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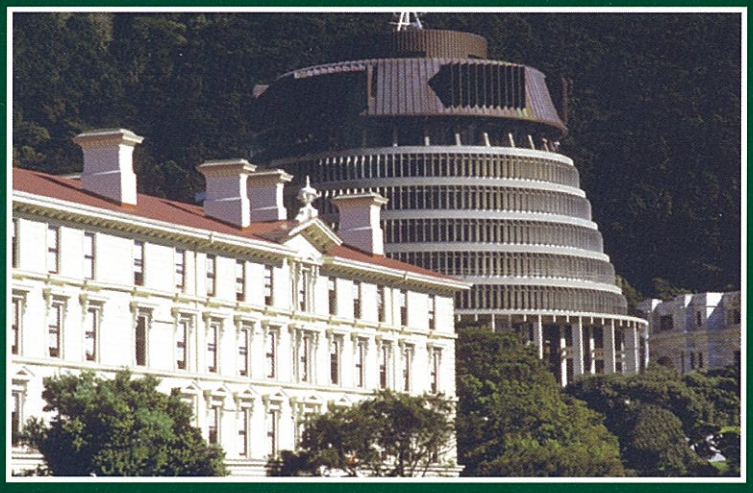

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SOME THOUGHTS ON ACCESS TO JUSTICE

Ronald Sackville*

In this paper Justice Sackville challenges six assumptions underlying discussions about access to justice. He suggests that the idealism of the access to justice movement should be tempered by an appreciation of the limitations of courts and tribunals as a means of advancing access to justice.

The expression "access to justice" is ubiquitous in modern legal and political discourse.[1] This is not surprising, as the concept embodies ideas that are both powerful and attractive. Consequently, discussion about access to justice frequently rests on unarticulated assumptions. Some of these concern the role that the court system can play in protecting or advancing the rights and interests of disadvantaged people. Others concern the source and nature of the major threats to individual dignity and autonomy in post-industrial society and the likely response of governments to those threats.

In this paper, after tracing the development of the access to justice movement from the 1960s, I identify six key assumptions that underlie much of the rhetoric about access to justice. I suggest that each of these assumptions is, at best, an over-simplification and, at worst, erroneous. The point is not to argue against the ideals of the access to justice movement or against measures designed to improve the responsiveness of the legal system to the interests of disadvantaged people. Rather, it is to introduce a note of realism into the debate by acknowledging the constraints on achieving the objectives of the access to justice movement.

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1 See for example Mauro Cappelletti and Bryant Garth (eds) *Access to Justice: Vol I: A World Survey* (Sijthoff and Noordhoff, Alphen aan den Rijn, 1978); Access to Justice Advisory Committee *Access to Justice: An Action Plan* (Canberra, 1994); Rt Hon Lord Woolf *Access to Justice: Final Report* (HMSO, London, 1996); Access to Justice Act 1999 (UK) (reforming the delivery of legal aid services in England and Wales and establishing two new systems: the Community Legal Service and the Criminal Defence Service).

I THE CONCEPT OF ACCESS TO JUSTICE

The attractiveness of "access to justice" as a catchphrase owes much to the powerful linguistic messages it conveys. These messages include both an ideal and an implicit promise that the ideal is attainable.

The ideal embodied in the concept of access to justice embraces (though is not necessarily limited to) the proposition that each person should have effective means of protecting his or her rights or entitlements under the substantive law. This ideal is often seen as an element of the fundamental principle that all people should enjoy equality before the law. That principle in turn derives from the notion that the very foundations of justice rest on recognition by the state of the values of human dignity and political equality.[2]

The implicit promise contained in the catchphrase is that the law and the legal system are capable of achieving the goal of access to justice, if not in the short term then ultimately. The implication is that a just society will be prepared to find the resources required to achieve the goal of access to justice. The catchphrase also suggests that it is feasible to establish mechanisms that will effectively break down the barriers that prevent disadvantaged individuals and groups from utilising the legal system to enforce their rights and protect their interests. Accordingly, the principle of access to justice carries with it a promise that there is a realistic prospect of ameliorating the unjust legal consequences of inequality in society.

Viewed this way, it is not surprising that the expression "access to justice" occupies a virtually unchallenged place in the political and legal lexicon. Few people are prepared to oppose, at least overtly, an ideal that appears to lie at the heart of a just society. But like other catchphrases, such as "fairness" or even "democracy" itself, part of the attraction of "access to justice" is that it is capable of bearing different meanings, depending on the perspectives or values of the commentator.

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2 Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977) 198–199. According to Dworkin, the "vague but powerful idea of human dignity" supposes that:

> there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

The idea of political equality supposes that:

> the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom.

Sometimes the expression is understood in a relatively narrow sense. For example, Lord Woolf, in his influential report entitled *Access to Justice* (hereafter the *Woolf Report*),[3] was concerned exclusively with the operation of the civil justice system. He identified a number of principles which "the civil justice system should meet in order to ensure access to justice".[4] These principles required, among other things, that the civil justice system should be just in the results it delivers; fair in the way it treats litigants; capable of dealing with cases at reasonable speed and at reasonable cost; and understandable to those who use it. Implementation of these principles, according to the *Woolf Report*, would address the principal defects in the existing civil justice system, such as undue expense and delay, lack of equality between litigants and excessive emphasis on an adversarial approach to litigation. Clearly enough, then, the focus of the *Woolf Report* is on the process of litigation within the court system, although the report includes consequential recommendations on topics such as legal aid and alternative dispute resolution.

The 1994 Access to Justice Advisory Committee report in Australia (hereafter the *AJAC Report*)[5] took a wider view of the concept. It saw "access to justice" as enhancing three broad objectives: equality of access to legal services and effective dispute resolution mechanisms; national equity (that is, access to legal services regardless of place of residence); and equality before the law (that is, the removal of barriers creating or exacerbating dependency and disempowerment).[6] While this concept of access to justice focuses on the justice system, it is confined neither to the courts nor to services associated with courts. It extends to the structure of the legal services market, improved access to sources of information for consumers (in both the public and private sector), and alternatives to the judicial process for the resolution of complaints or disputes.

Others take a still broader approach. Christine Parker, for example, argues that while recourse to law can be one means of doing justice, it is severely limited in what it can achieve. Law is limited as a means of securing justice, so she argues, "because of its coercive potential and its amenability to subversion by powerful interests".[7] Accordingly, law should be designed and enforced as non-coercively as possible. Moreover:[8]

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3 Woolf, above n 1 ["*Woolf Report*"].

4 *Woolf Report*, above n 1, 2.

5 Access to Justice Advisory Committee, above n 1 ["*AJAC Report*"].

6 *AJAC Report*, above n 1, 7–9. See also Australian Law Reform Commission *Equality Before the Law: Women's Equality* (ALRC 69 Part II, Canberra, 1994) ch 3 ("Understanding Equality").

7 Christine Parker *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999) 56.

8 Parker, above n 7, 56.

> [A] variety of other means of doing justice including alternative dispute resolution, participation in social movement politics, democratic representation, and civic education for the respect of rights must proliferate.

On this view, the access to justice ideal "is refreshed when justice in the courtroom gives way to justice in many rooms".[9] The concept of deliberative democracy is employed to allow citizens to share "in the practice of justice by realistic deliberative participation in local and private institutions, not just in public discourses that feed into central law-making processes".[10]

II THE ACCESS TO JUSTICE REFORM MOVEMENT

It is useful to reflect on the reasons for the very different usages of the single term "access to justice". The expression (and its analogues, such as "meeting the legal needs of the poor") first gained currency as part of a reform movement which took hold in the 1960s and 1970s. As Cappelletti and Garth explained in their influential 1978 report,[11] the concept of access to justice had been undergoing an important transformation for some time in many developed countries, corresponding to a comparable change in civil procedure scholarship.

In earlier times, so they argued, civil litigation procedures reflected the "essentially individualistic philosophy of rights then prevailing".[12] A right of access to judicial protection meant essentially a formal right to litigate or defend a claim: "the state … remained passive with respect to such problems as the ability, *in practice*, of a party to recognize his legal rights and to prosecute or defend them adequately".[13]

As laissez-faire societies grew in size and complexity, governments accepted that affirmative action was required to ensure enjoyment by all of basic social rights, such as

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9 Parker, above n 7, 207. The phraseology appears to derive from Marc Galanter "Justice in Many Rooms" in Mauro Cappelletti (ed) *Access to Justice and the Welfare State* (Sijthoff, Alphen aan den Rijn, 1981) 147.

10 Parker, above n 7, 220. See also Philip Pettit "Liberalism and Republicanism" (1993) 28 Aust J Pol Sci 162.

11 Mauro Cappelletti and Bryant Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report" in Cappelletti and Garth *Access to Justice: Vol I: A World Survey*, above n 1, 3.

12 Cappelletti and Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report", above n 11, 6.

13 Cappelletti and Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report", above n 11, 7 (emphasis in original).

the right to work, to health care and education. The right to *effective* access became part of the welfare state reforms:[14]

> Effective access to justice can thus be seen as the most basic requirement—the most basic 'human right'—of a modern egalitarian system which purports to guarantee, and not merely proclaim, the legal rights of all.

The importance of transforming a formal right to litigate or defend a claim into an effective right of access to the legal system was recognised by jurists and policy-makers alike. The point was put this way by Sir Leslie Scarman, for example, in the 1974 Hamlyn Lectures:[15]

> It is no longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and the exposed, to provide them with financial and other support, and with access to courts, tribunals, and other administrative agencies where their rights can be enforced.

These insights were supported by a substantial body of research which attempted to quantify the legal needs of disadvantaged people and to assess the extent to which the legal system failed to satisfy those needs.[16] Later studies have criticised the methodology used in the earlier surveys and have identified broader issues, such as the strategies adopted by people to resolve problems or disputes, as perhaps now more worthy of investigation.[17] There is also a body of opinion challenging the idea that all those who receive legal services actually need them, pointing out that some of the demand is supplier-induced.[18] Even so, the early studies brought home to policy makers the failure of legal systems to provide adequate sources of advice or assistance for many people experiencing serious "legal" problems. They clearly demonstrated the inadequacy, in practice, of a purely formal idea of equality before the law.

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14 Cappelletti and Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report", above n 11, 8–9.

15 Leslie Scarman *English Law—The New Dimension* (Stevens & Sons, London, 1974) 29, cited in Australian Commission of Inquiry into Poverty *Law and Poverty in Australia* (Second Main Report, Canberra, 1975) 2.

16 See for example Brian Abel-Smith, Michael Zander, and Rosalind Brooke *Legal Problems and the Citizen: A Study in Three London Boroughs* (Heinemann, London, 1973); Michael Cass and Ronald Sackville *Legal Needs of the Poor* (AGPS, Canberra, 1975).

17 For a brief survey see Hazel Genn *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford, 1999) 5–9.

18 Gwyn Bevan, Anthony Holland, and Martin Partington *Organising Cost-Effective Access to Justice* (Social Market Foundation, London, 1994).

Following the lead of Professor Cappelletti, researchers have widely accepted that there have been three waves of access to justice reform. In his terms, the "waves" have comprised:

- the provision of legal services for the poor;
- the representation of group and collective ("diffuse") interests other than those of the poor; and
- the emergence of the full panoply of institutions and devices, personnel and procedures, used to process or prevent disputes in modern societies.[19]

Some have identified a fourth wave, constituted by competition policy reform as applied to the provision of legal services. The principal objective of the fourth wave has been to strike down restrictive practices in the legal services market in the expectation that legal services will become available to consumers more cheaply and in more accessible form.[20]

Care must be taken when employing the imagery of successive "waves" of reform. The language may create the misleading impression of a series of discrete changes to legal systems occurring at different periods in the development of legal systems. It is more accurate to think of the "waves" as a number of interrelated changes. Some may be continuing in one form or another, while others may be in retreat. It is also important to recognise that reforms to the legal system and to dispute resolution procedures in general cannot be understood in isolation from broader social and economic changes taking place in a particular country or region. Nonetheless, the imagery of "waves" of reform assists in identifying some of the key assumptions underlying the reforms that took place in developed countries in the last third of the 20th century.

A The First Wave

The first wave identified by Professor Cappelletti saw the development and expansion of legal aid schemes. Governments in developed societies increasingly accepted responsibility for providing resources to assist people who would otherwise be shut out from sources of legal advice or representation. The emphasis was on overcoming the economic barriers to poorer people's securing legal advice or representation. However, it is

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19 Cappelletti and Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report", above n 11, 22–54; Mauro Cappelletti "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement" (1993) 56 MLR 282; Parker, above n 7, ch 3.

20 Parker, above n 7, 38–40.

not correct to suggest, as some commentators have,[21] that the first wave overlooked non-economic barriers affecting disadvantaged individuals and groups. Many researchers and policy makers were alert to barriers created by language difficulties, geographic isolation, and psychological constraints (including fear of lawyers, ignorance of the assistance available, and inability to recognise a "legal" problem), as well as the unresponsiveness of many law firms and legal aid agencies to the social and cultural needs of disadvantaged people.[22]

The legal aid "wave" received a powerful impetus from the creation in the United States in 1965 of the Legal Services Program of the Office of Economic Opportunity, followed in 1974 by the establishment of its successor, the Legal Services Corporation.[23] In the United Kingdom and other European countries, legal aid systems "dramatically improved" as governments accepted greater responsibility for funding, whether on the so-called "judicare" model (utilising the services of private legal practitioners at public expense), or through public agencies, such as those employing salaried attorneys or defenders.[24]

Australia followed a similar pattern. Until the early 1970s, civil legal aid had largely been the responsibility of the private profession, with services funded largely from interest generated by solicitors' trust accounts.[25] Some states provided legal aid in criminal cases through salaried public defenders,[26] but the involvement of the Commonwealth in the provision of legal services was very modest.[27] This state of affairs changed irrevocably with the establishment of the Australian Legal Aid Office (ALAO) in 1974 by the Whitlam Labor Government.[28] Although the ALAO was never placed on a statutory footing and its service provision functions were later taken over by State legal aid commissions, its creation marked the recognition by the Commonwealth that access to legal services required a national strategy. Of course, the times favoured, if only temporarily, the implementation of such a philosophy. The creation of the ALAO coincided with the

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21 See for example Kim Economides "2002: A Justice Odyssey" (2003) 34 VUWLR 1, 6–7.

22 Australian Commission of Inquiry into Poverty, above n 15, 31–37.

23 Cappelletti and Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report", above n 11, 23.

24 Cappelletti and Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report", above n 11, 24 and following.

25 Australian Commission of Inquiry into Poverty, above n 15, 16–17.

26 Australian Commission of Inquiry into Poverty, above n 15, 18–19.

27 *AJAC Report*, above n 1, 228.

28 The ALAO was established by the then Attorney-General, Senator L K Murphy QC. Senator Murphy was appointed the following year to the High Court of Australia.

Commonwealth's willingness to fund a range of new income maintenance programmes and to sponsor an expansion of the boundaries of the welfare state.

B The Second Wave

The second wave in the access to justice movement was designed to overcome what Professor Cappelletti describes as the "organisational obstacles" to civil and political liberties. Modern economies, he argues, are no longer based on individual relationships, but on the "mass phenomena" of production, distribution, and consumption. In such economies, individuals acting alone usually lack the resources to take action to vindicate their rights or challenge unlawful conduct. Their interests are simply too diffuse. They face "organisational poverty" which makes judicial protection inefficient without procedural and institutional reforms.

The reforms incorporated in the second "wave" included more liberal rules of standing (whether by statute or judicial decision); the creation of specialised regulatory agencies to enforce public or protect diffuse interests; the emergence and refinement of class actions or representative proceedings as a mechanism for enforcing group or numerous individual claims; and procedures such as the *action collective* which gives standing in some European countries to associations with particular interests, such as the environment or the protection of minorities.[29] Perhaps the most influential procedural reform of this kind, at least in the common law world, is Rule 23 of the Federal Rules of Civil Procedure in the United States, which provides for class actions, although even Rule 23 has not always overcome the serious procedural difficulties that sometimes affect representative proceedings.[30]

The second wave of access to justice reform has been clearly discernible in Australia. Commonwealth and State legislation has extended standing in certain proceedings to persons who have no direct or special interest in the subject matter of the litigation. The Trade Practices Act 1974 (Cth), for example, allows "any … person" to seek injunctive relief to restrain conduct that contravenes the consumer protection or competition policy provisions of the legislation.[31] Similarly, State legislation typically grants standing to

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29 Cappelletti "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement", above n 19, 284–287.

30 See for example *Eisen v Carlisle and Jacquelin* (1974) 417 US 156.

31 Trade Practices Act 1974 (Cth), s 80. The constitutional validity of s 80 was upheld by the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

anyone who wishes to challenge the legality of conduct seriously threatening the environment.[32]

Representative proceedings have long been part of the procedure of courts of equity and have been facilitated by rules of court.[33] While these procedures and rules afforded some solace to "diffuse interests", they have significant drawbacks.[34] To overcome these difficulties, the Commonwealth Parliament enacted legislation in 1991 providing for representative proceedings in the Federal Court.[35] This legislation was expressly designed to achieve two purposes.[36] First, it is intended to provide a "real remedy" in cases where many people have suffered a small loss and individual actions are not economically viable. Secondly, the legislation aims to establish a means of dealing efficiently with large claims by members of particular groups, such as aggrieved shareholders and investors. The legislation, the structure of which generally follows that suggested in 1988 by the Law Reform Commission,[37] has been widely utilised by applicants notwithstanding that its validity has not yet been definitively determined by the High Court.[38]

C The Third Wave

Professor Cappelletti explains the third wave of access to justice reform as designed to address "procedural obstacles", in the sense that "traditional contentious litigation in court … might not be the best possible way to provide effective vindication of rights".[39]

The search for alternatives to litigation led to conciliatory, non-contentious procedures, such as mediation or other forms of alternative dispute resolution, as well as arbitral mechanisms intended to resolve disputes more speedily and at less cost than the courts.

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32 See for example the Protection of the Environment Operations Act 1997 (NSW), ss 252, 253.

33 See *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, construing the Supreme Court Rules 1970 (NSW), pt 8, r 13(1).

34 See *Wong v Silkfield* (1999) 199 CLR 255, 261–262.

35 See now the Federal Court of Australia Act 1976 (Cth), pt IVA.

36 (14 November 1991) Commonwealth Parliamentary Debates 3174–3175, quoted in *Wong v Silkfield*, above n 34, 264. The second reading speech explicitly adopts the language of access to justice.

37 Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC 46, Canberra, 1988).

38 A constitutional challenge to parts of the legislation was rejected by the Full Federal Court in *Femcare Ltd v Bright* (2000) 100 FCR 331. The High Court dismissed a challenge on different grounds to the equivalent Victorian legislation in *Mobil Oil Pty Ltd v Victoria* (2002) 211 CLR 1.

39 Cappelletti "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement", above n 19, 287.

The phenomenon is not limited to common law countries, but has counterparts in the European civil systems.[40]

Once again, the Australian experience reflects that of other countries. While alternative dispute resolution (ADR) is by no means a new concept,[41] the *AJAC Report* enumerated a growing number of ADR initiatives within the courts and in the wider community,[42] including statutory provisions authorising courts to refer proceedings to a mediator with or without the consent of the parties.[43] The Access to Justice Advisory Committee suggested that the growth of ADR, in large part, had been a response to a number of perceived shortcomings in the court system including delays, expense, intimidating formality, and an emphasis on winner-take-all outcomes, rather than compromise or agreement between the parties.[44] A similar perception has encouraged a trend, particularly under State law, to specialist tribunals, such as consumer credit and residential tenancy tribunals, as speedier and less expensive alternatives to traditional court proceedings.

An important element of the third wave of access to justice reform in Australia was the comprehensive reform in the mid-1970s of federal administrative law. The reforms included the establishment of the Commonwealth Ombudsman,[45] the enactment of legislation specifying and enlarging the grounds of judicial review of administrative action and sweeping away the procedural complexities associated with the prerogative writs,[46] and the creation of the Administrative Appeals Tribunal as the forum for "merits" review of administrative decisions.[47] The "new" administrative law was principally designed to provide people who had previously been dependent on the favourable exercise of largely unreviewable administrative discretion with effective mechanisms for review of both the legality and merits of unfavourable decisions.

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40 Cappelletti "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement", above n 19, 292–293.

41 Conciliation is specifically identified in s 51(xxxv) of the Australian Constitution as a means of resolving industrial disputes.

42 *AJAC Report*, above n 1, 278.

43 See for example the Federal Court of Australia Act 1976 (Cth), s 53A.

44 *AJAC Report*, above n 1, 278.

45 Ombudsman Act 1976 (Cth). For an overview of the operations of the Commonwealth Ombudsman, see Christopher Enright *Federal Administrative Law* (Federation Press, Leichhardt, 2001) ch 47.

46 Administrative Decisions (Judicial Review) Act 1977 (Cth).

47 Administrative Appeals Tribunal Act 1975 (Cth).

Different forms of ADR have continued to emerge in response to the perceived need to offer consumers alternatives to courts or tribunals for the resolution of disputes. A number of industries, for example, have borrowed and adapted the concept of the ombudsman in order to establish cheap and speedy dispute resolution mechanisms for dissatisfied customers. These include the Banking and Financial Services Industry Ombudsman Scheme (which aims to resolve complaints between banks and other financial services providers and their customers), the Telecommunication Industry Ombudsman Scheme,[48] the General Insurance Enquiries and Complaints Scheme,[49] and the Financial Industry Complaints Service (which deals with complaints relating, for example, to life insurance, superannuation, and funds management). For the most part, these schemes allow consumers in dispute to obtain a determination binding on the relevant service provider, without the consumer's necessarily forgoing the right to initiate court proceedings if he or she chooses to pursue a legal remedy. The Access to Justice Advisory Committee reported that Government- and industry-based ombudsman schemes, because they are relatively inexpensive, speedy, and simple, have made a "considerable contribution to improving access to justice".[50]

III SIX ASSUMPTIONS UNDERLYING ACCESS TO JUSTICE

This account of the "waves" of the so-called access to justice reform movement shows that the assumptions underlying the movement (or movements) have by no means remained uniform over time. Nonetheless, many of the developments have rested on assumptions that have continued to shape thinking about access to justice. I do not suggest that each of these assumptions has been universally accepted or has escaped critical attention. But they have tended to underpin optimistic—often unduly optimistic—beliefs that, over time, the barriers to justice confronting those suffering disadvantage by reason of poverty, language and cultural differences, or disability can be substantially reduced if not entirely overcome.

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48 For a description of the Telecommunications Industry Ombudsman Scheme, which is established by statute, see *Australian Communications Authority v Viper Communications Pty Ltd* (2001) 110 FCR 380 (rejecting a constitutional challenge to the scheme).

49 This scheme provides for external resolution of certain categories of disputes between insurers and insured and is funded by participating insurers. The scheme is approved by the Australian Securities and Investment Commission.

50 *AJAC Report*, above n 1, 304. The Committee proposed (at 316) that the Commonwealth should enact legislation prescribing minimum standards for industry-based schemes, covering such matters as independence and impartiality, accessibility, effectiveness, openness, and accountability. Compare the Corporations Act 2001 (Cth), s 912A(2), requiring a financial services licensee to be a member of an approved external dispute resolution scheme.

The first assumption underlies much thinking behind the first and second waves of access to justice reform. The assumption is that the courts can be relied on to vindicate the rights and protect the interests of disadvantaged individuals and groups in a timely and cost-effective manner. In other words, courts can be expected to deliver just, expeditious, and economical outcomes, provided that appropriate resources are devoted to ensuring that the parties compete on a level playing field. On this approach, the resolution of disputes is quintessentially the province of courts and perhaps of tribunals that function very much like courts, if somewhat more informally. It follows that although litigation has often been expensive and fraught with delays, the judicial system can be made much more efficient, economical, and user-friendly. Accordingly, it makes sense for resources to be allocated to enabling individuals or groups to defend their rights or protect their interests through the judicial system.

The assumption that the courts can reform themselves to deliver just, expeditious, and economical outcomes is particularly evident in the aspirations expressed in the *Woolf Report*. The report proposes that rules should embody the principles of equality, economy, proportionality, and expedition "which are fundamental to an effective contemporary system of justice".[51] The "new landscape" will avoid litigation wherever possible (by encouraging ADR and providing potential rewards for these making reasonable settlement offers); simplify litigation; provide for a shorter and more certain timescale; enable parties of limited means to conduct litigation on a more equal basis; and produce a civil justice system which "will be responsive to the needs of litigants".[52] The language of the *Woolf Report* is calculated to encourage a belief that the courts are capable of reforming themselves so as to achieve the objectives of just outcomes at modest cost and with a minimum of delay.

A second and related assumption is that since the courts are central to the resolution of disputes and the maintenance of the rule of law, their authority in this respect is beyond challenge. It is perhaps easier to regard this assumption as fundamental in jurisdictions which have a constitutionally entrenched bill of rights. In the United States, for example, the sweeping protections accorded by the Bill of Rights, coupled with the general (albeit not universal) acceptance of the role of the Supreme Court as the ultimate interpreter of the Constitution, would appear to entrench the centrality of the courts as guardians of the rule of law. But in jurisdictions which do not have an entrenched bill of rights, for example New Zealand and, to a more limited extent, Australia, the assumption is not necessarily buttressed by firm constitutional underpinnings.

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51 *Woolf Report*, above n 1, 4.

52 *Woolf Report*, above n 1, 4–9.

A third assumption is that governments, especially national governments, will be willing and able to devote sufficient resources to expand legal aid services and thus enable disadvantaged individuals and groups to utilise or receive the protection of the court system. Once again, this assumption was particularly evident in the first and second waves of access to justice reform which focussed on legal representation and court proceedings as means of enforcing rights or protecting interests. Commentators were not naïve enough to expect that unlimited funds would be made available for legal aid. Nonetheless, the first wave of the access to justice movement, in particular, was supported by a belief that governments would be prepared to commit funds to provide adequately to meet at least the most obvious areas of legal need. These areas included affording counsel to persons accused of serious criminal offences; providing advice and representation to those embroiled in family disputes, especially where children were involved; and equalising the scales in civil litigation which pitted individuals or families against "repeat players" such as financial institutions or insurers.[53]

The belief that real resources available for legal aid would increase significantly over time reflected faith in the then prevailing philosophy underlying the welfare state. That philosophy took it for granted that governments had a critical role to play in ameliorating the adverse consequences of inequalities attributable to misfortune or poverty. It is no coincidence that legal aid services expanded at a time when the welfare state was at its zenith and before the triumphant march forward of the proponents of the free market. In this environment, the allocation of substantial public resources to enhance legal services for poor people was seen as fulfilling the basic responsibilities of government.

A fourth assumption underlying much of the access to justice movement is that increased access to the courts is an unqualified good. Since individuals and groups cannot enforce their rights unless they have the means and ability to institute legal proceedings, to place obstacles in their path is effectively to deprive them of their rights without due process. This in turn takes for granted that those who gain access to the courts will act rationally and ultimately accept the legitimacy, if not the correctness, of adverse decisions.

A fifth assumption is that the best way of enhancing individual dignity and autonomy is to replace the dependence of many people on the favourable exercise by public agencies or public officials of unfettered administrative discretion with entitlements which, by hypothesis, can be enforced as a matter of right. It is implicit that government action or inaction constitutes the greatest threat to those values. It is also implicit in a culture of rights that the competence of courts and independent tribunals to resolve disputes, especially between the individual and government, will be enhanced. The reform of

53 Marc Galanter "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change" (1974) 9 Law & Soc Rev 95.

federal administrative law in Australia in the 1970s gave a powerful impetus to this culture. The new system was designed to enhance the public law values of openness, rationality, fairness, and impartiality, by providing for merits review and for expanded grounds of judicial review when those values were infringed. The new system was extended to social security recipients, so that those who had previously had the status of supplicants acquired enforceable rights to income support and other publicly provided benefits.

A sixth assumption which underlies much of the access to justice reform movement is that the income maintenance programmes and the provision of services essential to the well-being of individuals, especially poorer people, generally will remain the province of government. Of course, before the era of corporatisation and privatisation, the extent to which the provision of services was the responsibility of government agencies or public authorities varied depending on economic, historical, and political considerations. In the United States, some essential services, such as telecommunications and railways, were provided by the private sector, although they were usually subject to detailed regulation. In other countries, such as the United Kingdom, New Zealand, and Australia, such essential services as energy, water, and telecommunications were supplied to householders or individuals by governments or public authorities. Income maintenance programmes, fundamental to the well-being of poorer people, were not only funded but administered by governments. Such programmes were at the very heart of public law and the culture of rights it had encouraged.

IV THE ASSUMPTIONS RE-EVALUATED

The first assumption, that courts can be relied upon to vindicate rights and protect interests in a timely and cost-effective manner, has a dual aspect. At one level, it reflects a belief, perhaps to be expected among lawyers, that courts (and tribunals) are at the very heart of dispute resolution. That is, in the absence of agreement between themselves, disputing parties can be expected to resort to litigation in one form or another to resolve their differences. If they do, the resolution takes the form of a binding determination which can be enforced under the authority of the State. At another level, the assumption is directed to the outcomes that courts are capable of delivering and the expectations that can fairly be held of the litigious process.

The centrality of courts in dispute resolution is an oversimplification of what in practice occurs and indeed has always occurred. Of course, most courts and tribunals adjudicate only a small proportion of the cases brought before them. The vast majority of cases do not proceed to a hearing. They are resolved by compromise, the withdrawal of the claim, or default procedures that do not take up court time. If it were otherwise, most court systems, in the absence of a massive infusion of resources, would doubtless collapse under their workloads.

Yet only a small proportion of disputes that could be brought before the courts find their way to litigation. In part, this is because some kinds of disputes are resolved by negotiations between the parties which take place "in the shadow of the law".[54] It is the courts that provide what has been described as a "bargaining endowment" that constitutes the backdrop to the parties' negotiations. The backdrop may include both substantive and procedural law, as well as the parties' understanding that litigation necessarily involves expense and uncertainty. The courts also provide what Galanter calls a "regulatory endowment" which aids dispute resolution:[55]

> That is, what the courts might do (and the difficulty of getting them to do it) clothes with authorizations and immunities the regulatory activities of the school principal, the union officer, the arbitrator, the Commissioner of Baseball, and a host of others.

The regulatory endowment includes not only the explicit authority and immunities conferred on decision-makers by law, but the legal doctrines and practical constraints that discourage challenges to their decisions.

More fundamentally, as Galanter argues, "justice is not primarily to be found in official justice-dispensing institutions".[56] For most people, justice is experienced not in state-sanctioned institutions such as the courts, but rather in their dealings as consumers, employees, patients in hospital, neighbours, or members of communities or social groups. Galanter applies the somewhat inapt (at least in an Australian context) term "indigenous law" to refer to these "concrete patterns of social ordering" which are to be found in a variety of institutional settings.[57] Even so, his insights serve as a useful reminder of the limits of the judicial process and of the law itself in dispute resolution.

The idea that courts can always be expected to deliver just, expeditious, and economical outcomes encounters the obstacle that any fair dispute resolution process must include "an element of individualised justice".[58] There is a tension between the objectives of expedition and cost minimisation, which invariably figure prominently in proposals for reform of the court system, and the constraints imposed by the requirements that courts adhere to standards of procedural fairness and achieve principled and just outcomes. The

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54 Robert H Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950.

55 Galanter "Justice in Many Rooms", above n 9, 155.

56 Galanter "Justice in Many Rooms", above n 9, 161.

57 Galanter "Justice in Many Rooms", above n 9, 162.

58 Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, Canberra, 2000) para 1.88.

tension is intensified when it is recognised that the courts, for constitutional[59] and other reasons, perform functions other than the resolution of particular disputes. These include maintaining the rule of law, protecting individuals against unlawful actions by the executive government, and developing the law in an orderly and principled fashion. Moreover, courts must perform these functions in accordance with the principles of open justice and must give reasoned decisions, a process that is necessarily labour-intensive and time-consuming.[60]

The point can be illustrated by reference to criminal trials. It is difficult to contend that an accused person's right to a fair trial should be seriously compromised in order to meet financial constraints or preconceived standards of timeliness. This is not to argue, of course, against measures designed to reduce the cost of the criminal justice system or to conserve scarce legal aid resources, provided that they are consistent with the fundamental entitlement of an accused person to a fair trial. But the fact is that the conduct of a criminal trial is necessarily a time-consuming and therefore expensive process. It is unrealistic to expect that the basic characteristics of a criminal trial, at least in common law jurisdictions, will change.

So far as civil litigation is concerned, it is true that procedural and administrative reforms, such as the introduction of judicial case management or the individual docket system[61] can reduce delays and expense. Nonetheless, if courts are to provide the disputing parties with a genuine opportunity to put forward competing contentions of fact and law and are to accord them procedural fairness, hard-fought civil litigation also is likely to take time and involve significant cost. Some civil disputes are of course amenable to summary resolution. But the notion that all civil disputes, regardless of the complexity of the issues at stake, can be conducted both expeditiously and cheaply is as unrealistic as the notion that all criminal trials can be conducted in a summary but scrupulously fair manner.

The key to determining what is desirable and feasible in the justice system is what the Australian Law Reform Commission describes as the "proportionality principle": the idea that the procedures and resources dedicated to the resolution of a dispute should be

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59 In Australia, for example, ch III of the Constitution imposes irreducible minimum standards that must be observed by the courts in exercising the judicial power of the Commonwealth.

60 This paragraph and other material in this section is drawn from Ronald Sackville "From Access to Justice to Managing Justice: The Transformation of the Judicial Role" (2002) 12 JJA 5, 12.

61 See Ronald Sackville "Courts in Transition: An Australian View" [2003] NZ Law Rev 185, 197–205. The empirical evidence by no means establishes that all forms of case management necessarily reduce costs.

proportionate to the value, importance, and complexity of the dispute.[62] This does not mean that the "value" or "importance" of a case is to be assessed solely by reference to the monetary value of what is at stake in the litigation. But it does mean that an objective of the civil justice system should be to ensure that the resources required to resolve a dispute are proportionate to the issues at stake. It follows, as the Commission observes, that the "task is to strike an effective balance between the concerns for individualised justice and for efficient use of limited public resources across the system".[63]

The second assumption, that the authority of the courts to resolve disputes will be enhanced or at least preserved intact, has been under challenge, even in jurisdictions with a constitutionally entrenched bill of rights. It is no coincidence that the challenge is most concentrated in areas that generate high public anxiety and thus attract political attention. The net result is often that challenges of this kind impair the ability of the courts to do justice.

One area in which the authority of the courts tends to be undercut by legislators is that of sentencing of criminal offenders, particularly by mandatory sentencing laws. Such laws do not prevent individuals from gaining access to courts. On the contrary, they only apply to criminal proceedings instituted by the state against accused persons found guilty of an offence. But mandatory sentencing regimes remove the judicial discretion to determine an appropriate penalty by reference not merely to the nature of the particular offence, but to the circumstances of the individual offender. They represent a retreat from the principle that, of all institutions, courts should be able to dispense individualised justice.[64]

In Australia, the State of Western Australia has a "three strikes" home burglary law which applies a minimum custodial sentence to both adults and juvenile "repeat offenders".[65] This legislation, which was introduced in 1996, was inspired by "three strikes" laws in the United States, of which the most significant is the Californian model.[66] A

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62 Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System*, above n 58, para 1.92.

63 Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System*, above n 58, para 1.95.

64 See generally Senate Legal and Constitutional References Committee *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (Senate Printing Unit, Canberra, 2000).

65 Criminal Code (WA), ss 400, 401.

66 See Michael Vitiello *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises* (2002) 90 Cal L Rev 257, reviewing Franklin E Zimring, Gordon Hawkins, and Sam Kamin *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford University Press, New York, 2001). California accounts for over 90 per cent of all "three strikes" cases in the United States: Vitiello, above, 264.

mandatory sentencing regime was also introduced in the Northern Territory in 1997, which imposed minimum penalties for a wide range of property offences. The penalties escalated according to the number of prior "strikes", but the regime differed from that of Western Australia in that it subjected juveniles to a less rigid regime. Following a change of government in the Northern Territory in 2001, the mandatory sentencing regime was repealed,[67] although current laws continue to impose certain constraints on courts in sentencing adults convicted of "aggravated property offences".[68]

The Australian mandatory sentencing regimes have attracted much criticism, largely because of their discriminatory impact on young and indigenous offenders and the absence of evidence suggesting that they have had any deterrent effect on crime. The evidence suggests, for example, that in Western Australia about 80 per cent of three strike juvenile offenders are Aboriginal, yet there has been no decline in home burglary rates.[69] While the Northern Territory regime has been largely abandoned, the Western Australia provisions continue in force. Moreover, the Commonwealth Parliament has recently introduced mandatory sentencing for so-called people smugglers,[70] suggesting that the curtailment of judicial discretion in sentencing continues to attract powerful political and public support.

A second area in which the authority of courts is under challenge is that of judicial review of migration decisions, especially decisions affecting applications by asylum seekers for protection under the 1951 Convention relating to the Status of Refugees.[71] As Professor Hathaway, an eminent scholar of international refugee law, has noted, there have been radical changes in global social and economic conditions since the scope of the 1951 Convention was expanded by the 1967 Protocol relating to the Status of Refugees.[72] There is no longer a convergence of interest between asylum seekers and the governments of advanced countries, as there was for some time after World War II, when refugees were

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67 Sentencing Amendment Act (No 3) 2001 (NT); Juvenile Justice Amendment Act (No 2) 2001 (NT).

68 Neil Morgan "Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002" (2002) 26 Crim LJ 293, 295–296.

69 The indigenous population is less than four per cent of the State's population: Morgan, above n 68, 298, 301.

70 See for example the Migration Act 1958 (Cth), s 233C, inserted in 2001, which provides mandatory minimum custodial sentences for certain "people smuggling offences", found in ss 232A and 233A of the Act.

71 Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 150.

72 Protocol relating to the Status of Refugees (4 October 1967) 606 UNTS 267; James C Hathaway "Can International Law be made Relevant Again?" in James C Hathaway (ed) *Reconceiving International Refugee Law* (Kluwer, The Hague, 1997) xvii.

predominantly of European stock and industrialised economies required fresh sources of labour. Nowadays, asylum seekers predominantly come from Asia (including the Middle East) and Africa, and often arrive without prior authorisation in developed countries which are experiencing relatively high unemployment rates. Not surprisingly, perhaps, the mass movement of peoples seeking a better life is more likely to arouse antagonism in those countries rather than sympathy. Public anxiety about "illegal" immigration is easily translated into alarm that in turn can generate attempts to curtail access by asylum seekers to courts and tribunals in order to review adverse decisions.

In Australia, judicial review of migration decisions has long attracted political controversy.[73] This is perhaps to be expected in a country in which racially based restrictions on immigration for many decades formed an article of faith. Federal governments of all political persuasions have been wary of court decisions that threaten to thwart, if only temporarily, implementation of migration policy or hamper administrative decision-making in migration cases. In consequence, Parliament has frequently enacted legislation, often with bipartisan support, designed to curtail the powers of federal courts to review migration decisions, including those relating to detention of certain categories of asylum seekers.[74]

Most recently, Parliament has enacted a so-called "privative clause" that was clearly intended by its proponents to leave courts, including the High Court, with very little scope for judicial review of the vast majority of decisions made under the Migration Act.[75] In an important decision, however, the High Court has given the privative clause an extremely narrow construction.[76] Significantly, the Court made it clear that any wider reading would be likely to render the provision invalid as an unconstitutional attempt to oust the entrenched jurisdiction of the High Court to grant writs of prohibition and mandamus against officers of the Commonwealth.[77] While the High Court's decision has temporarily frustrated efforts to curtail the scope of judicial review of migration decisions, it is unlikely that the last word has been spoken on the subject. The more fundamental point to emerge

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73 See Ronald Sackville "Judicial Review of Migration Decisions: An Institution in Peril?" (2000) 23(3) UNSWLJ 190, 202 and following.

74 See for example the now repealed Migration Act 1958 (Cth), s 476(2)(b), limiting the grounds on which migration decisions can be the subject of review in the Federal Court. The constitutionality of the limitation was upheld in *Abebe v Commonwealth* (1999) 197 CLR 510. As to compulsory detention, see the Migration Act 1958 (Cth), s 196; compare *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

75 The privative clause is found in the Migration Act 1958 (Cth), s 474.

76 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

77 Australian Constitution, s 75(v).

from the ongoing contest between Parliament and the courts is that it cannot be assumed that legislators accept that access to the courts and the capacity of the courts to dispense individualised justice are inviolable principles.

The third assumption, that public resources available for legal aid will increase over time, appeared to be well founded in Australia until the mid-1990s. The Access to Justice Advisory Committee recorded that total expenditure on legal aid by State and Territory legal aid commissions (which had taken over the functions of the ALAO) increased by over 30 per cent in the periods 1988–1989 and 1992–1993, in part because of significant increases in the funding of legal aid by the Commonwealth, although State grants and other sources of income also increased during the same period.[78] The Committee itself proposed that the Commonwealth, in conjunction with the States, should contribute funds to legal aid commissions and community legal centres "so as to compensate for identifiable factors that increase the demands on legal aid services".[79] This implied maintaining real resources at least at their then current levels.

In retrospect, it is perhaps surprising that the public resources available for legal aid increased for as long as they did. The period from the late 1980s to the mid-1990s, in Australia as in other countries, was a time when the philosophy of economic rationalism was gaining the ascendancy. Funding for legal aid is a particularly vulnerable area of social welfare expenditure since the direct beneficiaries of legal aid (apart from the lawyers), such as persons accused of serious criminal offences or individuals wishing to challenge the actions of elected governments, not only carry little political influence but attract virtually no public sympathy. One explanation for the relatively protected state of legal aid in Australia over quite a prolonged period was that the then Commonwealth Labor Government was prepared to support "social justice" programmes by shouldering a heavier financial burden than a strict interpretation of "Commonwealth responsibilities" might have suggested.[80]

Be that as it may, the mid-1990s marked the zenith of government commitment to legal aid in Australia. Since that time public funding for legal aid has declined substantially in real terms. It is no accident that the commencement of the decline coincided with the

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78 *AJAC Report*, above n 1, paras 9.23–9.25. Total revenue of the legal aid commissions increased from $190.3 million in 1988–1989 to $251.9 million in 1992–1993. The Commonwealth's contribution increased from $92.8 million to $117.7 million in the same period. In 1992–1993, the Commonwealth also contributed $8 million to Community Legal Centres.

79 *AJAC Report*, above n 1, para 9.45; Action 9.1.

80 One important rationale for Commonwealth funding of legal aid is that much of the expenditure is on matters of federal concern, such as family law proceedings and prosecutions under federal law.

decision of the newly elected Government, in June 1996, to cease funding legal aid for matters arising under State or Territory laws.[81] Thus the Commonwealth's grants to State and Territory legal aid commissions in 2002–2003 was virtually the same, in dollar terms, as in 1992–1993, while the total revenue of the legal aid commissions was only slightly higher.[82] The decline in the Commonwealth's contribution to legal aid has meant that regional variations in the availability of legal aid services in Australia have become more pronounced, thereby increasing the burden on community centres, on other community organisations, and indeed on courts and tribunals themselves.

Developments in Australia have been mirrored elsewhere. In the United States the structure of legal aid is considerably more complex than in Australia because of the proliferation and diversity of State, local, and privately funded schemes. One measure, however, is the amount allocated to the Legal Services Corporation, a corporation established by Congress and funded by annual appropriations. Its funding barely changed in nominal terms between 1980 and 2001.[83] Congressional hostility to legal aid is also illustrated by attempts to prevent public resources being used to challenge government decisions or policies.[84] In the United Kingdom, the enactment of the Access to Justice Act 1999 was in large measure a response to concern to "obtain the best value for taxpayers' money spent on legal services and the courts" and to control expenditure more effectively.[85]

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81 See Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into the Legal Aid System* (Canberra, 1998) ch 1.

82 Commonwealth grants in 2002–2003 totalled $120.6 million, while the total income of the legal aid commissions was $269.8 million. The latter figure was projected to fall to $224.5 million for the 2003–2004 year. (Information supplied by the Commonwealth Attorney-General's Department.) Between 1993 and 2003, the Consumer Price Index increased by 29.3 per cent (from 109.3 to 141.3).

83 The appropriation to the Legal Services Corporation in 1980 was US$300 million. In 2001, it was US$329 million, down from a peak of US$400 million in 1995: Legal Services Corporation <www.lsc.gov> (last accessed 5 March 2004).

84 See for example *Legal Services Corporation v Velazquez* (2001) 531 US 533, striking down an attempt by Congress to prohibit the Corporation's funding legal representation which involved an effort to amend or otherwise challenge existing welfare laws.

85 See Lord Chancellor's Department *Modernising Justice* (1998) Cmnd 4155, paras 1.9, 3.8. The report records that spending on all forms of civil and family legal aid had risen from £586 million in 1992–1993, to £793 million in 1997–1998, an increase of 35 per cent compared with inflation of 14 per cent during the same period. In New Zealand, in contrast to the position in Australia, cash expenditure on legal aid increased by 66 per cent ($49.7 million to $75.1 million) between 1992 and 2001, a period during which the Consumer Price Index increased by only about 21 per cent: Ministry of Justice *Eligibility for Legal Aid: Discussion Document* (Wellington, 2002) 12–13.

The experience of legal aid in the post-welfare-state era suggests that continued public funding of legal aid at the highest historical levels not only cannot be taken for granted, but may well represent an unattainable objective. In one sense, accepting that the resources available for legal aid are limited does no more than recognise that access to justice "must take its place in the realm of political competition for public funding".[86] Governments also have a responsibility to ensure that resources are deployed effectively. In addition, however, it is prudent to acknowledge that funding of access to justice programmes, particularly legal aid, is likely to encounter ideological resistance in the new economic and political environment. In short, the most optimistic aspirations of access to justice proponents are unlikely to be fulfilled by governments sceptical of the values implicit in the access to justice movement.

The fourth assumption, that increased access to courts is an unqualified good, might seem to be self-evident. After all, the fundamental objective of the access to justice movement is to ensure *effective* access to the legal system to enforce rights and protect legitimate interests. For this reason, courts have established an extensive array of principles and practices designed to assist and protect persons who, by choice or necessity, lack legal representation.[87] For much the same reason, impecunious litigants are usually exempt from the requirement to pay filing fees or other imposts that actually apply to litigants.[88]

These measures are readily justifiable if it be assumed that unrepresented litigants are prepared to act rationally and to accept the legitimacy of adverse decisions ultimately made by the courts. With increasing frequency, this assumption does not match the reality. Many unrepresented litigants do their best in difficult circumstances to navigate their way through the system consistently with the rules. But a small but important minority can be described as "querulous litigants", whose activities impose disproportionate burdens on limited judicial resources and on their unfortunate opponents.[89] These querulous litigants are often prepared to make and persist with baseless allegations, including claims that judicial officers have engaged in fraud or other serious misconduct. Frequently these same litigants resolutely refuse to accept the legitimacy of decisions unfavourable to their cause,

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86 Richard Moorhead and Pascoe Pleasence "Access to Justice after Universalism: Introduction" (2003) 30 J L & Soc 1, 2.

87 Australian Institute of Judicial Administration *Litigants in Person: Management Plans: Issues for Courts and Tribunals* (Canberra, 2001); Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System*, above n 58, paras 5.7–5.11, 5.152–5.157.

88 See for example the High Court Rules 1952 (Cth), O 16, r 30.

89 The expression has been used by Professor Paul Mullen, Professor of Forensic Psychiatry, Monash University (Address to Federal Court of Australia Judges, 22 August 2000).

regardless of the number of such decisions or the high standards of procedural fairness that have been observed in the course of reaching those decisions. Since they are often judgment-proof and are exempt from court fees, there are virtually no disincentives to persistent attempts to relitigate the same or substantially the same issues. The courts themselves have given relatively little thought to the self-protective measures that may be needed in the small but significant minority of cases where rationality on the part of unrepresented litigants is in short supply.

The extent of the problem in Australia is illustrated by the complaint of the High Court that there is a "growing trend … towards most of the time of the Court being taken up with hopeless cases by self-represented litigants".[90] The Court points out that 40 per cent of all applications for special leave to appeal in 2001–2002 were instituted by self-represented applicants, the overwhelming majority of which had no legal or factual merit. The Court further reports that around 50 per cent of the time of registry staff is taken up with self-represented litigants, who are frequently abusive and intimidating. It also identifies a trend, well familiar to other courts, whereby dissatisfied self-represented litigants commence criminal or civil proceedings against registry staff or judges of the Court.

The emergence of the querulous litigant as a fact of judicial life demonstrates that unfettered access to courts is not always a good thing. Of course, some degree of disruption inflicted on the justice system by such litigants may well be the price that has to be paid to ensure that people with genuine grievances are not deterred from persevering with their claims in an appropriate forum. On the other hand, it may be necessary, in order to achieve a reasonable balance between competing objectives, to challenge some long-held assumptions about the sanctity of the principle that all intending litigants are entitled to unimpeded access to the courts to ventilate their claims.[91]

The fifth and sixth assumptions can be considered together. The idea that a culture of rights enhances individual dignity and autonomy is closely associated with the view that government actions (or inaction) constitute the greatest threats to those values. The assumption that the well-being of people depends on the activities of government agencies or public authorities rests largely on the view that the government has the primary responsibility for formulating, funding, and administering welfare programmes or in providing essential services. The relentless rise of free market economics means that access to justice theorists and practitioners must confront the consequences of corporatisation,

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90 High Court of Australia *Annual Report 2001–2002* (Canberra, 2002) 7–8.

91 In a High Court case involving what were found to be "irresponsible allegations", McHugh J suggested reconsidering the exemption from fees for impecunious litigants in the absence of a showing that the litigant has an arguable case: *Savvas v Commissioner for Land and Planning* (17 June 2002) HCA C5/2002.

privatisation, and the emergence of the new "contractualism". Functions that only recently were widely considered to be the inalienable responsibility of government are now discharged, wholly or in part, by the private sector. As David de Carvalho has said:[92]

> Not only have those functions that "produce tangible and tradeable outputs" such as electricity and garbage collection been contracted out or privatised completely, but so have those social services that have traditionally been seen as the responsibility of government in its role as guarantor of social rights: health services, disability services, housing for the poor, public transport and employment assistance to name just a few.

The contracting out of responsibility for decisions governing entitlement to benefits under government programmes has severed direct links between individual claimants and government agencies. The new contractualism has even extended to the making of decisions as to whether individuals applying for income maintenance payments have complied with the eligibility requirements. Margaret Allars comments that the novel feature of the current "mutual obligation initiative in Australia":[93]

> is that [the] entitlement consists in a contractual right to benefits in exchange for performance of certain contractual duties. A recipient becomes ineligible for the welfare benefit by virtue of the reported 'breach' of the activity agreement. The state has a duty to provide welfare benefits and a right to the recipient's active involvement in improving his or her employment prospects. A discretionary decision persists in the new regime in that the Secretary's delegate determines whether 'reasonable steps' have been taken. However, the more critical step in the process is the earlier factual finding that a breach of contract has occurred. Continuing eligibility thus depends pre-eminently upon compliance with contractual obligations rather than with meeting statutory criteria.

The new contractualism may be compatible with judicial review. It may be open, for example, for courts to interpret the "agreement" reached between the provider and recipient of welfare benefits so as to protect the legitimate interests of the recipient.[94] But as decision-making functions are delegated or contracted out to private agencies, it becomes more difficult to apply and enforce public law values.

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92 David de Carvalho "The Social Contract Renegotiated: Protecting Public Law Values in the Age of Contracting" (2001) 29 AIAL Forum 5, 7.

93 Margaret Allars "Citizenship Rights, Review Rights and Contractualism" (2001) 18(2) Law in Context 79, 91.

94 Allars, above n 93, 97–99, referring to Federal Court decisions concerning "activity agreements" entered into by recipients of certain allowances.

The point is illustrated, in a commercial context, by a recent decision of the High Court of Australia.[95] Commonwealth legislation preserved a pre-existing export monopoly in respect of the national wheat crop, but in a different form. The expressed object was to maximise the return to wheat growers. To this end, the legislation prohibited the export of wheat without the consent of the Authority, a body created by statute. AWBI, a corporation effectively controlled by the growers, was exempted from the prohibition. The Authority could not consent to the export of wheat by a particular trader except with AWBI's prior written consent.

AWBI refused repeated requests for consent by Neat Trading, on the ground that it had a policy against approving the bulk export of wheat. On a challenge to the legality of AWBI's refusal of consent, the threshold question was whether AWBI's refusal was "a decision of an administrative character made … under an enactment" within the meaning of the Administrative Decisions (Judicial Review) Act 1977 (Cth).[96] Only if that question was answered affirmatively could the AWBI's decision to refuse consent be subject to judicial review.

It might be thought that although the AWBI was not a statutory authority, there would be little difficulty in characterising its refusal to consent as a decision of an administrative character made under an enactment. As Gleeson CJ pointed out,[97] AWBI, in practical terms, held a statutory monopoly over the bulk export of wheat, which was conferred in the national interest. AWBI exercised an effective veto over decisions of the statutory authority which had been established to manage the export monopoly in wheat. In reaching the same conclusion, Kirby J observed that the critical question was not whether AWBI was a body of a particular character, but the nature of the decision it was empowered to make.[98] That decision was "fully integrated into the regulatory scheme created by the statute".[99]

Despite these powerful considerations, the majority[100] considered that the AWBI's refusal to consent went beyond public law review, for three reasons.[101] First, the legislation distinguished between the roles of the Authority and the AWBI; secondly, AWBI had a

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95 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179.

96 Section 3(1), defining "decision to which the Act applies".

97 *Neat Domestic Trading Pty Ltd v AWB Ltd*, above n 95, para 27.

98 *Neat Domestic Trading Pty Ltd v AWB Ltd*, above n 95, para 99.

99 *Neat Domestic Trading Pty Ltd v AWB Ltd*, above n 95, para 103.

100 McHugh, Hayne, and Callinan JJ.

101 *Neat Domestic Trading Pty Ltd v AWB Ltd*, above n 95, para 51.

"private" character, as a company incorporated for the pursuit of the objective of maximising returns to growers; and thirdly, it was not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.

The precise relationship between public law and the provision by the private sector of collectively consumed resources and services is, as the decision of the High Court illustrates, still to be resolved. Some place their (perhaps excessive) faith in the forces of competition to ensure that the private sector adheres to the values preserved by public law norms. Some public law theorists, perhaps sceptical of the capacity or willingness of the private sector to adhere to values such as openness, fairness, and accountability, argue for an extended application of public law principles to private service providers, as a means of encouraging them to accept public law values when they take over traditional or even not so traditional governmental functions.[102]

Others see private service providers as by no means dangerous or corrosive of democratic values. On the contrary, Jody Freeman, for example, argues that:[103]

> for-profit firms, and a host of "intermediary institutions," including nonprofit, professional, religious, and public-interest organizations, can contribute technical innovation, ingenuity, cost-savings, quality, and diversity in the performance of arguably public functions.

She contends that privatisation has the potential to extend public law norms to private actors through a process she calls "publicization".[104] She envisages the enactment of legislation to require such actors to comply with public law norms and the formulation of judicial doctrines to encourage the process.

Commentators will doubtless continue to disagree as to the mechanisms best designed to ensure that public law values are respected in the post-welfare state era of corporatisation, privatisation, and contractualism. Unless those values are respected, however, many of the advances associated with the access to justice movement are likely to count for little. Whatever mechanisms are adopted to achieve that result, it can no

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102 See for example Patrick McAuslan "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46 MLR 1; Margaret Allars "Private Law But Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 Pub LR 44; Hon Sir Gerard Brennan "The Review of Commonwealth Administrative Power: Some Current Issues" in Robin Creyke and Patrick Keyzer (eds) *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (Federation Press, Annandale, 2002) 19 and following.

103 Jody Freeman "Extending Public Law Norms Through Privatization" (2003) 116 Harv LR 1285, 1289.

104 Freeman, above n 103, 1314.

longer be assumed that governments invariably represent the greatest threats to the autonomy and well-being of individuals.

V CONCLUSION

One of the difficulties that has bedevilled discussion about the concept of access to justice is a reluctance by some commentators to question the assumptions that often underlie the rhetoric. Identifying and evaluating some of the more important assumptions, as I have attempted to do in this paper, provides no guarantee of optimal policy outcomes. But it may assist in formulating the right policy questions and in reducing the risk that unrealistic expectations will be created of the justice system.

I have suggested that:

- there are inherent limitations, not always recognised, on the ability of courts and tribunals to deliver just outcomes expeditiously and economically;
- aggrieved individuals and groups do not always, or even generally, expect their disputes to be resolved through litigation;
- governments, regardless of political complexion, are not necessarily committed to the principle of effective access to courts to remedy genuine injustice; nor are they necessarily committed to the notion that courts must retain their authority to achieve individualised justice;
- public resources for legal aid programmes are unlikely to increase substantially in real terms in the post-welfare state;
- unimpeded access to the courts in all circumstances is not always a good thing; and
- traditional public law mechanisms for ensuring the fairness and accountability of decision-makers do not necessarily continue to apply in the new world of privatisation, corporatisation, and contractualism.

The analysis in this paper is not intended to detract from the importance of the role played by courts and tribunals in enforcing the rights and protecting the interests of disadvantaged individuals and groups. Nor is it intended to diminish the significance of well-targeted and effectively administered legal aid schemes and procedural reforms in equipping courts and tribunals to perform that role. But it is necessary to recognise the limitations of courts and tribunals as the means of achieving the stated objectives of the access to justice movement. It is equally necessary to recognise the practical obstacles to achieving these objectives. A healthy dose of scepticism is by no means incompatible with the idealism which so often accompanies the rhetoric of access to justice.