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Access to Justice

Contributors: Richard Moorhead
Editors: David S. Clark
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There are three main strands in law and society scholarship on access to justice and legal aid, which concern the delivery of free or subsidized legal services to those who cannot afford them. The first is a philosophical question: why promote access to justice? Traditional justifications center on making good the promise of the rule of law and the equal enforcement of rights. Approaches that are more radical see social citizenship, or advancing the interests of the poor, as crucial. Conversely, critical approaches often perceive legal aid as sustaining (rather than challenging) traditional power relationships.

The second strand asks: to what extent should legal aid services be funded to ensure these underpinning values? This strand is particularly pertinent to the explicit rationing of legal aid services, an increasingly visible part of most mature legal aid systems around the world.

The third strand considers how best to deliver access to justice through legal aid. A critical stream in this thought has been to challenge the traditional role of lawyers (especially those in private practice) and traditional models of practice (advice and casework). Here, one develops practical issues, such as cost effectiveness and quality, through a consideration of different models of legal aid activity (casework, public interest litigation, and legal education) and the role of nonlawyers in the provision of legal services. Layperson involvement challenges traditional justifications for professional monopolies.

Theoretical Foundations of the Debate

Traditionally, scholars see access to justice as essential for law's legitimacy. Legitimacy derives from the need to apply law equally to rich and poor alike. It **[p. 14 ↓]** also derives from the need to give meaningful opportunities to all to exercise their rights. The essential argument is that the application of legal rights either defensively (to protect individuals from intrusive actions, for example, by the state or businesses) or affirmatively (to advance individual rights against others) is too expensive for many to afford. As a result, the state needs to subsidize legal services to ensure equal access for all. A partial antidote to this view has come through the development of legal and quasi-legal services that do not require legal advice and representation (such as special

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tribunals, small claims courts, and ombudspersons), but most of these, in practice, require some form of at least rudimentary legal help if they are to be effective.

The “equal access for all” agenda has come under increasing strain. This is partly out of recognition that it is difficult to conceive of a legal aid system that would provide absolute equality in terms of both defensive and facilitative rights. There are too many rights to protect, and governments are certainly unwilling to fund the legal services necessary to secure equal access to them all. Economic work on legal services also suggests that legal services have characteristics that lead to an inevitable imbalance in their provision, which authorities cannot correct by state subsidy of legal services. As long as the demand for legal services outstrips their supply by lawyers and others, the rich will always outbid the poor for the best lawyers. These criticisms accord with two characteristics of legal aid systems around the world: many are limited in scope (tending to concentrate on criminal representation and family law), and they are consistently more poorly remunerated than private practice is.

The inequalities that the access-to-justice agenda seeks to wrestle with are not simply those of formal legal rights; they are inequalities of an economic, social, and political nature. From an access-to-justice perspective, this gives rise to a different species of argument centering on access to justice as part of a strategic advancement of the interests of a particular group (usually the poor, but sometimes other groups, notably ethnic minorities and women). The focus here shifts from rights toward outcomes. There are questions over the utility of rights of access to justice in this context. In particular, the ability of lawyers and legal processes to deliver substantial benefits to these groups is open to debate. It is arguable that other approaches (such as income redistribution, or better education) are more likely to advance the interests of these groups. Other arguments suggest that so-called strategic approaches designed to advance the interests of particular groups lead to largely symbolic victories, changing the law for these groups but not changing their circumstances. Sometimes judges will change the law, which subsequent legislation then overrides.

A third justification access-to-justice advocates see is the need to publicly fund legal services as part of the mechanism for ensuring that law works in the way intended or as a way of ensuring social citizenship. Thus, access-to-justice systems would work to ensure that officials correctly implemented legislation and that government agencies

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behaved lawfully. Social citizenship notions see access to justice that recognizes the importance of individual ability to challenge unlawful behavior or clarify rights and responsibilities in a way that is more democratic and responsive than top-down government.

How Much Justice?

If states cannot achieve equal access for all, then the question remains, to what extent should they seek to promote access of some more-limited kind? There are two main approaches to this question. One is a theoretical attempt to identify key rights or situations in which the exercise of rights is critical and to build access-to-justice decisions around those. The directions in which that approach leads depend on which theoretical underpinnings one accepts as being the guiding principles. Other attempts are more empirical in nature, such as the increasing interest in the study of legal needs.

Concerns about the limits of access to justice also reflect a direct challenge to the level of state spending on legal services across Western societies. Promotion of justice and its funding have to compete politically for public funds. This suggests a need to understand and articulate a case for the value of law, legality, and **[p. 15 ↓]** access to justice when health, education, and crime control dominate public spending concerns. In the media and political discourse, the idea of justice decouples from the legal system, where people more often see law and lawyers as barriers to fairness.

This situation has led to a growing interest in measures that enable greater control over expenditure, but also a wider ideological challenge to the desirability of legal aid funding and the utility of lawyers more generally. Mature legal aid systems have retreated from a belief in universal access for all and increasingly emphasize targeting services to those most in need. Targeting or rationing of access to justice is not new, but the explicitness of its recognition in many jurisdictions is, and it presents an overt challenge to universal equality before the law.

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How to Deliver Access to Justice?

Officials can deliver legal aid in a variety of forms. A key distinction is between systems that rely on salaried employees (such as public defenders) and those that provide legal services by funding private practitioners to handle cases on a case-by-case basis (often referred to as judicare). Another distinction is between the types of services provided. Different balances are struck between individual casework, public interest litigation (designed to change law for broader groups of individuals), and the legal education needed to overcome the barrier to access to justice posed by the general public's lack of knowledge about legal rights and remedies. Even within these different approaches, there are further nuances: some casework models, for instance, encourage individuals to deal with aspects of the work themselves by unbundling cases into the parts that need the assistance of a lawyer or paralegal and those that the client can do. Officials can employ this model, usually seen as a way of limiting expenditure, in an attempt to empower clients to take responsibility for their own cases. There is also experimentation that links the resolution of legal problems with the resolution of nonlegal problems, such as emotional, psychological, and parenting issues that family disputes cause.

Paradoxically, just as the idea of equal rights for all has waned, many of the ideas from the radical legal services movement—salaried services, public legal education, self-help, empowerment, and so on—have moved toward center stage. Most developed legal aid systems have evolved toward complex mixed models: mixtures of judicare and salaried services, lawyer and paralegal assistance and social casework, and legal education. This is partly because these models provide a set of tools for alternative and more effective management of limited resources. They also challenge conventional legal aid apparatus as supporting and reflecting the interests of the private profession. Mixed models provide a means of doing things more cheaply or flexibly, but also in a way that allows administrators, not lawyers, to control the purse strings.

There has been significant empirical work on the relative benefits of different models. Telephone advice, for example, has been effective, cheaper, and more accessible for some clients (such as those who are housebound or living in remote areas) but inappropriate for other types of cases and clients. Experiments with Internet services are growing. Two recurrent issues shed some light on broader theoretical concerns:

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comparisons of salaried provision of legal services with judicare highlight structural and ethical dilemmas in the practice of law, and comparisons of services by lawyers and nonlawyers question some of the fundamental tenets of professionalism.

Traditional theories of professionalism suggest that there are significant public interest benefits in reserving certain work (legal services) to those whom the professions certify as sufficiently competent. Therefore, the state should grant the profession certain privileges as a result, such as the ability to self-regulate and to charge higher rates. The evidence from legal aid studies suggests quite strongly that in the areas in which nonlawyer and paralegal work is permitted, nonlawyers and paralegals perform as well as or better than lawyers. It also suggests that there are significant levels of quality concern in the provision of legal services by qualified lawyers under legal aid schemes. Both types of finding call into question the claims of professional rhetoric.

Comparisons of salaried and judicare services have explored two issues. One is the extent to which private practitioners are more expensive than salaried **[p. 16 ↓]** lawyers. There are two sets of explanations as to why private practice might be more expensive. Proponents suggest that private lawyers are more independent and have stronger incentives to do more for their clients than do salaried lawyers, who may have conflicts of interest (they work for the state and are expected to take cases against the state) and lack motivation (what they are paid does not depend on how hard they work for their client). Opponents suggest that lawyers in private practice might take on more cases than they should and thereby overstimulate demand for legal services (sometimes called supplier-induced demand), they might do more work than is necessary on cases, or they might run cases in a way that advances their own economic interests over those of the client. The second issue relates to the conflict between these two positions: to what extent do salaried lawyers provide a lower- or higher-quality service than private practitioners do?

The empirical findings in this area are again interesting. They show that established salaried services are generally cheaper than private practitioners. Underresourcing of salaried services can lead to significant issues of quality and independence for those services. This is a particular problem in some U.S. public defender schemes. However, among those that are properly resourced, comparisons of quality with private practice have generally suggested that salaried services produce outcomes as good as or better

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than private practice does. There are some exceptions. Scotland's public defenders had slightly higher conviction rates than private practitioners had. Furthermore, establishing salaried services, while potentially cheaper in the end, may be more expensive in the short term because those services take a significant period to build up caseloads equivalent to those of their more established private practice counterparts.

Litigation Culture: A Challenge to Access to Justice?

The access-to-justice movement faces a broader problem. There is an emerging ideological challenge to the role of lawyers and the values of court-based resolution. The concern lies primarily with cost but is also founded on the dangers of adversarial practice and the self-reference of legal discourse (the assumption that certain problems are best resolved by legal means and by traditional legal professionals). Many see legal aid as feeding this process. While it would be wrong to say that well-funded legal aid programs could not contribute to a more adversarial culture, evidence exists that access-to-justice programs may reduce adversarialism if designed in certain ways. Evidence also shows that funding prelitigation advice, mediation, and other forms of alternative dispute resolution may reduce the number of, and adversarial activities within, litigated cases. Alternatively, fast-tracking intractable disputes through the courts can lead to better outcomes and reduce the stresses on participants. This suggests good access-to-justice policies should sometimes accelerate, rather than discourage, certain kinds of disputes.

The ability of legal aid to dampen adversarialism depends, of course, on programs organized in a particular way. The general picture to emerge from studies of criminal law and other fields is that lawyers encourage clients to settle cases, sometimes contrary to their interests. Legal aid systems may encourage this trend. Salaried legal aid services, and judicare services funded based on fixed fees, may be more likely to provide a routinized approach to casework because lawyers have no economic interest in pursuing a more adversarial course.

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This adversarial reduction has positive and negative aspects. Studies show public defenders may be more likely to encourage their clients to plead guilty, for example. This can lead to cost savings for the defense, and maybe more significant savings for the prosecution and courts. In Scotland, early pleas increased conviction rates, but the clients did not get reduced sentences. In Canada, conviction rates did not appear to increase, but clients got lighter sentences. In Scotland, a reduction in adversarialism looks highly positive for government policy: lower costs, more convictions, and no weakening of sentences. From a due process perspective, however, clients have surrendered the right to trial, arguably without pressure or reward but for no apparent gain and with a diminution in their satisfaction and levels of trust. In **[p. 17 ↓]** Canada, there appeared to be more of an accommodation between client and public interests.

Access to Justice and Market Solutions

One response to pressure on legal aid funding is to strengthen alternatives. In England and Wales, legislation promotes a particular approach to contingency fees (the conditional fee agreement), which insurance backs to protect clients against the cost implications of losing their case. As a result, the legal aid scheme has largely excluded personal injury work from its scope. Although the benefits to the legal aid budget of this reform were modest, it has enabled the government to claim, with some justification, that access to justice is facilitated for those who never qualified for legal aid but would nevertheless be unable to afford a lawyer should they wish to proceed with a case. The effect has been to put insurance companies and claims-handling companies at the center of a significant part of the civil justice system, while restructuring the incentives that determine how work is done. Insurance companies set the terms on which cases can be underwritten, and claims-handling companies dominate the marketing of personal injury work. In other jurisdictions, before-the-event legal expenses insurance has traditionally been strong, such as in Germany, or officials have made it compulsory, as in Sweden.

There are economic and social costs of privatized delivery through insurance and conditional fees. Insurance schemes cover only those who can afford insurance, and compulsory schemes are tied to some other form of activity that narrows their socioeconomic coverage (such as home owners and car drivers). Mechanisms for

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ensuring that insurance companies actually provide advice and representation in a way that effectively balances commercial and public interests are hampered by the insurers' claims of commercial sensitivity and the diversity of legal insurance markets. It is also possible that conditional-fee systems are more expensive than traditional legal aid provision. These extra costs pass on to unsuccessful defendants in personal injury claims, which means the costs are recouped through motor insurance and employer liability insurance premiums rather than through general taxation. Furthermore, conditional-fee cases deliver access in a narrower range of cases, such as those where prospects of success are very high and the costs of investigating a case, which lawyers bear before settlement, are low.

Institutional Design

Another stream of thinking about access to justice focuses not on legal services, but on the institutional architecture of legal systems and the design of law itself. This suggests that the way in which one should conceptualize access to justice is not simply in terms of funding advice services and lawyers but also in terms of the design and implementation of legal rules, both substantive and procedural. The extent to which legal systems can and will adapt to reduce complexity is unclear. There is, though, a developing area of work in theorizing and researching legal systems and their social interface, particularly with multicultural and gender issues in mind. At a more fundamental level, this kind of adaptation requires a greater willingness to alter legal frameworks and substantially adapt them to provide access rather than to seek to perfect, through increasing complexity, notions of procedural and substantive justice. Nevertheless, work within courts and elsewhere suggests that simplification of law and process can reduce the level of assistance people generally require in dealing with their own disputes.

RichardMoorhead

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See also

- Courts

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- Dispute Resolution, Alternative
- Lawyers
- Legal Aid, Criminal
- People's Courts
- Plea Bargaining
- Poverty
- Socialist Justice

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