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An analytical framework for empirical research on
Access to Justice

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Abstract

This paper addresses the scholarly critique that support for the rule of law, including access to justice suffers from unclear concepts and a lack of thorough research. The first part follows the historical development of access to justice research as reflected in definitions of the concept, and proposes a process definition for access to justice research that focuses on 'poor and disadvantaged' justice seekers. This definition is translated into a methodology for empirical research on this theme, which urges researchers to take real life problems of the poorest within the research context as entry point for analysis, instead of categorizing these problems into legal procedure-oriented themes which are then taken for granted. The second section explains the so-called ROLAX framework following the steps from real life problems to the final type of justice that is obtained. The last part of the paper adds a 'rule of law analysis' to this methodology. That analysis is aimed at assessing the quality of the available legal repertoire - legislation, procedures, institutions - in the concrete situation of particular justice seekers. By doing that the method can be used to indicate what type of changes in the legal system are needed to increase access to justice for the poor.

Keywords: *Access to Justice, Socio-legal Research, Social justice, Research methods, Rule of Law, Indonesia*

1. Introduction

This article addresses conceptual and analytical issues involved in research on access to justice. Its first draft was written in order to facilitate twelve empirical case studies, which were conducted in 2008-2009 in various parts of Indonesia within the framework of the so-called Access to Justice in Indonesia Project (AJI).¹ The main objective of the original paper was to structure the research and help the researchers focus consistently on the perspective of the justice seeker. The version presented here has been modified based on the experiences of the field researchers in applying the methodology proposed.

The UNDP definition of access to justice and its conceptual framework for access to justice constituted the starting point for developing the conceptual and methodological tools as proposed in this paper (UNDP 2007: 5). The UNDP framework proved to be very useful for standardising the structure of access to justice research and the resultant reports. However, it also limits the focus to what can be addressed by interventions of legal aid and legal empowerment. By contrast, in our approach the perspective of the justice seeker is central, and that often appears to be different than what the intermediary or legal aid provider assumes.

The present article first discusses a number of concepts of access to justice in use, before presenting its own definition. Taking the perspective of the justice seeker, this definition refers to both the process of obtaining access to redress mechanisms and the end goal of that process. In this manner it attempts to broaden the view of researchers from mainly focusing on issues of access to legal aid providers and state courts.

Second, by means of the so-called ROLAX² framework it tries to map in a systematised way how a potential justice seeker finds his or her way through the legal repertoire – or drops out of it for various reasons. Each step is briefly clarified to explain to the researcher what is meant by the various terms in the scheme and how one step relates to the other. For each step, the article points at some potentially useful theories and ideas that may be further explored by researchers working on a particular topic. Researchers can also use the framework for positioning their particular subject.

Third, the article suggests how the Rule of Law concept can be used within access to justice research, without losing sight of the nuances required to do so in different settings. The rule of law is part of our access to justice definition and in practice was not always well understood by the researchers working with the framework. Hence we deal with it separately. We do not propose one definition of the rule of law, but use elements from different definitions of the concept as found in the literature to construct an analytical framework for assessing the quality of legal systems. ‘Rule of law’ in this manner does not refer to a clear-cut, one size fits all concept that will inevitably bring about ‘good

¹ This project is sponsored by the Dutch Ministry of Foreign Affairs. It is being carried out by the Van Vollenhoven Institute (Leiden University) in 2008-2010 in collaboration with UNDP and the World Bank.

² ROLAX stands for Rule of Law and Access to Justice.

access to justice’, but rather presents a tool to notice and address the potential for misuse of power in access to justice processes.

2. Defining Access to Justice

2.1 Overview of definitions

Prior to the 1970s most access to justice definitions were a kind of short hand for access to (state) courts through legal aid – and today much of the research in this field still addresses these topics.³ However, the central position of state courts as the only way to ‘get justice’ is not sustained by empirical facts. Indeed, earlier writings on access to justice do not deny that justice can be obtained through other institutions than the state legal system only, or that lawyers are the single avenue to this system. To cite an example, in 1962 Orison Marden (1962: 154), President of the Bar of the City of New York, wrote:

‘Lawyers cannot guarantee that justice will be attained in a particular instance, but the skills and industries of lawyers can assure to their clients equal access to justice [...] many who need legal advice or representation, in civil or criminal matters, are not able to enlist the unpaid services of a lawyer.’

Implicitly the idea that justice is something obtained through (state) courts is so obvious to such authors that they did not feel the need for a clear definition of the concept.

This has changed since. With an increasing diversification of mechanisms of redress in modern countries, the access to justice concept has been progressively broadened to include other forms of ‘justice’ as well. Thus, in her standard work on the English legal system ‘Paths to Justice’, Hazel Genn (1999) not only explores access to courts and how these process cases, but also access to other mechanisms dealing with injustices, such as mediation. Fifteen years earlier, Cappelletti and Garth (1978: 6) in their earlier mentioned work already argued that

‘access to justice serves to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just.’

In the case of developing countries as Indonesia, it makes sense to travel further down this road. The primary reason is that effectively, state courts and other state institutions are not as important in dealing with disputes as they are in countries where the access to

³ See for example Kritzer, H.M, 2008.

justice literature originates.⁴ Legal and socio-legal literature on Indonesia has traditionally paid much attention to forms of dispute resolution other than those of the state and many authors have indicated that the two (or more) do not always sit together comfortably (e.g. Von Benda-Beckmann, 1984). Likewise, the World Bank (2008) research report 'Forging the Middle Ground' indicates that many of those involved in the cases covered in this report preferred non-official mechanisms to the ones officially established for this purpose.

On the other hand, one should not underestimate the importance of the state in any form of dispute resolution or rights vindication. Most of the literature indicates that rather than a dichotomy between state and non-state actors existing alongside each other, one finds forms of hybridisation. Thus, state courts may effectively recognise the jurisdiction of *adat* courts – even if this goes against legislation and legal doctrine (Pompe 1999). A more regular case is that state officials play an important role in addressing citizens' grievances. For instance, village and (sub-) district heads, police, or officials from certain government agencies may engage in forms of mediation (Nicholson 2001) or in receiving and processing complaints. It is important to note that the formal road to justice via courts is not often followed and that various alternatives and mixtures are used.⁵ This in itself is a sufficient reason to prefer a wide definition of access to justice, at least if one intends to capture more than just a small slice of the entire range of mechanisms used to address citizens' grievances. An example of such a definition is the one proposed by UNDP (2005: 5):

'Access to Justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.'

Compared to the definition offered by Cappelletti and Garth, the first notable difference is the explicit reference to 'informal institutions'. Secondly, 'rights' vindication or dispute resolution' has been replaced by the more straightforward 'remedy'. And finally, 'individually and socially just' as a standard has been turned into the less equivocal 'human rights'.

Elegant as it is, this definition raises several questions. For a start, the notion of remedy requires some further consideration. In the more limited definitions of access to justice, the choice for courts as the foremost avenue to justice assumes that the 'remedy' is a court judgment which represents the outcome of the justice process. It logically follows

4 More than half a century of socio-legal research has put beyond doubt that the importance of formal courts for processing disputes has been consistently overrated (see for instance Miller, R. & A. Sarat, 1981, Galanter, M, 1981. Nonetheless, the state legal system usually does influence dispute resolution outside the courts, because people take into account their legal position. This effect is generally known as the 'shadow of the law' (Mnookin, R.H. & S. Kornhauser, 1979).

5 This is quite evident from the more recent legal anthropological and other socio-legal literature, see e.g. Davidson, J. & D.F. Henley, 2007, Bedner, A, 2007.

that if courts are not the single object of access to justice research, other remedies must be explored as well, such as mediation agreements, police orders, municipal council decisions, etc. This would imply that ‘institutions of justice’ not only refers to institutions specially assigned the task of resolving disputes, but rather applies to all institutions addressed to provide a remedy. However, it is not clear whether that is the actual objective of the UNDP definition.

In the same manner, the definition does not refer to *what* a remedy is sought for. If we assume that UNDP refers to an injustice, it may cover anything experienced as an injustice by a person, unrelated to any specific normative system. This casts the nets extremely wide and does require more clarification.

Furthermore, although human rights offer a clear standard to evaluate the remedy provided,⁶ one may question whether they provide the most appropriate basis for evaluating the quality of justice procedures. If one conceives of human rights to include the right to a fair trial this seems sufficient. However, since we have widened the understanding of justice institutions beyond courts, it makes sense to judge their performance from rule of law notions such as the principle of legality and the concept that government is bound by law.⁷ In doing so, and in line with the UNDP definition, we look beyond state/government institutions to include traditional and religious forms of government as well as hybrid forms.

Finally, the idea of ‘remedy’ should go beyond the decision made, the agreement signed or the regulation passed, and extend to the implementation stage to secure the change that actually addresses the grievance. It is also necessary to look at the sustainability of the new situation, viewing access to justice as a long term issue. The UNDP definition does not explicitly deal with this issue of sustainability. Our emphasis on sustainability is intended to make access to justice research more relevant for policy recommendations.

2.2 A process definition of Access to Justice

If one intends to cover the various forms of access to justice that may be important to people who try to address the problems they experience in their daily lives, one needs a broad and detailed definition of access to justice. An obvious objection against such a broad understanding is that access to justice in this way may become an all-encompassing concept, covering political processes in the widest sense. Casting the net ambitiously wide may be said to run the risk of obtaining disconnected results. This is indeed a danger, but we think it can be surmounted by carefully selecting one’s topics within the entire field of access to justice, an issue we will later return to in this paper. Another

6 At least if we take the legal standards in the national legal system as the point of departure.

7 We agree that one can read the rule of law concept into human rights. However, we prefer to do this the other way round – for historical reasons, for connecting our work to the literature on rule of law assistance, and for the practical value of the framework explained in the fourth part of this article.

reason to adopt a sustainability based definition is that it helps researchers to focus on each step involved in the access to justice process examined. It thus serves to sensitize one to the various features of this process, which lie hidden in the more concise definitions.

Taking into account the above considerations, we propose the following definition, as originally devised by Otto.⁸ We will then address its elements.

‘Access to justice exists if:

- People, notably poor and disadvantaged,
- Suffering from injustices
- Have the ability
- To make their grievances be listened to
- And to obtain proper treatment of their grievances
- By state or non-state institutions
- Leading to redress of those injustices
- On the basis of rules or principles of state law, religious law or customary law
- In accordance with the rule of law’

People, notably poor and disadvantaged.

The first point to note is that this definition focuses on people, not citizens, like many other access to justice definitions. The reason is that ‘citizen’ implies recognition as a legal person by the state, which would exclude certain groups. ‘Poor’ has a long tradition in access to justice research, as we can see in the tendency to reduce access to justice to providing legal services to ‘the poor’ for free. We have added ‘disadvantaged’ to emphasise that access to justice is not just a matter of money, but includes scarcity of other forms of capital (Bourdieu 1986; Veland Makambombu, *this issue*). We prefer ‘disadvantaged’ over other terms that could be used here - ‘subaltern’, ‘vulnerable’, or ‘deprived’ - because it points

to the setbacks a person may suffer by his or her belonging to a certain category, for instance based on gender, marital status, ethnicity, or generation.

Suffering from an injustice

The second element brings in the notion of injustice that refers to -an often vague sense of - rights violation. As already noted above, this is not an easy matter to define. Issues that may seem grossly unjust from the point of view of an outsider, for instance a researcher, may seem perfectly alright in the eyes of the person or group concerned – or the other way round. Likewise, those experiencing similar problems may categorise these

⁸ This definition was originally developed by Jan Michiel Otto during the preparation of the AJI project and then slightly modified later on by the authors.

very differently when it comes to name ‘injustices’. Therefore, as will be explained below, in the ROLAX framework we start with real life problems instead of injustices.

Have the ability to make their grievances be listened to

When a person starts thinking of addressing someone or an institution in order to have something done about the injustice, the first step is blaming someone, and this turns an injustice into a grievance. Felstiner, Abel and Sarat’s (1981:15) seminal article on the transformation of disputes talks of a grievance ‘when a person attributes an injury to the fault of another person or social entity’. The second step is filing a claim to the most proximate and proper source of redress.

And to obtain proper treatment of their grievances

In this definition we understand ‘proper treatment’ in two ways. First, as a treatment which is appropriate in relation to the nature of the grievance, meaning that it potentially leads to a just outcome. Second, as to whether the justice seeker is treated properly by the institution addressed. These two will often go together, but not always. Additionally, a subjective understanding of ‘proper treatment’ by the justice seeker can be different from a researcher’s more detached point of view.

By state or non-state institutions

Here the definition clearly follows the UNDP and similar approaches, in not limiting the forums for providing justice to those of the state. As much of the access to justice research – and legal anthropological research in general – has demonstrated, many people prefer to bring their grievances to non-state institutions, including traditional or religious leaders, trade unions, NGOs, etc. These institutions may function as both dispute resolvers themselves and as intermediaries to other forums, including those belonging to the state.

Secondly, the definition speaks of institutions, in order to exclude individuals who incidentally act more or less as dispute resolvers. Thus, an institution refers to a forum for dispute resolution acting on the basis of formal or informal rules.

Leading to redress of those injustices

Although less normative a concept than ‘proper’, redress is not as straightforward a concept as one may assume at first glance. It entails subjectivity: what may be redress to one justice seeker may be disappointing to another. Additionally, in our view redress not only points at a positive decision by a forum, but also at the issue of implementation. This is in line with Otto’s (2002) concept of ‘real legal certainty’, which includes implementation of the decision to which a person is legally entitled. One could add here the earlier mentioned element of sustainability. The next matter of concern is that the perception of the injustice and the perception of redress may change during the process. For instance, victims of environmental pollution or damage show a tendency to shift their objective from obtaining relief of the damage or pollution to getting monetary compensation (Nicholson 2009; Bedner 2007). Finally, in many cases an injustice is

closely related to other injustices. Just as it is important to disentangle this amalgam, it is important to see which one of them is addressed in a procedure and how this relates to redress of the ‘main injustice’.

On the basis of rules or principles of state law, religious law or customary law

The use of ‘on the basis of rules or principles’ in the definition indicates that access to justice requires rules or principles guiding the procedure towards an outcome. Within that limitation, however, it is clear that we subscribe to a legal pluralist approach, with norms of various origins playing a role and interacting in practice. Moreover, ‘customary’ should be conceived of as including ‘modern custom’ and be seen as something dynamic, not in the static and rather traditional way in which it often tends to be interpreted.

In accordance with the rule of law

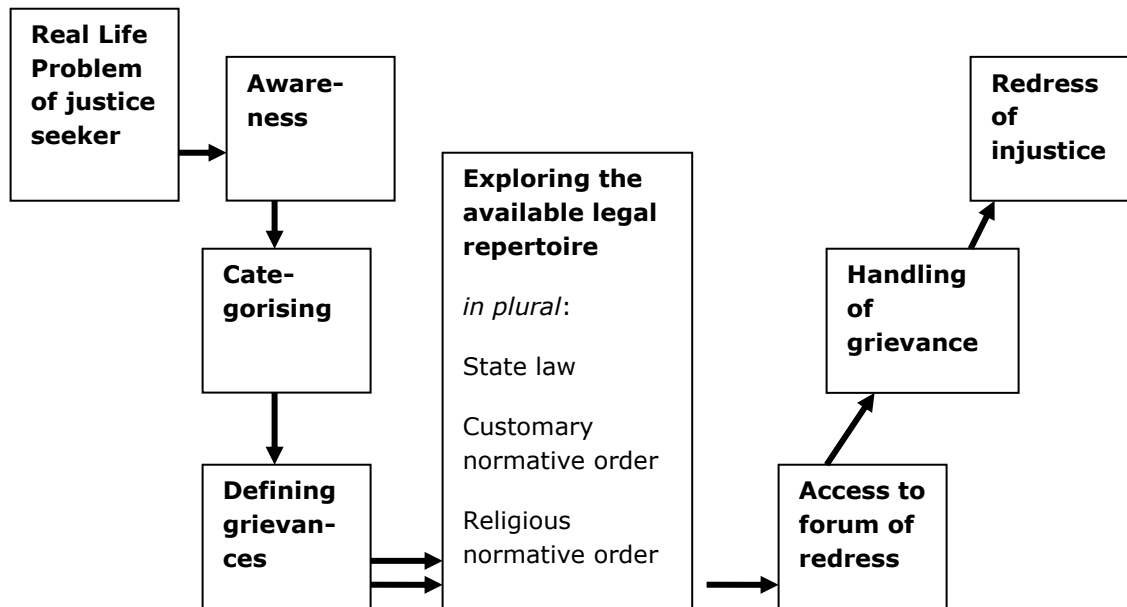
The ‘rule of law’ is not a clear-cut concept and, therefore, one could argue that it should not be used as part of a definition. However, precisely because it is not being strictly defined we think it may serve our purposes.⁹ In fact, we do not propose one definition of the rule of law, but instead we used elements from definitions of the concept as found in literature for constructing an analytical framework for assessing the quality of legal systems, as will be elaborated in section 4 below. Its core consists of two functions the rule of law intends to serve: preventing misuse of power by the state vis-à-vis its subjects and preventing misuse of power by one individual against another.

3. Towards an Analytical Framework For Access to Justice Research

This section describes the analytical framework for access to justice research based on our definition of access to justice and the framework used by UNDP (2006: 5). Inspired by Felstiner, Abel and Sarat's (1981) approach, it considers access to justice first and foremost as a *process*: it takes a potential justice seeker from the ranks of ‘the poor and disadvantaged’ and looks at the options he or she may follow ‘through the legal repertoire’ in order to attain the justice desired. The summary in Figure 1 explains the structure of the framework.

⁹ For that matter, this applies to human rights as well. See Goodale, M, 2007.

Figure 1. Summary of the ROLAX framework



The first characteristic of this framework is its relatively elaborate attention for the ‘naming’ part, including ‘awareness’, ‘categorising’ and defining ‘grievances’, which in many access to justice studies is little exposed. Likewise, it pays considerable attention to the issue of redress. The third particular feature is the assessment from a legal perspective of the position of the justice seeker *before* he or she addresses a forum, but *after* the ‘naming’ part. The question is what the ‘legal repertoire’ (in a broad sense) has to offer to the justice seeker, to what extent (s)he is aware of it, and whether its various elements conform to the demands set by the rule of law. The framework does not explicitly refer to ‘intermediaries’. However, these are obviously of significance in many cases in shaping the ideas and actions of the justice-seekers. Hence, researchers should be aware of their potential influence at every phase of the process.

A final remark concerns the nature of the framework. We are well aware that the neat chronology it suggests by following the steps from left to right is seldom found in reality. Many of the processes described are difficult to be separated in practice. Stages may be skipped and processes listed in a separate column may have started in another one. Moreover, researchers will often find that their initial phrasing of the research subject is in terms of defined grievances or legal claims – the fourth or fifth step in the framework – whereas a focus on the justice seekers’ perspectives forces researchers to reflect on the previous steps, moving through the framework in reverse direction. However, we have found that nonetheless it works well as a tool of analysis.

The next page shows the elaborate version of the ROLAX framework, followed by a clarification for each column. It should be pointed out in advance that it includes an extra row (at the bottom) for suggesting research questions arising from the researchers 'etic' point of view.¹⁰ This serves to emphasise the distinction between the findings of empirical research, focused on the justice seekers' perspective, and the analysis by the researchers. Such a divide is seldom strictly maintained in access to justice research and may lead to confusion about what justice seekers themselves think. The UNDP report *Justice for All*, for instance, contains many sections where researchers summarise and rephrase justice seekers' real life problems into legal categories, whereas the people involved are likely to have other ways of understanding them (Vel, *this issue*). Moreover, with a background in legal aid, many access to justice researchers tend to focus on the question 'what can be done to improve the situation', instead of first examining in depth the actual practices and experiences of those concerned.

10 In anthropology the insider-outsider difference in perspective is referred to as emic versus etic perspective. Emic means: defined by the actors themselves in a way that is meaningful in their socio-economic and cultural context, whereas etic refers to the external researchers interpretation and approach.

Figure 2. ROLAX framework

real life problems	<i>from real life problem to injustice to grievance</i>			<i>exploring available legal repertoire</i>	<i>getting access to justice</i>			
	awareness	categorizing	defining grievances	normative framework(s)	implementation of norms	access appropriate forum to	handling of grievance	redress of the injustice
<p>real life problem as defined by the subject (= the person concerned)</p> <p>description / analysis of causes by the subject (= the person concerned)</p>	<p>rights awareness (self confidence)</p> <p>Political awareness (self confidence)</p>	<p>problem typology: is - according to the subject - the problem an injustice</p> <p>categorizing the problem as: *individual / *gender / *class / *ethnic (by the subject)</p>	<p>primarily in terms of norm-violation within a particular normative system</p> <p>Primarily as a power problem in political terms (need for political action, violence, non-co-operation)</p>	<p>analysis from a procedural perspective: * does a normative framework exist? / * is it consistent? / * etc.</p> <p>analysis from a substantive perspective: * what is the substance of the norms</p>	<p>Is law / are norms implemented or not</p> <p>quality of implementation</p>	<p>forums available</p> <p>access barriers (physical, financial, categorial, trust = is it an appropriate forum in the eyes of the subject)</p>	<p>appropriate treatment in the eyes of the subject</p> <p>effects of this process on the initial problem and other impacts</p>	<p>Satisfactory remedy obtained (decision + implementation / enforcement)</p> <p>form of redress: direct remedy / increasing negotiation power / changing rules (legislation)</p>

						strategies: forum shopping / correcting institutions / activating institutions / creating new forums or mechanisms		sustainability / cause of problem addressed
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Research activities and questions from the researchers' point of view

description / analysis of causes by the researcher	Explanation of awareness and knowledge by the researcher	definitions and categorization by the researcher explanation of categorization by the researcher	Explanation of reasons for this choice	explanation of legal / normative situation Evaluate the normative framework and its implementation from a RoL perspective	explanation of (non- or bad) implementation	categorising forums, including appropriateness explaining choice and strategies	categorizing treatment explaining form, effects	Categorizing remedy Evaluation from a RoL perspective explaining form of redress and sustainability
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Real Life Problems,

The ROLAX framework takes ‘real life problems’ as its point of departure, instead of ‘justiciable problems’ or ‘injustices’. The reason is that all people -including the ‘poor and disadvantaged’ - can say what their problems are, whereas phrasing injustices is more difficult. Mapping real life problems can be done by recording the views and descriptions of the ‘poor and disadvantaged’ people concerned: what are in their eyes the main problems they are confronted with and what do they identify as their causes? Who are ‘poor and disadvantaged’ must be identified first, which is a delicate task. Groups identified as ‘poor and disadvantaged’ at the start of the research may need to be further subdivided, or may even turn out relatively privileged after all. This issue merits careful attention. Vel and Makambombu (*this issue*) propose using Bourdieu's (1986) concept of forms of capital to distinguish the ‘disadvantaged’, because belonging to the latter category is not caused by economic deprivation, but also by a lack of support from other people (social capital) and lack of status and knowledge (cultural capital).

In most access to justice research, including the AJI’s, these real life problems are related to a particular theme that was selected at an earlier stage. This may create problems, for some themes may turn out to be less relevant in the eyes of those concerned than in the eyes of the researcher – who may also identify other causes and problems than his or her research subjects do. This potential divergence of views is an important issue to be considered during the next phases in the framework, because the causes a person identifies to explain his or her problems are likely to be important predictors of his or her subsequent behaviour.

For example, suppose that ‘legal identity’ is the research theme. Two real life problems potentially associated with legal identity of the poor are malnutrition and diseases, as access to government services may relieve them and in order to get such access one needs an identity card. The question then is whether the people involved make the interconnection between malnutrition and diseases and identity cards.

Awareness

This takes us to the issue of awareness. Awareness is the ability to assess one’s own situation within a large cognitive framework. It is a determining factor in how people describe and explain their real life problems, and whether they see a problem as an injustice. Not taking a real life problem for granted requires the most basic form of awareness. It is then, that a problem becomes an injustice.

We distinguish between ‘rights awareness’ and ‘political awareness’. Although it often is difficult to make this distinction in practice, it is important with an eye on the next steps. If the subject defines a solution to his or her problem as something (s)he is entitled to in the form of a ‘right’, then this is likely to move him into the direction of a more ‘legal’ or ‘procedural’ solution than if (s)he defines the problem as a matter of differences in power

and interests. Still, both forms of awareness are likely to lead to self confidence and thus to a predisposition for taking action.

At this stage we may already find an important role for the intermediaries that in many cases are important at other stages as well: human rights NGOs, legal aid organisations, etc. Such actors influence how potential justice seekers perceive the causes of problems, and – in some cases – even how they define the problems themselves.¹¹

In order to explain the awareness observed, we use 'legal capital' additionally to Bourdieu's 'forms of capital'. It is a sub-category of cultural capital, but looking at it separately makes sense in the light of access to justice research. It comprises knowledge of and skills to use state, customary or religious law through all stages of the process. Obviously intermediaries are of particular importance in providing people with legal capital.

Categorization

There is a logical relation between awareness and the process of categorizing a problem as 'just a problem' or an 'injustice'. The latter requires referring to a normative framework, otherwise inaction will follow or the problem will be addressed in ways outside the scope of access to justice. If this is the case, the researcher should carefully consider what the underlying reasons are: absence of a norm or principle, lack of awareness, or fear.

Another form of categorizing is to conceive of a problem as an individual one or one shared by a group. If those concerned consider it a group problem, then what is the shared identity marker: gender, ethnicity, class, or other attributes? Identification of the problem as a collective one for a specific category is more likely to result in political action, which may or may not stay within the limits of the legal system. It also influences the way grievances are phrased and the choice of redress mechanism. It is interesting to note here that access to justice's traditional concern were individual problems, but experienced by a large group of people. The solution was sought in providing individuals from this large group with access to the legal system, in that manner individualising many problems experienced collectively. At the time, Marxist critics denounced this approach as a sham, diverting the attention from the underlying power problems. Perhaps not surprisingly, a similar critique has recently been made about the neo-liberal access to justice-related programmes of the World Bank, by scholars such as David Mosse (2004) and Tania Li (2006).

Defining Grievances

Categorizing is the final step of the process referred to as 'naming' by Felstiner, Abel and Sarat (1981) and with defining the grievance we proceed to the stage they call 'blaming'. Grievances imply that the victim holds someone responsible for the injustice. When additionally the injustice is phrased in terms of a particular normative system, it is more

¹¹ For a structured approach of the identification of all forces at play the division of society in 'arenas' with matching actors may be helpful. See Hyden, G, Court, J. and K. Mease, 2004.

likely that the grievance evolves into a legal claim. If the claim is rejected a dispute follows. In the words of Miller and Sarat (1981: 527):

‘A claim is a grievance that is registered to communicate the sense of entitlement to the most proximate source of redress, the party perceived to be responsible. A dispute exists when a claim based on a grievance is rejected either in whole or in part. It becomes a civil legal dispute when it involves rights or resources which could be granted or denied by courts.’

Conversely, if an injustice is seen as the consequence of differences in power and interests, the grievance is more likely to evolve into a political dispute.

The role of outside information in turning a grievance into a claim and beyond this claim-making process is often significant. In ‘juridicised’ countries, this is the stage where legal advice is central to the decision-making by the individual or group holding a grievance – whether to try mediation, go to court, ‘lump’ the matter, or organize a demonstration. To what extent this also is the case in a country like Indonesia and to what extent legal aid-like organisations or other intermediaries guide justice seekers in formulating claims in a particular direction are matters for empirical research.

Exploring the legal repertoire

In order to get a clear overview of the options available to the individual or group holding a grievance, the researcher must first look at the various normative systems in place and assess the claim-making process in the normative terms of those systems. For example, in a case in which people living along a river suffer from skin diseases because mining activities cause water pollution, they may choose to make a claim with reference to customary norms saying that the land along the river is their clan land on which such activities are not allowed; or alternatively refer to the Environment Act as part of state law. Identifying what the potential forums for redress are and how these relate to the applicable rules and principles in the case is also part of this.

The second step is to conduct empirical research on how justice seekers – which is what they have become by now – explore the legal repertoire and make strategic choices between norms and forums. They may prefer the norms and forums of a single normative system, but also combine state, customary and religious law in a way that they become mutually supportive. Forum shopping may appear attractive as well (Von Benda-Beckmann 1984: 37). Examining such strategies reveals the extent to which justice seekers are familiar with the complex of rules and institutions relevant to their case, as identified during the first step. Researchers must also take into account the influence of implementation practice on the assessment of the justice seeker. For instance, if someone knows he or she is legally entitled to a land right on the basis of both state and customary law, but customary rules are never obeyed by the implementing agency, the choice might be obvious.

Access to an Appropriate Forum

This stage is the core of most ‘classic’ access to justice literature: is there an appropriate forum available and can the justice seeker address it?

The core meaning of an *appropriate* forum is whether it can potentially offer the kind of redress the justice seeker is looking for. For example, many Indonesians have mistakenly addressed the administrative courts in order to obtain a land right, to find that these courts can only order the defendant to reconsider his refusal. The administrative court lacks the jurisdiction to determine whether the justice seeker is entitled to the land right – for that matter the appropriate forum is the civil court. However, there is more to this issue than jurisdiction. In the case of disputes, a useful point of departure to judge the appropriateness of a particular forum and procedure to deal with a certain dispute is found in relational distance theory, notably D.J. Black’s (1976) ‘styles of social control’. Black’s main argument is that the social distance between those involved in a dispute will determine to a large extent what kind of procedure will follow. However, it can also be argued that this social distance determines to a large extent what kind of approach or style of dispute resolution the people involved will regard as most appropriate. The implicit assumption is that a forum is characterised by one style – conciliatory, compensatory or penal – but this is not self-evident in another cultural context than in which the original study was conducted. None the less, for the empirical research on access to justice, Black’s theory can serve as hypothesis to be tested. Does social distance indeed determine the style of dispute resolution? Does it also determine the choice of forum? Alternatively, the rule of law framework discussed below can be used, as the institutional category of the framework contains a number of prescriptions for a researcher to value the ‘appropriateness’ of a forum.

Finally, justice seekers themselves may not be aware of the pitfalls related to the forum of their choice for obtaining access to justice. Hence again, the researcher ought to juxtapose the judgment of the justice seeker regarding ‘appropriateness’ with his or her own findings.

The second question under this heading concerns various barriers to access a forum. This is a well-known list, including physical, financial, psychological, and cultural aspects.¹² Most of the issues go without saying, such as the amount of formal and informal financial costs associated with a forum and the distance to it. Sometimes overlooked at first is that this aspect also relates to issues of procedure. If, for instance, a court needs many sessions before getting to a judgment, the issue of distance becomes much more of a problem.

The third question is about the reasons behind the choice for a particular forum. The perception of the justice seeker, which is determined by a variety of factors and actors,

¹² See for example UNDP, 2005, p 4.

will lead him to follow a particular strategy. We already mentioned forum shopping (or norm-shopping), but that is only one of many. Sometimes overlooked is the strategy followed if an appropriate forum is lacking, or thought to be lacking. In that case the justice seeker may, for instance, organise demonstrations or address forums that are not used for dealing with such grievances, as is clear in the case of Tjandra in this issue. This may even lead justice-seekers to actually try to create new forums or mechanisms, in order to bypass the problems of the older ones.

Handling of Grievance

This step concerns the treatment of the grievance by the forum involved. Basic forms of treatment are correlated to the kind of forum involved, so the choice made in the previous step heavily influences this one. For instance, one cannot expect a court to mediate in the same manner as an environmental officer from the district government. However, while for the researcher the appropriateness of the treatment will be ‘logically’ limited by the properties of the forum, they may not be of any concern to justice-seekers. The category of procedural elements of rule of law, discussed in the next section of this paper may be helpful in analyzing this matter.

Secondly, the process of handling the grievance can change the substance of the initial grievance. This may happen if new information comes up during the procedure, but also when parties to a dispute modify their position. For instance, a labourer who lost his or her job may see his or her case transform into a dispute about the legitimacy of labour unions (Tjandra, *this issue*). Finally, the researcher should be sensitive to external influences on the handling of grievances, for instance changing perceptions of the ‘adversary’, or changes in public opinion.

Redress of the Injustice

The final step in the analysis includes rethinking the problems associated with defining or evaluating redress. This is not as straightforward a matter as it may seem, for what may be redress to one justice seeker may be disappointing to another. One reason is that it is not always clear what the justice seeker intends to achieve – certainly not to the outside observer. For instance, in a case study of poor women in Cianjur who wanted to have a divorce before the Islamic Court, the UNDP researchers found to their surprise that some women were quite satisfied with a court judgment granting them the divorce and an alimony, but without the latter part being implemented. Apparently, the social importance of an official divorce had been underrated by the researchers, but turned out to be important to at least a section of the women in the sample (Sumner 2007).¹³

This example points also at the issue of implementation. Otto (2002: 23) has, for this reason, coined the concept of ‘real legal certainty’, which includes the implementation of the decision to which a person is legally entitled. While some researchers may be tempted to take a positive decision by a forum as redress, others may be blinded by the

13 Van Huis (*this issue*) took this finding as a start for his in-depth research.

assumption that only the implementation of a positive decision will bring solace. Another matter related to redress is that the perception of what constitutes proper redress may change during the procedure. For instance, victims of environmental pollution or damage show a tendency to shift their objective from obtaining relief of the damage or pollution to getting monetary compensation (D'Hondt, *this issue*; Nicholson 2010).

As already stated, in many cases an injustice is closely related to other injustices. Just as it is important to disentangle this amalgam, it is important to see which one of them is addressed in a procedure and how this relates to the 'main injustice'. Thus, in the example offered earlier about the inability of certain people to get legal documentation, one should not only look at the success in obtaining such documents, but also to what extent this actually brings closer the original objective of obtaining social benefits. This also shows that redress can take various forms. It does not have to be a decision in a single case that is subsequently implemented, but it may also be a change of the law (in a broad sense).

Finally, the ROLAX framework mentions 'sustainability' of redress, pointing at implementation of the redress and its time dimension. Many studies of access to justice or dispute resolution stop short at the judgment of the court, the mediation agreement or whatever the direct outcome of the procedure is. However, for a proper evaluation of redress one must also look at the enforcement or implementation of this outcome and its impact on the initial problem. There is moreover a temporary side to this process: the question is how long the effect will last, and whether the outcome is sustainable in the short, middle or long run. The elements in the rule of law scheme that will be discussed next section are helpful in evaluating this.

4. Rule of Law Framework for quality assessment in Access to Justice Research

In the previous section we described how researchers can analyze the process by which people who suffer an injustice seek a remedy through the legal repertoire. After a justice seeker has defined his or her grievance, or while defining this grievance, (s)he will start exploring what redress the legal system(s) available can offer him or her. Which institution can (s)he address? What legal (normative) arguments can (s)he use? What is the best strategy to follow? Empirical research will show the justice seeker's answers and choices, but whether those are *potentially* the best in that particular context requires an overview of the entire legal repertoire available and an assessment of the quality of the various systems concerned.

The need for a standard for such an assessment is why we included 'in accordance with the rule of law' in the definition of access to justice. Aware that rule of law is an essentially contested concept, we do not use a single definition of rule of law, but have listed and arranged the various elements that can be derived from the definitions in use as found in academic literature. This list of the elements of rule of law definitions are divided into three categories. This results in the analytical framework that we further

elaborate upon and clarify in this section. The purpose of the framework, in general, is to provide tools for assessing the quality of (parts of) a legal system. In research on access to justice, it helps researchers to evaluate the steps in the access to justice process systematically. For example, when a researcher studies the phase ‘handling of grievance’ (s)he will document what happened in practice, and analyse whether a court or a mediation forum was independent, whether a rule applied was known beforehand, whether the authorities acted outside of the law, and whether a human right standard is subscribed to in local notions of justice or not.

Before elaborating upon the rule of law framework we explain the concept itself and present a few issues from the debate about rule of law that we think are relevant for empirical research on access to justice.

4.1 What is ‘Rule of Law’?

Government officials worldwide advocate the rule of law, which reflects consent that adherence to rule of law is an accepted measure of government legitimacy (Tamanaha 2004: 2-4). Yet, politicians seldom define the meaning of the concept and there is no agreement among scholars on a single definition. The simplest one is probably the following:

‘The rule of law means literally what it says: the rule of laws. Taken in its broadest sense this means that people should obey the law and be ruled by it’ (Raz 1979: 210-211).

The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law (Tamanaha 2007). This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied. This is the *formal* definition of the rule of law. Formal theories focus on the proper sources and form of legality, looking at the procedures. By contrast, substantive theories also include requirements about the content of the law. *Substantive* definitions of the rule of law include reference to fundamental rights and criteria of justice or right, as the following one by Thomas Carothers (2006: 4):

‘The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and

independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.’

While there is considerable disagreement about rule of law definitions, and whether one prefers a formal or a substantive version, virtually everyone agrees on the two functions the rule of law serves. The first one is to curb arbitrary and unjust use of state power. The rule of law can then be understood as an umbrella concept for a number of legal and institutional instruments to protect citizens against the power of the state. The rule of law’s second function is to protect citizens’ property and lives from infringements or assaults by fellow citizens. In fact, both objectives seem to correspond with the justice ‘access to justice’ seeks to bring into citizens’ reach.

Apart from the distinction between formal and substantive, versions of rule of law can also be ‘thin’ or ‘thick’. If a definition includes only a few requirements it is usually called a ‘thin’ version of the rule of law, one with many is considered a ‘thick’ version. Usually thicker versions incorporate the main aspects of thinner ones, making them progressively cumulative. Tamanaha (2004: 91) has provided a scheme of alternative rule of law formulations that are not connected to specific regime types, positioning them on a scale of complexity (from thin to thick):

Table 1. Tamanaha’s alternative Rule of law formulations

Amount of requirements	Formal versions	Substantive versions
Few = ‘thin’	Rule by law: law as instrument of government Action	Individual rights: property, contract Privacy, autonomy
More – ‘thicker’	Formal legality: + general, prospective, clear, certain for all citizens	+ Rights of dignity and justice
Many – ‘thick’	Democracy and legality: + Consent determines content of law	+ Social welfare: substantive equality, welfare, preservation of cultural rights

In this scheme ‘democracy’ is mentioned as a characteristic of the thickest formal version of rule of law. Tamanaha explained this by arguing that ‘democracy is substantively empty in that it says nothing about what the content of law must be. It is a decision procedure that specifies how to determine the content of law’ (Tamanaha 2004: 99).

4.2 The Rule of Law led Governance Model (ROLGOM)

Building on such insights Bedner (2010) has developed a rule of law framework for research. After having dissected the concept as used in the literature into *elements*, he has ordered these into three categories: procedural elements, substantive elements, and control mechanisms. Within the categories these elements are ordered according to 'thickness'. For this article, Jacqueline Vel has extended Bedner's rule of law scheme with a special category of implementing institutions, because of the importance of implementation for basic adherence to the rule of law.

Compared with Tamanaha's scheme in Table 1 the 'ROLGOM' (Rule of Law led Government Model) has two additional columns: controlling mechanisms and implementing institutions. Indicated on the vertical scale is the gradation incorporated in the ROLGOM scheme, which runs from 'thin' to 'thickest' following Tamanaha's terminology. Next to the column 'main elements' one finds so-called 'quality criteria'. These are very simple notions to help researchers with what to look for when trying to evaluate an aspect of a case in relation to a particular element. Of course, a whole range of issues lurk behind a quality criterion such as 'juridically clear', but in order to keep the framework workable we have not addressed these here.

As stated before, which elements one intends to use for evaluation depends on the objective and the context of the case at hand. We will now first provide the scheme and then some notes on its use.

Table 2. Rule of Law led Governance Model

Type of elements in RoL definitions	Formal elements of RoL definitions (procedural)		Substantive elements of RoL definitions (content of laws)		Institutional elements (legal institutions)			
					Controlling mechanisms		Implementing institutions	
Developing complexity	<i>main elements</i>	<i>Quality criteria</i>	<i>main elements</i>	<i>Quality criteria</i>	<i>Main elements</i>	<i>Quality criteria</i>	<i>Main elements</i>	<i>Quality criteria</i>
<i>Thin</i>	law as instrument of government action (rule by law)	-presence of legislation -does the government operate without using law -incidental measures or general rules	subordination of all law to fundamental principles of justice, moral principles, fairness and due process	-applicable principles defined -conflict among these principles -effective subordination of law to these principles	independence of judiciary (sometimes broadened to <i>trias politica</i>)	is judiciary: - independent -impartial -accessible -qualified -empowered	executive institutions designed adequately to implement law	institutions: -existing -empowered -qualified
<i>Thicker</i>	state actions are subject to law	-room for discretionary powers -exception clauses in law	individual human rights	-legally guaranteed -legal guarantees implemented	implementation and enforcement of court decisions	- implemented -effective -enforced	executive institutions perform in accordance with law	-implement according to law -no side tracking -effective
	law must be general, prospective, clear and certain	is legislation: -juridically clear -stable -applied generally	social human rights	-legally guaranteed -action taken by the state to realise these rights	specialization within judiciary for safeguarding	-existing -qualified -impartial - independent	executive institutions implement internal control	-internal control mechanisms existing and implemented

	(formal legality)	-prospective -accessible: (published, comprehensible language, socialized)			g partivular rights	-accessible -empowered -effective	mechanism s against unlawful behaviour	-effective
<i>Thickest</i>	democracy: consent determines the content of laws	Participation mechanisms: -present -accessible -Effective?	cultural and group rights	-legally guaranteed -legal guarantees implemented	other external mechanisms designed for preventing unlawful government. behaviour	-checks and procedures existing -empowered -qualified -impartial -effective	executive institutions fulfil ISO standards	standards of International Organisation for Standardizati on

5. Conclusion: Combining ROLAX and ROLGOM in empirical research on access to justice

The ROLGOM scheme can be used to assess the quality of legislation, rules, procedures and activities of institutions in each step of the access to justice process, or in other words, in every step in the ROLAX scheme. Obviously ROLGOM is most applicable for assessing the legal repertoire, the step in ROLAX where the justice seekers explore which rules and legislation provide arguments in seeking access to justice. But additionally, the researcher can use the ROLGOM scheme as a checklist for every other step, for example when assessing legal awareness or the functioning of the general state court as a forum where the justice seeker can find redress.

We will now provide some examples of how these two methodological frameworks were combined in concrete empirical research by the contributors to this volume.

Procedural Elements

Novirianti (*this issue*), in her paper on protection of the rights of female migrant workers, shows that there is a lack of legislation at the district level. Since decentralization in 2001, the districts have the authority to make their own policy in many fields, and that opened the way for NGOs to draft a regional regulation that would protect migrant workers' rights better. Yet political tensions within the district parliament caused failure of this effort. The conclusion from this case study reveals that intervention in the procedural part of the legal system – in this case drafting a new regulation – is not a 'technical' matter that can just be executed by experts, but instead a very political activity. Improving access to justice in such cases requires improvement of procedural elements, but also sufficient political support.

Substantive norms

The case study on access to justice in land disputes in Sumba, where customary law dominates the local legal repertoire pertaining to land, highlights the bottlenecks for obtaining access to justice that concern the substance of customary law (Vel and Makambombu, *this issue*). Within that normative order – Sumbanese adat – Group Rights to land are a more general, 'thinner', rights than individual land rights. Moreover, the authors conclude that 'no one is equal before the customary law' which makes this normative order incompatible with one of the basic criteria for the rule of law. As a consequence this study leads to the warning conclusion that before propagating 'non-state justice' it is necessary to know the substance of the non-state order concerned.

Controlling mechanisms

Van Huis (*this issue*) addresses the institutional elements of the ROLGOM framework. The Islamic Courts have a specialized jurisdiction in family law for the Muslim part of the population and are generally considered of high quality. Yet, the case study found that only a small number of divorced women seek access to the court to formalise divorce. Furthermore, in only a few of the cases which went to court, did the court make a decision on alimony obligations. The conclusions hint at absence of controlling mechanisms. The norms and procedures seem to be available and clear, but there is a lack of implementation and there seems to be no way to do something about that. Absence of controlling mechanisms can lead to apathy on the side of the justice seeker.

Implementing institutions

Tjandra (*this issue*) describes how dismissed labourers found an unusual strategy to get access to justice. One core problem was that Indonesian labour laws seem to exist on paper, but that they are seldom implemented. Company management should obey the laws and if there are disputes between labourers and employers, the Industrial Relations Court should provide a proper forum of redress. With creativity, the dismissed labourers found an alternative procedure which turned out effective for their case. However, the case also shows that failure of the implementing institutions creates a justice barrier, which could be removed by improving performance of the institutions concerned.

In conclusion, we would like to point out we are aware that reading this article and our schemes separately is unlikely to be very exciting. However, we do hope that the case studies following this conceptual framework demonstrate that its use may lead to accounts and findings that *are* exciting - and thus testify to its usefulness.

One may still wonder to what extent the present framework is important beyond the AJI project itself. For us the need was obvious, as it allowed us to compare cases and to tease out general findings of materials that are otherwise difficult to compare. Although empirical facts seldom fit neatly into analytical categories devised beforehand, according to the researchers this scheme worked well for them to disentangle and make sense of sometimes convoluted processes. They also remarked that it indeed sensitised them to perceive various processes they might have missed otherwise.

In our opinion, it is this in particular that validates this publication. Those who carry out research into access to justice may prefer another definition of the concept, or devise different categories and steps, but as a point of departure our framework may be helpful for them as well. Based as it is on a rather thorough overview of the access to justice literature it also makes the insights found in this literature easier to access.

However, we will be encouraged if some researchers draw direct inspiration from this approach and thus contribute to the ultimate objective our project wants to serve: to produce insights on access to justice processes that can be compared and will therefore add to a general body of knowledge in this field.

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