Access to justice: to dream the impossible dream?

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Abstract

In the past the phrase 'access to justice' referred to access to courts, but since the 1970s it has acquired a broader meaning and is still evolving. Views on access to justice are closely linked to the socio-economic situation at a particular point in time. Our current world is complex and has given rise to matching complex needs. Huge social imbalances have been created and many groups of people have become marginalised and excluded from a fair determination of rights. Legal problems have thus acquired a social dimension, requiring the civil justice system to play an important role in realising social justice. Current access-to-justice concerns are aimed at promoting and achieving the social inclusion of those excluded from the justice system, and so the meaning of the phrase access to justice is extended to include access to mechanisms that facilitate social inclusion. Broad consensus on the basic guiding principles for such mechanisms has yet to emerge. Nevertheless, a new approach to access to justice has so far yielded many far-reaching procedural reforms in many countries, as well as many innovative measures (such as PLEI programmes, help centres, ombudsman institutions, special tribunals and funding schemes), giving reason for optimism that justice systems will be able to meet the needs of the most disadvantaged members of society.

INTRODUCTION

It is generally accepted that the justice system encompasses the institutions fundamental to the rule of law in democratic societies. Real, meaningful access to such institutions is essential in maintaining any democracy, and the persistent concern worldwide over access to justice systems, as well as the ongoing efforts by a wide range of stakeholders to improve such access, are thus easily explained. It is likewise understandable that 'access to justice' has been one of the most recurring themes in the field of civil procedure over the past forty odd years.

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Although traditionally the above institutions were equated with 'courts',[1] it is now generally accepted that justice need not only be dispensed by the formal justice system.[2] Further, although the cost of litigation, the slowness of the process, and its procedural complexity are usually still mentioned as factors obstructing or limiting access to justice, there is a growing awareness that discussions surrounding access to justice need to move beyond these issues.

While it is necessary to record the shortcomings of a system, no purposeful strides can be taken to rectify them if such a record simply becomes a litany of the failure of the justice system and of the ideals of justice. A broader approach than merely seeking a legal solution should be followed. As Lindblom and Watson[3] observe, civil procedure is 'constructed from, and is an expression of what we want to achieve in society and should not be restricted to purely technical questions about the most effective way of processing and solving disputes'. Although much discussion generally focuses on the main *features* of access, little attention is given to an understanding of the meaning of access to justice. No doubt litigation costs, complexity of procedure, and economy of process need constant attention, but it is argued that without cognisance of the trajectory development of the concept of access to justice, the ideal of effective access for all will not be achieved. This discussion is aimed at exploring the evolving content of the concept 'access to justice'.

A brief historical background

The start of the debate surrounding access to justice was in fact the start of *a movement* which has had a worldwide and lasting impact.[4] The notion of access to judicial institutions started in the late 1970s with the Florence Access to Justice Project,[5] headed by the emminent scholar, Professor Mauro

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1 See *eg* Friedman 'Access to justice: some historical comments' (2010)1 *Fordham Urban Law Journal* 3; Galanter 'Access to justice in a world of expanding social capability' (2010)1 *Fordham Urban Law Journal* 115; Zuckerman 'Justice in crisis: comparative dimensions of civil procedure' in (1999) *Comparative perspectives* (Anon ed) 3 at 9.

2 See eg Garth 'Comment A revival of access to justice research?' in *Access to justice* (2009) (Sandefur ed) 255 and the editorial 'Access to justice: classical approaches and new directions' at x.

3 'Complex litigation – a comparative perspective' (1993) *CJQ* 33 at 84.

4 The recent growth in literature confirms the continued involvement and collaboration of lawyers in the process. Galanter 'Access to justice as a moving frontier' in *Access to justice for a new century: the way forward* (Bass Bogart and Zemans eds) (2005) 147 at 151 points out that it has been well and truly 'institutionalized' in an array of bar, NGO and governmental programs.

5 This was a four-year comparative research project sponsored by the Ford Foundation and the Italian National Council of Research: see Cappelletti and Garth 'Access to justice: the newest wave in the worldwide movement to make rights effective' (1977–1978) Vol 27 *Buffalo Law Review* 181.

Cappelletti, that culminated in the multi-volume series *Access to Justice,* published during 1978 and 1979.[6] Cappelletti saw the development of this notion as comprising three 'waves':

> The first wave, ... involved the reform of institutions for delivering legal services to the poor. The second wave sought to extend representation to "diffuse interests" such as those of consumers and environmentalists: it commenced in the United States with the development of foundation-supported "public interest law firms". The third wave followed ... with a shift in focus to dispute-processing institutions in general, rather than simply on institutions of legal representation; less formal alternatives to court and court procedures … emerged … .[7]

This quotation succinctly paraphrases the change in the meaning of 'access to justice' during the period prior to 1970 to the late 1970s; from a narrow view of access to formal judicial institutions, to institutions which are more than mere governmental and judicial institutions.[8]

During the first wave, extensive steps were taken to reform the provision of legal aid to the indigent. The legal aid systems of much of the modern world were improved, but not all countries implemented identical systems.[9] Although legal aid addressed the legal costs barrier to access, it was not without its limitations and it was realised that legal aid could not be the only solution – effective legal aid schemes require large numbers of lawyers (often exceeding the supply) as well as ample funding, while not solving the problem of small claims brought by individuals.[10]

The second wave, by focusing on representing the diffuse interests the non-indigent, resulted in a re-evaluation of traditional civil procedure principles, such as standing, *res iudicata,* and the role of judges.[11] This wave

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6 This huge enterprise consists of 4 volumes with a follow-up volume entitled *Access to justice and the welfare state* (Cappelletti ed) published in 1981.

7 See 'Introduction' in *Access to Justice and the welfare state* (1981) 4.

8 Galanter n 1 above at 115; Cappelletti and Garth n 5 above at 197–222.

9 Jurisdictions either established the judicare system whereby legal aid is available for all eligible persons under statutory terms with the state paying private lawyers to provide the required services. Countries which used this model include Britain, Germany, The Netherlands and France. South Africa also provides this system of legal aid: the public salaried attorney model (whereby legal services were provided by 'neighbourhood law offices' staffed by attorneys who were paid by the state and used in the USA); or a combination of these models (used *eg* in Canada and Sweden): see Cappelletti and Garth n 5 above at 199–207.

10 Legal aid is generally not available for these types of claims: Cappelletti and Garth n 5 above at 208.

11 Traditional civil procedure is individualistic in that litigation is conducted between two parties and in connection to their own, individual rights, whereas diffuse interests relate to representative and collective interests. Judgments, to be effective, have to bind all

consequently saw *inter alia*, the recognition of the class action, the public interest action, and various governmental solutions, such as the introduction of the consumer ombudsman.[12]

The third wave grew out of the earlier two movements, and while not abandoning the techniques of these movements, saw them as 'only several of a number of possibilities for improving access'.[13] Whereas the first two waves were concerned with effectively representing either poor individuals or diffuse interests, the approach of the third wave was (and still is) all-encompassing in relation to law reform as it seeks to engage formal and informal institutions and processes[14] to resolve (or prevent) disputes in society.

As will be seen later, this wave has gained momentum and has morphed into a movement which brings new perspectives of law, and allows for more creative solutions as interdisciplinary collaboration between scholars develops, notably those from the social sciences.

Two other developments accompanied the access to justice movement (and continue to play a role). One was the so-called dispute perspective in legal studies, and the other, the Alternative Dispute Resolution (ADR) movement.[15] In terms of the dispute perspective, adjudication by the courts was seen as only one of a variety of ways that disputes could be dealt with, and used the pyramid model to explain the construction of disputes. In terms of this model actual litigation is the tip of the pyramid, while the lower layers of the pyramid are made up of successive layers of a great many incidents that could (but usually do not) turn into claims, through a process of naming, blaming and claiming.[16] The litigants who follow this path are those who eventually find themselves in the formal dispute resolution system. This

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parties, or in the case of diffuse interests, all members, despite them not all being before court personally and not actually being heard. Also, judges traditionally do not play an active role in litigation, whereas active participation or managerial judging is required in these matters. Clearly the protection of diffuse interests required the reform of the tenets of traditional civil procedure.

12 Cappelletti & Garth n 5 above at 210–221.

13 *Id* at 223.

14 See Galanter 'The duty *not* to deliver legal services' (1976) *Miami Law Review* 929. These reforms envisaged changes in court structures, the creation of new types of courts, the use of non-professionals, forms of procedure, etc.

15 Galanter n 1 above at 115.

16 Felstiner Abel and Sarat in their seminal work 'The emergence and transformation of dispute: naming, blaming, claiming …' (1980–81) Vol 15 *Law and Society Review* 631 postulate the construction of the pyramid to understand disputes. 'Naming' refers to the recognition and identification of an injury; 'blaming' refers to the recognition and identification of an injury; and 'claiming' refers to the seeking of redress: see at 635–636. Most disputes of course do not turn into claims or complaints and form the base of the pyramid.

model provided a 'theoretical structure for depicting the range of access concerns', and exposed a range of possible points (such as ignorance that an injury occurred or that it was attributable to a person; intimidation; and costs) where access may be lost in the adjudication process.[17] The dispute perspective has given rise to prolific research and scholarly contributions are found in dedicated publications.[18] Because disputes are seen as social constructs,[19] the emergence and transformation of disputes is seen as an important topic in the sociology of law in order to understand disputant behaviour and dispute processing,[20] and a more critical assessment of efforts to improve access to justice is consequently afforded.[21]

Alternative Dispute Resolution (ADR) was initially closely aligned with the formal court system, and court-linked processes disposed of many matters, thus alleviating overburdened court rolls.[22] Although one of the original reasons for the ADR movement was concern over the high costs of litigation and delays in resolving matters before courts (traditionally seen as barriers to effective access to justice), it was not clear whether this type of informal justice actually met 'the goal of solving problems of delay and litigation cost'.[23] In fact, Galanter[24] suggests that ADR no longer 'enjoys the

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17 Galanter n 1 above at 116–118.

18 See *eg Law and Society Review; Journal of Law and Society; Journal of Empirical Legal Studies*. This model has also not gone unchallenged: see Genn *Paths to justice* (1999) 10.

19 Felstiner Abel and Sarat n 16 above at 631.

20 *Ibid*. See also Coates and Penrod 'Social psychology and the emergence of disputes' (1980–81) Vol 15 *Law and Society Review* 655; Trubek 'The construction and deconstruction of a disputes-focused approach: an afterword' (1980–81) Vol 15 *Law and Society Review* 727. See also in general Tyler 'Citizen discontent with legal procedures: a social science perspective on civil procedure reform' (1997)1 *The American Journal of Comparative Law* 871.

21 So, for example, the various forms of dispute processing can be evaluated and improved (or others developed) once it is determined why disputants do not access them (*eg* negative experience; insufficient knowledge; apathy; perceptions, etc). Transformation research focuses on agents and study attitudes to document any shifts in opinion. These shifts are then used to develop hypotheses to explain them. Felstiner Abel and Sarat n 16 above at 651–652 state that the transformation perspective suggests that there may be too *little* conflict in our society (as opposed to the general view that there is too much), and explains it as follows: Because many studies are 'court-centred', conflicts are assessed from the court's point of view which perceives its resources to be limited. Any level of conflict that exceeds the court's capacities is 'too much'. If, however, the *individual* who suffered an injury is the point of departure, the question then becomes why so few such individuals get some redress.

22 Galanter n 1 above at 118; Lieberman & Henry 'Lessons from the Alternative Dispute Resolution Movement' (1986) 53 *University of Chicago Law Review* 424; Edwards 'Alternative dispute resolution: panacea or anathema?' (1985–86) 1 *Harvard Law Review* 668; Resnik 'Failing faith: adjudicatory procedure in decline' (1986) 53 *University of Chicago Law Review* 494 at 536.

23 Tyler n 20 above at 881.

24 N 1 above at 118. It appears that some ADR advocates had this objective even at the start of the movement: see Edwards n 16 above at 683.

assumption of facilitating Access to Justice', and has in some instances become a direct rival to access-to-justice programs.

Understanding basic concepts and the evolving concept of access to justice

Equal justice before the law[25] is a fundamental principle of legal systems in democratic societies, and in turn usually translates into equal access to the justice system[26] and adjudication in accordance with substantive standards of fairness and justice.[27] But as Macdonald[28] points out, since the first use of the access-to-justice-phrase (or 'slogan' as he prefers), there has been little agreement about what it means, prompting writers and commentators to (unhelpfully) remark that it encompasses a variety of meanings, or stated differently, that it means different things to different people.[29] This is no doubt due to the fact that the phrase has over time become politically loaded and thus necessarily problematic.[30] It is then not surprising that the phrase is said to suffer from 'a bad case of semantic overload':[31] The word 'access' is

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25 For example, in South African law this principle is enshrined in the Bill of Rights. S 9(1) of the Constitution of the Republic of South Africa, 1996 provides as follows: 'Everyone is equal before the law and has a right to equal protection and benefit of the law.' According to Rhode *Access to justice* (2004) at 3 this principle is one of America's most proudly (albeit also widely violated) legal principles.

26 Rhode n 25 above at 5; Tolsma De Graaf and Jens 'The rise and fall of access to justice in the Netherlands' (2009) 2 *Journal of Environmental Law* 309.

27 See *eg* Francioni *Access to justice as a human right* (2007) Vol XVI/4 1; Grossman and Sarat 'Access to justice and the limits of law' in *Governing through courts* (Gambatta May Foster eds) (1981) 77.

28 'Access to justice in Canada today: scope, scale and ambitions' in *Access to justice for a new century: the way forward* (Bass Bogart and Zemans eds) (2005) 19. Genn 'The case of medical negligence' in *Reform of civil procedure* (1995) (Zuckerman and Cranston eds) at 394 calls it an 'elusive concept'.

29 See *eg* 'Introduction' in *Access to justice for a new century: the way forward* (Bass Bogart and Zemans eds) (2005) 2; 'Civil justice on trial – the case for change'. Report by the Independent Working Party set up jointly by the general Council of the Bar and the Law Society (1993) 6.

30 See *eg* Smith *Justice: redressing the balance* (1997) at 9 describing how not only the Labour Party but also the Liberal Democrat Lawyers Association in Britain adopted the phrase. Access to justice is also seen as a human right – see Francioni n 27 above. Reference is even found within an environmental law context: see *eg* Homewood 'Access to environmental justice: transparency, the Aarhus Convention and the enforcement of the Environmental Information Regulations: some early reflections' paper delivered at the WG Hart Legal Workshop 'Access to Justice' by the Institute of Advanced Legal Studies, London on 27 June 2007.

31 See Grossman and Sarat n 27 above at 81.

nowadays also over-used,[32] explaining its cynical description as a word that appears on the first page of 'all modern lexicons of political correctness'.[33]

To add to the complexity of the concept of access to justice, the term 'justice' is similarly not easily defined, although it can be 'equated with fair, open, dignified, careful and serious processes'.[34] While it has often been debated whether or not society is more concerned with the substance of justice, many studies show that *procedural* justice is often more important than feelings of whether or not 'true justice' has prevailed: the fact that one has been listened to impartially would, therefore, seem to be a central value among litigants.[35] As it is no longer accepted that the only purpose of civil litigation is the resolution of disputes,[36] justice can no longer be defined to refer only to 'the satisfactory resolution of disputes'.[37] Justice may also not refer solely to a process or institution because for most people 'justice' is an outcome. If that outcome is not financial compensation (the principal remedy offered by the legal system), but rather the prevention of a certain occurrence, or even an apology, the formal legal is ill-suited for such outcomes or goals. They nevertheless present the justice many seek.

While the traditional view was that 'access' pointed to the courthouse door,[38] it was later believed that what citizens in fact needed was access to lawyers.[39] It is now generally accepted that these views are too narrow, and that the phrase encompasses more. Consequently, the question arising is: what then is a wide enough meaning? In this regard it has been argued that access presupposes some form of barrier that has to be identified and removed. One has to look closely at society. Societal barriers take on many guises: social, economic, political, demographic, and psychological.[40] These barriers lead to inequalities which in turn lead to the exclusion of some from the fair

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32 It is used in IT to indicate the use and unlocking of systems and data; in education to indicate admission; in connection with natural resources to indicate use, etc.

33 Andrews *English civil procedure: fundamentals of the new civil justice system* (2003) at para 9.03.

34 *Review of the Federal Civil Justice system* (August 1999) Australian Law Reform Commission, Discussion Paper 62 at 22.

35 *Review of the Federal Civil Justice system* 22, quoting MacDonald 'Study paper – prospect for civil justice' in *Study paper on prospects for civil justice* (1995) Ontario Law Reform Commission at 89.

36 And in so doing being civilisation's substitute for vengeance: Jolowicz *On civil procedure* (2000) at 387.

37 *Ibid*: it also secures the rule of law in a practical way. There are also methods outside the formal court system for dispute resolution, such as mediation, arbitration, etc.

38 Grossman and Sarat n 27 above at 80.

39 Rhode n 25 above at 81.

40 Macdonald n 28 above at 102 points out that the lack of access correlates with many medical, social and economic problems. See also Grossman and Sarat n 27 above at 82–83. Being a single parent, being unemployed, receiving a disability grant or being a member of a minority group are all factors that may present barriers.

determination of rights. Smith[41] points out that a society with maximum access to justice is one which is not affected by the inequalities of the parties to any dispute, and that the whole range of mechanisms to combat the disabling effects of sources of social exclusion (such as racism, poverty, educational impoverishment and gender), should be considered.

The notion of equality is no doubt strengthened by the recognition of human rights and the development of a human rights culture, and whether in individual jurisdictions, or in the European Union, the right to a fair trial is guaranteed.[42] In this regard, matters relating to access which arise during the course of proceedings will be considered against the provisions of the EU human rights provision, thus be shaping practice and procedure while defining the implementation of these provisions.[43] As Zuckerman[44] points out, to be treated as an equal is a basic requirement of justice. This means that no litigant is subject to procedural discrimination in the sense that no litigant receives preferential treatment, or is exposed to a higher risk of error when compared to others.

Along with the recognition of social rights, has come the acceptance of a social dimension to the notion of access to justice,[45] and that justice, therefore, must also embrace social justice.[46] Equal justice, in most discussions, implies equal access to the justice system, and the underlying assumption is that social justice is available through procedural justice. This does not appear to be the case,[47] and it is submitted that it is not a realistic

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41 N 30 above at 9.

42 See Harlow 'Access to justice as a human right: the European Convention and the European Union' in *The EU and human rights* (1999) (Alston ed) 187. See also Article 6 of the European Convention on Human Rights. In *Dambo Beheer BV v Netherlands* (1993)18 EHRR 213, ECtHR the court held that in litigation 'equality of arms' implies 'that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.'

43 A good example in this regard is the expansive approach in SA law to standing in Bill of Rights matters in accordance with the mandate given to the court in terms of s 8 of the Constitution: see *Ferreira v Levin NO* 1996 1 SA 984 (CC). As far as non-Bill of Rights matters are concerned, where common law standing principles apply, the latter principles could also be relaxed when appropriate: *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 4 BCLR 457; 1999 3 SA 191 (CC) at para 106.

44 *Comparative perspectives* (1995) at 5.

45 Cappelletti 'Alternative dispute resolution processes within the framework of the World-Wide Access-to-Justice Movement' (1993)3 *MLR* 282 at 295 sees this as the passage from the *Rechtstaat* to the *sozialer Rechtstaat* as reflected in the 'most advanced Constitutions of Europe'.

46 See 'Introduction' in *Access to justice for a new century: the way forward* (Bass Bogart & Zemans (eds)) (2005) at 3.

47 See Rhode n 25 above at 5.

demand since, as Arthurs[48] correctly argues, social justice requires that the systemic causes of injustice be addressed. As these are 'virtually all political, social, economic, or cultural in their nature', litigation can do very little in the way of correcting such problems, notwithstanding the outcome of individual cases,[49] as 'legal remedies cannot reach back to first causes or forward to ultimate cures'. He consequently argues that the best chance for justice lies in political and social mobilisation and sees a role for lawyers in such mobilisation. With this, one can conclude that the concept of access to justice has acquired more than a greatly expanded meaning, and has in fact become a 'banner for a comprehensive assault on injustice'.[50]

A change in focus

From the above it is clear that current access-to-justice concerns are not identical to those present when the movement started or the subsequent developments which followed thereafter. This underscores the fact that views on access to justice are closely linked to the socio-economic situation at a particular point in time, as borne out by the fact that the start of the movement coincided with the rise of the welfare state in several western European and British Commonwealth countries in the post World War Two years. Characteristically, this led to strong state involvement in the form of government-funded legal services[51] for the poor, with the state assuming the responsibility of providing access to justice.

The thinking on the roles of the state and society regarding access has since shifted away from state dependency. Our current world is characterised by increased industrialisation; the rise of transnational business; technological advances; and increased living standards for many. These factors have given rise to matching complex needs which have subsequently led to high expectations that such needs be met. However, it is trite that these advances and the wealth so generated are not accessible to all due to certain contributing factors such as population growth; immigration; growing 'under-classes'; and illiteracy (to name a few), leading to huge social imbalances.

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48 'More litigation, more justice? The limits of litigation as a social justice strategy' in A*ccess to justice for a new century: the way forward* (Bass Bogart and Zemans eds) (2005) 249 at 253.

49 As he correctly says, social justice is more than the sum of individual justice as won in courtroom proceedings.

50 Smith n 30 above at 10.

51 See *Access to justice: a world survey* (Cappelletti and Garth eds) (1978) Vol 1 at 52. Typically the state was relied upon to take responsibility for the protection of legal rights and to provide shelter, healthcare and education to the needy: see Mattei 'Access to justice. A renewed global issue?' (2007) 11(3) *Electronic Journal of Comparative Law* 1 at 2*:* http://www.ejcl.org (last accessed 7 December 2010).

The majority of legal problems encountered by individuals of low- and moderate-income are for the most part not complicated legal problems and form part of everyday life. Most of these law-related[52] problems fall within the ambit of civil law, and regardless of the country, seem to relate to employment, rent, faulty goods and services, money (debt/credit), relationships and family matters, and children matters.[53] As a rule, these problems are not considered serious by the formal justice system (the so-called 'little injustices'[54]). However, they feature largely in the lives of these individuals. Research has shown that individuals who experience problems 'often experience a problem more than once *and* more than one type of problem'.[55] The fact that these individuals are surrounded by law-related problems while lacking access to justice to deal with them, form part of the dynamics that create and perpetuate poverty and social inequality, which leads to marginalisation,[56] thus establishing social exclusion.[57] Social exclusion can consequently be explained as 'what can happen when people or areas suffer from a combination of linked problems such as unemployment, poor skills, low incomes, poor housing, high crime, bad health, and family breakdown',[58] but is by no means an exhaustive definition.[59] These legal problems have a social dimension and therefore the civil justice system has an important role to play in realising social justice, because the danger of social exclusion is that society could react in a negative manner to the consequences of exclusion. Already disillusionment, dissatisfaction, and estrangement are felt by many of the socially vulnerable.

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52 These problems are referred to in literature as 'justiciable problems'. Such a problem is defined by Genn n 18 above at 12 as a 'matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the [matter] involved the use of any part of the civil justice system'.

53 See *eg* Genn n 18 above (ch 2) (UK); Van Velthoven and Ter Voert *Paths to justice in the Netherlands: looking for signs of social exclusion* (2004) http://mpra.ub.uni-muenchen.de/21296 (MPRA Paper No 21296); Currie 'A national survey of the civil justice problems of low- and moderate-income Canadians: incidence and patterns' (2006)3 *International Journal of the Legal Profession* 217.

54 This is a phrase coined by the anthropologist Nader: see *No access to law: alternatives to the American judicial system* (1986).

55 Genn n 18 above at 32.

56 Currie n 53 above at 218. See also *Legal and Advice Services: A pathway out of social exclusion* (2001) Joint Report by Lord Chancellor's Department and Law Centres Federation 11 states for example that a lack of access to reliable advice can be a contributing factor in creating and maintaining social exclusion.

57 Currie n 53 above at 218.

58 Pleasence *Causes of action: civil law and social justice* (2006) at 2.

59 Many definitions of social exclusion exist: see Pleasence n 58 above at 2 fn 7.

Widespread dissatisfaction with the justice system – including the legal profession and the judiciary – has been reported.[60] This has prompted Hudson[61] to remark, somewhat bitterly, that citizens affected by legal complexities are 'as oppressed as subjects of a monarch dispensing arbitrary justice'. Yet, while the law is targeted as scapegoat for society's grievances and unfulfilled aspirations, there is a continued demand for legal services and society continually looks to the law to correct the societal imbalances.[62] According to Grossman and Sarat,[63] this paradox can be resolved if one looks beyond the right *of* access, to the rights which may flow *from* such access. Viewed this way, access is more than a mere admission ticket to the formal legal process; it is a 'basic political resource' allowing for other opportunities.

The social dimension of access to justice is also broadening. Not only has the concept expanded to include new types of problem, but there is now also a realisation that problems experienced by types of *people* who were previously ignored need to be included, for example, people with disabilities, migrants, asylum seekers;[64] even others that do not qualify as the 'poor' need consideration.[65] As society continues to advance, together with rising

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60 There is a multitude of literature on this point. For a few examples, see Jacob *Civil litigation: practice and procedure in a shifti*ng culture (2001) at 4; Resnick n 22 above at 494; Fix-Fiero *Courts, justice and efficiency* (2003); Tyler n 20 above; Lightman 'The civil justice system and legal profession – the challenges ahead' (2003) 33 *CJQ* 235; *Discussion Paper: Major themes of civil justice reform* (2006) Civil Justice Reform Working Group (British Columbia); *Review of the Federal civil justice* system (1999) Australian Law Reform Commission Discussion Paper 62; Ipp 'Reform to the adversarial process in civil litigation' (1995) Vol 69 *The Australian Law Journal* 705.

61 *Towards a just society. Law, labour and legal aid* (1999) at 2.

62 Rhode n 25 above at 8 points out that matters such as unsafe conditions, abusive marriages, discriminatory conduct and inadequacies in social services that once were accepted as a matter of course now give rise to demands for legal remedies and for assistance in obtaining them illustrating society's increased expectations with regard to the law.

63 N 27 above at 89.

64 See the speech by Vice President Franco Frattini, the European Commissioner responsible for Justice, Freedom and Security, delivered at the 28th Conference of the European Ministers of Justice, Lanzarote, on 31 October 2007 on 'Emerging issues of access to justice for vulnerable groups, in particular migrants and asylum seekers, children, including – children perpetrators of crime' : http://www.libertysecurity.org/article1691.html (last accessed Feb 2011).

65 Kritzer 'Access to justice for the middle class' in *Access to justice for a new century: the way forward* (2005) (Bass Bogart and Zemans eds) 257 at 258 points out that those at the very bottom of the economic hierarchy often have better access to the institutions of justice than do those somewhat above them. He is of course correct as this is a consequence of applying means tests for access to various support services – those that fall outside of the range are automatically considered to be able to have the means to access these institutions, or at least to be able to obtain assistance to do so. This assumption is often incorrect. See also Harris and Foran 'The ethics of middle-class access to legal services and what we can learn from the medical profession's shift to a

expectations, so '[t]he realm of injustice is enlarged,'[66] prompting Galanter to refer to this result as a 'moving frontier of injustice.'[67] In this regard, he points out that increases in justice do not imply a corresponding decrease in the amount of injustice, as both grow together – injustice keeps growing with human inventiveness and knowledge.[68]

Cappelletti and Garth[69] foresaw that legal strategies alone would not resolve the plight of the poor and that the resolution would be found through a combination of legal and non-legal methods which would shift access to justice towards becoming part of a more 'citizen-centered and community-focussed' justice system.[70] Current access-to-justice concerns are thus aimed at promoting and achieving social inclusion, thereby extending the meaning of the phrase 'access to justice' to include access to mechanisms that facilitate social inclusion. In so doing, this new approach gives effect to Cappelletti and Garth's access-to-justice approach in respect of the third wave.

The current challenge

The battle for an accessible civil justice system cannot be fought on a single front. Therefore, while it is true that the initial focus of Cappelletti's 'third wave' on procedural reform was inadequate to battle disadvantage that leads to injustice, it is submitted that one must accept that reform of the formal legal system is part and parcel of the access to justice debate. Reform should, however, be a continuous process aided by systematic evaluation and reassessment[71] to sustain the battle on this front as well. As mentioned above, measures from previous waves were not replaced by those of subsequent waves, and in this regard the past few decades have yielded growth points in a number of existing measures from previous waves, as well as many innovations. A few examples are offered as illustration.

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corporate paradigm' (2001)3 *Fordham Law Review* 775; Moore 'Lawyering for the middle class: symposium introduction' (2001)3 *Fordham Law Review* 623.

66 Galanter 'Access to justice as a moving frontier' in *Access to justice for a new century: the way forward* (2005) (Bass Bogart and Zemans eds) 154.

67 *Ibid*.

68 N 66 above at 155.

69 Access to Justice: a world survey (1978) at 51 fn 142. This approach is also referred to as their 'access-to-justice approach'.

70 Currie 'Riding the third wave – notes on the future of access to justice', paper delivered at the Symposium 'Expanding horizons: rethinking access to justice in Canada' March 2000 Ottawa (printed and bound papers) 39.

71 See Sackville 'Reforming the civil justice system; the case for a considered approach' in *Beyond the adversarial system* (Stacy & Lavarch eds) (1999) 34 at 66.

Legal aid has become an integral part of the justice system,[72] ensuring representation in the courts and at tribunals, and ameliorating some of the effects of social disadvantage. Far-reaching procedural reforms in the United Kingdom and New Zealand were effected to ensure proportionality; that expenses were curtailed; matters were dealt with expeditiously; early settling of cases was promoted; and that parties were treated equally.[73] Other measures include, for example, case management;[74] conditional and contingency fee agreements;[75] class or group actions;[76] and court-linked

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72 For the benefits achieved in the US, see Currie 'Down the wrong road – federal funding for civil legal aid in Canada' (2006) 1 *International Journal of the Legal Profession* 99 at 113. In Canada, legal aid is delivered by thirteen legal aid plans, one in each province and territory: Currie at 114 fn 4, and appears to be the largest of the access to justice programmes in Canada. See Currie 'Some aspects of access to justice in Canada' in *Expanding horizons: rethinking access to justice in Canada* National Symposium held on 31 March 2000 (bound proceedings) at 41. For the position in Scotland, see *Advice for all: public funded legal assistance in Scotland – the way forward* (2005) Consultation Paper of the Scottish Executive, Justice Department; Australia: see *Access to justice. An action plan* (1994) Report by the Access to Justice Advisory Committee ch 9.

73 See the so-called Woolf reforms contained in *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (Woolf Final Report) and expressed in the new Civil Procedure Rules (CPR) of 1999. See also the New Zealand District Court Rules 2009 which introduced this new regime. For a current overview, see Harle 'A sea change in civil procedure' in *Newsletter*, International Law Office of 8 June 2011 at http://www.internationallawoffice.com (10 June 2011). For Canadian reform initiatives, see Hanycz 'More access to less justice: efficiency, proportionality and costs in Canadian Civil Justice Reform' (2008)1 *CJQ* 98.

74 See Woolf Final Report n 73 above Section 2 ch 3; Bramley and Gouge *The civil justice reforms one year on* (2000) ch 6; 'Task force proposes fundamental civil justice system reform' , media release by the BC Justice Review Task Force dd 27 November 2006 available at www.bcjusticereview.org (last accessed December 2010).

75 CFAs were introduced in the UK by the Conditional Fee Agreements Order 1995 (SI 1995/1674) and refined by the Access to Justice Act 1999. Contingency fee agreements are also permitted in South Africa: The Contingency Fees Act 66 of 1997. The USA is well known for its use of contingency fees: see *e g* Mulheron *The class action in common law legal systems: a comparative perspective* (2004) at 469. In Europe, speculative fees are widely permitted – nearly all Member States permit success fees: see Hodges *The reform of class and representative actions in European legal systems* (2008) at 151–152. These types of fees are important as they assist in the funding of litigation. In the UK, for example, a survey found that more than half of the respondents had an income below the national average of GBP 25 000; that nearly half of the cases involving CFAs had a compensation value below GBP 5 000 with almost three-quarters winning a payout of up to GBP 10 000: see Hyde 'Claimants will miss out through CFA reforms, research suggests' *The Law Gazette* 27 May 2011 at: http://www.lawgazette.co.uk/news/claimants-will-miss-out-through-cfa-reforms-research-suggests (last accessed 30 May 2011).

76 Many jurisdictions have followed the United States, and have devised their own US-style class actions, such as Canada in the various provinces (see *eg* Branch *Class actions in Canada* (1998) (Loose-leaf publication); Australia (see Pt 4A, Supreme Court Act 1986 (Victoria) and r 34, Supreme Court Rules 1987 (South Australia). These actions are also not unknown in Europe: see *eg* Nordh 'Group actions in Sweden: Reflections on the purpose of civil litigation, the need for reforms and a forthcoming proposal' (2001) 11

ADR.[77] While commendable and showing commitment to improving access to justice, one has to admit that these measures do not offer proof of an accessible justice system, but merely of an accessible dispute resolution system.[78] One could hence argue that formal civil justice reformers are also concerned with a new approach (akin to Cappelletti's 'access-to-justice approach') to make the justice system accessible, and are not only concentrating on reshaping formal justice. However, it is accepted that this has become the secondary front, and that the main assault on injustice will be directed via the new approach to access to justice.

With regard to the new approach, Macdonald[79] calls for a comprehensive access to a justice strategy that is multi-dimensional and takes a pluralistic approach to legal institutions. This entails, on the one hand, that the problem of lack of access cannot be solved with a one-size-fits-all approach, because different people have different needs. Variables such as the difference in legal needs, geography (urban v rural) and socio-demography (gender, age, employment status, education, etc)[80] need to be taken into consideration to eventually create solutions which would offer individuals a choice. On the other hand, it entails moving beyond dispute resolution towards preventative law. In this regard, he points out that a substantial amount of law is made, administered and applied by non-public bodies, but warns that they often operate like 'little legal systems' and that problems of justice in these institutions are legion.[81] Consequently, these institutions also warrant attention from an access-to-justice perspective.

According to Currie,[82] the solution to access to justice problems lies in a multidisciplinary approach in which the justice system partners with communities, interest groups and institutional sectors, such as health care, education and social services, to produce legal and non-legal solutions. This seems to have happened in the Netherlands where less court litigation is experienced because the legal profession and various social institutions have created a variety of processes that are more efficient, faster and less costly than in other countries. Dutch citizens, for example, may obtain legal advice

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Duke Journal of Comparative and International Law 381; Hurter 'Failure to comply with guidelines laid down by courts ruled fatal' (2010)2 *TSAR* 409.

77 See *eg* the use of ADR in the new reformed UK justice system: Bramley and Gouge n 74 above ch 2. See also *Discussion Paper: Major themes of civil Justice Reform* (2006) Civil Justice Reform Working Group par 6 where the Working Group prefers to consider 'early dispute resolution' possibilities instead of conventional ADR mechanisms.

78 Macdonald n 28 above at 24.

79 *Ibid*.

80 See also Currie n 70 above at 38.

81 N 28 above at 26.

82 N 70 above at 38–39.

and dispute settlement services from a wide range of sources other than lawyers.[83]

The challenge clearly lies in designing appropriate mechanisms to ensure the social inclusion of those excluded from the justice system. Broad consensus on the basic guiding principles for such mechanisms has yet to emerge, but there is, nevertheless, ample evidence that the type of thinking promoted by the new approach to access to justice has yielded interesting results. Many jurisdictions have started exploring mechanisms and the new approach has found expression in creative ways. Some of these include:

Public Legal Education and Information (PLEI) programmes

In Canada, these programmes began in the late 1960s in student law clinics and consumer advocacy groups, and provide information about the law and how the justice system works. Their focus is on empowerment and a vast array of organisations (such as consumer groups, disability associations, gender equality groups and legal aid organisations), provide such legal information. They attempt to equip people to play a positive role in recognising and solving their problems.[84]

Help Centres which provide free walk-in services are attached to the Civil Court of the City of New York. These centres offer free legal and procedural information on how to proceed in court. Trained lawyers give legal and procedural information on housing, civil, and small claims court procedures. These lawyers are employed by the Civil Court , are neutral and therefore do not give legal advice or advise people how best to handle a case. The centres provide free brochures, pamphlets and booklets on legal topics, free internet services legal assistance, videos and community seminars to watch and information on rental assistance and social services.[85]

Also attached to the Civil Court is a Volunteer Lawyers Project. Volunteer lawyers assist self-represented litigants and work in the Help Centres where they provide free legal information and advice in housing, civil and small claims cases. Although they review court papers, discuss the relative strengths and weaknesses of a case, help with the filling out of forms and the planning of the next steps in the case, they do not go to court or file papers.[86]

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83 Zuckerman n 1 above at 50.

84 Currie n 72 above at 42.

85 http://www.courts.state.ny.us/courts/nyc/housing/generalcivil.shtml (last accessed 10 June 2011).

86 *Ibid*.

These programmes make a valuable contribution, since it has often been stated that for many it is precisely the 'characterisation of a problem as a legal problem that is the most important barrier to access'.[87]

The ombudsman institutions

These institutions are found in a growing number of countries, deal with disputes between individuals and the government, and are concerned with correcting administrative misconduct. The ombudsman is an independent protector of the public, and is active in a variety of fields, such as banking, insurance, finance and housing. The ombudsman investigates complaints and if found justified, seeks redress through processes similar to mediation or conciliation.[88]

ADR

ADR in its narrower meaning, as being consensual, and facilitated to some extent by a neutral third party without the power to compel settlement, is not only practised by lawyers but also by other trained professionals and in some instances, by lay persons. Although purported to be a speedy, inexpensive and informal method for resolving disputes, and a method whereby relationships (in a community or between partners, for example) may be preserved,[89] it is not without criticism.[90] However, certain forms of ADR, notably mediation, are growing in use.[91] Cappelletti[92] appeals for a move towards conciliatory justice for which an array of institutions should be considered that adopt conciliatory procedures for use in areas where these procedures may be a 'better' choice (for example in disputes between neighbours and in institutions such as schools, offices, hospitals and villages), as opposed to a contentious solution that could exacerbate the conflict. It is submitted that this would entail a shift away from ADR in its

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87 Macdonald n 28 above at 29. See also in general Genn n 18 above at 7 and 12–14.

88 Cappelletti and Garth n 5 above at 274–276; *Access to justice. An action plan* n 72 above at 303–304; Hodges *The reform of class and representative actions in European legal services* (2008) at 257–258.

89 See *eg* Lieberman and Henry n 22 above at 425–426. See in general Doyle *Advising on ADR: The essential guide on appropriate dispute resolution* (2000).

90 See Edwards n 22 above at 676–680; Fiss 'Against settlement' (1984) 93 *Yale Law Journal* 1073; *Access to justice. An action plan* n 72 above at para 11.5; Dean 'Neuberger: mediation is no substitute for justice' *The Law Gazette* 17 November 2010 at: http://www.lawgazette.co.uk/news/neuberger-mediation-is-no-substitute-for-justice (last accessed 24 November 2010).

91 See *eg* Mattei n 51 above at 16–17. Some jurisdictions in the US and Canada use mandatory mediation for most non-family civil cases: see BC Ministry of Attorney *General Discussion Paper: Major themes of Civil Justice Reform* (2006) (prepared for the Civil Justice Reform Working Group) at 13–17.

92 'Alternative dispute resolution processes within the framework of the World-Wide Access-to-Justice Movement' (1993) 3 *MLR* 282 at 287–290.

narrow meaning, and hopefully towards 'appropriate'[93] dispute resolution methods which would, for example, allow for the use of socio-cultural specific dispute resolution practices.[94]

Special tribunals

The Housing Part of the Civil Court of the City of New York was established to resolve housing disputes. The hearing officers, known as Housing Court judges, are lawyers selected for their knowledge of the housing industry.[95] Assistance to individuals is rendered by *pro se* attorneys. Parties try to negotiate a resolution of the dispute and only if not possible, will they return to the court for a hearing. Although the emphasis is on conciliation, tenants are educated in respect of their rights.[96] Since its establishment in 1973, this tribunal has grown considerably, bearing testament to its tremendous contribution towards access to justice, and demonstrating the potential of specialised tribunals.

In India, courts known as *'Lok Andalats'* or 'People's Courts' have been created.[97] These courts seek to promote the informal resolution of disputes by way of conciliation and compromise, and are presided over by a sitting or retired judicial officer who acts as chairperson, together with two other members, usually a lawyer and a social worker. Court procedure is informal, with no appeal against a judgment, but cheap and speedy dispute resolution is offered. Matters that are pending or are at pre-trial stage in formal courts may be referred to a *Lok Andalat*. What is interesting is that these courts have been modelled on the ancient cultural system of *Panchayats* known in the rural areas of India and governing legislation has incorporated concepts familiar to those using the courts.[98]

Funding for litigation

Access to justice is enhanced if a variety of funding schemes are available to give financial assistance to litigants to pursue meritorious claims. Two of the

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93 Doyle n 89 above at 1 is of the opinion that ADR is better referred to in this manner because it is neither a second-best option, nor does it negate the need for traditional litigation as an important means of resolving disputes.

94 Economic changes have also caused an increase in immigration in many communities, giving rise to cultural diversity. Many countries, such as Canada, Australia and South Africa also have indigenous groups that practice their own unique dispute resolution processes. The question is whether mechanisms should be customised for such groups to encourage participation in the main system.

95 Cappelletti and Garth note 5 above at 273.

96 See http://www.courts.state ny.us/courts/nyc/housing/generalcivil.shtml (last accessed 10 June 2011), and see also for statistical information on case volumes.

97 These courts are organised in terms of the Legal Services Authorities Act, 1987.

98 See Bhatt 'A round table justice through Lok-Adalat (People's Court) – a vibrant – ADR – in India' (2002)1 *SCC (Jour)* 11; Ravish 'Significance of Lok Adalat' both available on http://kelsa nic.in/lokadalat htm (last accessed 14 June 2011).

best known sources for funding are third-party funding (associated with conditional and contingency fee agreements),[99] and legal expenses insurance (LEI) schemes. For current purposes the latter is of importance.

LEI schemes provide insurance cover for the cost of specified legal services, and are available only to individuals who are able to afford annual premiums. This type of insurance often forms part of other insurance, such as domestic insurance policies. LEI schemes are widely available in Britain and Europe,[100] and in particular in Germany, where they are commonly used.[101]Although LEI schemes do not improve access to justice for the most disadvantaged members of the community, it should be remembered, as pointed out above, that justice is often beyond the means of middle income individuals as they do not qualify for legal aid. Furthermore, they are also affected by the same access to justice issues and LEI can thus be seen as complementary to legal aid.[102]

Although these mechanisms represent only a fraction of measures put in place to reflect the new approach to access to justice, they give reason for optimism that justice systems will be able to meet the needs of the most disadvantaged members of society.

CONCLUDING REMARKS

Reflecting on the evolution of the meaning of the phrase 'access to justice', yields a number of results. One is a reminder of what the initial goals of the movement were; another is to be made aware that the needs of society have changed, have grown in complexity to such an extent that a new approach to ensuring access to justice is needed, and will continue to change in future; but perhaps more important is the fact that much debate on the parameters of such new approach has been stimulated.[103] A number of writers[104] have

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99 See *eg* Mulheron and Cashman 'Third-party funding of litigation: a changing landscape' (2008) 3 *CJQ* 312.

100 See Cappelletti and Garth n 5 above at 280–283; Jackson *Review of civil litigation costs* (2009) Preliminary Report ch 13 and (2009) Final Report ch 8.

101 Kilian 'Alternatives to public provision: the role of legal expenses insurance in broadening access to justice: the German experience' (2003) 30 *Journal of Law and Society* 31.

102 *Access to justice. An action plan* n 72 above at para 10.44.

103 See for example the WG Hart Legal Workshop *Access to justice* held 26–27 June 2007 by the Institute of Advanced Legal Studies of the University of London and the wide range of topics discussed, such as the role of NGOs, environmental justice, human rights issues, public service ombudsmen, state sponsored ADR mechanisms and professionalism.

104 See, for example, Currie n 72 above; Sackville 'Reforming the civil justice system: the case for a considered approach' in *Beyond the adversarial system* (Stacy & Lavarch eds) (1999) at 34; Smith n 30 above; *Access to justice for a new century: the way forward* (Bass Bogart and Zemans eds) (2005).

already started exploring this aspect. To this end, research linked to the dispute perspective in legal studies referred to above, also makes a valuable contribution.

No single strategy will be successful to meet the new challenge. However, it is submitted that no part of any strategy will be successful until a comprehensive needs assessment is done in a particular society. The mere gathering of statistics and raw material on, for instance, the volume of litigation or the number of people who received legal aid in a past year is not enough or even necessarily helpful: one needs to be clear on what it is that needs to be determined. In many countries various broad-based empirical studies have been done in the past with little follow-up research, despite many calls for further research and information.[105] For the most part legal institutions and governments do not invest much in justice system research and development, although it has been acknowledged that '[a]ll successful reform endeavours require adequate empirical information'.[106] Needless to say, proper evaluation and debate of data is essential to reform, because ultimately the justice system must respond readily to the needs and expectations of its users. What research to date has shown is that individuals do not necessarily want the same result in respect of a grievance or a dispute. Contrary to general expectation, financial compensation is not the most important result in all instances, and very often a change of behaviour is sought, or replacement of an article, or repair or the delivery of a service is the main aim.[107] Also, the way in which grievances, disputes and other problems are handled is important, because it gives people 'important information about their status within society'[108] – clearly another factor which plays a role in social exclusion and one that has serious implications for public trust in the legal system.

The question 'how much justice' is enough has purposely been avoided, since there is no answer that will satisfy all people. While 'total' justice[109] is

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105 See n 104 above.

106 See *Review of the Federal civil justice system* (August 1999) Discussion Paper 62, Australian Law Reform Commission at para 2.49. See also Galanter 'News from nowhere: the debased debater on civil justice' (1993)1 *Denver University Law Review* 77.

107 Doyle n 89 above at 22.

108 Tyler n 20 above at 894.

109 There has been a clamour for 'total justice' from various quarters: see Rhode n 25 above at 8. This view ties in with the fact that in industrialised countries better standards of living lead to increased expectations about the functions of the law in maintaining those standards. Thus Rhode points out that unsafe conditions, abusive marriages, discriminatory conduct and inadequacies in social services were once accepted as a matter of course, but now prompt demands for legal remedies and for assistance in obtaining them: *ibid*.

clearly unrealistic and 'equal justice'[110] probably too idealistic, it is submitted that Rhode's view[111] that 'adequate' access to justice should be a social priority is a goal that is achievable.

In setting ourselves the task to try and achieve the goal that is access to justice, it is necessary to recognise that it is virtually impossible to level the playing field in the complex societies in which we live, and that the justice system cannot 'compensate for inequalities which a globalising and restructuring economy' is bound to exacerbate.[112] This should, however, serve to inspire a breadth of approach to meet the challenges brought about by ever expanding meanings of the concept 'access to justice' because

> [n]othing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness.[113]

In conclusion, one should heed the warning by Cappelletti and Garth[114] that a change towards a more social meaning of justice should not mean that the core values of traditional procedural justice are to be sacrificed – specifically the fundamental guarantees of civil procedure of an impartial adjudicator and the right to be heard. Reforms must therefore be thoughtful, because the goal is not to make justice 'poorer', but to make justice available to all, including the poor.[115]

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110 Moorhead & Pleasence 'Access to justice after universalism: introduction' (2003) 1 *Journal of Law and Society* 1 point out that the 'equal access for all' agenda has come under increasing strain, and that the tensions within this agenda is partly conceptual. The differences lie between those who advocate minimal rights to ensure some level of access, and those who claim equality should be absolute.

111 N 25 above at 20.

112 Smith n 30 above at 11.

113 Brennan 'The community's responsibility for legal aid' (1956) Vol 15 *Legal Aid Brief Case* 75.

114 N 5 above at 291.

115 *Id* at 292.