The methodological and practical challenges of selecting variables, finding suitable indicators, and designing scales (in money or in points) seem to be considerable.

But it can be rewarding. If access to justice in the most common procedures can be measured, this is likely to lead to an improvement of these procedures. If prices and quality become more transparent, at least some suppliers may be expected to upgrade their procedures. And at least some clients of the various justice systems that are in use all over the world will be able to make better choices.

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