Presentation delivered to 2nd UCL Conference on Access to Justice and Legal Services, 2018

Jan Winczorek, University of Warsaw
janwin@janwin.info

Uphill paths. Polish research on access to justice (presentation notes)

This paper reviews some Polish empirical research on access to justice by presenting the main findings in a broader context of policy reforms. First, outcomes of two studies of general population are summarized: a 2012 legal needs study conducted by Institute of Public Affairs, which informed the reform of 2015, and a 2015 study of paths to justice, sponsored by one of the bar associations and designed by the present author. Second, some observations are made on potential and actual use of these findings in knowledge-based policies of access to justice. Third, paper presents main assumptions and some preliminary outcomes of an empirical study of paths to justice in small and medium enterprises (SMEs), currently being conducted by the present author.

Introduction

Poland has never been in the forefront of the access to justice movement. Despite deep systemic transformation establishing rule of law and human rights protection post 1989, in the 1990s and 2000s only piecemeal reforms of limited impact were undertaken in access to justice. Some institutions of out-of-court advice continued to operate since the olden days and some new were introduced, but their provision remained narrow, sectoral and uncoordinated. Similarly, access to attorneys before courts continued to be offered to a very limited number of beneficiaries under antiquated "law of the poor" system. That was combined with a skimpy attorney fee scheme and fee shifting scheme believed to facilitate access to lawyers, as well as deregulation of professions and ebb and flow of changes in procedural laws. None of these developments was yet backed by comprehensive impact assessment relevant in the field of access to justice.

In the absence of a public policy, most drive towards enhancing access to justice came from grassroot movements and human rights activism. Major non-governmental initiatives included the flourishing clinical movement, a network of NGOs offering British-style citizens advice, many dispersed NGOs providing regular legal advice, some well-marketed public lawyering programmes, and largely uncoordinated pro-bono.

Consistent with this, empirical research on access to justice, academic and otherwise, has been scarce and unsystematic, and so were other attempts to provide analytical backing for reforms. This could be linked to scarce funding and no interest in decision makers, yet some of this could well be accredited to the specific research interests of Polish sociology of law and empirical legal scholarship[1].

A somewhat more systematic interest in empirical research on access to justice began to develop only after Poland had joined the EU in 2004, and continued throughout 2010s. Firstly, a EU-funded pilot program sponsoring delivery of out-of-court legal advice by NGOs was established. This necessitated formal, research-based evaluation, eventually leading to the perception that a more general study, investigating feasibility of a permanent program to fund out-of-court legal advice is needed. This exercise (hitherto 2012 Government study) was brokered in 2011 and carried out in the following years. Whilst its actual impact on legislation is dubious, the system of state-funded out-

1

of-court legal advice has indeed been established in 2015, and began functioning in 2016, with aid being delivered in more than 1500 offices across the country.

The increased interest in empirical studies of access to justice is a consequence of that very fact, but also structural shifts in the legal services market. Following a deregulation of the professions in the late 2000s, number of attorneys grew significantly. The increased competition in the market has incentivised both bar associations active in Poland[2] to sponsor some empirical studies on accessibility of services delivered by their members. Among these studies was the first Polish study implementing principles of path to justice research, sponsored by National Council of Legal Advisors, completed in 2015 (hitherto NCLA study).

This paper elaborates on two completed empirical studies on access to justice (The 2012 Goverment-sponsored study and the 2015 NCLA-brokered one) and another one that is currently ongoing (hitherto NSC/SME study). It also outlines some assumptions of yet another, NGO-led and EU-funded project (hitherto POWER/RIA study) to assess the outcomes of said law on out-of-court advice, which is currently pending realization. It still leaves without discussion a number of other academic and independent studies, some of which utilise data from the 2012 project.

Main purpose of the paper is to reflect, through case studies, on the conditions of possibility that such empirical projects lead to actual policy change. The rather specific Polish situation is thus analysed to provide more universal implications for knowledge-based policy design and implementation.

Results

As a result of this exercise it appears that for effective collaboration between researchers and policy makers in access to justice, no less than three conditions must be met. Firstly, there must exist sufficient competence in the academia and the researching community. Empirical projects in access to justice tend to be overwhelmingly complex due to the fact that many factors influencing study design and execution must be considered. These factors include (but are not limited to) multiplicity of units of analysis, large datasets, complex interdependencies between variables, problematic operationalisations, epistemological nuances, multiplicity of stakeholders, and hidden agendas.

If such a competence is unavailable, the results produced will not only be poor academically, but also irrelevant for the policy exercise. They might be easily questioned by stakeholders whose interests might be exposed or threatened by introduction of a more rational policy. Even more importantly, low-quality research might lead to uncertainties discouraging decision-makers from pursuing reforms in the form advised.

Secondly, the processes of absorption of research outcomes and of brokering fresh research for policy purposes demand that in public administration there exists significant skill. This, again, is crucial not just for interaction between public administration and researchers and for absorption of the outcomes of research, but simply for managing the access to justice system. This, too, is due to complexity of the regulated matter.

2 For historical reasons, the Bar in Poland is divided into two associations: advocates' and law advisers'. Currently both professions enjoy almost identical status, the most significant difference being that law advisers are allowed to work on the basis of labour contracts.

More specifically, if the system is managed by individuals unable to comprehend the intricacies of empirical research, or if the organization of administration otherwise prevents them from utilizing such information, proper decisions may be made and implemented only incidentally. Such parameters of the system as expected demand for services, structure of that demand, and outcomes of provision may be determined only thanks to the research.

On the other hand, obtaining by individuals skills that are necessary for that purpose is in itself a result of an *organizational* learning process. Learning to use and broker research is only enabled by a right milieu, including formal and informal motivational systems, proper information flow, functional division of labour, adequate competence differentiation, effective decision chains, and so on. In the absence of those, attempts to obtain skills required to acquiring knowledge necessary in system management will easily be frustrated, and will fail.

Thirdly, the process of implementing knowledge-based policy in access to justice presupposes political involvement and effective management of conflicts related to divergent interests. These emerge between direct providers of aid – such as NGOs and lawyers' associations – but also in other, more indirect stakeholders, such as different departments of government and branches of local self-government.

Furthermore, access to justice may, or may not, become a part of the political agenda and become a mobilization device in political campaigns. This may directly or indirectly serve the needs of stakeholders, leading to clientelism and selective or biased acquisition of research results. Only when such interdependencies are recognized and managed, may a knowledge transfer be effective, and research brokering be rational.

Apart these primary conditions, also more specific, secondary factors exist. They are derivatives of the combinations of former ones rather than their simple direct consequences, but may well become as effective obstacles to implementation of a knowledge-based policy. One such condition is, obviously, access to adequate funding. Obtaining money covering research needs is impossible when specific research objectives are perceived as unjustified by uninformed decision makers or when the proposals to finance research are confronted with stakeholders' perception that revealing certain facts may threaten their interests.

Similarly, proposals to reform access to justice, produced as a result of research must be perceived as implementable within a legal and administrative environment. That pertains, for instance, to innovations which may be perceived as inadmissible due to regulations of legal services, financing schemes required for provision of legal aid, which may appear in contravention with more general rules of public finance, etc.

Discussion

The projects discussed in this paper illustrate these points because they have suffered from just such problems. The 2012 governmental project is particularly instructive here as it was specifically performed to inform policy change, and as it reveals deficits in all three fields mentioned.

The project was initiated by Ministry of Labour as a result of long running pressures from activist groups, demanding that before a system of out-of-court legal advice is introduced, a model solution is elaborated, so that effectiveness of the reform is ensured. A consortium of NGOs was entrusted

with the task of delivering a model solution, including a legal think tank, a public policy think tank, a coalition of advice societies, and an umbrella organization for university legal clinics.

This selection of partners in the project is noteworthy. Despite gravity of the task and despite significant funding for research, the consortium did not include a university or any other academic institution. Its connections to research professionals were only indirect. The member organizations had to recruit external experts to advise them on how to do research, and one of the partners was singled out as responsible for the process. Basic methodological assumptions of the study, including its general design, types of research to conduct and sample sizes were yet decided rather as a result of bargaining in the early stages of project drafting, than during an academic debate. Consequently, research design was a product of informal bargaining and undisclosed political interests.

The methodological imperfections became quickly visible as quality of the brokered research turned out to be insufficient to serve its purpose. This included inadequate methodology of the main survey exercise, and insufficient sample sizes. Whilst data was intended to inform about the state of out-of-court services before a new system is introduced, it largely failed to measure the undisclosed demand for such services (or "legal needs"). Only thanks to somewhat extravagant analytical manoeuvres, was it possible to produce any figures that could inform the decision-making process, including rough estimates of the expected demand.

This had created the possibility that policy recommendations were questioned when the process of drafting the new law was initiated. Some of the stakeholders denied the very necessity of starting a legal aid system on the grounds that all demand for legal service might well be met using existing the already existing means, and that in the alternate case the hitherto market will be negatively affected. Furthermore, since research in the project failed to demonstrate how complex and diverse could be the beneficiaries' problems and strategies, the necessity of adequately addressing them could be ignored by legislators. Therefore, a simple rather than comprehensive aid system was developed.

Apart from data quality issues, the project was affected by political disputes. About the time of project's start, out-of-court legal advice finally made it to the agenda of government's top officials. In an unprecedented outburst of interest, the necessity to establish a system of out-of-court legal advice was stressed by both prime minister and president in their important public addresses. This must have created significant pressure on members of central administration who were eventually tasked with drafting the new law. They had to bear in mind that the law must be passed before the upcoming parliamentary elections, and this resulted in heavy corner-cutting when it comes to organization and complexity of the new system.

The most striking features of the new law was that it aimed to minimize costs and simplify the process of providing services to the extent possible. None of these is in itself a bad thing, yet both impinged on functionality of the system. The execution of the system was delegated to local self-government with only 3% overhead to cover indirect costs. The categories of beneficiaries entitled to use the system were established in such a way as to minimize the necessity of verifying their economic or social status, yet without much regard for policy goals this was supposed to serve. As a result, the complete list of categories of persons entitled to use the system is as follows: persons under the age of 26 or over the age of 65, recipients of social security benefits, war veterans or combatants, holders of the "large family card".

On the other hand, two sets of interests could be identified in stakeholders partaking in the legislative process. First concerned the question, which specific types of service providers should be included in the system. Main fault line was whether provision should be offered by NGOs along with the members of bar associations, or just the latter, and, consequently, if services other than traditional advice should be financed in the system. The resolution to this dillema was inconsistent. Whilst NGOs are considered valid providers in the system, the only acceptable services are traditional legal advice (including drafting first motion in a case) and "legal information", delivered by members of the bar, or law clerks with significant experience. No outreach, distance or integrated services are permitted and financed – delivery of which could be managed by NGOs – nor is citizens' advice or mediation.

Second issue was competition for political backing arose between agents of change within government. As it were, the research exercise was sponsored by Ministry of Labour, but drafting of the new law was entrusted with Ministry of Justice. As a result, the outcomes of the research exercise could be safely ignored by Ministry of Justice, and some policy options could be implemented which were not recommended in the project.

On top of that, public administration turned out to be incapable of internalizing some of the basic messages stemming from international research and practice of legal aid management. Whilst the current trend is to integrate legal aid with other services to the extent possible, the newly established Polish system remains structurally decoupled from its environment. This pertains to other state-funded social services, particularly in social welfare, but also to the mechanism to provide lawyers at the court stage. Because of that, persons who are beneficiaries of some social programmes might not be eligible for legal aid and vice-versa, and recipients of out-of-court advice might not receive state-funded assistance when their case makes it to a court.

As a result of this design, the new law is strongly dysfunctional. As opposed to many legal aid systems having to cope with excessive demand for their service, it suffers from interest of potential beneficiaries. Furthermore, the fixed-budget, fixed-hours system of payment makes it grossly inefficient. By rough estimate, some 70% of funding is spent to pay for hired staff's idle time, not to deliver actual legal aid to the people in need.

In contrast to the governmental project, the 2015 NCLA project was entirely financed from private resources of the NCLA. This meant that unlike the former case, general study design, drafting the questionnaire and other decisions regarding research methodology were outsourced to a single expert. While the study had to respond to NCLA's specific research agenda and was limited in its scope for financial reasons, it was still sufficiently funded to be modelled after the many hitherto paths to justice studies. Most significantly, it wasn't influenced by stakeholders' bargains or other political limitations. As such, it produced results allowing for throughout understanding of legal needs of general population in Poland, and how are they resolved.

While in terms of quality of data the NCLA project excelled the governmental one, it too failed to produce much change in policy. Despite being finished before final enactment of the legal aid act, and despite sponsor's obvious interest in that regulation, its results weren't used by the sponsor to influence the legislation. This has to do with complexity of the results, and the fact that devising a public communication strategy on its basis isn't obvious, particularly under conditions just described. Another reason for this was lack of coordination between research and policy making,

specifically improper timing. At the time of research's completion drafting of the new law was already coming to an end, and much of the strongly politicized bargaining had already taken place.

Most importantly, the study demonstrates, that in principle the single most important obstacle to resolving one's legal issues is the fact, that individuals do not perceive problematic events in their life as justiciable. They also view legal services as expensive and are not particularly adept in looking for legal assistance. All this calls for a number of initiatives, including a wide-tailored public legal education program, and wide marketing of any institutional method of resolving them, such as a legal aid system. No such initiatives were taken place under the new law, with governmental campaign before the launch of the system in 2016 being limited and untimely.

Other findings in the research largely confirmed the commonsensical objections against the new law. It indicated that justiciable problems are the most prevalent among the middle-aged, active persons, not the youth and the elderly. It demonstrated that being self-employed is correlated with having problems, but not seeking legal advise and so is ill-health and disability. Finally, it showed that low income alone does not explain legal abstinence, because persons of limited means are still able to obtain their legal assistance if gravity of the case justifies that. This would suggest that an aid system should include wider categories of beneficiaries and should not be perceived as an another incarnation of the poor law.

Additional factor mitigating the potential for policy change stemming from the NCLA study was the political change, which occurred in Poland in the fall of 2015. These limitations made themselves visible in three prongs. Firstly, and quite paradoxically, during the presidential campaign of 2015, the issue of legal aid was still high in the political agenda. The successful candidate established an "aid office" delivering aid during the campaign, and then institutionalized it in his new cabinet. Yet, after enactment of the new law at the end of Parliament's term, the whole issue was quickly removed from public view.

Second reason was that NCLA, similarly to the other bar association in Poland and other lawyers' professional societies, took an articulate stance towards violations of rule of law of the new government and president. This didn't leave much space for cooperation in the field of legal aid.

Thirdly, the main platform for advising Minister of Justice, established in the new law on legal aid, the Board of Free Legal Advice and Public Legal Education, failed to serve that purpose. Primary reason for that was that it was composed of representatives of selected stakeholders and public administration, rather than specialists eager to deliberate. The non-deliberating character of the Board was further reinforced by political radicalism of the new political leadership of the Ministry, stifling the barely-incumbent debate. Altogether, this didn't create much space for discussion of a knowledge-based policy.

The further two projects are yet not complete, but they do offer fresh options for utilization of knowledge in legal aid delivery. The POWER/RIA project, which is run by a coalition of NGOs and remains at the early stages of development, specifically aims to provide evidence for policy change. It will include a number of research exercises, which are supposed to overcome data scarcity problems resulting from faulty mechanisms of data collection in the current system.

Specifically, it will address low-granularity of the existing official data and attempt to deliver more information on actual operation of aid offices and situation of aid providers. Due to rather complex

system of financing and administration of the aid system, combined with some structural issues pertaining to the relations between self-government and central government, no data on delivery of legal aid in individual aid offices is available at the central level, even though such data is collected locally.

Retrieval of office-level data it from all 320 local districts will be followed by interviews with organizations and individuals delivering aid, in-site quantitative observations of actual encounters of beneficiaries with the system, and a limited quantitative study of brand recognition. It is hoped that this provides information on actual scale and nature of offices' operation, optimality of their geographical localization, differences between aid delivered by NGOs and members of the Bar, and general user experience.

Chances of effectively communicating the results of this exercise to policy makers appear to be dim, though. Even though the project is funded by public resources, current government is unlikely to use it, as it is not known for its keen cooperation with NGOs not directly supporting its agenda. Moreover, in the informal division of labour within the ruling party, the task of reforming the legal aid seems to be vested with the President, who seems to have made independent decisions on what the law should be like.

An amendment of the 2015 law on legal aid has already been filed to the parliament, following brief public consultation exercise in early 2017. While it does address some of the issues that have emerged under current system, it does not resolve the central question of aid system's decoupling from other branches of social service nor does it change system's main faulty tenets. The consultation process itself seems to be hasty and partial.

Difficulty to come through with the message might also be the fate of the 2017 NSC/SME project, which has been in progress for more than one year. While it is based on the earlier experiences with studying access to justice in Poland, it differs from them in two respects. Firstly, it is a study of access to justice in small and medium entrepreneurs, not in the general population. Secondly, it is purely academic. It was sponsored by state-funded, apolitical grant-delivering institution, the National Science Centre, as basic research. This guarantees the researchers academic freedom, but has obvious drawbacks from the perspective of policy development. Although the project presupposes that its results are reported to decision-makers, it is unlikely that any political leverage could be used to pass the message through.

It is not to say, though, that the both projects will be unsuitable for developing a policy. In the case of NSC/SME, scope of the funding allowed to design a comprehensive study, including a quantitative part (a paths to justice-type CAWI survey, n=7200) and a qualitative exercise (100 IDIs, case studies). One preliminary observation stemming from the latter is that there exists much demand for communicating law-related needs of SMEs to decision-makers, and that a state-supported aid system would be welcome particularly in the most vulnerable segments of SMEs: the self-employed persons and micro-companies.

Although only rudimentary analyses of quantitative data have been conducted that far, data quality appears to be sufficient to provide information on problem incidence and structure, as well as actions undertaken to resolve them. It is expected that application of multivariate and modelling techniques should be possible, including variables describing justiciable problems and methods of

resolving them, SMEs characteristics, as well as responses measuring respondents' views and opinions on some law-related issues.

Apart from that, in the quantitative exercise conducting of certain methodological experiments was possible. These include testing questionnaire variants with and without a triviality filter, different time periods during which justiciable problems might have emerged, and different wording regarding types of respondents' potential opponents in their justiciable cases. The versatility of the CAWI research tool allowed also for deploying the questionnaire on two sub-samples of respondents – current and past owners and managers of SMEs. Preliminary analysis suggests, that in all cases significant differences can be observed.

Conclusions

In the Polish experience, delivering knowledge for the purposes of policy making in legal aid proved to be difficult. Apart from structural factors – like vested interests and political campaigns – impossible to avoid in any contemporary social system, three obstacles to doing this effectively were identified. Firstly, as the 2012 Governmental study indicates, persuading decision-makers to implement particular policies requires quality research. In the absence of this, policy advice can easily be side-stepped.

Secondly, the needs for such a research and must be recognized. In the 2012 study, this was prevented by change of agents of change in the middle of the process and by more general phenomena within public administration. These included strong antagonisms between ministries, and mechanisms of recruitment to the leading positions in administration of justice system, leading to significant competence mismatch.

Thirdly, there must exist institutionalised methods of dealing with the diverse interests linked to legal aid delivery. This could be public deliberation exercises, open consultations with experts, and wide public involvement. There must be sufficient time for this so that expertise could be produced, delivered and internalized. In the Polish case, the process lacks transparency, and lacks actual debate. The changes are introduced hastily and without clear explanation of motivations for doing that. This facilitates clientelism and prevents rational arguments from obtaining political support. Crucially, under such conditions the elected decision-makers are unable to see how introducing an effective policy might be useful for obtaining popular support in their campaigns.

This final point has particular relevance in the context of recent rise of populist politics. It has been observed that the rise of the populist parties in Poland can be linked to the perception in parts of the electorate, that the hitherto existing political, economic and legal system deprives them of the possibility to actively manage their lives and live their values. This in turn leads to feelings of indignity and frustration. The easy solutions, offered by populists, including the lavish yet short-sighted social benefits programmes and ill-founded promises of changes in the justice system involving curtailment of rule of law, capitalize just on this.

It is not to say that a knowledge-based, effective legal aid system is a silver bullet against political populism. Still, it enables citizens to effectively pursue their social, political and economic rights and interests, thus creating sense of empowerment and self-dependency. In a sense, the increased interest in legal aid system in the first half of 2010s was well-placed. What was yet missed, was how to introduce it effectively.