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### Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared

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# Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared

Maurits Barendrecht

## **Abstract**

Access to justice can be enhanced in many ways. What is the most effective way to do this, given limited resources? Three perspectives are used to compare access to justice policies: (1) costs and benefits, (2) transaction costs (diminishing market failure and government failure), and (3) legal empowerment (enhancing people's control over their lives and their bargaining position). The analysis suggests that legal information and education strategies should have a higher priority, followed by improving access to (informal) adjudication. Civil legal aid on an individual basis is a rather costly strategy. Moreover, legal aid is less likely to create just outcomes on its own: a judge without a lawyer is more valuable than a lawyer without a judge.

**KEYWORDS:** legal aid, courts, legal information, access to justice

## **I. Three Ways to Enhance Access to Justice**

In the access to justice literature, many waves and approaches to improve access to justice have been distinguished (Capeletti and Garth 1978; Parker 1999; Anderson 2003; Moorhead and Sherr 2003; Rhode 2004; Bhabha 2007). Three main strategies stood the test of time:

1. Individualized legal aid and legal advice (pro bono, subsidized legal services, public defender models);
2. Improving accessibility of individual or group procedures (at courts, in informal justice systems, in every day justice practices, or ADR);
3. Empowerment through legal needs related information (legal information, codification, public legal education, negotiation and conflict management skills)

In this paper, these three strategies are compared. They complement each other, but also compete for resources. What do we know about their effectiveness, and their possible side-effects?

Let's be more specific. Everywhere in the world, women seek access to justice in case of a divorce. They may need child support from their husband, and probably a share in the property or some form of alimony. There may be domestic violence to deal with. For the children, it is important to continue the relationship with their father. Now what is the best way to spend €1000 of government money for these women and children? Should it be used to buy 10 hours of state of the art legal aid in divorce cases? Should the money go to 10 hours of services by a judge, in a modern, customer-friendly procedure before a formal or informal court? Or should the money be given to a text writer to work for 10 hours on informing women about their rights in a state of the art way?

To answer that question, I will review the literature on access to justice using three theoretical perspectives. That is the only thing we can do, now that there is not yet a large body of empirical research on the effectiveness of access to justice strategies. We have not yet tested what works. So this research cannot be more than explorative in nature. Perhaps the best we can hope for is that this exercise helps to identify research issues that make access to justice policies more evidence based.

The first perspective I will use is cost-effectiveness. The benefits for the users and the costs of the strategy for governments can be assessed. Secondly, the three strategies are studied from the perspective of transaction costs. Are these policies likely to remedy the market failure that make it difficult to obtain access to justice by relying on private legal services, or to compensate for the

government failure that is likely to occur when the state provides dispute resolution mechanisms? Finally, the way these strategies are believed to contribute to empowerment of the beneficiaries is reviewed.

Before we apply these perspectives, the strategies have to be defined more precisely. What types of legal aid or accessible courts are we talking about? Good legal aid may be better than mediocre courts or sloppy legal information. Strategies are dynamic: legal aid has developed from mere litigation assistance into the direction of counseling and negotiation help. In order to minimize these problems of comparability, I will focus on the strategy as it is currently applied by the top 30% of the profession, because that is where investments in access to justice are likely to go. There is no systematic review of these practices, showing what the best professionals in town are doing to help their clients. But based on the literature, and on best practices studied in developed legal systems, as well as in five developing countries, I come to the following assumptions:

- When talking about supporting individual legal aid, the state of the art seems to be that lawyers have sound legal knowledge about their area of practice (family law, employment law, etc.). They also have the knowledge and skills to lead a client through negotiation and litigation in standard situations. In divorce cases, this will probably mean that the woman receives some form of counseling to sort out the problem and her ability to cope with it. Then the lawyer will approach the other party for an amicable solution, using a mix of advocacy, negotiation, and mediation skills. If no solution can be reached, the client will receive the necessary litigation support (Mather, McEwen et al. 2001).
- If we talk about investing in access to courts, we focus on a modern, customer-friendly procedure before a formal or informal court. For a family court, it would mean that a woman can easily bring forward their case, using her own words for her legal needs, before a judge who will help the parties to settle a case, and will give a speedy decision if that does not work. The procedure and the rules of substantive law make it likely that solutions are practical and fit the interests of those involved (Babb 1997; Babb 2008).
- When discussing informing the women about their rights, the state of the art way of providing information is certainly that it is presented in a form that is understandable for the clients without having to consult an expert (Buck, Pleasence et al. 2008). Moreover, the information is tailored to the problem at hand, arrives just in time (when needed to act upon) and is sufficient to cope with this problem, promoting self-reliance. So it will contain information about the process and about the likely outcomes, and offer a (limited) number of options (Lawler, Giddings et al. 2009). In case

of a divorce, the package may entail information about how to cope with the divorce situation, legal information about what are normal outcomes for child support, custody, and property division, as well as the processes of negotiation and addressing a court, which is sufficient for a *pro se* litigant (Van Wormer 2007). There may even be some form of online dispute resolution help, that makes use of the advantages of online communication (Katsh 2007; Van Veenen 2010).

## II. Cost-effectiveness

Now that we have defined the three strategies, the evaluation can start. The first perspective is that of cost-effectiveness. If money is spent on legal aid, better court procedures, or legal information, this will have beneficial effects on the lives of the clients. They may obtain monetary compensation, and other positive outcomes, such as a workable relationship with their ex-husband. The way they are treated during the process may enhance their sense of justice being done. These values of these procedural and outcome benefits can be established: in terms of money or in terms of procedural justice and outcome justice (Gramatikov, Barendrecht et al. 2008).

Costs of access for clients can be assessed in term of out of pocket expenses, opportunity costs (time spent and loss of value during the process), as well as emotional costs. For governments, the costs are mostly the expenses for access to justice falling on the budget for the department of justice.

### A. *How Legal Aid Helps Clients*

Legal aid is usually given on a one lawyer to one client basis. Then, the calculation of the direct costs and benefits is rather straightforward. The costs are reflected in the hourly fee of the lawyer. To give a sense of what costs we are talking about: In the Netherlands, the average amount of money paid to a legal aid lawyer is around €1000 per case, which is based on an average hourly fee of around €100, which are convenient numbers for a rough calculation. In the UK, the average amount paid out per case is a multiple of this. At the other end of the spectrum, there are the paralegal programs offered by NGO's in developing countries. Typical costs per case may be around \$100 there (and several 100's of \$ at purchasing power parity), assuming legal aid is given by a well trained paralegal. Much less has to be spent if support is given by a volunteer with a limited amount of training.

The direct benefits of legal aid consist of the added value that accrues to the client: money and assets recovered, the experience of procedural justice and outcome justice. Moreover, the client may save some costs, because the lawyer

does work that the client would otherwise have to do herself. Usually, the benefits for the clients will be higher than the costs of legal aid for the government, so there is a net gain here.

Civil legal aid will also have some indirect benefits. A recent literature review on legal aid in family cases reports that civil legal assistance can reduce the need for safety-net programs, re-arrests of juvenile offenders, the time children spend in foster care, the incidence of domestic violence, improve clients' health, and reduce the costs associated to eviction (Abel and Vignola 2009). Sometimes lawyers work for groups of clients, or they achieve a result that serves as a precedent for many other cases (public interest litigation). There will also be collateral costs: actions of legal aid providers will often impose legal costs on opponents. Some of the benefits accruing to the client will be a Pareto improvement, but successful legal aid efforts will often also result in a payment to the client that has a purely distributive effect, where the gain for the client corresponds to a loss for the opponent.

One problem with legal aid is that its effectiveness depends on the functioning of the broader legal system. Hazel Genn made this point in her Hamlyn lectures in relation to mediation, but it applies to legal aid as well: "Mediation without the credible threat of judicial determination is the sound of one hand clapping" (Genn 2008). A lawyer, just like a mediator, will usually not be able to reach a fair result for his client, if there is no judge who can impose such a result.

In a recent qualitative study regarding Oxfam Novib legal aid projects in 5 developing countries, we found strong evidence of this. Legal aid providers try to negotiate solutions in divorce cases, but the outcome depends on the effectiveness of a threat to pursue the case before a court or another neutral forum. According to the legal aid providers we interviewed in Egypt and Bangladesh, every man knows that it will be hard for his wife to obtain a court decision about child support and property and to enforce it. In negotiations, the men have the power. In Bangladesh, we even found widespread disappointment in litigation among poor women receiving legal aid (Gramatikov and Porter 2010).

This lack of effectiveness is not limited to developing countries. The power of male defendants in Bangladesh and Egypt is similar to the power insurance companies have in personal injury cases in the Netherlands, which may take years to proceed through the court system, and require substantial investments in obtaining expert evidence. Plaintiffs may leave 20 to 50% of the expected damages award on the table because they do not have the perseverance and the money to go for a court decision.

Thus, investing just in legal aid, without providing a neutral adjudication and enforcement mechanism as a backup, will not lead to fair and just outcomes. As a very rough rule of thumb, pure legal aid may get you about half of what you

are entitled to, if you have to negotiate in the shadow of a costly and/or lengthy procedure.

*B. Costs and Benefits of Accessible Court Procedures*

An alternative is thus to invest the money available for access to justice in a procedure before a neutral. This can be a formal court, a specialized tribunal, or an informal (village) court. The typical costs of a civil court case in the Netherlands are around €1000, which is the rough amount a district court receives per case (which is defended) according to the fee system agreed between the judiciary and the ministry of justice. For tribunals it may be somewhat lower, and for village courts in developing countries, which are ran by volunteers, the costs may be limited to some costs of regular training.

The benefits are again the added value that accrues to the client: money and assets recovered, the experience of procedural justice and outcome justice. Compared to the investment in legal aid, the discount a client may have to leave on the table in case of malfunctioning procedures partly disappears, so the benefits for the client seems to be higher. Compliance with the neutral decision, can still be a problem, though.

The indirect effects of investing in the neutral intervention seem to be similar to those of legal aid as well: effects of fair and just outcomes on others (precedents), less need to spend on programs for the poor, prevention of violence. There is one big extra benefit, however. For each case decided by a neutral, there are a number of cases that will be settled in the shadow of the court intervention. In a well functioning court system, 60% to 90% of the cases will settle before the court has to intervene. So there is a multiplier effect here. Whereas €1000 invested in legal aid will lead to one client whose legal needs are met, €1000 invested in a court procedure may improve the lives of 2,5 to 10 clients.

This is only true, however, if clients of neutrals do not require representation. Some clients may need help with bringing their case to court, or to negotiate with the other party. Interestingly, recent empirical research into the outcomes obtained by represented and unrepresented clients suggests that the so-called 'representation premium' is diminishing (Adler 2008; Wissler 2010). Research also indicates that the more complex a procedure, the more adversarial, and the more dominated by professional lawyers, the greater the need for representation may be (Sandefur 2006). If the judge remains a passive arbiter, the unrepresented litigant will be worse off, whereas they will benefit from "*principle-based communication*," a simpler, more empathetic and cognitively open way of managing hearings (Moorhead 2007).

This is an extra reason for an approach that is generally recommended: simplifying court procedures (see below, Section IIIB). Simple procedures

diminish the need for a lawyer in order to reach a just outcome. Because they require less work by professionals, they will also lower the costs for the client of obtaining legal services. So with making procedures more understandable and simpler to conduct for clients, the costs of legal aid subsidies can go down as well, even if some clients still need representation.

### *C. The Impact of Legal Information*

Information about law takes many different forms. The most famous and classical one is codification, which originally was a tool to inform the broader public of customary ways to settle disputes (Coyoumdjian 2008). Nowadays, there may be websites that inform the public about their rights, sites where people can ask legal questions for a fee ([www.lawguru.com](http://www.lawguru.com) is an example), and online dispute resolution tools. In developing countries, NGO's spread legal information through workshops, support groups for women, radio, drama, leaflets, or copies of legislation. As discussed above, the information may be about coping with conflicts, substantive legal information, as well as the processes of negotiation and addressing a court. State of the art legal information arrives just in time, is understandable, is tailored to the problem at hand, and is sufficient to cope with this problem.

Legal information and legal education seems a particularly promising strategy, because the costs of distributing information have dropped dramatically since the earliest days of codification. Moreover, literacy and education levels continue to rise, so an ever larger proportion of the population can be reached by it.

The costs of providing legal information are primarily the costs of collecting the information and presenting it in an understandable form. Once the information is presented, distribution costs are the costs of one extra download, one more printed copy brought to a client, or telling the story again. So economies of scale can be huge. For €100.000 it may be possible to present a guideline leading clients through a common legal problem, such as divorce, neighbor problems, or an eviction case. If this guideline helps 10.000 people in this situation every year over a period of 5 years, the costs per person served drop to €2 plus distribution costs per person. There is an economy of scale here.

The benefits of providing the information are that clients can use it to cope with their legal problems. Presented with the right type of information, a certain proportion of the clients will be able to solve the problem in a satisfactory way.

Collateral benefits arise as well, because legal information is likely to spread through the population. For the most common types of problems, people will probably know someone who has had a similar problem, and can thus transmit the information, or refer a person to the right sources

How effective this is, depends on the type of information. Legal information is often thought of as being country-specific, because every country has its own system of rules and precedents. This changes, however, if we take the modern perspective on legal information having to be tailored to the problem at hand, arriving just in time, and being sufficient to cope with the problem. Then clients in different jurisdictions seem to have very similar problems, requiring rather similar information that is structured in a similar way, but also differs in some respects.

It seems useful to distinguish four categories of information, which translate into different production costs, distribution costs and possible economies of scale:

- There is *general (international) knowledge* (skills of negotiating, putting pressure on people, good solutions for domestic violence and other frequent legal needs, procedural justice norms, how to present a case before a judge). This information can be shared across borders, making huge economies of scale possible, but there are additional costs of translation and possibly of adapting to local tastes.
- Much legal knowledge is *country-specific knowledge* (the rules of substantive law that are really needed to solve the problem, some rules of procedure, generally observed social norms, going rates at courts and in negotiated settlements). Here the format for presenting the information can be similar across borders (adaptation to language and local tastes is still necessary), but the content differs from country to country.
- There is also a fairly substantial amount of *local knowledge* involved (where to apply for a permit in this municipality, how does this particular court work). This is the type of implicit knowledge many lawyers offer to their clients. Economies of scale are much more difficult here, although local social networks may provide them.
- Finally, there is *client- and case specific knowledge* (facts of the case, interests and characteristics of the parties involved, people who may influence the other party). This information is usually provided by the client, collected by the lawyer contacting the other party and hearing his perspective, or gathered by experts. The know how involved here is mostly asking the right type of questions. Formats for collecting this knowledge can be fairly general, and may be provided on line. Lawyers who help clients in individual cases ask similar questions throughout the world and use rather similar formats for their documents and for fact-finding. So some economies of scale are possible here again.

There are limits to the effects of legal information, though. Information will greatly reduce the costs for clients of dealing with the problem, and of addressing a court or another neutral forum. But it is no substitute for such a forum. So legal information will be most effective in combination with investments in accessible court procedures, either before a formal or an informal court.

Moreover, for some clients, taking action before such a forum will still be difficult without help from others. But for these clients, the costs of obtaining legal services will be much lower if legal information is generally available. Friends, volunteers or paralegals can be much more effective helpers when they have low cost access to this information. Each lawyer can handle more cases from poor clients, because he can let clients do more work themselves, and because he has to spend less time on researching the law and the available procedures.

### **III. Transaction Costs: Market and Government Failure**

Another way to evaluate access to justice policies is to see them as ways to provide what citizens have difficulty to find on the market. Standard economic theory predicts that demand for justice services will be met by producers who will provide these services. There are many reasons to suspect that markets are not very good at delivering justice, however. Even the most extreme market oriented thinkers tend to agree that the state has a role in providing enforcement of rights.

On the other hand, there is a lively market for legal services through law firms, legal expenses insurers, mediation, and arbitration services. Government policy tends to have a market twist to it as well, as ministries of justice announce that people should be stimulated to use their own resources to solve their legal problems, and use the formal legal system as an *ultimum remedium*. So it is worthwhile to investigate how supplying different forms of access to justice subsidies is likely to influence the market for legal services.

The usual approach for this type of analysis is to use the perspective of transaction costs. On the market for goods and services, buyers and sellers incur various costs of undertaking a transaction (Williamson 1981; Rao 2003). The parties have to search for suitable partners, inform themselves about the attributes of goods and services, and negotiate a contract. This is also true for finding a lawyer, a suitable neutral to decide in a dispute, or for finding legal information on the internet. After the contract has been concluded, the buyer of services has to monitor the performance by the seller, and the seller has to ensure that the buyer pays the price. Transactions need some governance structure and this is costly to set up. Regulation of the market is sometimes necessary to prevent market failure, and where governments step in other rules are needed to diminish government failure. The costs of regulation, the costs of running the economic system, are also transaction costs. Each way of organizing transactions, either through the market

or through governments, has its costs and the challenge is to minimize these costs (Williamson 1999; Rao 2003; Brousseau and Raynaud 2006).

The major sources of transaction costs on the market for justice services have been identified (Barendrecht 2009). The following analysis builds on this work.

#### *A. Why Do Legal Services Need Government Intervention?*

When individuals have a legal need, they usually can find some help. This ranges from help offered by friends and the family, to many types of paid advice and professional legal services. Legal needs surveys conducted in many countries show that numerous different services for help with legal problems are available (American Bar Association 1994; Genn and Beinart 1999; Johnsen 1999; Genn and Paterson 2001; Pleasence, Buck et al. 2004; Coumarelos, Wei et al. 2006). There are scores of payment models as well, such as insurance, membership fees, hourly fees, fixed fees, and contingency fees. In developing countries, many problem fixers (the Latin American term is *tramitadores*) present their services to those who have to deal with paperwork or legal procedures.

So why is it necessary to supply subsidized legal aid to the poor? One line of thinking is that the market is unlikely to provide legal aid for the poor of sufficient quality. Civil legal aid is then seen as a social benefit similar to adequate health care, and acceptable education, which should be available to all. Still, only a limited number of countries in Western Europe have a more or less general coverage of their population for civil legal aid risks, and this usually extends only to the poorest 30 or 40% of the population. So the social benefit reasoning seems not to be strong enough to convince states to spend sufficiently on legal aid.

A slightly different reason for subsidizing legal aid starts from the idea that clients need protection if they buy legal services. The economic literature mentions asymmetric information between client and lawyer as a market failure that has to be remedied. The lawyer knows so much more about the legal systems and the services, that the client is unable to assess the quality of the services provided. Therefore, the profession has been regulated (Stephen and Love 1999; Lee 2010). The type of regulation that many countries have chosen is that only qualified lawyers may provide legal advice or may represent clients in certain courts. This type of regulation is costly for the professionals and makes it difficult to provide cheap legal services, so the consequence of this choice is that legal services for the poor need to be subsidized.

Most commentators that use the economic perspective criticize the monopoly for lawyers, however. Professional monopolies tend to lead to high prices, and to a lack of innovation. So they say that the market for legal services

should be opened up. Providing rules for the delivery of the services (consumer law protection), or transparency through certification is preferable to the professional monopoly approach (Stephen and Love 1999; Hadfield 2000; Baarsma, Felsö et al. 2008; Commission on Legal Empowerment of the Poor 2008; Hadfield 2008). Although these writers do not actually draw this conclusion, they seem to indicate that a different type of regulation protecting consumers of legal services would take away this reason to subsidize legal aid.

Legal aid can also be seen as emanating from the need to provide checks and balances on government. Unchecked government leads to government failure, when civil servants fail to reach outcomes that optimally serve the interests of all persons involved. This is a strong argument in favor of legal aid for defendants in criminal cases, and a rather convincing argument for legal aid in cases against government agencies (Pearce and Levine 2009). The argument can be extended to powerful business interests, that have to be checked as well. However, there is again the dependence on the judiciary to make legal protection against the powerful come true. Without access to courts that are willing to protect individuals against abuse of power, a lawyer can help his clients only by mobilizing the press or by organizing support from society.

A final line of thought is that access to justice should be available to all citizens at no cost. Human rights enforcement, laws, access to dispute resolution systems, and legal aid are to be provided by the state. They are a condition for economic and human development. If the state fails to provide this, as in many developing countries, NGO's have to step in. This approach is appealing, but unrealistic in the present day world, where states routinely ask payments for their justice services in the form of fees for property rights registrations, passports, ID's and courts, and where private spending on legal services tends to be huge in comparison to government budgets for justice services. Legal systems do not recognize a general right to civil legal aid. For example, the European Court of Human Rights, in its Airey judgment of 1979 (application 6289/73), decided that Article 6 ECHR may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case, but not as a general rule.

The bottom line is that the case for providing legal aid to the poor is not clear cut, at least if we take the point of view of remedying market failure and government failure. Civil legal aid is generally not seen as an indispensable social benefit. Opening up the market for legal services seems to be preferable to regulating the profession and thus making the services more expensive for the poor (Hadfield 2000; Pearce and Levine 2009). As a provider of checks and balances on abuse of power, legal aid is not very useful without access to courts.

Providing access to justice for free is not realistic in the real world. Only for criminal defendants, the arguments for free legal aid are stronger.

*B. Why Are Accessible Court Procedures a Government Task?*

On the one hand, it is taken for granted that a government should set up courts. On the other hand, citizens are often told that they should solve their own problems, by agreeing on mediation or arbitration, suggesting the market can deal with dispute resolution after all. This apparent contradiction can only be resolved, if we take a closer look at the costs of agreeing on a suitable procedure.

In an earlier paper, we showed how letting disputants agree on a procedure can be difficult (Barendrecht and De Vries 2006). Landes and Posner called this the “submission problem” in the context of letting the disputants choosing a private judge (Landes and Posner 1979). Psychologically, one or both of the parties may suffer from loss aversion or over-optimism, and emotionally it may be hard to face the other party again. The parties may distrust the proposal of the other party to solve the conflict in a particular procedure, a phenomenon called reactive devaluation (Ross 1995; Barendrecht and De Vries 2006). Strategically it can be more attractive for the parties to avoid or postpone meeting, especially for a defendant who is better off now than he expects to be after resolution of the dispute. A transaction aimed at solving the dispute through mutually agreed upon methods poses a bargaining problem. By agreeing on the procedure, the parties influence the outcome of the dispute (see, for the distributional effects of agreeing about institutions in general, Knight 1992). Bargaining failure is likely, because parties tend to do better if they take extreme positions, commit to earlier offers, or use delaying tactics (Muthoo 1999; Muthoo 2000; Mnookin 2003; Barendrecht 2009). If the parties fail to agree on a dispute resolution procedure, they may resort to other means of meeting their interests, including violence, or other abuses of power.

So from the perspective of transaction costs, giving people access to justice by allowing them to address a court seems to be a well founded policy. It lowers their transaction costs. Courts offer a valuable service that the parties cannot agree on themselves.

But transaction costs analysis does not stop here. If governments step in to provide access to court decisions, this will also have transaction costs, for instance in the form of government failure. Government agents like judges may fail to take good decisions, because they lack the right information about the facts and the circumstances surrounding the case. It can be difficult to control judges, who, in a similar position as other civil servants, may behave as bureaucrats maximizing their own resources instead of caring for the interests of the citizens (Stiglitz 2000).

The literature seems to agree that courts set up by governments tend not to be very efficient institutions. Court delay and high costs of litigation are pervasive around the world (Trubek, Sarat et al. 1983; Buscaglia and Dakolias 1999; Messick 1999; Zuckerman 1999; Peysner and Seneviratne 2005; George 2006; Cabrillo and Fitzpatrick 2008). Courts are slow in taking up information technology. They do not systematically incorporate innovations in conflict management in their services, although there is much criticism on the way courts intervene in disputes (Tyler 1997). The inefficiencies are so apparent, that the basic attitude of citizens is that litigation should be avoided. Governments have accepted this, which is a strange state of affairs, taking into account that courts were set up in the first place in order to help people to solve problems they cannot solve themselves (Barendrecht 2009).

In the more recent literature, there is agreement about the reasons for these inefficiencies. Judges have insufficient incentives to deliver high quality and low cost services (Trubek, Sarat et al. 1983; Messick 1999; López de Silanes 2002; Botero, La Porta et al. 2003; Peysner and Seneviratne 2005; George 2006; Cabrillo and Fitzpatrick 2008). The explanation is as follows. Generally, judges have two clients with conflicting views about what the court should do and how to resolve the case. They are independent, which implies that they should not listen to other people such as the government or other powerful people. Judges are supervised by other judges in appeal, but these do only look into the legal quality of the decision and the procedure, not into the costs, the timing of the intervention, and its contribution to solving the conflict as it is experienced by the parties.

So improving court procedures will not happen by just subsidizing the courts. Empirical research has confirmed that increasing budgets, or hiring more judges, is not effective (Botero, La Porta et al. 2003; Beenstock and Haitovsky 2004). What helps, is to make judges more accountable to clients.

This can be done by simplifying procedures, which is both recommended by policy researchers (López de Silanes 2002; Botero, La Porta et al. 2003; Islam 2003; Cabrillo and Fitzpatrick 2008; Commission on Legal Empowerment of the Poor 2008) and by experts in the law of civil procedure (Woolf 1996). In order to fight court delay, publication of performance data for individual judges has proven to be effective in the United States (López de Silanes 2002). Individual calendars also increase accountability of individual judges and have proven to be effective tools to speed up the pace of justice (López de Silanes 2002). The costs suffered by users of the court services can be measured in combination with the quality of processes and outcomes as experienced by the users (Gramatikov, Barendrecht et al. 2008). Transparency of this type of data, again increases the accountability towards clients (Cabrillo and Fitzpatrick 2008). Specialization makes courts more clearly responsible for dealing with a certain class of disputes,

and creates interfaces where client needs can become more clear (López de Silanes 2002). Clients can pay fees that are proportional to court effort, and thus come into a more direct relationship with the court as well (López de Silanes 2002; Cabrillo and Fitzpatrick 2008). Judges will also learn more about client needs if they communicate interact with the clients directly, and not through lawyers.

For now it is sufficient to conclude that investing in court procedures is more complicated than subsidizing legal aid. A client will make the lawyer work for the money, even if it is supplied by the government. The subsidy is less likely to result in client friendly services if it is given to the judge. Money spent on courts will be most effective if it also used to create additional reasons (incentives) for courts to help clients solve their problems at lower cost.

### *C. The Reasons for Public Supply of Legal Information*

What could be reasons to spend public money on legal information? As many webmasters and newspapers have experienced lately, it is difficult to make money from selling information, which suggests some form of market failure. Indeed, markets for information goods are special. Information is a public good, meaning it is difficult to exclude people from using it once it is supplied. Legal information is also an experience good, that is the quality of the information can only be assessed by the customer after delivery. Finally, the upfront production costs of the information are high in comparison to the marginal costs of producing an extra copy and distributing it (Varian 1998; Stiglitz 1999).

If an entrepreneur informs the broader public in detail how to solve legal problems, it will thus be difficult for him to make money. Clients can spread this information freely. Competitors can copy it. Legal information providers have to find tricks around these problems. That explains why legal information is mainly sold in the form of tailor made advice by lawyers, which makes it more difficult to copy, or by combining it with carrying out the advice. This is an expensive way of spreading legal information, though, and it often does not reach the poor. Although they would be willing to pay for their part in the production costs of the information and distribution costs, the poor cannot buy information for that price.

This is a clear instance of market failure. Supplying legal information is thus a task the government can take up. It has been doing that for centuries, for instance in the form of civil law codification: informing the public of standard solutions for legal problems. However, as with any type of government intervention, just positioning the provision of legal information as a task for government is not enough. Government failure is a threat as well (Barendrecht 2009). Additional safeguards are necessary. Without this, it is unlikely that codification, precedents, or any legal information effort by governments will fit

clients needs: just in time information, standardized for the most important problems, and allowing to cope with all elements of the problem.

With present day communication skills, and the low cost of distribution, the benefits of better legal information policies can be huge. If governments should do things that it can do better than the market, legal information seems to be a good way to spend access to justice money on. If only there was a way to make governments perform this task well.

#### **IV. Empowerment**

Legal empowerment is on its way to recognition as a stated goal of law and development efforts. Former heads of state joined in a Commission on Legal Empowerment of the Poor (Commission on Legal Empowerment of the Poor 2008), and the General Assembly of the UN accepted its conclusions. UNDP has a legal empowerment policy and the World Bank a very similar Justice for the Poor approach. NGO's like Open Society Justice Initiative embraced the concept. Irene Khan, former Secretary General of Amnesty International, argued for making legal empowerment a Millennium Development Goal (Khan and Petrasek 2009).

The reasons for the popularity of this approach may be the following. Legal empowerment clearly links access to justice to economic development. The concept directly addresses the power difference between poor individuals and the powers that restrain them. It also fits the trend in development studies to look for ways to enable people to find their way out of poverty, reflected in microcredit, micro insurance, and micro health care approaches. Whereas access to human rights is primarily seen as a duty falling on governments, the legal empowerment approach argues that informal justice and alternative dispute resolution can be as effective, if properly linked to the formal system.

The concept of legal empowerment is not much used in access to justice debates in western democracies. But it also seems to fit the modern views on social policy, with its emphasis on stimulating participation. Moreover, it is liked by those who believe clients should have more say in the processes of legal negotiation and adjudication. For governments worried about the costs of providing professional legal aid and formal courts of justice it is attractive as well.

As yet, legal empowerment is a rather vague concept. Golub defines it as "using the law to specifically strengthen the disadvantaged" (Golub 2010). In his definition, law includes informal practices, access to administrative processes, and customary justice. "Strengthening", means increasing people control over their lives, and improving their bargaining position, which is both an (incremental) process and a goal. Women who experience a crisis in their marriage relationships report high levels of stress and uncertainty, so regaining control over their lives is

certainly a priority, as is improving their bargaining position. Legal empowerment is bottom up, in the sense that it builds on people's capacities to act on their own.

There are clear links between legal empowerment and procedural justice. Components of procedural justice, such as informational justice (knowing what will happen in the process), interpersonal justice (respect), voice and participation (Tyler 1988; Tyler 1997; Colquitt 2001) are likely to correlate strongly with clients' perceived control over the situation and their ability to deal with the problem.

#### *A. Legal Aid as Empowerment*

Access to a lawyer can certainly help a person to regain control over the situation. The lawyer has relevant knowledge. He has experience with similar situations. Having a good lawyer will reduce uncertainty and the trust in a good outcome.

Much depends, however, on the precise working methods of the lawyer. A good family lawyer will nowadays use some counseling skills in order to empower a client with family problems to deal with the situation at home. She will let her client play her own role in negotiations, depending on her desire to participate and her capabilities. Other lawyers, however, may take over the process from the client, negotiating with the lawyer of the other party and only asking the client for consent to the deal.

Depending on the procedural rules and practices at a court, the lawyer may coach the client through a court hearing, or take the over the procedure from him. The evidence available suggest that procedures which are heavily controlled by lawyers, tend to be rated lower by clients on procedural justice (Lind, MacCoun et al. 1990; Tyler 1997; Tyler 2007). Standards on how to coach and help clients through a divorce process are slowly emerging, but they have not yet been clearly articulated. Lawyering is not yet evidence based. One reason for this is that the same is true for judges. The way judges conduct proceedings is still highly depending on their own tastes and the organization of the court in question. So the lawyer has to adjust to the personal preferences of the judge, and to the local culture of courts.

In the paradigm of legal empowerment, the relationship to legal aid is thus less self-evident than in earlier access to justice approaches. This is reflected in the reports of the Commission for Legal Empowerment of the Poor, that did not call for increasing legal aid budgets as a remedy. The commission argued for opening up the market for legal services, broadening the scope of legal services (paralegals, integration into other services), and using informal justice and ADR, properly linked to the formal legal system (Commission on Legal Empowerment of the Poor 2008).

*B. Accessible Court Procedures and Improved Bargaining Positions*

As we discussed, judges, court practices, and court procedures are highly variable. In some courts, a client is not allowed to speak in person, or can say only a few words. At the other extreme, there are judges in problem solving courts, family courts, and small claim tribunals that directly communicate with clients. Practices of approaching clients are hugely different as well. When observing court hearings at a particular court during a day it is possible to meet judges who are very critical to everything a client has done in the past and presently does in the court room. Other judges will make clients feel at ease, and encourage them to speak about their problems. The same variability will occur in informal courts, where volunteers or local leaders may have very different practices as well.

Whether interventions of a court empower clients, also depends on the type of outcome. Obviously, a client who does not recover any money in court, is less likely to feel empowered. Another factor is whether the decision taken by the judge can be enforced, solves the problems as experienced by the clients, and will work in practice. Certainly, the interventions of lawyers, judges, and other officials are very important for the experienced legal empowerment. They are highly salient in the process of accessing justice. When a victim is trying to cope with the situation, he will look for signals how the community reacts to what happens. Official reactions represent what society thinks (Lind and Tyler 1988; Van den Bos, Lind et al. 2001). But in the end, the client has to be empowered to deal with the situation ‘at home.’ It is in the real world, that his bargaining position should be improved.

As was the case for lawyers, the answer to the question whether investing money in court procedures empowers clients, is thus: it depends. The perspective of empowerment shows clearly that the quality of court interventions matters a lot. The quality that is needed to promote legal empowerment, is certainly not only legal quality. Procedural justice and workable outcomes are at least as important. Formal, procedural approaches of courts, may even disempower clients.

When dealing with access to courts, the Commission for Legal Empowerment of the Poor argued for simplifying procedures (Commission on Legal Empowerment of the Poor 2008). This is in line with the finding reported in Section IIB, that *pro se* clients do better in simpler procedures, suggesting that they find it easier to control the situation if the procedure is understandable and rather straightforward.

*C. Legal Information and Control Over the Situation*

To what extent is legal information empowering? In a study of five access to justice programs in developing countries, we asked clients which type of additional help they would like to receive:

- Getting more help with contacting, talking, and negotiating with the other party;
- Having more information about fair and just solutions to such problems ;
- Improvements in the way neutral persons investigate the problem and make the other party cooperate to a fair solution;
- Receive help with letting the other party do what he/she has promised or should do;

Having more information about fair and just solutions was on top of the list of our respondents in Egypt and Bangladesh, and also scored high in the other countries visited (Azerbaijan, Mali, Rwanda). Legal information and education strategies are also a priority in the strategies developed by the Commission for Legal Empowerment of the Poor (Commission on Legal Empowerment of the Poor 2008).

It is not difficult to see how information can enhance the control over the situation that clients experience. If the information is targeted to the problem, is understandable, and arrives just in time, it reduces uncertainty. It also reduces the costs of searching for the right strategy.

Another reason why respondents from developing countries value information highly may be that it helps them to monitor opponents, helpers, lawyers, and judges. Once a woman knows what kind of process and outcome she may expect, it becomes much easier for her to assess whether her husband offers her a good deal. She then also knows whether the lawyer or the judge treated her similar to other persons in her situation. Giving the clients access to legal information, diminishes the probability that a lawyer can take advantage of her client, or that a court can be bought. In this sense, information improves the bargaining position of the poor.

**V. Discussion**

What can we pick up from this analysis? I warned that it cannot be more than an exploration. We have not done a controlled experiment in which money is spent on legal aid, improving court procedures, and legal information, and the effects are measured. The theoretical perspectives that I used are rather general. Concepts like legal empowerment and transaction costs in the market for legal services are

still fluid, and have to become more precise before more rigorous conclusions will be possible.

The research is limited in other ways. We did not consider strategies such as public interest litigation, or advocacy for better protection of human rights, which could have a huge economy of scale. There are reasons to believe these strategies could be rather effective, but also reasons to doubt this, because these strategies do not seem to have immediate effects on access to justice on the local level for the problems of every day live, such as divorce, inheritance, property conflict, and employment disputes. We also did not consider investing in mediation and arbitration, although they may provide adequate solutions to legal problems experienced by the poor. There are good reasons to believe that merely making these services more attractive does not improve access to justice. This is not likely to solve the two major problems identified by Genn and Landes/Posner: Mediation and arbitration do not bring in the threat of an enforceable neutral decision (see Section IIA) or solve the submission problem in relation to hiring a private judge (see Section IIIB).

Another limitation of this research is that I did not discuss the political economy of various access to justice policies. Some policies (legal aid) will have more lobbying power behind them than others (improving legal procedures, and legal information). Perceived demand for legal aid may be stronger, because clients will want their immediate needs relieved if they experience a problem, and turn to personal advice and help, rather than plead for more accessible courts or legal information. Investments in courts and legal information will probably not come in time for them, but only for future users of the legal system. Thus, political economy considerations may well explain why most budget for access to justice goes to legal aid, less to accessible procedures, and even much less to public legal information.

We found that subsidizing legal aid relieves the immediate need for help of clients and can empower them, although this depends on the way it is delivered. Legal aid is expensive though, because it serves one person at a time. A further limitation is that in the absence of easy access to a neutral forum, it cannot guarantee just outcomes. Legal need is least needed to remedy market failure: for clients it is much easier to contract a legal aid provider, than it is to hire a private, neutral judge, or to buy adequate legal information. There may be a quality problem with the legal aid the market would provide to the poor, but it is questionable whether limited access to the market, regulation of the profession (making the costs of the service higher), and subsidies are the best answer to that problem. Subsidizing legal aid may finally undermine the strategy of making court procedures more accessible. If lawyers are usually present in the court room, it is less necessary for a judge to take the information needs, the procedural justice

needs, and the substantive needs of the client into account. The presence of a lawyer can also make it more difficult for the judge to spot these client needs.

Investing money in a procedure before a neutral is likely to be more cost effective. For every problem solved by a court, there are 3 to 10 solved in the shadow of the court's intervention. If the client can effectively represent herself, she is likely to obtain a fair outcome. This seems to be possible in simple procedures. Research suggests that in such procedures the representation premium is small. It is probably much smaller than the discount clients assisted by a lawyer (or mediator) have to leave on the negotiation table, if there is no easy access to a neutral. The arguments from market failure are also much stronger for improving access to courts, because two parties in a conflict are unlikely to agree to let a neutral decide the issues (the submission problem). However, investing in a neutral court procedure is more difficult, because it is uncertain that the courts will actually deliver accessible procedures. Government failure is likely. Various measures will have to be implemented to remedy this. Court should be monitored from the perspective of client needs, and other measures increasing accountability towards clients should be taken, such as simplifying procedures, specialization, individual accountability of judges, and fees proportional to court activity.

Legal information can be delivered at low cost if it can be general. Information becomes more expensive when information needs are specific. Still, the benefits per € invested can be huge. There is also a clear-cut case for government intervention. Legal information of the right type (just in time; standardized for the most urgent problems; sufficient to deal with these problem from coping, though negotiation and litigation; understandable) is rather expensive to produce, whereas it is difficult to sell for a profit on the market. But making it a government task is not sufficient, because government failure is likely. There is not yet a state of the art for a government agency providing legal information. Monitoring and other mechanisms to ensure that the information fits clients' needs are necessary. Moreover information will not do the job on its own. Some additional personal advice and help will be necessary for non standard cases, and for some unskilled people. Investing in publicly available legal information, however, will also reduce the costs of legal aid and the costs of accessing procedures before a neutral. It is also empowering for poor clients seeking access to justice, in their relationships to opponents, to lawyers, and to judges.

## **VI. Conclusion**

Using the perspective of costs and benefits, transaction costs, and legal empowerment, I summarily evaluated three access to justice policies. Subsidizing legal aid is a widespread policy, in the form of government legal aid schemes, or

NGO supported projects to enhance individual's human rights, women's rights, legal aid, or legal empowerment on a one lawyer to one client basis. Much less money is spent on improving court procedures for clients with the legal problems of everyday life. Systematic government spending on legal education and legal information is even less common.

Our analysis by and large suggests that it should be the other way round. Legal information, and easy access to a neutral forum, are more cost effective, more likely to enhance self reliance on the market for justices services, and more likely to lead to legal empowerment. Providing legal information can be done using large economies of scale, even across borders. A judge without a lawyer is worth more than a lawyer without a judge, because many people will settle in the shadow of a court intervention. Moreover, the loss in outcomes by unrepresented litigants seems to be lower than the loss in outcomes by people who have to settle without a credible threat of judicial determination.

Therefore, most of the next euros, dollars, francs or rupees should probably be spent on legal information and improving court procedures. The remainder is probably best spent on specific pockets of needs for legal aid (criminal defense for people under arrest, public interest litigation). However, investments in procedures for the common legal problems of the poor and legal information have to be carefully monitored. The market, nor the government, can be trusted to deliver these services in accordance with client needs.

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