OPINION

After access to justice?

We live in a brave new world. Many of the hopes and aspirations of the international access to justice movement of 1970s are now being contested anew. It is worth taking stock of the origins and the impact of this movement, and its prospects for the future.

Cappelletti and Garth are generally regarded as introducing the phrase in their four volume, six book, comparative study, *Access to Justice*, published in 1978-79 (Alpen aan den Rijn: Sijthoff & Guiffre). This major work on what they called the Access to Justice Movement was an attempt to describe what they saw as a wave of similar reforms to the legal system that were occurring in many of the rich countries during the 1960s and 1970s. These reforms were, according to Cappelletti and Garth, aimed at improving the accessibility to the legal system for all citizens but especially for the poor and other disadvantaged groups. They concluded that reforms such as legal aid, small claims courts and mediation were finally making the ideal of Liberal theory of equal access to justice for all, a reality; that it was equal justice in practice and not just in theory.

Looking back, we can see that the phrase has had a powerful impact in Australia but also in many other countries around the world. It prompted much new scholarly research that tried to test whether different reforms had actually improved access to justice. A journal called the *Windsor Yearbook of Access to Justice* was launched. Governments announced policies and reforms to the legal system that would increase access to justice. The legal profession in many countries took up the phrase, arguing that the profession was concerned to improve access to justice. Community-based agencies of many types used the theme to justify the case for funding. Many community pressure groups took it up as a basis for reforms to different aspects of the legal system. As one commentator put it, the phrase had, and still has, a powerful rhetorical impact.

But looking back we can also be aware of some of the limitations of this conceptualisation and the actual reforms of the access to justice movement. First, Cappelletti and Garth were, with hindsight, extremely optimistic about the impact of these waves of reform. While it was fair to point to such reforms, to the structures and mechanisms for processing disputes, and to conclude that they were remarkable, they were clearly jumping the gun in announcing, or even suggesting, that the reforms would actually work. There is enough evidence now to suggest that, as we might have expected, the reforms have not solved all the access problems, and in many cases have not worked very well at all. Indeed, they have almost certainly solved some problems and created some new ones.

In addition, Cappelletti and Garth got some things plain wrong. For example, they implied that most of the rich societies would implement the reforms of the movement. But many countries did not introduce substantial publicly funded legal aid schemes, nor introduce small claims courts.

Above all, Cappelletti and Garth got it wrong because they were unlucky enough to be writing at the wrong time in history. Precisely at the time they were writing there was evidence of the stirring of anti-government sentiments that we have now lived with for some 15 years. So at precisely the time that access to justice was being promoted as the underlying goal for legal reform, we saw the beginning of a period of loss of faith in government. The result has been a steady decline in government's role in most western societies. Governments of all persuasions around the globe are engaging in budget cuts in the pursuit of smaller government. The cuts affect the poor and disadvantaged groups the most, as they are usually the least organised and hence least likely to protest effectively. Not unexpectedly, many of the recent reforms to legal systems have been simply in pursuit of cheaper solutions in the name of rationalisation and efficiency, rather than attempts to improve access. As a result there is little doubt that access to justice for the poor and disadvantaged is now declining overall.

So what does the future of the access to justice movement look like? It is probably fair to say that access to justice is not a realistic goal for reform of legal systems any more. The obsessive faith in small government has put paid to that for our lifetime at least. But it probably never was a realistic goal in the sense that genuine equal access was never a realistic possibility.

Where does that leave those who are concerned to improve the legal system? First, we need to go back and rediscover the unfairness caused by different methods of processing disputes. And we need to conduct more research to demonstrate where the legal system is doing well in terms of access for citizens.

Second, we need to get used to the fact that the future may simply be one of trying to defend some of the reforms of the last 20 years or so. We will need to choose which ones to defend. Others will probably wither on the vine (note the slow decline of legal aid in this country) and many new changes will be for the worse. The access to justice movement was overly optimistic about the impact of reforms to the legal system, but it had no idea of the viciousness of the so-called rationalisations that we are starting to see.

The access to justice movement is now firmly part of history. What will be a phrase that will capture the spirit of the rationalisation of the legal system of the future? Perhaps no phrase will capture the spirit of dark times that we live in. It may just be a long period of slow, all-pervasive decline in the institutions of justice that no simple rhetorical phrase can encapsulate.

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