



DEMOCRATIZING JUSTICE IN CANADA

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The Canadian Forum on Civil Justice (CFCJ) is a national not-for-profit organization dedicated to civil justice reform and access to justice research and advocacy. Established by the Canadian Bar Association and affiliated with Osgoode Hall Law School, the CFCJ envisions an accessible, sustainable and effective justice system for all Canadians.



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Democratizing Justice

Democratization means making something, usually a public good, accessible to everyone. The democratization of technology related to the internet or the democratization of health care are examples. As digital technologies become more widely adopted in areas touching peoples' daily lives such as making appointments, applications for employment, being informed about changes in conditions of services or bargains available in the marketplace, the reasons for making enabling technologies accessible to everyone become increasingly obvious. In a nation with a long-standing system of publicly funded health care the reasons are obvious although the realization seems to be falling short. In justice democratization is being discussed, but unlike health care in which democratization is accepted but falling short of its full realization, democratization of justice is a concept and an objective yet to be fully accepted.

The idea that access to justice should be universal has had a long history in the socio-legal studies literature. David Luban lamented that effective access to legal services for the poor would be unattainable because it would require more money than society [US] could be expected to spend on its poor. A more modest ideal of minimal access to legal services for the poor was viewed as more realistic.¹ Three decades later, with the momentum of U.N. Sustainable Development Goal 16, Justice for All² has changed the conventional discourse, taking a more assertive and positive position that universal access to justice, a more expansive goal than access to legal services, is an attainable goal.

A precursor of a broader concept of access to justice emerged earlier than the theme of justice for all emerged in the legal needs research literature. In the legal needs literature, the inflection point in thinking about the nature of legal problems, justice and access to justice occurred with the publication of Hazel Genn's seminal Paths to Justice study. In that research, Genn laid the foundation for viewing legal problems from the point of view of the individual experiencing them rather than from the perspective of the formal justice system. Genn made the focus of her study justiciable events, "a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being legal and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system".³

Paths to Justice spawned a large and growing body of legal needs research and literature, producing a remarkably consistent body of findings.⁴ Among them:

- **A high prevalence of justice problems.** Estimates from four Canadian legal needs studies places the percentage of people experiencing one or more everyday legal problems at between 45% and 50%. The most recent study estimates the percentage at 34%.⁵
- **Problems frequently do not occur in isolation.** About a third of people experiencing at least one problem experience multiple problems. Experiencing legal problems has a momentum. The probability of experiencing another legal problem increases with each additional problem experienced.⁶ Multiple problems tend to cluster into groupings. Legal problems can trigger or can be triggered by other legal or non-legal problems. Problem clusters can be made up of interdependent legal and non-legal problems in which durable resolutions require

1 David Luban, *The Right to Legal Services* in A. A. Paterson and T. Goriely (eds.), *Resourcing Civil Justice*, Oxford, University Press, 1996. P. 39.

2 *Justice For All: The Report on the Task Force for Justice*, Task Force on Justice, Justice for All – The report of the Task Force on Justice: Conference version. New York: Center on International Cooperation, 2019, available at <https://www.justice.sdg16.plus/>. There are earlier statements of the justice for all objective, for example in Roger Smith (ed.), *Shaping the Future: New Directions in Access to Justice*, Legal Action Group, London 1995. P. 12.

3 Hazel Genn, *Paths to Justice; What People Do and Think About Going to Law*, Hart Publishing, 1999. P. 12.

4 Organization for Economic Cooperation and Development and the Open Society Foundations, *OECD Publishing*, Paris, 2019.

5 A. Currie, *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns*, *International Journal of the Legal Professions*, Vol. 13, No. 3, 2006 presents the results of a 2004 Canadian survey of legal problems; A. Currie, *The Legal Problems of Everyday Life*, in Rebecca L. Sandefur (ed.), *The Sociology of Law Crime and Deviance: Vol. 12, Access to Justice*, Emerald, 2009, pp 1 – 42 presents the results of a 2006 Canadian survey of legal problems and A. Currie, *Lives of Trouble: Criminal Offending and the Problems of Everyday Life*, paper presented at the International Legal Aid Group Conference, Wellington New Zealand, 2009 presents the results of the 2008 Canadian legal problems survey, Trevor CW Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, *Everyday Legal Problems and the Cost of Justice in Canada*, Canadian Forum on Civil Justice, Toronto, 2016, Laura Savag and Susan McDonald, *Experience of Serious Legal Problems in Canada*, *Juristat 85-002_X*, Statistics Canada, 2022.

6 For a detailed analysis of these legal problems dynamics see Ab Currie, *The Legal Problems of Everyday Life* in Rebecca L Sandefur (ed.), *Sociology of Law Crime and Deviance*, Vol 12, *Access to Justice*, Emerald, 2009, pp. 1 – 42; Ab Currie, *Nudging the Paradigm Shift: Everyday Legal Problems in Canada*, Canadian Forum on Civil Justice, Toronto, 2016.

holistic approaches that take the interconnections into account.

- An important finding replicated throughout the body of legal needs studies is that **many people experiencing legal problems do not request authoritative assistance in a timely manner**, often until the situation becomes desperate. There are many reasons why people acquiesce in a problem situation rather than seek help. The vast majority of people experiencing an everyday legal problem take some action to resolve the problem, but do not seek authoritative help. People do seek help with everyday problems from familiar sources, such as friends and relatives or the internet. However, people do not recognize the seriousness or the legal aspects of the problem when it first occurs and often do not seek appropriate or effective help.⁷

Outreach is the Key

In order to fully meet the needs of the public outreach is essential.⁸ The first problem in meeting the legal needs of the large number of people who do not or who delay taking action is to find them first.⁹ Outreach can be undertaken in a number of ways depending on the circumstances but going out to the community to learn about the problems affecting people and partnering with the community to develop appropriate and effective approaches to helping people are critical. At the individual service delivery level, going out to where people live or spend much of their time providing service “where they are at” is the formula for success. If you sit in your office waiting for people to appear at the door asking for help, you will already have failed to meet the needs of the large number of people who do not take action at the early stages of a problem, especially the needs of disadvantaged people or people affected by trauma.

Resolutions, Not Legal Outcomes

As ideas about how people experience problems in everyday life evolve, a perspective is emerging that people want resolutions not necessarily legal outcomes. There are problems for which legal action is necessary. Legal action may have to be taken in combination with other types of help to address the other problems in the person’s life that are unique to the way in which the individual is experiencing the problem.¹⁰ Also, there may be far more sensible and practical ways to deal with everyday legal problems than through legal action. As Philip Lewis famously remarked, although the person with a leaking roof has a right to have it repaired by the landlord, it is not clear whether he would be better off with a lawyer or a ladder.¹¹

Whole Client, Whole Lawyer

A holistic and integrated approach treating the “whole client” is transformative for the individual being served. It is also transformative for lawyers accustomed to providing legal services in conventional ways. The intake or first interview must be holistic, exploring the other legal and related non-legal problems being experienced by the person as well as the presenting problem. In addition, within a holistic approach the legal worker should explore what outcomes the individual wants, taking into account how different actions might affect their life, their important relationships and their life in the wider community. A lawyer providing assistance may not have the resources, expertise and experience necessary to address all the related legal and non-legal problems at issue.¹² Collaborative partnerships with other service providers extends the reach of legal aid and expands the boundaries of access to justice, no longer the exclusive domain of the legal profession and the formal justice system.

7 Op. cit. footnote 6.

8 Pascoe Pleasence, Christine Coumarelos, Suzie Forell and Hugh M. McDonald, Re-Shaping Legal Assistance, Building on the Evidence, A Discussion Paper, Law Foundation of New South Wales, Sydney, 2104, p. 31.

9 Ab Currie, You Have to Find Them First and that’s a People-Centered Process, Learning about People-centered Justice from the Rural Mobile Law Van, Canadian Forum on Civil Justice, Toronto, 2023.

10 Rebecca L. Sandefur, Access to What? *Daedalus* 19 (winter) 2019; Rebecca L Sandefur, “What Do We Want!”, *Fordham On-Line Law Review*, Vol. 87, Article 22, 2018.

11 Philip Lewis, *Unmet Legal Needs in Pauline Morris*, Richard White and Philip Morris, Social Needs and Legal Action, Martin Robertson Publishing, London, 1973, p. 79.

12 Richard Moorehead and Pascoe Pleasence, Access to Justice After Universalism, *Journal of Law and Society*, Vol. 30, No. 1, March 2003, p. 1.

Data from Legal Needs Surveys and the Need for Democratization of Justice

There is some evidence from existing research that begins to make the case for democratizing access to justice.¹³

- Existing research tells us that people who experience everyday legal problems experience high levels of stress as a consequence.
- People who experience physical health problems make more frequent use of medical health services as a consequence of experiencing everyday legal problems.
- As a consequence of experiencing everyday legal problems people may experience loss of employment, loss of housing and be required to use social assistance. There is a cost to publicly funded institutions.
- Experiencing everyday legal problems is more frequent among people with physical disabilities.¹⁴

Measuring Success and Further Supporting Democratization

Future research supporting the democratization of access to justice should reflect the idea of people-centered justice, that is, focusing on outcomes of assistance that represent aspects of individual well-being that follow as a consequence of receiving help in resolving life problems. The research results cited above takes us part way there by showing that people may experience loss of employment or housing, or significant disruptions to their lives including high levels of stress and other health issues as a result of experiencing everyday legal problems. Outcomes showing that improvements in quality of life in terms of secure housing, a secure livelihood, improved family life, personal security and reduced stress can follow as a result of people receiving effective and timely assistance with a range of everyday legal problems. This is based on an understanding of how everyday problems exist “at the intersection of human adversity and the law”¹⁵ and how people-centered legal services can result in improvements in people’s lives.

Although systematic empirical evidence is not yet available from the ongoing Rural Mobile Law Van project¹⁶, anecdotal evidence is intriguing. People coming to the law van asking for assistance are always asked how they learned about the “van”. Case notes are recorded for the people requesting assistance at the mobile summer van or at the fixed-location winter venue. Below is recorded in a case note from one of the winter locations.

A mother and daughter appeared at one of the 2023-2024 winter venues. They learned about the service from a post on Facebook. The daughter had multiple problems, a long-term disability matter, an employment matter, and questions about Aboriginal Status applications. The mother had questions about wills, powers of attorney and, generally, wanted to better understand what happens when a loved one passes away. They received several referrals. In addition, an arrangement was made for the daughter to be contacted by the employment lawyer from the clinic. She was also directed to the Indigenous justice coordinator at Legal Aid Ontario.

At the end of the session one of the two people said (quote): *“do you know how much you’ve helped us? We’ve only been here a short amount of time.”*

This anecdote is a glimpse into what democratized justice might look like in form and substance. In a 1990 interview about the spread of technology, the futurist fiction writer William Gibson coined the enduring phrase “the future is already here, it is just not yet evenly distributed.”¹⁷ The democratization of justice is not here yet, but it is visible, although unevenly distributed, in innovations that appear from time to time and here and there. The problem is not to let these glimpses into democratized justice fall away rather than endure as a piece of a new architecture of access to justice.

¹³ Ab Currie, *Nudging the Paradigm Shift*.

¹⁴ Ab Currie, *Civil Justice Problems and the Disability and Health Status of Canadians*, Pascoe Pleasance, Alexy Buck and Nigel J. Balmer (eds.), *Transforming Lives: law and social process*, Legal Services Commission, London, 2006, pp. 44 - 66.

¹⁵ Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in P. Pleasance, A. Buck and N J Balmer (eds.), *Transforming Lives: Law and Social Process*, London, 2007, p. 112- 132.

¹⁶ Op. Cit, footnote 9.

¹⁷ William Gibson, the origin of the quote is much disputed, but Gibson may have first said it in an interview about the spread of technology in a *Cyberpunk* interview in 1990 and again during an NPR radio interview in 1999.

What Is Needed as We Move Toward Democratizing Justice

The case note summarized above is one illustration of the injustices and needs that loom large in peoples' lives. They should not be ignored because the formal justice system has no room for them because of the barriers, the gatekeepers, and the costs. We need to expand what we mean by a system of justice to accommodate these "little injustices"¹⁸ for which the formal justice system has no room. However, in an important sense they are not really little injustices merely because they do not come to the attention of the courts or attract the services of lawyers working within the business model of the private bar. Within a people-centered justice framework, these are big and troubling problems in the lives of the people experiencing them. They may represent significant costs and consequences, both directly and in lost opportunity, measured on the scale of peoples' everyday problems affecting their everyday lives.

Lawyers and Legal Clinics Will Not Do It Alone

Strengthening communities being served is an important way forward in the process of democratizing access to justice. The bar for achieving access to justice has been set higher in the discourse around access to justice that has emerged in recent years. Looking at problems from the point of view of the people experiencing them, identifying undiscovered legal problems, serving the needs of the broader public, the focus on people centered-justice in providing assistance that takes into account how the individual is experiencing the problem and the outcomes they want are goals that are beyond the capacity of community legal clinics and staff lawyer offices acting by themselves. The task is daunting, even for community legal clinics with long-standing commitments to the communities in which they work. The range of problems people bring cannot be addressed with the human resources and areas of resident expertise available. The lack of funding from conventional sources is unlikely to grow enough to meet the challenge.

Building an infrastructure to democratize justice will involve building the capacity of communities.¹⁹ In most communities there is an existing social organization of helping consisting of government-funded social services and voluntary associations assisting people with a variety of problems. Experience shows that these organizations are eager to partner with community legal clinics when they understand that the problems with which they are assisting their own clients or members of their constituencies may have legal aspects and that free legal consultations are available.²⁰ However, considerable community development has to be done to build collaborative partnerships. This requires building the legal capability of community organizations so they understand how problems often exist at the nexus of the law and the human problems with which they are concerned. The democratization of justice will benefit from providing helping organizations with an understanding of progressive legal services resting on the ideas now familiar in the socio-legal literature. The bottom line for community organizations is that the problems for which they are assisting their own clients or members of their constituencies are human problems that may have legal aspects, and that partnering with community legal clinics on a case-by-case basis may help them better assist their own clients. The combined efforts of legal and non-legal assistance may produce the most durable solutions to complex problems. People-centered approaches may produce resolutions that make the most sense to people experiencing the problems but the appropriate approaches may be best achieved with the combined resources of legal and non-legal community partners.

Collaborations between legal clinics or offices and community organizations may not come easily. Experience has shown that such collaborations have to overcome practical obstacles. Community legal clinics seeking to establish working relationships with community organizations have to take into account existing practices and procedures of helping organizations such as existing intake protocols and the practical realities extremely busy front line service providers working in demanding circumstances.²¹ However, a network of access to justice services involving referrals going both

¹⁸ Laura Nader, *Alternatives to the American Judicial System* in Laura Nader (ed), *No Access to Law: Alternatives to the American Judicial System*, Academic Press, New York, 1980.

¹⁹ Ab Currie, *The Communities Being Served are the Resources that Are Needed: Innovations in Community Based Justice*, An Anthology of Canadian Research, Canadian Forum on Civil Justice, Toronto, 2022.

²⁰ Ab Currie, *Legal Secondary Consultation, How Legal Aid Can Support Communities and Expand Access to Justice*, Canadian Forum on Civil Justice, Toronto, 2018.

²¹ Ab Currie, *The Sub-regional Rollout of the Legal Health Check-Up*, January 2016. www.legalhealthcheckup/bundles/legalcheck/pdf/subrefionalrolloutreport .

ways, secondary consultations and collaborative problem-solving will go far to advance the democratization of justice, extending the reach of clinics and the boundaries of access to justice

How Little Would Outreach Cost?

The cost of the infrastructure and the salaries of lawyers and legal workers would be small compared with construction and on-going maintenance of court buildings, lawyers, judges court support staff and the security apparatus and personnel. This is not to argue that resources should be taken from the courts that are already struggling under budget constraints for the work that they are required to do or that the formal justice is not in need of increased funding. It is an argument to add a relatively small amount to the budgets of community clinics, staff lawyer offices and privately-funded clinics to expand access to justice, to achieve a relatively big effect relative to the cost by extending the reach of legal aid. The courts are important for upholding the rule of law. However, as we re-think the fundamental questions: what is a legal problem?, what is justice? and what is access to justice? We also need to re-think what we ought to mean by the rule of law.

Building the Legal Capability of the Public

Everything said about developing an understanding of holistic, integrated and people-centered justice applies to individual members of the public as well as to service providers in community organizations. From the legal needs literature, we already understand much about why people do not take appropriate and timely action when first experiencing a legal problem. One part of the explanation for why people do not come forward is that they do not trust lawyers. Disadvantaged people may consider lawyers as part of the bureaucratic class that has misunderstood their problems or been unsympathetic to their lives and thus been largely responsible for creating their disadvantage. Being convinced that the person offering help is “a different kind of lawyer”²² might be a tall order. Therefore, the trusted intermediaries to which people otherwise go for help might be essential strategic partners in democratizing justice.

From Public Good to Public Policy

Legal needs research, socio-legal theory and the evolving policy discourse that has followed has had an enormous impact on how we think about legal problems, justice and access to justice. Why has it not yet had a commensurate impact on funding and service delivery, moving closer to democratizing justice? If some inferences for Canada can be drawn from American public opinion research, there may be public support for expanding access to civil justice. According to one US study, an overwhelming majority of voters believe it is important to ensure that everyone has access to the civil justice system, whether framed as “legal representation” or “legal help.” Voters support increasing state funding to build a more accessible civil justice system, and, surprisingly, their support is not very tax sensitive.²³

In Canada there are many organizations that are champions of expanding access to justice. At the national level, the Canadian Forum on Civil Justice, the Action Committee on Access to Civil and Family Justice and the Canadian Bar Association are notable. There are many organizations active across the country in the provinces and territories carrying on great work to expand access to justice. However, there appears to remain a chasm between professional and informed public discourse on the one hand, and felt need and public demand on the other, that must yet be crossed to bring about justice for all.

Perhaps what bedevils movement toward democratizing justice is that access to justice is a wicked policy problem, fraught with lack of agreement about basic definitions, about changing requirements, or with possible solutions that are not yet clear.²⁴ Achieving clarity and agreement might be a long and uncertain road if led from the top down. Paradigm shifts are characterized by an initial discovery or realization, followed by sometimes long periods of ordinary research and theoretical work elaborating and refining the eureka concept.

22 Ab Currie, *Extending the Reach of Legal Aid: Final Report on the Pilot Phase of the Legal Health Check-Up Project*, Canadian Forum on Civil Justice, Toronto, 2015.

23 Celinda Lake, Anat Shenker Osorio, Daniel Gotoff, and Corey Teter, *Building a Civil Justice System That Delivers Justice for All*, Public Welfare Foundation, 2017.

24 Brian W. Head, *Wicked Problems in Public Policy, Understanding and Responding to Complex Challenges*, Palgrave Macmillan, Sydney, 2022.

An action-oriented bottom-up strategy of outreach and innovation to bring legal help to people where they are at might work better. That way, people who experience barriers that prevent them from taking action to deal with a legal problem, who do not recognize the legal nature or the seriousness of the everyday problem they are experiencing, or who are uncertain that there is any help available for their problem or do not know where to find help can experience access to justice by getting the help they need without being expected to make their own way to the front door of a law office or community legal clinic. This is democratizing justice in action. What is needed is a well-funded national program to encourage outreach and innovation in access to justice. Second, what is needed closely following on from innovation is a commitment by donor organizations and government funders to provide on-going funding for what works. By creating public awareness and demand through outreach and peoples' experience of getting help when they need it politicians and policy-makers who make public policy might follow.