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Public Interest and Access to Justice: A Liminal Analysis²

1. Introduction

Everyone will agree that access to justice is a good thing. Being able to resolve a legal dispute in court or to obtain legal assistance improves the situation of members of the public. It is also a value on which the legal system is premised. What is law for if in practice it cannot be used?

It could seem that there is no contradiction between the pursuit of the broadest possible access to justice and the public interest. After all, it is in the interest of the whole community if individuals are able to use the law for legitimate purposes. The benefits this brings are not only private but also public.

But is this really true? This article considers the possible areas of conflict between the public interest and access to justice. It argues that there exists a trade-off between access to justice and the public interest, such that under some conditions access to justice policies may turn against the public interest rather than support it. This is due to the fact that there exists a fundamental contradiction between the modes of thinking on which these concepts are based, which in turn is rooted in how the legal system evolved in modernity. This sets the limits of access to justice policies if the public interest is not to be harmed.

In this paper, the relations between access to justice and the public interest are analysed using three methodological perspectives. First, the paper reviews some arguments raised for access to justice in legal and academic discourse, and selected mechanisms for improving it proposed therein. While doing this, it reconstructs the common theoretical arguments linking access to justice to the public interest. Then, it records the contradictions between them along with the consequences of attempts to simultaneously give effect to the principles they serve. Second, it illustrates each of the conceptually established problems with empirical evidence. In doing so, it refers to studies on access to justice in small and medium enterprises, conducted by this author and Karol Muszyński in 2018 and 2019. Third, it offers a theoretical interpretation of the findings

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using the conceptual tools of a contemporary sociological theory, the purpose being to explicate the root causes for observed contradictions and suggest a way forward.

2. Some conceptual remarks

Access to justice is not a clearly defined concept. However, following the efforts of Florence Access to Justice Project carried out in the 1970s, and many subsequent empirical works, there exists a consensus that access to justice extends beyond access to justice institutions, such as courts, bailiffs, public administration, and the police. The possibilities of accessing justice citizens have thus depend on the totality of actual social conditions, including but not limited to a combination of black-letter law, available legal institutions and legal practice as well as citizens' legal capacity and distribution of power and material resources. By the same token, initiatives to improve citizens' access to justice must be holistic, i.e. take into account as many factors conducive to the desired effect as possible, not just a select few.

This notwithstanding, no overarching perspective exists that would bring together all aspects of access to justice. In literature, particular approaches prevail, which use the term to refer to narrow areas of legal practice and their perceived deficits. This is hardly surprising, because any attempt to enumerate institutional designs and actual circumstances that help people use law or make it difficult is doomed to fail. A way around would be to use an abstract, agreed-upon definition, but none is available.

Similarly, public policies are often conducted as if in the belief that the various initiatives to improve access to justice simply add up, regardless of the possible conceptual differences. Based on literature, several approaches can be distinguished arguing that access to justice is desirable. They are expressed both explicitly and implicitly, but they still relate to specific aspects of this issue rather than to the whole of it. In practice, they are also undertaken without any coordination, leading to a plethora of specific mechanisms to improve access.

Not claiming completeness, this article takes into account six such approaches:

- 1) Access to legal text allows the public to adapt their behaviours to legal norms. It is better for the community if the addressees know the law than if it is unknown and unclear, rendering the proscriptions impossible to follow.
- 2) Access to court allows conflicts and disputes to be resolved. For the community it is better if disputes between individuals are resolved than if they persist and if their resolution is uncertain.
- 3) Defining access to justice as a human right allows for establishing a mechanism of self-regulation of the legal system. It is better for the community if the law itself eliminates norms and legal institutions which impede access to justice than if they linger.
- 4) Access to legal staff allows people to make better use of law. For the community it is better when individuals proactively use the law than when they cannot use it to solve their legal and life problems.
- 5) Access to justice system is access to actual justice, not just formal justice institutions. The law is a social institution thanks to which people can live their lives closer to the ideals of attributive and distributive justice. Thus access to justice system helps achieve actual justice. As a result, relations in the community become fairer, and a fair world is better than an unfair one.

- 6) Access to justice initiatives may contribute to achieving many goals beyond just improving access to justice. They may serve as instruments to improve the economy, because they provide real guarantees of property rights and social rights. It is better for the community if all people can make proper use of the society's resources and participate in economic exchange thanks to improved access to justice.

The common feature of these arguments is that they do not refer to the private good but stress the collective gains. It is not just that access to justice allows individuals to improve their individual existence and pursue private interests. Rather, the situation improves for the whole community in perfect harmony with the public interest.

The plurality of concepts and conceptual and practical inconsistencies are likely to be a result of the long development of the process of reflection on access to justice and the fact that the field has undergone significant transformation in the last few decades. The appeal to the collective good to justify programs to improve access to justice is a focal new development³, which coincided with the great expansion of access to justice programmes since 1970s. The traditional, limited approach to the issue, rooted in the medieval provision of legal assistance *pro deo*⁴ and culminating in the “poor privilege” of the modern industrial era, justified enhancing access to justice by a moral obligation of caring for others. In the Christian version, this is an indirect implementation of the obligatory alms-giving, based on individualistic and metaphysical premises.

The contemporary perspective breaks away from this outlook. Whilst it treats access to justice as an individual entitlement, it stresses the fact that it indirectly serves the whole community. This perspective is therefore rationalist and collectivist. This is also where the fundamental connection between the general idea of access to justice and the concept of public interest becomes apparent. It translates into the dilemma: either the broad schemes are justified by potential collective gains, or they must be cut down to the skimpy poor law schemes justifiable by the preservation of individual well-being only.

Another crucial matter is how the concept of public interest should be understood. Like access to justice, the term has no clear definition in law. In the texts of normative acts, it usually serves as a general clause, aimed at making the application of law more flexible. This prevents, “for the sake of public interest” such exercise of individual rights that would negatively affect the collective interests and rights of others. Consequently, public interest is established *casu ad casum*, depending on the changing circumstances of the case and only provisionally defined in legal dogmatics.

While I accept that this practice may be right, my approach is more conceptual. My understanding of public interest takes its cues from regulation theory and public choice theory. Many controversies notwithstanding, it rests on an observation that individual strategies of pursuing interests regulated only by the “invisible hand of the market” may lead to market failures. In such situations, the pursuit of private interests leads to negative externalities that should be addressed in the name of public interest⁵.

³ M. Cappelletti, *The Emergence of a modern theme*, in: J. Gordley, E. Johnson, M. Cappelletti (eds.), *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*, Milano 1975, pp 3–75.

⁴ N. Huls, *From Pro Deo Practice to a Subsidized Welfare State Provision: Twenty-Five Years of Providing Legal Services to the Poor in the Netherlands*, “Maryland Journal of Contemporary Legal Issues” 1994/5, p. 333.

⁵ For discussion see: M. Hantke-Domas, *The Public Interest Theory of Regulation: Non-existence or Misinterpretation?*, “European Journal of Law and Economics” 1994/2, pp. 165–194.

Air pollution is a classic example. The consumption of goods and services is beneficial for producers and consumers, and the optimal price is determined by a market mechanism. However, the price setting process does not include the cost borne by the whole society and the environment. Thus, an environmentally-neutral business must internalize the cost of neutralizing the negative externalities it produces. This is only possible if an external regulator affects the market, e.g. by introducing taxes and bans on certain types of activity.

Since, thus understood, public interest refers to the public good, it is indivisible and non-transferable. It cannot be reduced to the sum of the interests of individuals (i.e. providing everyone with their own air) or compensated by introducing inequalities in access (i.e. banning some people from breathing). Therefore, protecting it not only requires regulating individual, detached activities but everyone's behaviour.

Based on a superficial analogy, one could come to the conclusion that providing access to justice consists in eliminating failures of the legal process. If legal texts are unavailable – because they are incomprehensible and complicated so that they can conceptually and structurally correspond to the reality – they should be simplified and clarified to the extent possible. If litigation requires skills and resources – because the court must rely on complex procedures – the process should be made more accessible by introducing simplified rules and reducing costs in some matters. If legal services are too expensive – because they require expert knowledge and an individual approach to the case – the public should subsidize legal staff, providing public legal aid.

The problem is that this is not as simple as it appears. Any attempt at improving access to justice, perceived as a public good, has side effects, which create further external effects that must be removed, etc. As a result, accessibility of justice must be balanced against the public interest.

In what follows, the claim that there exists a contradiction between access to justice and the public interest is substantiated. Some pitfalls of access to justice in specific access enhancement policies are discussed.

3. Public interest as a restriction of access to the legal text

The idea that texts of legal acts must be accessible is deeply rooted in European legal culture. It is discussed in cultural pieces dating back to ancient times and has been a target of many lawmaking reforms. Since the beginning of modernity, it has been particularly strong, belonging to the adages of the codification movement. As it is widely recognized, the postulate is that a clear and concise legal text better allows the addressees of the law to “enjoy their freedom”⁶. To do so it must be understandable – expressed in a familiar language, thoughtfully and systematically drafted and published in an accessible form.

Difficulties are also well recognized. Already the nineteenth-century critics of codification projects observed that codification of law could not reflect the complexity of society. They found customary law more suitable for meeting this objective⁷.

⁶ As Józef Wybicki, a 18th century Polish protagonist of codification of law put it. See: K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność* [Eng. *Grand Civil Law Codifications. The History and Present*], Warszawa 2009, p. 50.

⁷ F.C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [Eng. *On the Vocation of Our Time for Legislation and Jurisprudence*], Heidelberg 1814, p. 45ff.

In a newer version, the same thought is expressed by authors of pluralistic theories of law. They stress that the perception that centralized legislation may produce just and effective law is flawed⁸. The law is pluralistic anyway due to the multiplicity of customary norms and the complexity of the matter under regulation.

This is also related to another essential problem. The clash would be inevitable even if the postulates of systematic legislation and rationality of legislative bodies could come true. For centralized legislative mechanisms to meet the needs of citizens, a pluralistic representation of individual interests must be possible. It is clear, however, that a “point-to-point” reflection of the convictions and needs of all citizens in legislative collective bodies is impossible.

Yet another problem is the limited ability of such institutions to self-restrict in order to protect the minorities’ rights. This rather must be enforced by political institutions. Thus, even if the medium of law were in itself completely neutral, the political mechanisms would prevent the multiplicity of interests and needs of the society from being fairly reflected.

This creates a contradiction which is relevant for the relationships between access to justice and the public interest. The more order is superimposed on law, the more complicated it becomes, both semantically and structurally. This is because the conceptual apparatus that is used for such purpose must reflect the complexity of the matter regulated. At the same time, the need to strictly control this process deprives its addressees of influence.

This means that attempts to make law more accessible based on the rigour of codification are rather a source of confusion for users and addressees, than they enable direct understanding of the sense of regulation. Systematic law only becomes more understandable to a *skilled* user, at the expense of those who are less competent.

This even applies to such goodly-hearted initiatives as plain language campaigns, aiming at making legal texts clearer⁹. Such initiatives were accused of promoting the use of only one idiolect out of many. In so doing, they counter-factually assume that language is a unified, coherent entity where an expression clear to some is clear to everyone¹⁰.

Similar observations have been made in relation to attempts to expand public consultations in legislation¹¹. Although such initiatives do allow the interested parties to comment on the planned legal acts, they are not impartial. They open the possibility mainly to those who have sufficient technical competence to participate and are able to influence the agenda. Interests and views expressed by others, even if they are experts in the field, are less likely to be included.

As a result, the public interest, manifested in the need to determine the contents of law in a systematic and predictable way, conflicts with total accessibility of law. At its best, systematization causes a change in existing differences in access by facilitating it for some groups, but not all. The same applies to attempts at removing linguistic and representation anomalies in the codification paradigm.

⁸ J. Griffiths, *What is Legal Pluralism?*, “Journal of Legal Pluralism and Unofficial Law” 1986/1, pp. 2–55.

⁹ J. Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law*, Durham 2012.

¹⁰ S. Turfler, *Language Ideology and the Plain-Language Movement: How Straight-Talkers Sell Linguistic Myths*, “Legal Communications and Rhetoric: JALWD” 2015/12, p. 195.

¹¹ A. Bora, *Technoscientific Normativity and the “Iron Cage” of Law*, “Science, Technology, & Human Values” 2010/1, pp. 3–28.

A fresh empirical illustration to these issues is provided by empirical research on access to law among small and medium-sized enterprises (SMEs) in Poland¹². With the help of paradigmatic empirical tools, the study measured the incidence of legal problems and the various ways of addressing them¹³. It also qualitatively inquired into the experience of business owners with access to justice and their views on this.

The research was carried out shortly after the entry into force of the General Data Protection Regulation (GDPR)¹⁴. It forced entrepreneurs to introduce far-reaching changes in the practice of personal data management. This included launching new operating procedures, establishing new privacy regulations and even changing office equipment. Whilst it is hard to deny that the protection of personal data is justified and intuitive, the regulation itself is particularly complicated, and, despite its wording, it is quite general.

The matter under regulation is extremely complex, too. In business there exists an infinite multitude of factual situations related to personal data management. This situation incentivized respondents to use various sources of information on compliance requirements and adapt diverse strategies. The actions taken varied depending on the resources, the size of the company, the market and industry in which it operates, the business model, forms of customer relations, etc.

Whilst all entrepreneurs complained about the need to introduce changes, some realized that even if they do not comply, the risk of sanctions was small. For others, the danger was much higher, prompting a search for safe solutions. In such cases the possibility and scope of adaptation depended on the ability to mobilize material resources, assess risks, take the time and devote attention to understand the legal obligations, and, finally, manage the process of implementing changes.

Doing this was difficult especially for the smallest companies serving private clients in industries requiring data processing. In corporations, GDPR rules and guidelines were swiftly included in decision-making processes. Here, competence problems related to identifying business threats were easily overcome with the company's own resources and with the help of outsourcing. Similarly, in the case of organizations operating under wider networks (e.g. franchises), even small ones, the support from the network made compliance easier, rendering a competitive advantage.

Thus, the GDPR split business owners into several groups. For some, it imposed unmanageable burdens. For others, it became a managerial resource allowing for better shaping of the company's practices. In this way, it contributed to improving internal processes rather than imposing a limitation. For others yet, it made little difference. This happened despite the fact that technically the regulation was equally accessible to all.

¹² J. Winczorek, K. Muszyński, *Access to justice in small and medium-sized enterprises in Poland. An empirical report*, Warsaw 2019, http://ddp.wpia.uw.edu.pl/DDP_report_EN.pdf, accessed on: 22 June 2020.

¹³ The study consisted of a quantitative element and a qualitative one. In the former, 7,292 questionnaire interviews were carried out with managers and owners of SMEs in the web environment (CAWI). The study followed the paradigmatic methodology of paths to justice. The questionnaire was carefully scripted to ask the respondents about their business problems. Those who reported problems were further questioned about their nature, so as to filter out justiciable problems (issues that could have been resolved by legal means). Next, a series of questions was asked to figure out what steps (if any) had been taken by the respondents to address these issues, allowing for a statistical analysis of the types of problems encountered by Polish SMEs and reactions to them. The qualitative part comprised 101 in-depth interviews with owners and managers of SMEs. It inquired about their perceptions of justiciable problems and the barriers to resolving them.

¹⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJEU L 119, 4.05.2016, p. 1.

4. Public interest and court guarantees of access to justice

A similar difficulty emerges in the second avenue of improving access to the justice – changing access to court. It may be associated with the rationalization and proceduralization of judicial decision-making that occurred in modernity. As Max Weber made clear, modern law is characterized by the rationality of both the matter of law and the legal process, including dispute resolution¹⁵.

Regardless of the issue at hand, the course of rational court proceedings must be predictable and subject to algorithmic description. Spontaneous interaction between the audience and the court, in the course of which the latter obtains legitimacy by demonstrating its understanding of the popular sense of justice, becomes impossible. Any such contact must be mediated by codified forms.

As in the case of legislative systematization of substantive law, also increasing the regularity of court procedures correlates with a growth of complexity. The conceptual framework of procedural law is extensive and convoluted. In practice, it is also subject to changes related to the varying material requirements of court proceedings, culture and methodology of adjudication, as well as trends in case law.

For people not having the necessary competence and experience, this hinders rather than facilitates access to justice. The complexity of courts as a social institution means that to be able to use them effectively one must have the minimum of necessary resources. These include knowledge, experience, the ability to manage one's own situation and organize one's activities in the manner required.

Like other resources in society, such assets are not evenly distributed. As Marc Galanter famously notes¹⁶, litigants can be classified as repeat players, who regularly appear in courts and are able to successfully adapt to requirements of court proceedings, and one-shotters, who lack the experience to do so. The actual chances of getting through with one's argument obviously depend on the above¹⁷.

Problems this creates are well known and they are reflected in remedial actions. Procedures may be simplified in various ways by creating special proceedings, providing alternative solutions and reducing court fees. For example, the Polish civil procedure has simplified proceedings for low-value claims, a writ of payment procedure, allowing for the recovery of uncontested or proven claims, and supports mediation and amicable settlements.

However, none of this allows for a complete elimination of resource-consuming barriers. Sometimes simplifications amplify the inequalities. This is the case with writ of payment procedures, which largely enable late payments to be enforced by the strongest players on the market – corporate repeat players, not by entities that have small amounts and irregular claims.

Meanwhile, empirical research shows that using the court to resolve legal problems is an exception, not a rule. Financial issues are a good example of this. These are the most common problems among SMEs, but even in their case some two-thirds of issues are not addressed using a lawyer, and just 25% is taken to court¹⁸.

¹⁵ M. Weber, *Wirtschaft und Gesellschaft* [Eng. *Economy and Society*], Tübingen 1922, p. 503ff.

¹⁶ M. Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, "Law & Society Review" 1974/1, pp. 95–160.

¹⁷ H. Kritzer, M. Herbert, S.S. Silbey (eds.), *In Litigation: Do the Haves Still Come out Ahead?*, Stanford 2003.

¹⁸ J. Winczorek, K. Muszyński, *Access...*

Qualitative research sheds a light on this. Entrepreneurs are well aware of the fact that enforcement of claims by way of court proceedings is time-consuming and costly. They recognize that the costs of the proceedings and the costs of representation may be higher than the amount they may recover.

They also know that payment arrears affecting them are very often the result of delays elsewhere in the sector. Some of them react to these barriers by learned helplessness, combined with futile attempts to pursue claims using informal and private methods. Others, in cold blood, calculate the profitability of pursuing claims and decide, as a rule, not to respond to arrears, because they know that such reactions are often more expensive in terms of labour and time than obtainable profits.

A naive person, trusting the exalted language of constitutions and human rights acts could expect that the right to a fair trial pronounced in such documents is strictly implemented. A sober glance at the reality of court systems, however, shows that abolition of all restrictions preventing disputes from reaching the court is unrealistic. Removing them creates the danger that courts will become completely clogged, and a multitude of latent barriers prevent this from happening.

Solid empirical evidence indicates that this reaches beyond blocking access to court for spurious litigation¹⁹. Also the Polish study shows that cases of the interviewed entrepreneurs are important both to them and the economy. However, the number of such cases by far exceeds the capacity of the judicial system.

This makes it clear that access to court must be restricted, even if by latent and unintentional processes. By the same token, public interest demands that optimal balance is struck between the scope of access to court, the duration of proceedings and the costs that the society must cover.

A similar problem troubles human rights courts. According to their case law, access to justice must be viewed as one of the supreme principles of the legal order. All other standards must comply with it and it must be realistically implemented by local institutions. If a violation of this principle is demonstrated, the contravening norms are eliminated from the legal order by judicial decisions. Also a change in how institutions operate must occur²⁰.

In this way, access to justice defined as a human right becomes a regulatory idea of the legal system. By using it, the legal system may work itself clean, which serves both the private and the collective interest. The latter is supported by the fact that similar cases will not be brought to court in the future. This results in improved options for using law among general population²¹.

The problem is, however, that human rights proceedings are as inaccessible as ordinary courts. They, too, require time, competence and money, and for this reason they are slow and selective. A known paradox relating to the European Court of Human Rights is that while it rightly condemns the procedural delays in national courts, it suffers from the same malaise²².

¹⁹ P. Pleasence, N.J. Balmer, R.L. Sandefur, *Apples and Oranges: An International Comparison of the Public's Experience of Justiciable Problems and the Methodological Issues Affecting Comparative Study*, "Journal of Empirical Legal Studies" 2016/1, pp. 50–93.

²⁰ An obvious illustration of this mechanism is the jurisprudence of European Court of Human Rights (ECtHR) relating to Articles 6 and 13 of the European Convention on Human Rights. The judgments it passed are too many to enumerate here, but it is worth noting that in ECtHR's case law the concept of access to court in Article 6(1) was gradually expanded until the necessity of providing effective measures to safeguard it was stressed.

²¹ C. Harlow, *Access to justice as a human right: the European convention and the EU*, in: P. Alston (ed.), *The EU and human rights*, Oxford 1999, pp. 187–213.

²² L. Glas, *Translating the Convention's Fairness Standards to the European Court of Human Right: An Exploration with a Case Study on Legal Aid and the Right to a Reasoned Judgment*, "European Journal of Legal Studies" 2017/10, p. 47.

Thus, the complexity of proceedings before human rights courts has the same latent function as the complexity of ordinary litigation. Paradoxically, difficulties in access to such courts are a condition of their availability. This allows for the concentration of limited resources of the justice system on the resolution of some cases rather than all that could theoretically and formally be reviewed. Just like codified law, limitations in access to courts result in providing the chances of using law – but selectively, supporting just some of the interested parties.

5. Public interest and access to justice as a service

These problems with access cannot be resolved by increasing access to legal services. This is not only because private institutions are not always able to replace public ones, but also because multiple public interest issues emerge in connection with this.

In theory, using the help of a lawyer increases the chances of effective access to justice, because it mitigates competence barriers. The client may communicate with his or her patron informally and at his/her convenience. A lawyer then acts as a translator between law and the layman²³, making the requirements for participation in the legal process less stringent.

This suggests that it would be in the public interest to maximize access to legal services so that they are affordable and locally available. The simplest strategy of so doing may be privatization, through which the distribution of legal services is entrusted to the invisible hand of the market.

However, this amplifies economic barriers. As long as legal services are purchased for a fee, access to them varies depending on the users' income. It is not only that (large numbers) persons for whom the prices of the cheapest services are still too high are deprived of help. Price differentiation is equally important. Even if legal aid is available to everyone, high-quality services remain expensive, which means that less affluent persons are forced to use help of inferior quality.

Neither does the availability of legal services eliminate all competence barriers. In order to be represented or to receive advice, one must have some competence. This affects people in the worst position in society, for example persons with disabilities, members of ethnic minorities, and immigrants²⁴. They may avoid using legal services for fear of ridicule, due to the inability to navigate in a formal environment, and because of insufficient awareness that this is necessary.

Again, an example of the differences in the use of legal services is provided by empirical research on SMEs²⁵. A sharp contrast was observed between the smallest and the largest entrepreneurs. The latter were able to “technologize” legal services. They embedded them in their production chains, predicting that a set fraction of the company's operations will require legal support. The former could only routinize the fact that they were not able to effectively mobilize legal assistance. They tried to compensate for this by using business models that did not require the use of legal services.

²³ T. Parsons, *A Sociologist Looks at the Legal Profession*, in: *Essays in Sociological Theory*, London 1964, pp. 370–385.

²⁴ A. Kubal, *Immigration and Refugee Law in Russia. Socio-Legal Perspectives*, Cambridge 2019; L.J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, “Law & Society Review” 2011/2, pp. 337–371; S. Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, “ILSA Journal of International & Comparative Law” 2010/2, pp. 281–320.

²⁵ J. Winczorek, K. Muszyński, *Access...*

These differences concerned entrepreneurs, i.e. persons who in statistical terms are more organized, more educated and more aware of the need to use the law than non-entrepreneurs. It is therefore unsurprising that similar barriers affect the latter to an even greater extent²⁶.

For these reasons, policies for access to justice comprise attempts to eliminate market failures in the legal services market. This includes regulation and subsidizing of counselling, representation or mediation, the use of financial and insurance mechanisms, regulation of *pro bono* and paralegals, etc. For brevity, just the simplest examples are mentioned here.

The effectiveness of funding programs can be evaluated based on both positive and negative examples. The former concern the introduction of new mechanisms for financing services, the latter – situations in which such programs are liquidated or restricted.

An illustrative example is provided by a minute amendment to the Polish Mental Health Protection Act²⁷ under which decisions on compulsory treatment must be taken by a court in the presence of a representative of the person concerned. In the absence of a representative by choice, one is appointed *ex officio*. Since the amendment, the number of persons represented *ex officio* in all family law cases has more than doubled²⁸. In view of the characteristics of cases (urgent) and clients (unlikely to be well-organized) this proves that before the amendment in most such cases there was no representation at all.

A converse phenomenon occurred as a result of a reform of legal aid in England and Wales. It significantly reduced the availability of free representation, previously very broad. Within a few years, this caused a sharp increase in the number of unrepresented persons in courts and negative effects on laypersons' ability to resolve disputes²⁹. The change was introduced under the slogan of privatizing the costs of court cases, i.e. transferring them to parties that are engaged in a dispute³⁰. However, it caused social costs resulting from increased legal uncertainty and law's decreased ability to affect social and economic relations³¹.

Subsidizing legal services for people who cannot use them is thus necessary. On its face, this is also perfectly consistent with the public interest. Persons who cannot be represented or advised may not successfully reach justice, which makes everyone worse off. Incompetently pursuing it anyway, they also generate costs in the justice system.

Still, legal aid causes problems. It normalizes the bottom run of legal services. Inevitably, working for clients who are unable to pay the lawyer's costs is less attractive and prestigious than working for clients who can. As a result, providing the same quality of service as in the general market may be difficult.

²⁶ See extensively: J. Winczorek, *Dostęp do prawa. Ujęcie socjologiczne* [Eng. *Access to Law. A Sociological Approach*], Warszawa 2019.

²⁷ Polish title: Ustawa z 19.08.1994 r. o ochronie zdrowia psychicznego (tekst jedn.: Dz. U. z 2020 r. poz. 685).

²⁸ A response by Polish Ministry of Justice to public information request by Adriana Bartnik (document No.: BK-I.82.53.2020), Warsaw 21.02.2020 (on file with the author).

²⁹ C. Bevan, *Self-Represented Litigants: The Overlooked and Unintended Consequence of Legal Aid Reform*, "Journal of Social Welfare and Family Law" 2013/1, pp. 43–54; S. Wong, R. Cain, *The Impact of Cuts in Legal Aid Funding of Private Family Law Cases*, "Journal of Social Welfare and Family Law" 2019/1, pp. 1–12.

³⁰ H. Genn, *What Is Civil Justice For? Reform, ADR and Access to Justice*, "Yale Journal of Law and the Humanities" 2019/1, pp. 397–417.

³¹ K. Richardson, A. Speed, *Restrictions on Legal Aid in Family Law Cases in England and Wales: Creating a Necessary Barrier to Public Funding or Simply Increasing the Burden on the Family Court*, "Journal of Social Welfare and Family Law" 2019/2, pp. 135–152; S. Kirwan, *Law and the 'Stbx': Online Fora and the 'Delegalized Space' of Family Law*, "Oñati Socio-Legal Series" 2017/7, pp. 1421–1444.

Furthermore, in subsidized legal services, links between supply and demand are unclear and troublesome³². If they are to maximize access to justice, free legal services should be as informal as possible. However, this usually presupposes that the decision to deliver the services in individual cases depends on the actions of those who benefit from it. Due to an imbalance in competence between the client and the lawyer, a possibility emerges for the latter to “create the need” for his or her own service. If this happens, and if financing is external, the usual reasonable limits to demand are lifted and costs skyrocket.

Although it cannot be assumed that, as a rule, the legal aid process is unreliable, it does create an incentive for unethical actions. In countries where decisions to provide advice have been effectively left to lawyers themselves, the number of cases handled keeps increasing, and so do the costs³³. This applies especially to representation, which in the experience of free legal aid systems is particularly costly.

Negative social effects of incentives to provide legal services to people who otherwise cannot use them are visible also in the macro dimension. In some countries, a correlation was observed between free legal aid initiatives and crises in the legal services market³⁴. If the industry’s profitability decreases, professionals lobby to increase subsidies for free assistance. In recent years, a similar correlation could be observed also in Poland, where the establishment of the system of free out-of-court legal assistance coincided with an increasing number of young lawyers in the market.

Subsidizing legal services may thus become a self-propelling mechanism of demand generation. The need for equalizing the possibility to use law may serve as an opportunity to maximize private gains. Ironically, the transaction between the client and service provider, which was to eliminate externalities resulting from market failures, produces an external effect of its own.

Thus, maximizing the possibility of using law by providing unlimited free legal service must at some point conflict with the public interest because it will incentivize ‘easy riding’. This substantiates the conclusion that the process must be strictly controlled through public policy. The same holds also for other methods of facilitating access to legal services than subsidies. If lax standards of control are implemented, the policy affects the public interest because it exposes the community to the costs of aid exceeding the profits it may provide to the community.

6. Public interest and instrumental approaches to access to justice

A generalized view of the reasons for inaccessibility of law is provided by the fifth perspective listed, originating in the monumental Florence Project on Access to Justice. Writers such as Mauro Cappelletti and Bryant Garth were in pains to stress the fact that the ability of citizens to use law ultimately depends on the distribution of other

³² H.M. Kritzer, *Lawyer Fees and Lawyer Behaviour in Litigation: What Does the Empirical Literature Really Say*, “Texas Law Review” 2001/80, pp. 1943; C. Tata, *In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and ‘Ethical Indeterminacy’ in Criminal Defence Work*, “Journal of Law and Society” 2007/4, p. 489.

³³ C. Tata, *In the Interests...*, p. 489; R. Moorhead, E. Cape, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work A Report to the Legal Services Commission*, London 2005; B. Gwyn, *Has There Been Supplier-Induced-Demand for Legal Aid*, “Civil Justice Quarterly” 1996/15, pp. 98–114.

³⁴ Z. Bankowski, G. Mungham, *Images of Law*, London 1976; D. Nelken, A.A. Paterson, *The Evolution of Legal Services in Britain: Pragmatic Welfarism or Demand Creation*, “Windsor Yearbook of Access to Justice” 1984/4, p. 98.

basic goods in society³⁵. These include material resources, access to knowledge and social networks, etc.

By the same token, improvement of access to justice is only possible when access to such other resources improves. If non-legal inequalities persist, barriers to access to law reflect that. As a consequence, they affect different categories of citizens unevenly, even if the difficulties created by the legal system are in themselves identical for all. The barriers also reproduce, contributing to further inequality in law and elsewhere.

This is why “justice” is the key concept in access to justice post-Florence Project. The term refers not only to the justice system, but quite simply to the fact that access to justice is distributive justice³⁶. Equal opportunity to fairly resolve legal problems requires that people have fair access to other goods.

In such a holistic approach, the links between access to justice and the public interest get more complex because social inequalities become the intervening factor. The struggle to make the law more accessible depends not only on its contents and the way its institutions work, but also on all possible social factors.

This translates into practical solutions. A public policy for access to justice must be integrated, that is, use a variety of tools to address as many correlated and non-legal barriers of access to justice as possible. Competence barriers should be addressed by means of public legal education, information about law should be made available in ways suited to some people’s limited abilities to process information, legal assistance should be available immediately in places where such need arises (i.e. prisons, detention centres, banks, public administration offices). Apart from that, multiple forms of legal aid should be used, a plurality of formal ways of redress should be established, etc.

A methodologically similar observation is made in the works emphasizing the extra-legal collective effects of law being used by individuals. Just as the holistic approach, these perspectives may be called “instrumental”, because they advocate using access to justice policies as tools for achieving further objectives. For instance, legal empowerment of the poor, an international movement for inclusion through law, recognizes that improving access to justice may help eradicate economic inequalities³⁷. If the poor have at their disposal legal guarantees of property rights and other rights, such that allow them to effectively seek redress in situations of conflict or exploitation, they do better economically. As a result, the economy as a whole becomes more efficient.

Another example is provided by narrower initiatives for medical-legal partnerships, which attempt to make lawyers and doctors provide services jointly³⁸. They highlight the relationship between access to law and health. In some areas, this relationship is clearly causal: difficulties in using law affect the health of persons concerned and their families. An oft-cited example concerns housing problems. The inability of tenants to effectively demand from the owners that the premises are maintained up to proper technical and hygienic standards has negative impact on their health, including conditions like asthma

³⁵ M. Cappelletti, B. Garth, *Access to Justice: A World Survey*, Milano 1978; B. Hubeau, *The Legacy and Current Relevance of Cappelletti and the Florence Project on Access to Justice*, “Recht der werkelijkheid: tijdschrift voor de sociaal-wetenschappelijke bestudering van het recht” 1978/3, pp. 6–30.

³⁶ M. Gramatikov, M. Barendrecht, M. Laxminarayan, J.H. Verdonschot, L. Klaming, C. van Zeeland, *A Handbook for Measuring the Costs and Quality of Access to Justice*, Antwerpen 2010.

³⁷ D. Banik, *Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication*, “Hague Journal of the Rule of Law” 2009/1, pp. 117–131.

³⁸ H. Genn, *When Law is Good for Your Health: Mitigating the Social Determinants of Health through Access to Justice*, “Current Legal Problems” 2019/1, pp. 159–202.

and tuberculosis. Providing legal assistance to such persons may supplement the treatment of the physical ailments, because it may contribute to removing their root causes³⁹.

At first blush, the connection between such instrumental approaches to access to justice and the public interest is obvious. It is in the public interest that individuals make greater use of the law and benefit from greater distributive justice. If the latter is improved by far-reaching social reforms, access to justice improves as well. It is also in the public interest that the functioning of the whole community improves after entitled persons receive their dues. Furthermore, investment in access to justice provides returns in the form of savings in other areas of public service, like healthcare.

Unfortunately, the two approaches share certain difficulties. They are based on non-obvious assumptions about causal relationships between distant legal and extralegal phenomena. These assumptions may be correct, but their verification requires detailed and current empirical knowledge. Obtaining it and putting it to work is not easy. First, a cognitive difficulty must be overcome. Good empirical research must be designed and implemented if it is to enable verifying hypotheses regarding causal relationships between access to justice and wider social phenomena. Second, the absorption of knowledge by decision-makers is by no means problem-free. Rather, they tend to implement public policies based on dogmatic and stereotypical assumptions about causal relationships between access to law and specific social phenomena. This exposes them to a risk of making fundamental mistakes.

For example, studies show that the impact of income on individuals' ability to use the law is not as strong as previously thought. The barriers to access are more dependent on subtle circumstances of the case, as stressed by access to justice movement. Meanwhile, many legal service subsidy programs routinely target poor people, which leads to sub-optimal effects. This can be exemplified by the numerous imperfections of the Polish system of out-of-court free legal assistance and the phenomenon of middle-income access to justice barriers⁴⁰.

Difficulties in using empirical knowledge when designing public policies are also illustrated by some attempts to rationalize access to justice based on the New Public Management directives. In line with them, policymakers try to improve the effectiveness of some institutions of access to justice by accounting for their functioning with the help of quantifiable indicators and by pursuing reforms in such a way as to maximize their economic value while keeping expenditure constant⁴¹. What escapes notice, however, is that efficiency understood as maximizing indicators with given outlays is not the same as actual effectiveness of access to justice⁴².

An illuminating example is provided by the recent attempt to reform the judiciary in Portugal. It increased the specialization of justice institutions by creating special courts in the hope of making the system more effective. However, this did not improve access to courts but instead led to greater geographical and communicative barriers⁴³.

³⁹ R. Pettignano, L. Bliss, S. B. Caley, S. McLaren, *Can Access to a Medical-Legal Partnership Benefit Patients with Asthma Who Live in an Urban Community?*, "Journal of Health Care For the Poor and Underserved" 2013/2, pp. 706–717.

⁴⁰ M. Trebilcock, A. Duggan, L. Sossin (eds.), *Middle Income Access to Justice*, Toronto 2012.

⁴¹ P. Albers, *Improvements of Judicial Systems: European Experiences*, "International Journal for Court Administration" 2008/1, pp. 45–57.

⁴² N.L. Holvast, N. Doornbos, *Exit, Voice, and Loyalty Within the Judiciary: Judges' Response to New Managerialism in the Netherlands*, "Utrecht Law Review" 2015/11, p. 49; H. Sommerlad, *The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratization, Stratification and Surveillance*, "International Journal of the Legal Profession" 1999/3, pp. 311–343.

⁴³ J.P. Dias, C. Gomes, *Judicial Reforms "Under Pressure": The New Map/Organization of the Portuguese Judicial System*, "Utrecht Law Review" 2018/1, pp. 174–186.

For these reasons, the public effects aimed at improvement of access to justice acutely depend on the quality of public administration. The business of promoting access also becomes risky, because – as is widely recognized – the transmission of expertise from research to public administration is prone to errors. Therefore, caution is advisable when implementing such projects.

7. Access to justice, public interest, and systemic sociology of law

The relationship between access to law and the public interest discussed here turns out not to be trouble-free. Extending access to law works both ways – in line with public interest and sometimes against it. The areas of conflict discussed in this paper – and many more omitted for brevity – appear to be persistent and systematic. This indicates that there exists an essential contradiction between the two values, such that requires that access to justice is mitigated by the requirements of public interest.

This contradiction begs further inquiry. Systemic sociology of law, which takes its cues from Niklas Luhmann's systems theory, may be applied to finding the underlying factors. Whilst there is no room for a detailed presentation, the special role of two elements of that theory should be emphasized. The first one is the belief that in the modern times society consists of relatively autonomous functional social subsystems that depend on mutual relations, but still operate idiosyncratically, forming a polycontextural entity. In so doing, they reproduce and produce communication patterns that are unique to them⁴⁴.

The second element is the observation that function systems are essentially inclusive⁴⁵. In an evolutionary process they develop specific communication mechanisms by which they relate to individuals. These mechanisms are of such nature that in principle they do not discriminate against anyone. They allow for referring to any individual and making him or her a theme of the system's communication. This is the case in the legal system, in which everyone is a subject of rights and obligations, in the political system, where everyone has suffrage, in the economic system, where everyone can be a consumer, etc.

Inclusion is also reflected in communication in the systems, which produce appropriate semantics for this purpose. Semantics is often mobilized when inclusion turns out to be imperfect, triggering an avalanche of communication⁴⁶. This allows for rebuilding systemic structures once a case of exclusion is observed, whether the process is completely hypocritical or not. A perfect example is provided by the political system, in which electoral campaigns and support raising may successfully be based on thematization of social exclusion.

The legal system is different still⁴⁷. Communicating about access to justice is not its canonical element. The system does not reflexively process the totality of its own inclusion conditions. Instead, it deals with inclusion in a very specific way, by using minute formal requirements enabling legal communication, such as substantive and procedural rights. If it appears that there are no formal restrictions on exercising them, then the

⁴⁴ N. Luhmann, *Die Gesellschaft der Gesellschaft* [Eng. *The Society of Society*], Frankfurt am Main 1997, p. 272ff.

⁴⁵ N. Luhmann, *Die Gesellschaft...*, p. 618ff.

⁴⁶ N. Luhmann, *Die Realität der Massenmedien* [Eng. *The Reality of the Mass Media*], Opladen 1996, p. 172ff.

⁴⁷ See extensively: J. Winczorek, *Dostep...*, pp. 350–352.

inclusion condition is deemed satisfied. If this is not the case, redress is available, but it is usually limited to the case in which justice was denied.

Following this, access to justice is difficult to define in a way expected by Cappelletti. By reference to underlying inequalities, the notion presupposes that the legal system makes inquiries into the workings of other functional subsystems. Yet, the legal system does not have sufficient resources to do so. The requirement is in conflict with the general principle on which modern society is built, where the logic of each function system cannot be effectively reflected in any other. Compared to other function systems, the legal system is particularly weak at doing this because it only operates according to the formal logic which prevents it from actively following the irritations from environment.

The transition from the traditional “poor privilege” to a modern rights-based access to justice concept corresponds with this. As it were, the formal right to be represented in court is merely an evolution of the medieval alms-based, charity-like aid system. It is a remnant of the olden metaphysical thinking (legal aid must be provided because god so requires), rather than a direct reference to inclusion mechanisms in law.

In this way it reflects a top-down organization of the society, where morality and religion play the role of society-organizing vantage points. By so doing, it addresses the needs for reflection needs in the legal system in a paradoxical way: by closing shut the possibilities of inquiring into the workings of other systems, relevant for individuals’ possibilities of using the law. All such approach may offer is verification whether ultra-specific procedural conditions of access are satisfied, rather than actual ones.

The concept of access to justice based on observation of social inequalities is more compatible with the organization of a modern society. It may only be justified by the fact that improving access contributes to an abstract collective good rather than to individual welfare and a deity’s satisfaction.

This in turn requires establishing proper reflection mechanisms in the legal system, such that enable it to reflect holistically on its own inclusion conditions. These mechanisms should provide specific, yet flexible, conditions for stating if access to justice is not hampered depending on the involved persons’ status in other function systems. This in turn demands a coupling between the legal system and such other social systems to provide material input for the legal system to communicate in the formal mode.

Some institutional solutions that enable modifying the operation of the legal system in this way, like legal aid boards, are already known. Yet, in the absence of a more developed coupling, the legal definition of access to justice is likely to be metaphysical or otherwise inaccurate. If it is excessively formal, it will be prone to futility, as illustrated by cases of access to courts and access to legal texts. If it is based on overly optimistic accounts of causal links between using law and outcomes in other social systems, it is likely to result in perverse social consequences. Examples of the attempts to develop socially and economically effective justice systems illustrate this very aptly.

In contrast to this, the discourse of public interest appears to be more resistant to errors. It, too, is based on the legal system’s observation of other systems in its environment. Yet, what is reflected upon by invoking the public interest is not the impact of the environment on the system, but the other way round. When evaluating if public interest is not harmed, one looks into the consequences that a legal system’s operation may bring to the society as a whole.

We could say that by referring to access to justice the legal system observes itself outside-in, and by using the semantics of public interest it does that inside-out. The latter

is more in line with the long-established mode of operation in the legal system, because over centuries the legal system has been attuned to legitimizing its own existence vis-à-vis the constantly threatening system of politics. Public interest is perfectly suited for this purpose, because it allows for putting a limit to the system's own operations if they conflict with political requirements.

Clearly, public interest also has scope for errors and abuse. Empirical validity of the term is questioned in regulation theory, which stresses the ubiquity of regulatory capture⁴⁸. Here, regulation is seen as an outcome of a power struggle which inevitably leads to imposing arbitrary and unfair burdens on the public.

The emerging idea that limitations of access to justice hitherto discussed are manifestations of institutionalized regulatory capture might seem tempting. It is provocative and radical. Still, it is intellectually flashy and unfounded. After all, every attempt mentioned to provide access, albeit limited, does provide some progress. More importantly, the public interest as a legal term is a normative concept which guides adjudication rather than an academic theory. Its point is not to describe the realities according to the demands of the science system, but to regulate communication in the legal system *in concert with* the operations of other function systems.

All in all, the concentration of the legal system on its own formal logic appears to be the major barrier to access to justice and the reason for contradictions between it and the public interest. This has led to uneven semantic development and lack of connections between the concepts used for both modes of observing the system's environment.

8. Conclusions

This paper looked into the relationship between access to justice and public interest. Against the popular belief it argued that the former is not always compatible with the latter. Even in the policies that are legitimized by stressing the collective gains of access to justice, a tension between accessibility of justice and the public interest is palpable.

A selection of such contradictions was discussed. Even this limited evidence provides an opportunity to observe the systematic reasons for such a clash, using systems theory. A number of concluding observations may be formulated on these grounds.

The image of access to justice policies as a strictly charitable enterprise, prone to abuse by beneficiaries is not only false, but also dysfunctional. It is rooted in the olden perception of initiatives for access to justice as alms-giving. Thus, if an "undeserving" person uses such assistance, he or she is morally suspect, not because he or she is free riding, but because his or her deeds are an offence against a metaphysical order.

This is an outdated approach, because it looks for justifications of access to justice outside the legal system. In this way it obfuscates the actual working of the legal system's inclusion conditions. The transition to rights-based concept of access to justice, which is legitimized by reference to collective good is a promising candidate for a mechanism of reflecting inclusion in the legal system. It is yet not fully developed and calls for further conceptual clarification. This in turn requires institutional development, such that will allow for new modes of communication in the legal system to be developed.

⁴⁸ M.E. Levine, J.L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, "Journal of Law, Economics, & Organization" 1990/6, pp. 167–198.

From this stems the problematic fact that thus understood access to justice may bring not only positive collective outcomes, but also negative ones. This may happen because the legal system is unable to adequately observe itself the impact it has on the environment, which is presupposed by the modern concept of access to justice.

This should not be taken as an argument why access to justice is an essentially flawed concept and public interest is not. Rather, it indicates lack of conceptual devices that would enable the system to effectively thematize its environmental dependence.

While they are absent, a reasonable strategy of access to justice would be to promote a diversity of programmes in the hope that this irritates the legal system into evolutionary changes and production of a modern doctrine of access to justice. The concept of public interest may be instrumental here, because it may allow for opening up the legal system's clogged reflection mechanism.

Public Interest and Access to Justice: A Liminal Analysis

Abstract: The paper argues that there exists a contradiction between access to justice and public interest. It substantiates this claim by reviewing selected arguments for access to justice and by referring to empirical evidence. The contradiction is then interpreted using a sociological theory of law, which enables establishing the structural reasons for such a clash. In order to reconcile access to justice with the public interest, the legal system must develop the semantics allowing for a better understanding of social inclusion conditions. In particular, the legal system must finally do away with pre-modern charity-oriented concept of access to justice, be able to grasp access to justice in its totality and reflect on conditions of legal inclusion. If it fails to do that, it is doomed to reproduce the conflict. The concept of access to justice developed by Cappelletti and others in the 1970s is a good point of departure here, but it is by far insufficient.

Keywords: access to justice, public interest, systems theory

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