

Access to justice as a form of inequality

Introduction

The study of the judiciary allows us to see an array of both visible and invisible techniques of domination. On the one hand, the judicial system serves to legitimate the state's monopoly of the use of physical force. The state differs from other organizations as a result of the successful claim on the part of its representatives "to the monopoly of the legitimate use of physical force in the enforcement of its order" (Weber 1968, 54). A court order gives the clout of legitimacy to a prison sentence as the most manifest expression of the use of physical force. The "visible" side of the domination exercised by the judiciary can be perceived easily. For instance, countries with a high prison population rate (the number of prisoners per 100,000 of the national population) are often criticized as being too oppressive.¹

On the other hand, the operation of the judiciary also involves invisible techniques of domination. In contrast to the visible techniques, the invisible ones are rarely accounted for in public discussions and subject to criticism. Critical sociology partially bridges this gap by directing our attention to the symbolic power of naming or labelling (Bourdieu 1987, 838). The actor, who gives names and definitions to things and processes, simultaneously gains power over the other actors, who use these definitions. They see the things in a way that benefits the author of the definitions.

The symbolic power of the jurists (they produce *legal* definitions as the only acceptable ones) does not exhaust the list of invisible techniques of domination in the case of the judiciary, however. Access control to justice represents the other major technique of domination. This paper discusses access control to justice as a tool for sustaining and enhancing the power of the jurists. It

applies the concept of the power triad to the context of juridical transactions and explains the inequalities embedded in them with its help.

The ideal of equal justice is a distinctive feature of Western democracies. For instance, the official mission of the Department of Justice of Canada is “to ensure that Canada is a just and law-abiding society with an accessible, efficient and fair system of justice” (Department of Justice of Canada, 2013). Equal justice requires free access to justice. Access to justice can be defined as “the ability of groups and individuals to be able to bring an alleged rights violation to the attention of a court and to have that court adjudicate the claim in a fair and impartial fashion on the basis of the evidence and according to the applicable rules of law” (Baumgartner 2011, 457).

In reality, however, not everyone can successfully bring an alleged rights violation before a court. The outcome of a legal suit depends less on the merits of the case than on how well a party is represented in the court. An unrepresented party – a *pro se* litigant – experiences court dismissals more often than a party represented by a professional lawyer (Hannaford-Agor, Mott 2003, 171). Despite a growing number of *pro se* litigants – they initiate up to a quarter of all new civil cases in the United States (Rhode 2004, 82) – the existing judicial system has an institutionalized bias against them.

The existing theories highlight the consequences of the institutionalized bias rather than its origins. Namely, the economic theory of the unequal access to justice emphasizes the high costs of obtaining legal assistance, which leaves low- and middle-income groups unrepresented and excludes them from the judicial system. Economists suggest that the high costs result from the monopoly over legal advice. Nevertheless, they do not explain why this monopoly emerged and became sustainable. Critical sociologists link the monopoly over legal advice to the specific

interests of the jurists. They show how the acceptance of the rule of lawyers (as opposed to the rule of law) becomes a key condition for gaining access to justice. At the same time, their theory of the jurists' domination undermines the interests of the litigants, assuming that they play a passive role only.

Section I of this paper discusses three theories of access control to justice: economic approaches, critical sociology, and the concept of the power triad adapted to the particularities of juridical transactions. Section II compares the academic discourse about access to justice with the public discourse in the mass media. It shows “the lack of public recognition that there is a serious problem” with respect to the access to justice (Rhode 2004, 4). This outcome is not surprising, taking into consideration the thesis formulated above about the “invisible” character of access control. References to financial barriers and to an informal hierarchy in the judiciary prevail in the - rare - newspaper articles devoted to the issue of access control.

I. Existing theories of domination in the system of justice

Economic approaches

Economists consider the judicial system as a particular market. As on any other market, the price for a commodity or service (legal advice) that is traded is determined by supply and demand. Litigants need the advice of experts (lawyers), lawyers charge a fee for offering it. Some people cannot afford food and shelter, others cannot afford legal services. “There is certainly broad consensus that middle-income people are closed out of the system” (Zorza 2011, 167; for a review of the literature on the issue of costs, see Taylor, Svechnikova 2010). The “prohibitive” (for low- and middle-income people) cost of legal advice is nothing other than a “fact of life”: it results from a particular combination of supply and demand.

The specific combination of supply and demand on the “judicial market” results from several factors. First, traditionally, there were more restrictions on ownership and advertising with respect to law firms, which limited competition on this market. For instance, the relaxation of the rules on advertising on the domestic conveyancing market in the United Kingdom in the 1980s increased competition among the law firms (Paterson, Farmer, Stephen, & Love 1988). Second, and more substantially, the supply is limited by the existence of a monopoly over legal advice. Only accredited jurists, i.e. lawyers admitted to the Bar, can legitimately provide legal advice to litigants. Other experts, including paralegals and “jailhouse lawyers”,² cannot legitimately offer assistance to litigants, regardless of their experience and know-how. As in the case of any other monopoly, this increases legal fees.

The monopoly over legal advice is not a natural one. On the one hand, it does not exist in all legal systems.³ On the other hand, even in the countries based on Anglo-Saxon law (the United Kingdom and its former colonies, including the United States and Canada) with the most professionalized judiciary, lawyers held no monopoly over legal advice for long periods of time. For example, in the United States “unauthorized practice started to be banned after the [first] Great Depression” only (Rhode 2004, 74).

Unlike *natural* monopolies (public utilities being a prime example), the production of legal services by a single provider, namely the Bar, has no advantages in terms of costs compared with their supply by a multiple competitive providers. The existence and stability of the monopoly over legal advice can hardly be explained in terms of transaction costs, or costs related to contract making, either. Specific assets cannot be redeployed without a loss in their value.

Transaction costs depend on the degree of the specificity of assets involved in the transaction (Williamson 1985), including human asset specificity (one's know-how specific to the transaction) and procedural asset specificity. The latter type of asset specificity refers to the degree of a provider's workflows and processes that are customized in accordance with a court's requirements (Zaheer, Venkatraman 1994, 553). Court documents must be prepared, formatted, filed and served according to court rules that are notoriously complex and impenetrable.⁴ Professional lawyers may outperform non-accredited suppliers of legal advice and unrepresented litigants in meeting specific requirements and following particular procedures set by the courts.⁵ Economic approaches do not explain, however, why these requirements and procedures are so specific that they require highly idiosyncratic knowledge. Could the rules not be simplified and made more accessible for non-specialists?

A common solution to the problem of the high cost of access to justice – the system of legal aid and assistance – takes the monopoly over legal advice for granted, while trying to mitigate some of its effects. Most countries based on Anglo-Saxon law rely on this system as a unique tool for enhancing access to justice. The Legal Advice and Assistance Act of the British Parliament (1949) provided people who are unable to pay for legal advice with free legal aid (Sommerlad 2004). The system of legal aid has been subsequently reformed several times, most recently in the 1990s, which led to “a retreat from universality and an emphasis on targeting services to those most in need” (Moorhead, Pleasence 2003, 2). In the United States, after a ruling of the Supreme Court in *Gideon v. Wainwright* (1963), the right to free legal counsel in criminal prosecutions has been acknowledged and enforced (George 2006, 312).

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

This brief discussion of the economic approaches to the problem of access to justice can be summarized in the following manner. Professional lawyers dominate in the judiciary. Their domination has just one dimension: the high fees charged for legal services. Professional lawyers have a monopoly over legal advice that enables them to charge more than on a competitive market. Lawyers’ knowledge of a court’s procedural requirements (the specificity of their human and procedural assets) is the source of their comparative advantages over non-specialists.

Economic approaches do not address the question of the stability of the monopoly over legal advice. How can we account for the persistence of requirements that are so specific that they restrict access to justice for low- and middle-income people? Purely economic monopolies, with the exception of natural monopolies, tend to be unstable. “Pure’ economic monopolies are logically possible, but seem rare and unstable; on the other hand, monopolies based on political and economic power are common and stable” (Etzioni 1988, 227). Does political power play a role in establishing and sustaining the lawyers’ monopoly?

Economic approaches also leave the issue of litigants’ interests unaddressed. From an economist’s point of view, lawyers maximize their income by charging high fees for legal services. Why are some litigants prepared to pay them? In other words, what leads them to bring their issues before a court despite the associated costs? Economists – neoclassical economists, to be more

precise – consider preferences as stable and exogenous to their models (Eggertsson 1990, 5-6). The demand for legal mediation and legal services are no exception.

Critical sociology

Probably the most important contribution of critical sociologists to our understanding of how the judiciary works refers to their attempt to make supply and demand endogenous. Instead of taking the interests of professional lawyers and litigants for granted (both presumably maximize their utility), critical sociology offers an explanation of their making. It is presumed that the interests of the professional lawyers and litigants evolve in the process of the interactions between them and with representatives of the state.⁶

Critical sociologists use conflict as a starting point in their analysis. In contrast to economists, who consider mutually profitable transactions (both parties win to some degree) as prevailing on the market, critical sociologists see conflicts everywhere. People disagree over everything: from the distribution of household chores to who has control of an organization or a state. A peaceful solution to these disputes can be found in a court. While not being a critical sociologist, John Commons formulates a relevant argument: “there is always a third party to every transaction, the judge who decides or is expected to decide every dispute upon the principle of the common rule applicable to all similar transactions” (Commons 1959, 242; see also Bourdieu 1987, 831).

From this perspective, transaction as an elementary form of interaction is seen as a site of power struggles. The parties to a transaction attempt to impose their wills on the opposite parties. The parties do not differ in kind. The party that is currently more successful in gaining control over the transaction may be relegated to a subaltern position next time and *vice versa*. Everything

depends on the distribution of the resources in a particular situation and the strategies chosen by the parties. If there were more chances, “B [the actor in a subaltern position] would do more or less the same things: A [the actor vested in power] and B are engaged in plays of power” (Ailon 2006, 776).

Professional lawyers dominate in the system of justice because their particular interests coincide with the need for peaceful conflict resolution. Pierre Bourdieu (1994, 10) argues that the “specific interest of the jurist” consists in promoting “the universal”, i.e. rules and procedures the universal enforcement of which offers everybody security and justice. Lawyers succeed in persuading the others that their individual and group knowledge serves the common interest. To achieve this result, they rely on techniques of symbolic power representing *specific* rules and procedures as the *universal* ones.

The litigants’ interest in having their disputes resolved in a peaceful manner is subsequently reshaped by professional lawyers. Using their power of labeling, they appropriate the right to decide which disputes can be brought before a court and which cannot. “The specific power of legal professionals consists in *revealing* rights – and revealing injustices by the same process – or, on the contrary, in vetoing feelings of injustice based on a sense of fairness alone and, thereby, in discouraging the legal defense of subjective rights” (Bourdieu 1987, 833).

Only disputes that can be expressed in specific terms proposed by professional lawyers have a legal solution in these circumstances. This means that by bringing a case before a court, the litigant agrees to have it reformulated in the specific terms proposed by professional lawyers and accepts their domination. Without a lawyer, the litigant is as helpless as a foreigner without knowledge of the local language or a translator’s help.

One strategy for “translating” disputes, namely for making them suitable for a legal solution, refers to rationalization. Justice is not inherently rational, i.e. based on strictly formal conceptions and procedures. Max Weber opposes the system of rational justice proper to Civil (or “continental”) Law and Common (or “Anglo-Saxon”) Law to what he calls Kadi justice. Kadi justice implies informal judgments rendered in terms of concrete ethical or other practical valuations (Weber 1968, 976; see also Matza 1990, 118-119). In contrast to rational justice, Kadi justice tends to be more personified and emotionally charged. The rationalization of legal arguments is intended to reduce the personal or emotional dimensions of a conflict. The jurists argue that the unrepresented litigant is unable to get rid of what is personal or emotional, which justifies their involvement.

As a result of a power play regarding dispute resolution, the judicial system is transformed into a particular field of power, a juridical field. “The juridical field is the site of a competition for monopoly of the right to determine the law” (Bourdieu 1987, 817). Litigants occupy a subaltern position within this field. The group of professional lawyers is also highly stratified in keeping with their ability to change the law or to interpret it according to individual and sub-group preferences. Big law firms outperform small law firms and sole practitioners in this respect. The resulting informal hierarchy within the legal profession clearly undermines the doctrine of professional collegiality and the theoretical equality of all practicing members of the Bar (Bourdieu 1987, 808).

As it often happens, the weaknesses of critical sociology are the flip-side of its strengths. Critical sociologists explicitly assume that both litigants and professional lawyers seek power. The latter simply turn out to be more successful in the circumstances. An exclusive emphasis on power plays overshadows all other reasons for using the system of justice. A litigant brings a suit hoping

to “get” a particular business or an individual. Such a suit is often “frivolous”.⁷ A lawyer steps in to “get” the litigant. Such a lawyer is perceived as a “bloodsucker”. The “bloodsucker” overcharges the litigant and distorts the substance of the initial claim by “translating” it into legal parlance. The legal field is populated by “power freaks”. It must be noted that neither economic approaches nor critical sociology pay special attention to the figure of the judge and the judge’s role in controlling access to justice.

In critical sociology, the eventual connection between the law and legitimate interests and plans disappears. Rational considerations emerge as a by-product of “translating” initial claims into legal (“rational”) terms instead of being their eventual source. Professionals differentiate themselves from lay people (litigants) “by fostering a continual process of rationalization” (Bourdieu 1987, 817).

Hernando de Soto (2005) demonstrates that people, including the least fortunate, have a rational interest in relying on the law in their everyday activities. The law not only helps *solve* conflicts, it serves to *prevent* their emergence by facilitating the coordination of individual plans and projects. To coordinate their actions – on the road or on the marketplace – individuals need to refer to the same norms and rules. The rules of the road do as much to help solve disagreements between the motorists as to prevent collisions. In its function of a coordination device, the law facilitates predictions and, consequently, makes the rational choice possible. A motorist achieves the ultimate goal – safely moving from point A to point B – being able to calculate manoeuvres of the other motorists and to adjust to them. In other words, the process of rationalization should be considered not only as an outcome, but also as a point of departure for accessing the law. Anyone

who interacts with other people when trying to achieve rationally chosen goals needs the law and, consequently, access to the justice system.

Power triad

A better approach to understanding the problematic character of access to justice is supposed to meet apparently incompatible requirements. First, critical sociology highlights the importance of the desire for power as a motive in human behavior. Economic approaches assume that actors intend to maximize their utility and do so in a rational manner. A more comprehensive framework shall serve to analyze the interplay between two motives, utility maximization and the desire for power.⁸

Second, both the economic approaches and critical sociology consider the issues of access control and domination separately. The economic approaches show how lawyers dominate litigants by successfully upholding the claim to the monopoly over legal advice. Access to justice turns out to be limited because of the high fees charged for legal advice. Critical sociology links this monopoly to the use of a particular technique of power, namely the symbolic power of labelling (the power of naming things and processes using specific categories). Only the litigants, who agree that the jurists have an upper hand in defining their interests, get access to the juridical field. From this point of view, problems with access to justice also represent an outcome of the lawyers' monopoly instead of being its precondition. Thus, a more comprehensive framework should shed light on access control as a technique of power and its role in establishing and sustaining the lawyers' monopoly.

The concept of the power triad serves to meet these requirements, arguably. As stated before, interactions within the justice system involve at least three parties: two opponents and a "judge,

priest, chieftain, paterfamilias, arbitrator” (Commons 1959, 67). The involvement of three parties is not, however, sufficient for the emergence of a power triad. The existence of the power triad requires the interactions to be structured in a particular manner, namely, in a chain of domination, and a party in this chain to perform a specific function, namely, gate-keeping (Oleinik 2010a, 145-163).

The triad existing within the justice system includes actors of three types: judges (C-type actors), professional lawyers (A-type actors) and unrepresented litigants (B-type actors). Other parties involved in juridical transactions can be classified in one of these categories. For instance, registry officers, who regulate document turnover at a court, and paralegals (non-accredited and non-professional lawyers) are also B-type actors.

The judge plays a central role in the justice system. All other parties agree that the judge has the power to decide matters brought before the court. The judge’s power has several sources. Some of them take manifest forms and are commonly acknowledged. For instance, the judge’s decisions are believed to derive from legal authority: the judge has the ultimate right to apply and to interpret (in Common Law) the law in keeping with the circumstances of a particular case. In this sense, the judge “is himself subject to an impersonal order by orienting his actions to it in his own dispositions and commands” (Weber 1968, 217).

This ideal-typical description of the judge’s behavior lacks important nuances, however.⁹ First, the nature of the judge’s power depends on characteristics of the law that underpin court orders. The law may be either “good” or “bad” (de Soto 2005). Good laws facilitate coordination and mutual adjustments. The rule “drive on the left” or “drive on the right” illustrates the idea of a good law in the context of road traffic because it creates certainty as to other motorists’

manoeuvres. “Bad” laws create opportunities for extracting rents instead of facilitating coordination. To continue with the example of road traffic, setting a speed limit when road conditions allow safe driving at a higher speed construes a “bad” law. It has no other rationale than the extraction of fines and, eventually, bribes.

“Good” laws derive from customs and cannot be imposed “from above”. The situation in former colonies and countries with various, sometimes divergent legal traditions turns out to be problematic in this respect (Anderson 2009; Kelly 2005). If law is associated with actions of occupying states or discriminating groups, then most laws are perceived as “bad” because they are disconnected from everyday practices.¹⁰

A simple and most straightforward solution for getting “good” laws involves legalizing customs, i.e. giving them the force of law (de Soto 2005). When embedded in customs, “the rules can be justified by reference to beliefs” prevailing in a society (Beetham 1991, 16). Traditions are often inconsistent and contradictory, which requires the involvement of the state or the courts (Commons 1959, 300; Hodgson 2009, 155). By selecting relevant customs, the judge draws boundaries as to what is legal and what lies outside the justice system.¹¹ As a result, some transactions (and their parties) are included, whereas others are excluded from legal regulation.

In Common Law, the judge exercises complete discretion in selection of customs. This discretion extends the scope of the judge’s power beyond the limits of legal authority. In addition to the existing law, the judge’s choices are determined by the judge’s personal preferences, the extent of the judge’s knowledge and so forth. “Discretion resides wherever there is power” (Commons 1959, 355).

Second, the circumstances of a case brought before a court are never fully known. The parties involved have different, most often conflicting, takes on what happened. The judge is provided only with bits of the relevant information, which prevents the judge from reconstructing the entire picture. Acting with incomplete information, the judge faces a dilemma. In the case of criminal prosecution, the judge can err by deciding that a person is innocent when, in fact, the suspect is guilty. What is more acceptable then, to send an innocent person to jail or to leave a criminal unpunished?¹² The probabilistic nature of the court's orders has implications for the discussion of the judge's discretionary power.

The more limited the information available to the court is, the larger the scope of the judge's discretion. This postulated regularity can be demonstrated with the help of a thought experiment. Let us first assume that the judge acts with complete information, i.e. there are no information asymmetries between the parties involved in a dispute and the transaction costs are nil. In this case, the judge has the unique task of persuading the party who is clearly wrong and denying evident matter of fact. In a world of zero transaction costs, all contracts would be self-enforceable.¹³ Actors would prefer not to bring matters before a court whereas the judge would have no discretion. The judge's discretion would be limited by what is evident to everyone. Unfortunately, this perfect (from several points of view) world has several features of a totalitarian society: it requires the total transparency that undermines privacy and safeguards against total surveillance and control.

If the conditions of zero transaction costs are relaxed, the parties to a dispute act in conditions of information asymmetry. One party has only a part of the relevant information at its disposal. The bits of information possessed by the parties do not necessarily add up and represent

the entire picture because the parties share it with the court in a selective manner (the one that maximize their chances to win¹⁴). No one, including the judge, knows the truth. A court order represents a best guess at what really happened, at best.

Court rules further restrict the amount of evidence available to the judge. Legally admissible evidence refers to a subset of the evidence available to the parties. Not all evidence can be admitted by the court. To be admitted, the evidence must be produced in accordance with specific rules (for instance, “rules of discovery”) and formatted in a particular manner (for example, administered as an affidavit). The judge has the ultimate authority for deciding the admissibility of evidence. By doing so, the court also shapes the scope of the judge’s discretionary power. The less evidence is admitted, the larger the scope of the judge’s discretion, all other factors being equal.

The judge performs the role of a gate-keeper in several respects. The judge selects particular customs and dismisses others. As a result, some stakeholders and their claims get a legal status whereas the others do not. The judge decides the admissibility of the evidence brought by the parties to a dispute. As a result, one party may strengthen its position in the proceedings. The judge allows the actors to become parties in a dispute (granting them the status of an intervenor in the regular proceedings or a class/subclass member in the class proceedings). As a result, the balance of power between the parties may change. Gate-keeping in various forms extends the scope of the judge’s discretion and, consequently, enhances the judge’s power.

It must be noted that no specific assumptions as to the judge’s motivation have been made so far. One reason is the lack of comprehensive empirical studies of this issue.¹⁵ Regardless of a particular judge’s motives – utility maximization¹⁶ or personal affects and predispositions or the desire for power or the disinterested search for truth and justice – the judge performs the function

of gate keeping, or access control to the justice system. The gate-keeper's role objectively serves to extend the scope of the judge's power beyond the rather narrow limits of legal authority.

Furthermore, the gate-keeper's power rarely takes manifest forms. A formal decision regarding the merits of a case turn out to be disconnected in space and time from the seemingly "technical" decisions as to who is allowed to appear before the court and what is permitted to be brought before it.

This extended power appears to be compatible with both prevailing theories of law, formalism and instrumentalism. According to the former, the justice system has complete autonomy with respect to external sources of influence, including political power. According to the latter, the justice system tends to be subordinated to outside sources of power whereas the law is a "partisan weapon" in the hands of the power elite (Tushnet 1976, 276). "Formalism... asserts the absolute autonomy of the juridical form in relation to the social world... instrumentalism... conceives of law as a reflection, or a tool in the service of dominant groups" (Bourdieu 1987, 814; see also Commons 1959, 332).¹⁷

From the formalists' point of view, the judge's powers, enhanced by gate keeping, help to protect the autonomy of the justice system. Only its representatives can decide who and what is "in" and "out". From the instrumentalists' point of view, gate-keeping refers to nothing other than an additional "partisan weapon" complementing other weapons. It can be compared with the preliminary screening of candidates running for public offices in some countries. Screening serves to get rid of unwanted candidates at the very beginning, thereby reducing the need for vote fraud at the end. The only difference lies in an additional layer in the instrumentalists' model of legal

stratification: the judge presumably acts on behalf of the higher-ups (for example, state representatives or large corporations).

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

Access to justice is not free, nevertheless, because of the gate-keeping exercised by the judge, a C-type actor. To be admitted to the justice system, litigants must be able to express their claims in a very particular manner and to produce supporting evidence in keeping with very specific rules. The unrepresented litigant with no or limited previous litigation experience has minimal chances of succeeding. In addition to knowing the rules for each step in litigation, the litigant must predict the discretionary decisions of the judge. “The citizen can disregard the state – he wants to know what the court and the sheriff will do” in the circumstances (Commons 1959, 125). No code or manual or book can help in fully understanding the gate-keeping, only extensive experience. Yet, without this full understanding, litigants will see their claims dismissed regardless of their eventual merits. Litigants will appear before the court without being heard and properly understood.

The chances of the litigant, a B-type actor, to be heard by the judge, a C-type actor, can be increased by involving a professional lawyer, an A-type actor. The A-type actor translates the claims

of the B-type actor into the language that is comprehensible for the C-type actor and gives them the proper format. The judge has a more limited power to restrict the lawyer's access to justice because the latter normally knows the rules and procedures and has extensive experience in appearing before a court. The lawyer can predict how the judge will use the discretionary power in the circumstances of a particular case.

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

The lawyer's power to charge high fees for legal advice refers to just one dimension of A's domination over B. A also makes changes in B's decision-making sets by suggesting which claims and evidence can be deemed legally admissible and which cannot. If A decides B's strategy in the proceedings, then A has power over B. "The will chooses between opportunities, and opportunities are held and withheld by other wills which also are choosing between opportunities" (Commons 1959, 304). The litigant's opportunities are "held and withheld" by the lawyer. As a matter of fact, B has two options: either to see B's claims dismissed by C or to be heard by C in keeping with the conditions imposed by A.

A has the power to alter the set of opportunities available to B by virtue of A's preferential access to the justice system. In other words, A's power over B has a structural nature. B can access justice only by changing the initial claims and accepting A's conditions, both financial and other.

A would not have preferential access to justice without C performing the role of a gate-keeper and without A's acceptance of C's discretionary power.

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

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

B is dominated by both C and A. The power triad produces the drift toward discrimination against unrepresented litigants. C's and A's prejudice against them is institutionalized in nature. An institutionalized prejudice is differentiated from social, racial or personal prejudice because of its embeddedness in formal institutions. The prejudice against unrepresented litigants depends less on the good or bad will of a particular judge or lawyer than on the consistent patterns of interactions within the justice system. In other words, the prejudice has structural origins. Nevertheless, even B gains something from entering the justice system. If B decides to stay out of it, the prospects for B's coordination with other individuals and organizations would be undermined.

B's conditional access to the justice system (B enters under the condition of being represented by A) creates a demand for legal counsel. B does not choose between being an unrepresented litigant and being represented by a lawyer. B chooses between being represented by a lawyer and not entering the justice system. The first choice implies that B prefers to be represented because of the associated advantages (for instance, the need for training and experience to make better use of the court rules and procedures). B interacts with A as a principal with an agent. The second choice means that B decides to be represented as a condition for gaining access to justice. Without being represented by A, B will see all claims dismissed by C.¹⁸ A gains power over B, relegating the litigant to the role of an agent. The lawyer, legal counsel, also becomes a key figure within organizations. "Those who tacitly abandon the direction of their conflict themselves by accepting entry into the juridical field (giving up, for example, the resort to force, or to an unofficial arbitrator, or the direct effort to find an amicable solution) are reduced to the status of client" (Bourdieu 1987, 834).

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

The operation of the justice system as a power triad has important implications for the character of the power relationships between the parties involved. In the case of legal authority, law is an independent variable, a cause, judicial power – a dependent variable, an effect. The latter restricts and derives from the former. The existence of the power triad extends the scope of the

judge's discretionary power and, consequently, makes it less constrained by legal restrictions. Legal authority transforms into power. The rule of law becomes the rule of lawyers (C and, to a lesser degree, A). Judicial power changes its place in the causal sequence with law. Judicial power is now an independent variable, law is a dependent one. Judicial power shapes law as its representatives see fit. Namely, when a court changes the deflection of something, it "legislates" (Commons 1959, 356).

II. Public discourse on the access to justice

The problematic character of access to justice is not easily recognized either in the professional discourse on the justice system (because the jurists have the symbolic power of labelling) or in public discourse. A study of publications in the major printed mass media helps to empirically demonstrate the latter assertion. The study has two objectives: first, to confirm the lack of public acknowledgement that there is a serious problem with access to justice and, second, to show that the mass media pays more attention to the visible techniques of domination in the justice system (for instance, inflated legal fees and the existence of formal hierarchies) than to the invisible ones (namely, access control).

Publications in the major newspapers of three countries based on Anglo-Saxon law, the United Kingdom (the *Times*), the United States (the *New York Times*) and Canada (the *Globe and Mail*), were included in the sample.¹⁹ The natural language search terms were "access to justice" (with two index terms added: "law & legal system" and the country name). The search covered the period from the start of July 1985 to the end of March 2013, i.e. almost 28 years.

In total, 642 publications were included in the sample after eliminating duplicates: 362 articles, commentaries and letters to the editor from the *Times* ("T"), 100 from the *New York Times*

(“NYT”) and 180 from the *Globe and Mail* (“GM”).²⁰ A series of additional searches served to assess the relative attention paid by the mass media to the issue of access to justice and, consequently, to verify whether public recognition is indeed lacking. First, the number of publications mentioning “homicide rate” suggests that in North America (the United States and Canada) a particular aspect, the problem of homicides, attracts more public attention than the broader problem of accessing justice (Table 1). Overall, the mass media in the three Anglo-Saxon countries mention high homicide rates more than twice as often as a problematic access to justice in general. Second, the issues of access to some other goods, namely credit and education, also attracts more public attention in North America than access to justice.

Table 1 about here

The British mass media show a somewhat divergent pattern. They devote relatively more attention to access to justice, which can be explained by a series of reforms of the schemes for legal aid carried out during past twenty years by the New Labor governments.²¹

The US case deserves particular attention. According to common belief, Americans are among the most litigious people on Earth. In 2002, a total of 99.72 million suits were filed in state and federal courts in the United States (George 2006, 296). The 2000 census estimated the United States population to be 281,421,906, which gives 0.35 lawsuits per person, including newborns, per year. At the same time, the American mass media discusses the issues of access to justice less willingly than the mass media in the less populous and less litigious Canada and the United Kingdom. This lack of public recognition sharply contrasts with the intensity of the problem in the United States. As one observer notes, “‘equal justice under law’... comes nowhere close to describing the legal system in practice” in this country (Rhode 2004, 3).

The selected publications were content-analyzed using both qualitative and quantitative techniques as well as an original methodology for triangulating the outcomes of qualitative and quantitative content analysis (Oleinik 2010b). Namely, 10% of the publications (N=67) were randomly selected for manual coding (qualitative content analysis). The structure of a code book for manual coding derives from the three theoretical approaches discussed in the first section of this paper. Three categories, “Economic approaches”, “Juridical field” and “Power triad”, regroup 11 codes (Table 2). The code “Financial barrier” refers to “Economic approaches”. Five codes (“Government”, “Big law firms”, “Small law firms”, “Judges” and “Unrepresented litigants”) refer to the second category, “Juridical field”. They operationalize various elements of the formal and informal hierarchies that constitute the juridical field. “Like the Church and the School, Justice organizes according to a strict hierarchy” (Bourdieu 1999, 818). Five remaining codes (“Cultural barriers”, “Institutional barriers”, “Symbolic barriers”, “Excluded actors” and “Gate-keeper”) operationalize two distinctive features of the power triad, namely boundaries and access control.

Table 2 about here

It should be noted that the three approaches partly overlap. After all, they help describe various aspects of the same phenomena (a problematic access to justice). For instance, “Financial barriers” refer to the idea of the monopoly over legal advice (“Economic approaches”) and a particular barrier that a gate-keeper may erect (“Power triad”). Elements of the formal and informal hierarchies are relevant to the discussions of both “Juridical field” and “Power triad” (for example, the judges perform the role of C and occupy a top position in the formal and informal hierarchies).

The code “Financial barriers” was applied to fragments discussing fees charged by lawyers as an impediment to free access to justice:

“Approximately 70 per cent of those who need legal-aid help in connection with family matters are women. Men traditionally have the money. They hire private lawyers independently. So this decision primarily affects women and their dependent children” (GM, 2002).

“Lawyers have indeed encouraged an increasingly litigious society. But Mr. Quayle addresses himself mainly to richer Americans, like manufacturers, municipalities and doctors. He offers nothing for the poor and middle class who need lawyers but can’t afford their fees” (NYT, 1992).

“Solicitors in England and Wales lost their legal battle yesterday to force the Lord Chancellor to withdraw cuts in legal aid which in effect restrict access to justice for millions of people” (T, 1993).

State representatives (the Crown, government officials: the Attorney General, the Lord Chancellor etc.) play leading roles in the juridical and bureaucratic fields. The bureaucratic field, i.e. “the space of play within which the holders of capital (of different species) struggle *in particular* for power over the state” (Bourdieu 1994, 4) is of interest to the extent to which it affects transactions within the juridical field. The legal aid programs administered by the government and the legal reforms initiated by its representatives are prime examples of how the code “Government” was applied.

“In Ontario, every client has the right to choose any lawyer, and the province pays the bill if the client can’t. Ontario’s Attorney-General, Howard Hampton, wants to change all this. He is determined to establish a family law clinic by this fall where clients are assigned the next available government-paid lawyer” (GM, 1992).

“The government has been required to provide lawyers for people facing jail because of criminal charges since a landmark ruling by the United States Supreme Court in 1963, *Gideon v. Wainwright*” (NYT, 2010).

“A review of legal aid will conclude early next year. The Law Society is willing to work with officials to their tight timetable, Mr. Nally says, but the challenge for the Government was to ‘do more and to do it quickly’” (T, 2004).

Big law firms occupy dominant positions in the juridical field together with the government and the judges. In contrast to small law firms, they work with corporate clients and wealthy individual clients. They have a significant influence over court decisions and the interpretations of law underlying them. The code “Big law firms” was applied to fragments referring to the role and operation of these actors.

“Plaintiffs’ lawyers say the arrangements level the playing field when they take on big corporate defendants with seemingly limitless cash for legal fees” (GM, 2012).

“But, after two years of litigation, Mr. Dowd and a big Chicago law firm to which he referred Ms. Corcoran advised her to settle the case for the \$1.4 million she had originally been offered. The lawyers had taken the case on contingency, meaning they were entitled to a percentage of anything she received” (NYT, 2004).

“Lord Carter of Coles consulted disproportionately with London firms and practices undertaking very high-cost criminal cases so his proposals do not address the issues facing most legal aid solicitors” (T, 2006).

The code “Small law firms” refers to the role and operation of small law firms and sole practitioners. In contrast to big law firms, they serve small businesses and individuals with limited financial resources. Small law firms have a limited say within the juridical field.

“Lawyer Deanna Ludowicz said the deep cuts left her the only person in the town of Grand Forks doing legal aid. But recently, Ms. Ludowicz said she had to stop doing legal-aid work because of inadequate payments and demanding clients. She now refers those seeking help to larger centres” (GM, 2006).

“Mr. Dowd earned his law degree at night at Oklahoma City University. He passed the Illinois bar on his second try and set up shop in Des Plaines, where he works as a solo practitioner handling mostly divorce and bankruptcy cases. As of 2002, his biggest injury case ended in a \$14,000 settlement” (NYT, 2004).

“Criminal defence lawyers will seek to rebuff a notion that they are ‘fat cats’, and concentrate on the key role they play in helping the public, and the increasingly straitened circumstances they claim affect their profession. ‘The fact of the matter is, an hourly rate for a criminal defence lawyer is less than that of a plumber,’ said Mark Harrower, the vice-president of the Edinburgh Bar Association” (T, 2012).

The judges are in the highest layer of the judicial hierarchy, both formal and informal. The code “Judges” was applied to references to their leading role within the judicial system.

“In the case last month, a judge refused to let a man be tried for gross indecency, ruling that he could no longer obtain a fair trial after the Sexual Assault Crisis Centre of Essex County destroyed its files. It is believed to be the first such ruling in Canada” (GM, 1994).

“In a speech in Albany, the chief judge, Jonathan Lippman, said his proposal, the first such plan by a top court official in New York, reflected a commitment by the state’s courts ‘to bring us closer to the ideal of equal access to civil justice’ that he described as one of the foundations of the legal system” (NYT, 2010).

“As similar cases have revealed, British judges think they smell humbug when they are faced with journalists claiming that a promise of anonymity must override a court’s demand to reveal a source” (T, 1996).

Unrepresented litigants form the lowest strata in the informal judicial hierarchy. The theoretical equality of the parties in juridical transactions sharply contrasts with the unrepresented litigants’ lack of any power in reality. “The system has been designed by and for lawyers, and too little effort has been made to ensure that it is fair or even comprehensible to the average claimant” (Rhode 2004, 5). The code “Unrepresented litigants” highlights various aspects of their situation.

“Mr. Steinberg said the issue of access to justice is inextricably tied to the legal-aid funding issue, since people who cannot get legal-aid lawyers have to represent themselves” (GM, 2002).

“Ms. Corcoran, negotiating without a lawyer, had already received a settlement offer of \$1.4 million” (NYT, 2004).

“The inability of the public to understand how barristers can take on awkward cases, and the consistent failure to understand the very clear, if broader, morality of the professional

service barristers provide is no reason at all for a change in practices. The apparently guilty must be represented because to have them unrepresented or underrepresented is outrageous” (T, 2000).

A set of four codes is intended to describe specific types of barriers delimiting the field of juridical transactions and creating conditions for access control.²² “Cultural barriers” exist if the law turns out to be disconnected from customs and traditions. A gap between law and customs makes the former impenetrable for unprofessional claimants and complicates their access to justice.

“I believe the relationship between aboriginal and non-aboriginal peoples of Canada could be the dominant issue of the next decade. It is an affair that is soul-size for Canada, and its outcome will tell us what kind of society we choose to be. Globe columnist Jeffrey Simpson recently called attention to the ‘dangerously widening divide’ between aboriginal and non-aboriginal Canadians. We need to confront anything within the soul of our nation that indicates weariness with doing justice, or reveals a potential for prejudice or even racism” (GM, 2000).

“With the Assembly now responsible for Welsh subordinate legislation, its bilingual nature is a key feature of its distinctive approach to the drafting and presentation of legislation – an approach similar to that followed in Canada, an important common law jurisdiction with similar bilingual requirements” (T, 2001).

“Institutional barriers” refer to the sometimes obscure and contradictory court rules and procedures that complicate interactions between the parties to a dispute instead of facilitating them. “Court procedures and legal discourse can in themselves, unless popularized, constitute a process of social exclusion rather than empowerment” (Sommerlad 2004, 367).

“Ms. Joy managed to obtain a memo on courtroom rules of conduct from Judge Rawlins that stated lawyers shall appear in court in ‘conservative clothing.’ By any standards, this incident is a farce. It confirms what Dickens’s Mr. Bumble said: ‘The law is a ass, a idiot.’ But it is an ass that insists on a dress code. Although Ms. Joy’s treatment is relatively trivial, it does speak to the law’s tendency to place form over function and style over substance” (GM, 2002).

“Last year, a group of lawyers, in a concerted campaign, filed petitions with state supreme courts, bar associations or ethics commissions in 12 states seeking to cap contingency fees at 10 percent of the first \$100,000 of a settlement, and 5 percent of anything more. The petitions were denied in five states, rejected on procedural grounds in two and remain pending in five” (NYT, 2004).

“The first phase of its civil justice reform programme takes effect from April, Lord Irvine said. ‘These reforms will unify, simplify and speed up court procedures and protocols, to deliver justice directed towards the needs of court users,’ he added” (T, 1999).

The code “Symbolic barriers” was applied to fragments discussing professional qualifications and other credentials as a formal requirement for providing legal advice. The division between lawyers and paralegals (individuals who have relevant expertise without meeting formal requirements) is a case in point.

“One type of competition Mr. Gervais worries about is a new class of advisers who have made inroads into what was traditionally a lawyer’s bread and butter – areas such as estate planning and tax planning. ‘There has been a definite erosion of practices to paralegals and tax advisers. We must use technology to get closer to clients by partnering on source information” (GM, 1997).

“For a while, that traditional carve-up worked well: the Bar enjoyed a monopoly of advocacy rights in the higher courts; and solicitors of conveyancing and probate” (T, 2001).

The code “Excluded actors” refers to the people, mostly unrepresented litigants, who are excluded from the justice system. The excluded individuals see their claims dismissed not because the claims lack merit, but as a result of the existence of various barriers and access control.

“Judge Wagner said aboriginals were left out of the national discourse for far too long and credited key judgments from the Supreme Court of Canada for ending this injustice” (GM, 2012).

“‘I am not talking about a single initiative, pilot project or temporary program,’ Judge Lippman said, ‘but what I believe must be a comprehensive, multifaceted, systemic approach to providing counsel to the indigent in civil cases” (NYT, 2010).

“Without that [legal] help the most disadvantaged members of our communities cannot defend their fundamental rights” (T, 2004).

The code “Gate-keeper” is central for understanding how the power triad operates. The gate-keeper benefits from the existence of various barriers (erecting some of them) by providing conditional access to the field of juridical transactions. The judges and state representatives exercise access control more often than the other actors.

“I’m just not convinced there are many people out there with valid claims who are being denied access to justice. We’ve shifted way to the other side, creating a chance for people to bring lawsuits with no risks” (GM, 1998).

“In the second major revision this week, Assemblywoman Margaret M. Markey, a Queens Democrat, told supporters that her bill would now establish 53 as the maximum age for anyone wishing to file suit claiming sexual abuse as a child” (NYT, 2009).

“Accordingly where, as in the present case, the judge gave permission to appeal on terms, the prospective appellant could not appeal against those terms since he would, almost always, have been present when permission was given” (T, 2011).

After completing the qualitative content analysis, the validity and reliability of the manual coding were assessed by triangulating the results with the outcomes of the quantitative content analysis in two forms: the analysis of words co-occurrence and the use of a dictionary based on substitution. It was impossible to calculate alternative measures of the reliability, namely, the coefficients of inter-coder agreements, because of the involvement of a single coder, namely the author of this monograph.

The use of two specialized computer programs, *QDA Miner v. 4.0.4* and *WordStat v. 6.1.5* served to perform the following tasks. First, coding co-occurrences in the manually coded publications was visualized and the distances of all the publications from the publication lying in the center of a two-dimensional map (“centroid”)²³ were calculated. The distances are expressed in

values of Jaccard's coefficient. Second, a dictionary based on substitution was created. It has the same structure as the codebook. There is a list of words and expressions for each code. For instance, the words "judge", "judges" and "the court" can be used as substitutes for the code "Judges". The selected publications were then coded in an automated manner. The distances from the same centroid were calculated after analysing coding co-occurrences. The distances are expressed in values of Cosine coefficient. Third, the distances from the same centroid were also calculated after running the word-co-occurrence analysis. These distances are expressed in values of Cosine coefficients. Forth, the distances obtained in the three previous cases were cross-correlated. Moderately-strong coefficients of correlation are indicative of an acceptable level of reliability and validity (Oleinik 2010b). In the present case, the Pearson correlation coefficients r are .752 (between the qualitative coding and the automated coding using the dictionary based on substitution), .282 (between the automated coding and word co-occurrence) and .223 (between the qualitative coding and word co-occurrence, $N=67$ in all three cases). Fifth, the entire sample ($N=642$) was coded in an automated manner using the dictionary based on substitution. Table 2 reports the outcomes of both the manual coding of the subsample and the automated coding of the entire sample.

The mass media pay the most attention to the formal and informal hierarchies in the judiciary (47.6% of the fragments coded in the automated manner, 39.7% of the manually coded fragments). The issues of the cost of access are also in the focus of the public discourse (31.8% of fragments coded in the automated manner, 36.2% of the manually coded fragments). Various aspects of the power triad do not attract much public attention (20.5% of fragments coded in the automated manner, 24.1% of the manually coded fragments).

The relative ignorance of the eventual existence of the power triad in the justice system is consistent with the “invisibility” of gate-keeping as a technique of domination. Even the actors directly affected by access control do not necessarily perform relevant operations in a conscious manner. For instance, the judge may erect additional barriers (e.g., by introducing a new procedural “filter”) attempting to better control the entire process. As a result, however, the number of excluded actors may be increased. The only alternative for the would-be excluded is to hire a lawyer. These processes strengthen the power triad instead of disbanding it.

A more detailed analysis of coding co-occurrences suggests that the public discourse revolves around the financial barriers (Figure 1).²⁴ The financial barriers (in short, high legal fees) are mentioned not only more often than other obstacles to free access to justice, they also co-occur with most other codes. This finding comes as no surprise: the monopoly over legal advice takes obvious forms. The fees charged by lawyers can be relatively easily assessed and studied (Taylor, Svechnikova 2010).

Figure 1 about here

The codes included in the category ‘Power triad’ refer to the invisible technique of domination, namely access control. Not surprisingly, the idea that the problematic character of access to justice is due to the prevalence of access control tends to be overlooked. Common references to the judges in the context of the discussion of the barriers, especially cultural and institutional,²⁵ suggest that they may perform the role of a gate-keeper.

The analysis of the sequences of the qualitative codes shows that in a few cases only there are reasons to believe that a particular sequence is not due to chance alone. Out of 121 eventual sequences (a matrix of eleven codes by eleven codes), only 16 sequences have the probability of

occurring by chance alone of 5% or less.²⁶ Five sequences referring to various aspects of gate-keeping have to be discussed in more detail: “Judges” → “Gate-keeper” (p=.009), “Gate-keeper” → “Financial barriers” (p<.001), “Financial barriers” → “Gate-keeper” (p=.001), “Gate-keeper” → “Symbolic barriers” (p<.001), “Symbolic barriers” → “Gate-keeper” (p=.014). Their existence suggests that the judge performs the role of a gate-keeper more often than the other actors do. The symbolic and financial barriers help delimit the field of juridical transactions and subsequently control access to it. Here is an example of the code “Judges” followed by the code “Gate-keeper”:

“Apart from Judge Rawlins’s perverse and arrogant refusal to give her reasons (which seems a flagrant disregard of basic principles), this incident adds fuel to the critical fire that judges and courts are more concerned about appearance than reality – or, to put it more accurately, that there is some important and deep connection between the two. Indeed, the fact that judges dress in a rather camp style themselves seems to give some credence to this unfortunate idea [...]

But sadly, Judge Rawlins is not on her own. A couple of years ago, in a highly charged trial, a judge asked a spectator to leave the court unless he removed his headgear. When the man said that his *kufi* (Muslim cap) was an obligatory accessory for a person of his religion, the judge had him removed from the court, insisting that decorum and respect were essential to the judicial process” (GM, 2002).

This situation refers to the judge’s discretionary power to eventually exclude a party whose dress does not conform to the judge’s expectations from the court room. This case also illustrates how a party’s non-conformity to purely formal, procedural requirements may lead to this party’s disqualification regardless of the eventual merits of the party’s arguments.

A comparison of the relative frequencies of the codes (automated coding with the help of the dictionary based on substitution) across countries and by the publication format (article, commentary, letter to the editor) did not reveal significant – statistically and substantially – differences with a few exceptions.²⁷ The public’s attention only varies in the case of three codes out

of eleven. The North American mass media pay relatively more attention to the excluded actors than the British press does ($F=3,620$, $p=.027$). On the contrary, the British mass media discuss the role of the government more actively ($F=4,599$, $p=.010$), which can be explained by its active involvement in the above mentioned series of legal reforms. The British press also discusses the role of small law firms more willingly ($F=14,328$, $p<.001$).

The publication format plays the role of a differentiating factor with respect to all the codes except three: “Institutional barriers”, “Judges” and “Symbolic barriers”. The difference in the coverage of the situation of the excluded authors appears to be particularly noteworthy (Figure 2). Most references to the excluded actors can be found in letters to the editors ($F=3,506$, $p=.015$). They are written mostly by ordinary people without being commissioned. In the commissioned publications (articles) the mass media devote less attention to this issue. In other words, the journalists’ tend to under-evaluate the consequences of the operation of the power triad. The technique of access control turns out to be particularly impenetrable for external observers. These consequences are seen more clearly by those who have first-hand experience of the institutional exclusion.

Figure 2 about here

Conclusion

The three analytical approaches to the problem of access to justice depict various aspects of the same phenomena. They all lead to the same conclusion: access to justice is problematic. However, the economic approach serves to discuss the most visible dimension of this problematic access, namely, excessive legal fees. Critical sociology serves to unveil a less visible technique of domination, the symbolic power of labelling. Finally, the concept of the power triad is intended to

link the problematic access to the prevalence of access control as one of the most invisible techniques of domination. The concept of the power triad also sheds light on how the formal and informal judicial hierarchies are established and reproduced.

The invisible character of access control accounts for the lack of public recognition of the importance of the problem with respect to access to justice in general and with the existence of access control in particular. The mass media in the three Anglo-Saxon countries devote less attention to the issue of access to justice than to more specific topics. When discussing problems with respect to access to justice, they often focus on the surface of the problem (emphasizing high legal fees) instead of its essence. Other barriers (institutional, cultural and symbolic) remain on the periphery of the public's attention. The public discourse does not acknowledge the eventual existence of the institutionalized prejudice against unrepresented litigants.

To test the hypothesis of the institutionalized prejudice against unrepresented litigants in a more comprehensive manner, one needs to content-analyze the court rulings, probably using the methodological approaches discussed in this paper. The researcher shall expect several challenges in going down this road. For instance, the status of the parties (unrepresented, represented) is not always unambiguous. A party may be represented by in-house counsel, a small law firm, a large law firm or by several counsel simultaneously. Court records are not always specific enough in this regard.

Some solutions to the problem of access to justice can be briefly outlined without claiming to offer a systematic overview. Deborah Rhode (2004, 20) aptly formulates a general principle that a better system should satisfy: "it should maximize individuals' opportunities to address law-related problems themselves". This means that a better system should offer more opportunities for

unrepresented litigants, which would undermine the current system of the institutionalized prejudice against them.

The simplification of the law, court rules and procedures represent one practical strategy for enhancing access to justice. Another strategy involves unbundling. Unbundling involves the following arrangement: the lawyer performs “only certain of the required tasks, with the client doing the remainder” (Zorza 2011, 160). In other words, the litigant determines the overall strategy and division of tasks. The litigant hires the lawyer to perform some of them that require the most specialized knowledge and experience. As a result, the litigant regains power and the status of a principal in the relationship with the lawyer.

The litigant’s empowerment will allow lessening the current almost exclusive emphasis on legal-aid programs. The “do it yourself” principle redirects spending from supporting the monopoly over legal advice to programs of technical, educational and informational assistance to unrepresented litigants. Being empowered, they could achieve their objectives better and at less cost. The “do it yourself” system is the exact opposite of the existing system based on access control.

SUMMARY:

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

theoretical discourse of access to justice is confronted with the public discourse. 642 texts published in three major newspapers, the *Times*, the *New York Times* and the *Globe and Mail* over the period from July 1985 to March 2013 were content-analyzed using both qualitative and quantitative techniques. The outcomes of the content analysis confirm the lack of public acknowledgement that there is a serious problem with access to justice, especially as far as the most invisible techniques of domination are concerned.

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Tables and Figures

Table 1 “Relative frequency of mentions for selected key terms, July 1985 – March 2013”

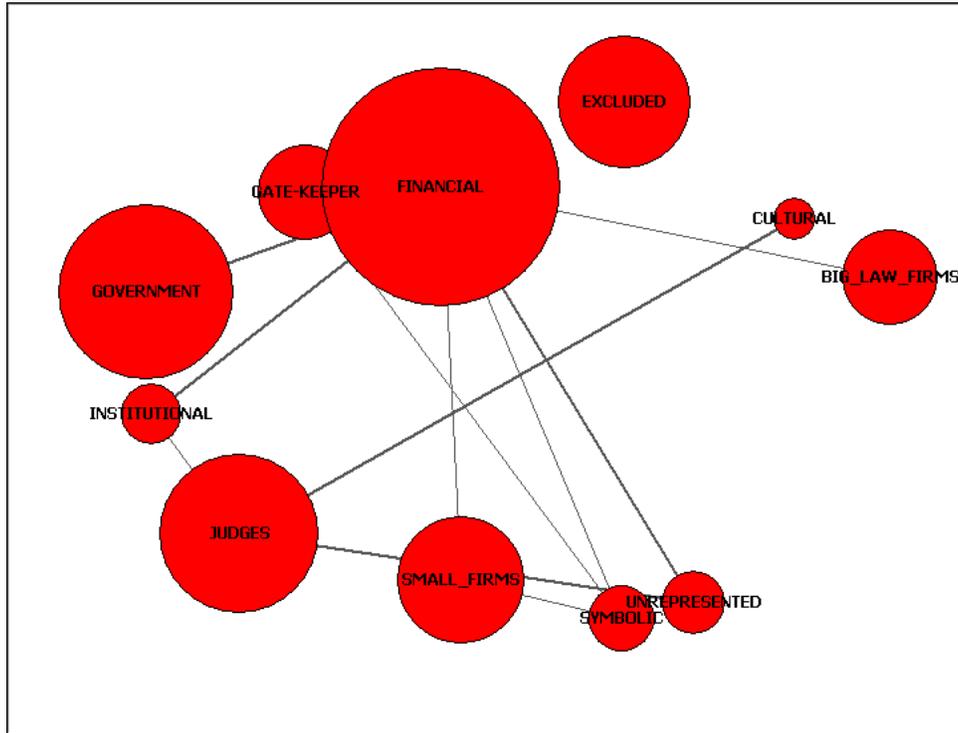
	Access to justice	Homicide rate	Access to credit	Access to education
<i>The Globe and Mail</i>	180	320	239	192
<i>The New York Times</i>	100	684	391	254
<i>The Times</i>	362	341 ²⁸	154	109
Total	642	1345	784	555

Anton Oleinik MUN

Table 2 “Code book and frequency of codes and categories in sample (N=642, automated coding with the help of a dictionary based on substitution) and subsample (N=67, manual coding)”

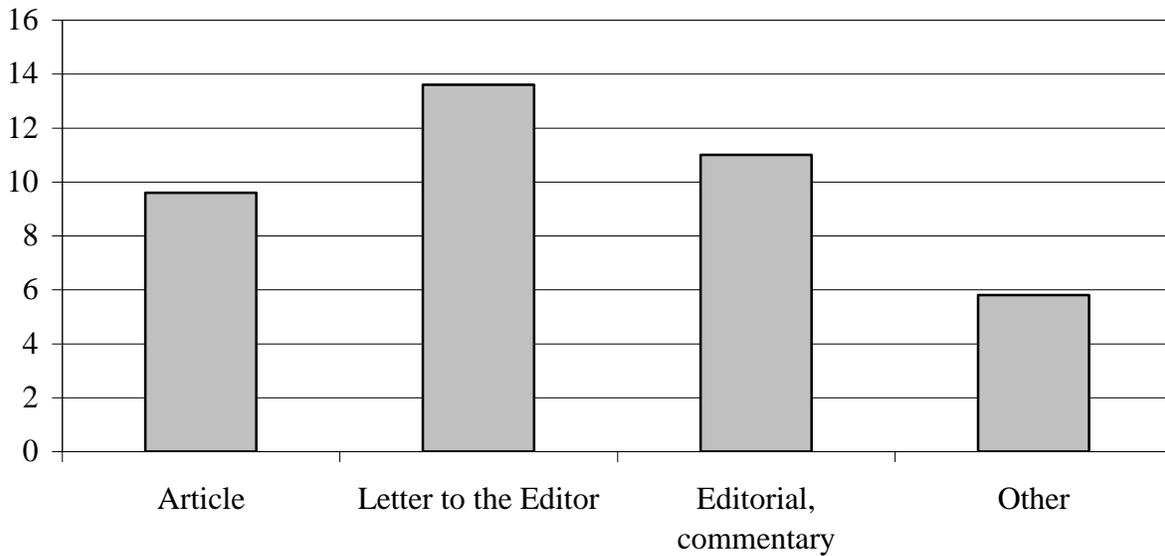
Category	Code	Code frequency		Cases (% of cases)		Category frequency (% of total)	
		subsample	sample	subsample	sample	subsample	sample
Economic approach	Financial barriers	168	2449	46 (65.7%)	436 (67.9%)	168 (36.2%)	2449 (31.8%)
Juridical field	Big law firms	21	396	15 (21.4%)	173 (26.9%)	184 (39.7%)	3662 (47.6%)
	Government	60	1319	31 (44.3%)	413 (64.3%)		
	Judges	44	1086	26 (37.1%)	293 (45.6%)		
	Small law firms	53	687	24 (34.3%)	228 (35.5%)		
	Unrepresented litigants	6	104	6 (8.6%)	86 (13.4%)		
Power triad	Cultural barriers	10	75	6 (8.6%)	31 (4.8%)	112 (24.1%)	1579 (20.5%)
	Institutional barriers	8	158	8 (11.4%)	101 (15.7%)		
	Symbolic barriers	23	191	7 (10%)	96 (15%)		
	Excluded actors	39	759	20 (28.6%)	254 (38.2%)		
	Gate-keeper	32	396	16 (22.9%)	173 (26.9%)		
Total		464	7690			464 (100%)	7690 (100%)

Figure 1 “Two-dimensional map of coding co-occurrences, multi-dimensional scaling (N=642, automated coding)”



Stress 0.25, R²=0.69

Figure 2 “Relative frequency of the code ‘Excluded actors’ by publication format, % of Total codes (N=642, automated coding)”



Notes

¹ Judging by prison population rates (International Centre for Prison Studies 2013), the countries with the most repressive judiciaries include the United States (716 at the end of 2011), Cuba (510), the Russian Federation (484), Belarus (438) and El Salvador (425).

² “Jailhouse lawyers” are prison inmates with some knowledge of law who give legal advice and assistance to their fellow inmates. Sometimes this term is used more broadly. It then describes any jurist who provides legal advice to a client without signing a formal contract and being acknowledged as a “lawyer on the record” by the court.

³ For instance, there are no restrictions as to who may represent a litigant in Russia, as per Sections 25.3 and 25.5 of the Administrative Code of the Russian Federation.

⁴ A wrong color of the cover or incorrect line spacing may lead to a rejection of a court document containing otherwise valid arguments. This holds true even if departures from a prescribed format are minor (e.g., 1.8 line spacing as opposed to double line spacing).

⁵ An empirical finding that “it is the type of problem not the characteristics of the person having the problem [including the level of income] that is the major predictor of lawyer seeking” (Kritzer 2008, 877) confirms the importance of knowing particular procedural requirements, arguments. The more sophisticated the procedures set for a particular type of legal case is, the more chances there are that the litigant will seek legal advice, regardless of the amount of resources at the litigant’s disposal.

⁶ Critical sociologists describe the formation of rational interests in detail by considering the example of the housing market. They, namely, assert that “the housing market is... *truly constructed by the state*, particularly through the financial assistance” (Bourdieu 2005, 89).

⁷ US President George W. Bush echoes this line of thought stating in his 2004 State of the Union address that “our agenda for jobs and growth must help small-business owners and employees with relief from needless Federal regulation and *protect them from junk and frivolous lawsuits*” (emphasis added).

⁸ Socioeconomics has a similar ambition to study the interplay of two motives in human behavior, utility maximization and moral imperatives. “Where the neoclassical assumption is that people seek to maximize one utility, we assume that people pursue at least two irreducible ‘utilities’, and have two sources of valuation: pleasure and morality” (Etzioni 1988, 4).

⁹ The arguments below refer to the Common Law system, yet they can also be adapted to the particularities of Civil Law.

¹⁰ The case of Canada is particularly interesting. This country has two legal traditions, Common Law and Civil Law (in the province of Québec). Legal processes deriving from Common Law may be perceived as alien and imposed from above by supporters of the project for Québec sovereignty. For instance, the Front de Liberation du Québec Manifesto popular in the second half of the 1960s (especially at the beginning of the October 1970 crisis) labeled the judges as “rotten” and associated them with “the Anglo-Saxons of the Commonwealth” (the Manifesto was aired by CBC/Radio-Canada on October 8, 1970).

¹¹ De Soto (2005) uses the term “extralegal” to describe actors and practices that remain outside the justice system.

¹² These alternatives correspond to Type I and Type II errors in statistical analysis (Neuman 2006, 373).

¹³ The “first” Coase theorem depicts such a world. It states that if transaction costs are nil, the initial distribution of property rights does not affect the value of production (Ménard 2005, 46-47). In practical terms this means that the parties are able to exchange property rights without a court’s intervention: the party who values a property right the most will get it sooner or later. This party will buy out the right from the other party who possessed it at the initial stage.

¹⁴ The information asymmetry increases, paradoxically, if state representatives are a party in a dispute. State representatives have an “innate instinct for secrecy” (Spencer, Spencer 2010): they tend to provide the court with as little information as possible.

¹⁵ As of June 2013, the *Web of Knowledge*, the most comprehensive database of scholarly publications covering the period since the start of the 19th century, lists 34 sources only on the topic of judges’ motivation (Topic=(judge* motivation), Categories=(Law OR Criminology Penology)).

¹⁶ Neoclassical economists assume that the judge maximizes utility like any other actor. For instance, the judge presumably has an interest in rendering impartial judgments because the reputation of impartiality helps increase the number of “clients” (litigants who choose this particular judge) in the future and, consequently, the judge’s income (Milgrom, North & Weingast 1990).

¹⁷ Economists tend to consider law as instrumental. Neoclassical economists see law as an instrument for achieving an optimal allocation of resources, namely in conditions of non-zero transaction costs. The “second” Coase theorem states that, when transaction costs are positive, the initial distribution of property rights counts and the court shall intervene by allocating resources to those who value them the most (Ménard 2005, 47). Institutional economists consider law as a tool for social change. “The law tends to be instrumental for the institutionalists, while for Proudhon, the law is based on morals and is an expression of justice” (Solari 2012, 237).

¹⁸ A comparative analysis of the system of criminal justice shows that human rights tend to be protected if the accused are provided only with legal counsel. “The case of the correlation between the right to counsel and a country’s human rights practices is fairly robust, if not particularly strong” (Baumgartner 2011, 486).

¹⁹ The search was conducted on March 26, 2013 using the *Lexis-Nexis* database.

²⁰ Most publications, 68.1%, are articles, 15.4% are editorials or Op-Ed commentaries, 8.4% are letters to the editor and 8.4% are other types (announcement, book or movie review etc.)

²¹ “Described as focused on ‘efficiency and effectiveness rather than (on) equality and ideals’, the New Labour model has been presented as a modernized social democratic version of access to justice as access to legal services, which will be more effective in countering social exclusion” (Sommerlad 2004, 362).

²² As noted before, the code “Financial barriers” can be added to this list.

²³ A letter to the editor published in the *Times* in 1997.

²⁴ The two-dimensional map of coding co-occurrences was produced using the techniques of multi-dimensional scaling. This shows the relative frequency (measured by Cosine theta) of the codes co-occurring in the same paragraph. The

larger the circle, the more often a particular code occurs. The closer the circles, the more often the corresponding codes co-occur in the same paragraph. The stress (distortion in the process of data reduction) is close to an acceptable level: stress of .15 or lower refers to the highest standard (Bernard 2013, 413).

²⁵ In Figure 1, they are visualized by lines connecting particular codes.

²⁶ The observed frequency of a sequence (for instance, Code A followed by Code B) was compared with its expected frequency. After converting the difference into a Z-value, one is able to calculate the probability of obtaining this particular sequence.

²⁷ The relative frequency of the codes was cross-tabulated with the country of publication and the format of publication. Values of Student's F and their level of statistical significance informed the decision as to whether the observed differences can be deemed statistically significant.

²⁸ Fifty-seven mentions of "homicide rate" and 284 mentions of "murder rate" (this expression is more common in British English, apparently).

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