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# Access to Justice: Variations and Continuity of a World-Wide Movement

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## Access to Justice

### Variations and Continuity of a World-Wide Movement

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Florence, Bloomington, Ind., and Siena\*

*I. Assessing the Access-to-Justice Phenomenon: The Insights of Reviews – II. Recent Developments in Access to Justice – 1. Legal Aid and Advice – 2. The Representation of Diffuse Interests – III. The Effort to Go Beyond the Provision of Legal Services: The “Third Wave” of the Access-to-Justice Movement – 1. The Trend Toward Conciliation – 2. Changes in the Legal Profession – IV. Access to Justice Today*

Six years ago, the authors of this article presented the “Comparative General Report” on “Access to Justice” at the Conference on „Der Schutz des Schwächeren im Recht“, organized by the Max-Planck-Institut für ausländisches und internationales Privatrecht to celebrate the 50th anniversary of the Institute’s foundation<sup>1</sup>. That report was, in fact, a comparative

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*Literature cited in abbreviated form: Access to Justice, ed. by Cappelletti. Vol. I: A World Survey, ed. by Cappelletti/Garth; II: Promising Institutions, ed. by Cappelletti/Weisner; III: Emerging Issues and Perspectives, ed. by Cappelletti/Garth; IV: Anthropological Perspective, Patterns of Conflict Management – Essays in the Ethnography of Law, ed. by K. Koch (Alphen a/d Rijn and Milan 1978/79); Les conciliateurs – la conciliation, Une étude comparative, Colloque de l’Association internationale des Sciences juridiques, Pau, juillet 1981. Sous la direction de Kötzt/Ottenhof (Paris 1982); Cook/Roehl/Sheppard, Neighborhood Justice Centers Field Test: Executive Summary, Final Evaluation Report (Washington, D. C., 1980); Jobert/Rozenblatt, Le rôle du conciliateur et ses relations avec la justice (Paris 1981); Röyal Commission on Legal Services, Final Report, 1979 (Cmnd. 7648).*

<sup>1</sup> See Cappelletti/Garth/Trocker, Access to Justice, Comparative General Report: *RabelsZ* 40 (1976) 669.

analysis of the preliminary results of a large research project. This project was concluded about three years ago with the publication of the Florence Access-to-Justice series<sup>2</sup>. Since then, there has been a more recent volume that continued the theoretical approach of the Florence Project<sup>3</sup>. Also, in the spring of 1981, the twenty-one Ministers of Foreign Affairs of the Council of Europe agreed to recommend to their governments a series of measures "to facilitate access to justice."<sup>4</sup>

As the Florence Project in large part indeed sought to describe and explain a profound "movement" in the law, we do not think that those who contributed to or have been interested in the Project can now simply ignore the movement's continuing manifestations. Developments in access to justice provide vital insights into the role of the legal profession, legal procedures, and law generally, and new developments must be used to test the validity of the insights proffered in the Project publications. We therefore believe it useful to keep abreast of the changing situations in various countries and to consider the responses to the Project series. If one test of the Project's ideas and insights is whether they help to explain and evaluate new national developments, another is surely the opinions of the many scholars and practitioners who have considered the Project volumes and reviewed their contents.

This report will be organized in the following manner. It will examine the scholarly reactions from a number of reviewers to the publications of the series (*infra*, sub I). It will then report on recent developments, especially in Europe and in the United States (*infra*, sub II and III). And we will conclude by trying to provide some perspective of the meaning of the access-to-justice movement today (*infra*, sub IV).

### I. Assessing the Access-to-Justice Phenomenon: The Insights of Reviews

The crucial importance of access-to-justice problems is demonstrated in part by the widespread interest that the Project volumes have generated. Numerous reviewers have already introduced the Project results to their reading publics, several conferences on access to justice have been held,<sup>5</sup> and government agencies have been discussing this work.<sup>6</sup> On the practical

<sup>2</sup> See *supra*, note\*.

<sup>3</sup> Access to Justice and the Welfare State, ed. by Cappelletti (Alphen a/d. Rijn etc. 1981).

<sup>4</sup> Council of Europe, Recommendation No. R.(81)7, reproduced in full *infra*, p. 814.

<sup>5</sup> For example, a conference on "Access to Justice in Israel" took place in May 1981, at Bar-Ilan University. In September 1980, the Ministers of Justice of French-speaking countries held a conference on "L'accès à la justice" in Paris.

<sup>6</sup> For the United States, for example, Maurice Rosenberg, then in charge of the U. S.

level, there is a broad consensus that reforms in courts, in court procedures, and in the legal profession are necessary to adapt the systems of justice to new social policies and newly-recognized interests. More creativity and experimentation are clearly required, and comparative study can help to suggest new and promising approaches if not specific candidates for transplantation. Increasingly it is recognized that the organization of lawyers, courts, and other dispute processing institutions determines to a great extent which kind of disputes will be brought to the law, whose rights will be enforced, and even what the result may be of negotiations that take place outside of the courts. The institutions are not sacred: they serve to aid or thwart the implementation of social policies.

The substantive law has increasingly been manipulated in recent decades to enforce governmental policies; and now there has been a strong tendency to manipulate procedural law and institutions with those same policies in mind. One of those policies, quite clearly, consists simply in favoring access to lawyers and the institutions necessary to resolve disputes and enforce legal rights.

There appears to be little debate about the foregoing observations. And while the independent value of access is generally accepted, it also is increasingly recognized that access cannot be the only goal. "Access to justice" suggests that "access" itself is an instrumental value, which can promote any of a number of substantive results. Even "justice" is an ambiguous term, which can refer to a variety of possible situations. Many of the most insightful questions raised by reviews about the "Access-to-Justice" Project<sup>7</sup> and movement concern precisely these difficult problems embedded in the idea of access to justice.

The first question, as *Martin Partington* writes, is to "whose justice is access being sought."<sup>8</sup> There were discussions of this problem in various Project studies, but perhaps this political issue merits further elaboration. The Project's general report in Volume I focused on access to justice as a movement to make particular rights effective, especially the rights of the poor, consumers, environmentalists, employees, tenants, and the like.<sup>9</sup> It Justice Department's Office for Improvements in the Administration of Justice, prepared a lengthy review of the series for the "Council on the Role of Courts" (unpublished, on file at the European University Institute, Florence).

<sup>7</sup> Reviews have been published in at least fourteen countries, but it would not be useful to list all of them here. A number of reviews are discussed *infra*, at text accompanying notes 8–32. But see also, *e. g.*, the following general reviews, which are not discussed *infra*: Commonwealth L. Bull. 5 (1979) 1379; *Kojima*, Comp.L.Rev. (Japan) 14 (1980) 163; *Baur*, ZZP 93 (1980) 92; *David*, Rev.int.dr.comp. 31 (1979) 617; *Ekelöf*, SvJT 1981, 109; *Hutcheson*, Mod.L.Rev. 43 (1980) 483; *Jacoby*, Am.J.Comp.L. 29 (1981) 532; *Stalev*, Socialistizesko pravo 28 (1979) 78; *van Compernelle*, Rev.Inst.belge 57 (1980) 424.

<sup>8</sup> *Partington*, L.Q.Rev. 97 (1981) 185.

<sup>9</sup> See *Cappelletti/Garth*, Access to Justice – The Worldwide Movement to Make Rights Effective, in: Access to Justice I at 3.



was argued that often these rights, typical of modern welfare states, have not been well enforced, and changes in the legal system are being made to facilitate that enforcement. Access reforms are in large part efforts to bring to relatively weak groups rights that have been embodied in welfare state legislation. The concern here is as much with the results of access as with access itself. Justice implies here some effort to support what might be called the redistribution of rights implied in the modern welfare state.<sup>10</sup>

If access to justice means in part this political, redistributive trend, which of course derives from complex social and economic forces, then we must ask the further question of whether a focus merely on the law and legal institutions pays too little attention to the political power and influence of the groups whom changes in the legal system were supposed to benefit. Several commentators, including *Roman Tomasic*<sup>11</sup> and *Philip Lewis*,<sup>12</sup> raise this issue.<sup>13</sup> They suggest that all the detailed discussions of legal phenomena may obfuscate the real issue. It may be that disadvantaged groups simply require more power in order to obtain more social benefits and rights. If they become more powerful, they will find a way to obtain their rights, whether through legal reform or otherwise. The results of the legal process merely ratify the distribution of power.

These are weighty issues, involving the basic problem of the relationship of law to politics and society. Without pretending to resolve that question, a first response to this line of argument is simply that most of these rights have been enacted into law, implying some political consensus or at least sufficient political power to demand reforms on behalf of the relatively weak. The political power issue has to some extent receded into the background. Moreover, our role, as scholars of the legal system, is mainly to work on the assumption that the rights that are proclaimed are supposed to be enforced. We can analyze the barriers to enforcement and let others draw the conclusions that follow from the politico-legal steps that are taken to promote or hinder enforcement. Indeed, the details of access to justice may be more useful to political analysts than a priori theorizing about the powerful and the weak.<sup>14</sup> Finally, even if law be merely "superstructure" as some Marxist and various other kinds of determinists might argue, it is

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<sup>10</sup> See also *Cappelletti/Garth*, Foreword – Access to Justice as a Focus of Research: Windsor YB. of Access to Justice 1 (1981) p. IX.

<sup>11</sup> *Tomasic*, Legal Serv. Bull. 5 (1980) 100.

<sup>12</sup> *Lewis*, Int. J. Sociol. L. 9 (1981) 109.

<sup>13</sup> See also notes 19–28 and accompanying text *infra*.

<sup>14</sup> *Marini*, *Politica del diritto* 11 (1981) 585 (614) thus suggested: "The validity of reforms must not be examined in abstract, but requires the operation of a critical analysis of the functions of the juridical institutions in relation to the effective distribution of power in the society, seeking to find in the judicial mechanisms the dialectic between interests already realized and those still to realize."

nevertheless increasingly<sup>15</sup> admitted that the law and legal processes do have some “relative autonomy”. If there is autonomy, relative or otherwise, questions of “how much” and “to what effect” again force us to consider access-to-justice details.

*Maurice Rosenberg* (then Assistant Attorney General) made a slightly different political criticism. He suggested that the Project was not politically naive, but rather too political. He emphasized and perhaps in part complained that the Project’s concern was essentially with advocacy of the political power and rights of the underprivileged.<sup>16</sup> There may be truth to that observation, but the access-to-justice movement need not rely only on the legalizing of a political program. One need not favor the enforcement of those rights more than other rights to make them a focus for study and reform. The fact is that it is these rights that have, for a variety of reasons, an extraordinary symbolic value in the welfare state, and it is they that have raised the most fundamental problems for our modern legal systems. They pose a challenge to which reformers – some motivated by pure politics and some by a more technical desire to make the legal system responsive to new rights and interests – have begun to respond.

Another politico-legal question about the access-to-justice movement is whether the new rights can in fact be made effective through the reform trends described in Project reports. *Tomasic* points out that there is as of yet little solid empirical evidence to justify much confidence that these reforms do make these rights effective to any great extent.<sup>17</sup> *Rosenberg* also suggests an “idealistic” emphasis on courts and laws as means of delivering social benefits.<sup>18</sup> The problem is raised especially, however, in the lengthy reviews by *Jacinta Paroni Rumi*<sup>19</sup> and *Austin Sarat*,<sup>20</sup> both of which seek to concentrate on the issue of what can be accomplished by the reform cycle prompted by a perceived gap in the enforcement of new rights and an effort to adapt the machinery of justice to facilitate enforcement. In part, of course, this is a technical question, but it too returns us to the political question of what techniques are politically possible.

*Paroni Rumi* concludes her thoughtful review by discussing the “lesson of pluralism” mentioned in several Project studies. She characterizes it, however, as “an expression typical of the U.S. world.”<sup>21</sup> She suggests that the numerous institutions, reforms in the legal profession, alternatives to the courts, and the like, are typical of an American approach to social problems

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<sup>15</sup> See, e.g., *Marx and Engels on Law*, ed. by *Cain/Hunt* (New York 1979).

<sup>16</sup> See *Rosenberg* (*supra*, note 6).

<sup>17</sup> See *Tomasic* (*supra*, note 11) at 101.

<sup>18</sup> See *Rosenberg* (*supra*, note 6).

<sup>19</sup> *Paroni Rumi*, *Sociologia del diritto* 7 (1980) 149.

<sup>20</sup> *Sarat*, *Harv.L.Rev.* 94 (1980/81) 1911.

<sup>21</sup> *Paroni Rumi* (*supra*, note 19) at 159.

and social change – an approach that relies almost obsessively on a plurality of devices and reforms rather than one coherent plan. This approach reflects the weak, anti-programmatic American political party system. She observes that, while many devices are created, seeming to reflect a number of efforts and experiments to implement a desired social policy, it may be that this apparent reform activity is mainly symbolic, more theater than reality. It helps to provide psychological benefits to diverse groups and to preserve social equilibrium, but it may not result in social change. Numerous new laws and procedural changes give the illusion of political transformation, but real reform may not come without a sustained political commitment to in fact accomplish change. Her conclusion, however, is not that nothing is being accomplished. Rather, this entire movement – which of course has many parallels outside of the United States – must be evaluated carefully in order to determine which “reforms” in substance and procedure are merely symbolic and which ones also contribute to actual changes.

*Sarat's* review takes a very similar approach, chiding the Project for ignoring “the legitimation function of the recognition and extension of rights.”<sup>22</sup> He also notes a failure in what he considers the Project's general assessment of the “third wave” of reforms, which emphasize changes in the legal system not limited to providing legal representation. He sees this third wave as “a retreat from the commitments and possibilities of the first two.”<sup>23</sup> In other words, he sees some potential in the provision of legal services, but a seemingly broader approach culminates in activities that only serve to “legitimate” the system, not change it in favor of the disadvantaged. We shall return to the problem of how to characterize the “third wave”, but it is useful to ask how the legitimacy idea furthers our analysis.

The focus on legitimacy no doubt provides some explanatory power, but *Sarat's* own review illustrates the problems it raises as a tool for evaluating access to justice. On the one hand, he suggests that “access to justice can never be fully realized in a liberal society,”<sup>24</sup> which is no doubt true (about any society), but he emphasizes on the other hand that “[a]ccess may have significant redistributive consequences.”<sup>25</sup>

Access reforms may in other words accomplish only legitimation, or they may provide change. We agree with that point, and we in fact have written that the “access-to-justice movement and its opposite are very similar in appearance.”<sup>26</sup> The question, however, is how can one tell whether legal changes in a particular country, to quote the statement of David Trubek

<sup>22</sup> See *Sarat* (*supra*, note 20) at 1915.

<sup>23</sup> *Id.* at 1919.

<sup>24</sup> *Id.* at 1924.

<sup>25</sup> *Id.* at 1924.

<sup>26</sup> *Cappalletti/Garth*, Foreword, in: *Access to Justice III* at V, IX.

cited by Sarat, “will succeed only in securing the reforms which will increase the legitimacy of the current system, and fail to secure those that will make it really change.”<sup>27</sup> A priori theorizing will not tell us the difference between real change and merely symbolic change. Only empirical research can tell us what actually happens, and, indeed, it is a matter of debate as to what would be real social change and what would not be. Our approach at this point is simply to recognize that access to justice, as was stated in the foreword to Volume III, is „an experiment in welfare state rights and, more generally, in welfare state politics.”<sup>28</sup> Let us see what the potential is of the welfare state before dismissing it as a symbolic product of legitimation needs. Sarat, however, like Paroni Rumi, raises a critical question, and we hope it continues to be addressed in future research on this topic.

Considerable legal reform activity is certainly not the same thing as social reform. The further question, also raised by some reviewers, is whether anyone really would be pleased with an unequivocal commitment to make new rights effective through legal and politico-legal reforms.<sup>29</sup> This question refers in part simply to the costs of the reform machinery – new courts, more judges, and the commitment of more and more legal and paralegal personnel to the difficult problem of making individuals aware of their new rights and willing to take measures to enforce them. But it also refers to the costs of enforcement – no one really wants all the underenforced laws to be enforced, even if that would perhaps mean the realization of the legal changes embodied in welfare state legislation. The access-to-justice movement, as described in the Project reports, tends to assume that many new rights, designed to benefit ordinary people, are going “by default”, in the words of the British Lord Chancellor’s Advisory Committee on Legal Aid and Advice,<sup>30</sup> and that more enforcement is necessary to make these rights more than merely symbolic. Of course, as was pointed out in Project reports, enforcement may often be efficiently and effectively accomplished by methods that require no courts or lawyers. But there also seems to be a strong tendency or necessity to enhance the importance of law and lawyers. We must recognize the limits of excessive legalism – where the law and legal

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<sup>27</sup> *Trubek*, Public Advocacy – Administrative Government and the Representation of Diffuse Interests, in: *Access to Justice III* at 445, 493.

<sup>28</sup> *Cappelletti/Garth* (*supra*, note 26) at XVII.

<sup>29</sup> See, e. g., *Garrett*, *Law Society’s Gaz.*, May 21, 1980, p. 520: “The ultimate cost (which in the end the ‘consumer’ must pay) would be prohibitive, the temptation to overuse the service would be overwhelming and we should lose what is left of our sturdy common sense willingness to put up with quite a lot that we do not like in the interest of getting on with our life and work.”

<sup>30</sup> Lord Chancellor’s Office, *Legal Aid and Advice 1972–73* [Twenty-third Report] (1973) 26.

regulation closely structure all relationships. At one level there is a question of priorities, and at another is the question of how far we want to go with the extension of legal rights.

There has indeed been a reaction to the specific problem of excessive legalism (which in part reflects also the general reaction to some of the costs of the welfare state), and this reaction has increasingly generated a new kind of legal procedural reform. There has been a tremendous recent upsurge in interest in conciliatory approaches to justice, as emphasized by Sarat, among others, and described below.<sup>31</sup> The focus is not on finding ways to help people vindicate their rights but rather on ways to bring them to an amicable agreement. To the extent that this new focus relies on agreement, not coercion, it moves closer to negotiation than adjudication. Such agreements, however, will inevitably reflect the relative bargaining power of the disputants. Thus one can argue that the political (welfare state) underpinning of the access-to-justice movement will be lost, since the new rights sought to be enforced were aimed at redressing social inequalities. These rights may be forgotten in a conciliation setting, where the dominant interest is in harmony. Thus, Sarat argues, the wave of reform emphasizing conciliation is a way to prevent the real change that rights enforcement might have accomplished for the weak.<sup>32</sup> That important question, as we shall see, cannot be answered in the abstract. But it provides a setting and a theme by which to consider the meaning today of access to justice and its various modes of reform. We turn now to the current manifestations of the "access-to-justice" movement, and our conclusion will return to Sarat's concern and the problems highlighted generally by the reviews just discussed.

## II. Recent Developments in Access to Justice

We cannot cover all developments which relate to the concerns of the Florence Project, but we can provide some coverage especially of the situation in Europe and the United States. They will be discussed very briefly, following the "three wave" schema of the Project's general report.<sup>33</sup> Our aim is to provide information, suggest the kind of activity that is taking place, and hopefully shed some more light on the important legal and political questions discussed in the previous part of this report. The access-to-justice movement is continuing, but is not necessarily expanding. Whether the access-to-justice approach as described before is one that will

<sup>31</sup> See notes 107-175 and accompanying text *infra*.

<sup>32</sup> See Sarat (*supra*, note 20) at 1919.

<sup>33</sup> See Cappelletti/Garth (*supra*, note 9); Cappelletti/Garth/Trocker (*supra*, note 1) at 681-717.

continue to characterize legal developments in modern societies is not easy to decide, but it would certainly be premature to see the future only from the perspective of the present financial crises. Bold initiatives in welfare state programs are unlikely at this point, but we cannot say for sure if reform has merely slowed down or has taken a new direction. In any event, the following discussion will demonstrate once more Franz Klein's insight that the "varied manifestations [of civil procedure] are among the most important documents of mankind's culture."<sup>34</sup>

### 1. Legal Aid and Advice

There are competing aspects related to devices providing legal aid and advice for the poor.

One is simply the task of providing an affordable or even gratuitous lawyer to an individual who would like legal counsel. Such *judicare systems* have tended to reflect primarily that individualistic concern, and it is also probably the basic concern of the well-funded Swedish combined staff and *judicare* program.<sup>35</sup> The problems include the income eligibility limits, the method for proving eligibility, the compensation to the attorney, and the availability of free legal advice as well as representation in court. Recent developments in France, Belgium, Great Britain, the Federal Republic of Germany, and Sweden have addressed these technical but nevertheless important concerns.

In *France*, which has had a *judicare* system since 1972, art. 72 of the Loi de finances of December 31, 1980 liberalized eligibility limits to keep up with inflation.<sup>36</sup> The maximum monthly income for full state subsidization of legal aid for an individual went from 1620 francs to 2700 francs, while that for partial state subsidization rose from 2100 to 3500 francs. The maximum compensation for lawyers, however, was raised only from 1080 francs to 1300 francs. Thus while the individual eligibility limits have now gone since 1972 from 1500 and 2500 to 2700 and 3500, the maximum compensation payable to lawyers has moved only from 1000 to 1300 francs. Lawyers have complained from the beginning that their compensation is inadequate, and they can be expected to complain even more.<sup>37</sup>

<sup>34</sup> F. Klein, *Zeit- und Geistesströmungen im Prozesse*<sup>2</sup> (1958) 8.

<sup>35</sup> On *judicare* and the Swedish system, see generally, *Cappelletti/Gordley/Johnson, Jr., Toward Equal Justice – A Comparative Study of Legal Aid in Modern Societies* (Milan and Dobbs Ferry, N. Y., 1975) 271–450, 525–583. On Sweden see also *Boman, Scandinavia*, in: *Perspectives on Legal Aid*, ed. by *Zemans* (Westport, Conn., 1979) 243–253.

<sup>36</sup> See Loi de finances No. 80–1094 du 30 Déc. 1980, J. O. 1980, 3099.

<sup>37</sup> For recent complaints, see, *e. g.*, *Justice – Aide Judiciaire, Réponses des ministres aux questions écrites: Gaz. Pal.*, May 29, 1980, at 2; *Ordre des avocats au barreau de Nevens, Délibération en l'aide judiciaire: Gaz. Pal.*, April 7, 1981, at 13. See generally *Thery, Access to Justice in France*, in: *Access to Justice I* at 479, 485; *Hamelin/Danien, Les règles*

Already the French system, however, is an advance on the "charitable" system of legal aid, which still is found in *Italy*<sup>38</sup> and, with some recent modification, in Belgian law. In *Belgium*, a law of April 9, 1980, provides some compensation for young "pro deo" lawyers who furnish assistance, but this is just a first step.<sup>39</sup> Regular lawyers (not apprentices or "stagiaires") are not compensated for any legal aid work they undertake. The existing system was otherwise unchanged. But, as the title of the law itself states, this legislation only claims to give "une solution partielle au problème de l'assistance judiciaire."<sup>40</sup> Legal aid reform has begun, but has a long way to go in Belgium.

*Great Britain*, responding in part to the close scrutiny provided by the Royal Commission on Legal Services,<sup>41</sup> also made substantial changes in the eligibility limits.<sup>42</sup> When the *judicare* scheme began operation in 1949, roughly 70 to 80 percent of the population was eligible for some subsidization of legal aid, but this figure had declined to about 30 percent by 1976-77. In April 1979, despite worries about the cost of the program, the figures were raised substantially by the Legal Aid Act 1979. Once again, up to 70 percent of the population will be eligible. The compensation for private attorneys is still not the full fees they would normally receive, but it is sufficient to create an incentive to do legal aid work. There indeed is an active debate about whether a law firm could make a reasonable profit existing solely on legal aid work.<sup>43</sup> At present, however, it appears that the only place where any private law

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de la nouvelle profession d'avocat (1981) at 168-172, 249-250. After this report was completed, a new French decree (decret no. 82-141 of 9 Feb. 1982, J. O. 1982, 95) has substantially raised the compensation for lawyers.

<sup>38</sup> See generally *Trocker*, *Assistenza legale e giustizia civile*, Due studi sull'evoluzione dell'assistenza legale ai meno abbienti nel mondo contemporaneo (1979); *Vigoriti*, *Italy*, in: *Zemans* (*supra*, note 35) at 177.

<sup>39</sup> Bull. lég. belge 1980, 203.

<sup>40</sup> *Ibid.*

<sup>41</sup> See *supra*, note\*.

<sup>42</sup> See generally *Edwards*, *Big Changes in Legal Aid*: Law Society's Gaz., Feb. 14, 1979, at 145. The limit for "disposable income" free of contribution went from 815 £ to 1500 £ per year and the limit for eligibility at all went from 2600 to 3600 £. Disposable income is gross income minus income tax, national insurance, expenses of going to work, and housing. The raise took place prior to the Royal Commission Report, but the scrutiny of the Commission no doubt helped promote this development. See also Royal Commission at 113-125. - Some administrative streamlining also took place with the abolition of the distinction between *area and local committees*. See *Edwards*, *Changes in Legal Aid Administration*: Law Society's Gaz., March 12, 1980, at 209. - Eligibility has correspondingly been expanded by *changes in the "green form" scheme* that allow lawyers to provide aid under the scheme (whereby the solicitor need not obtain the authority of the legal aid area office to provide aid up to a certain cost) and extended to aid in magistrates' courts. See Royal Commission note 40, at 114-115. *Edwards*, *Civil Proceedings in Magistrates' Courts and Legal Aid, Amendments in Green Form Scheme*: Law Society's Gaz., Nov. 14, 1979, at 117. See also *Civil Legal Aid and Legal Advice* (financial eligibility): Law Society's Gaz., Nov. 18, 1981, at 1284.

<sup>43</sup> See, e. g., *A Solicitor, Is Legal Aid Practice Possible?*: Legal Action Group Bull. 1978, 205; *Edwards*, *Does Legal Aid Pay?*: Law Society's Gaz., Sep. 19, 1979, at 889; *Simmons-Bennet*, *Legal Aid - Educating the Public*: Law Society's Gaz., May 20, 1981, at 336.



firms do subsist entirely on *judicare* is the *Netherlands*, where the *judicare* system remains the primary approach to legal aid.<sup>44</sup>

The *Swedish system*, in effect since 1972, has been modified only slightly.<sup>45</sup> The indexing of the financial limits to the cost of living prevents the problems of declining eligibility. Sweden thus continues to allow subsidized legal aid to a very large proportion of the population. Changes in the Swedish system have taken the form of improving its efficiency. Thus the procedure for qualifying for legal aid and advice has been simplified. In many cases now eligibility can be decided by lawyers and courts rather than "legal aid boards". On the other hand, the public legal aid offices, which already played a very limited role, have recently been reduced in number from six to two.

A limitation on the French system, unlike the other ones mentioned here, is the lack of availability of *judicare* lawyers for legal advice as opposed to representation in court. This also has been for a long time a key problem in the *Federal Republic of Germany*, but the new German legal aid scheme, enacted into law in 1980, seeks to change that situation.<sup>46</sup> Lawyers under the reformed system can obtain reimbursement of up to 100 marks for legal advice to qualified individuals, except in social and labor matters, and the lawyers themselves can make the determination of whether the client is eligible. One hundred marks is a rather small sum, and there is some skepticism<sup>47</sup> about whether lawyers will use this reform widely, but it signals an important step in improving the German *judicare* system. Germany's neighbor, *Austria*, which has a *judicare* system like that of Germany, appears to be moving in the same direction of reform.<sup>48</sup>

<sup>44</sup> See, e. g., J. Cooper, *Public Legal Services in Three Countries – A Study of the Relationship Between Policy and Practice* (diss., Florence 1981) 110–114.

<sup>45</sup> See *Himmel-Liljegren*, *Rechts- und Prozeßkostenhilfe in Schweden*: Z.f.Rpol. 1979, 312; *Lindblom*, *Procedure*, in: *An Introduction to Swedish Law*, ed. by *Strömholm* (1981) 95, 127–129. In *Norway*, a Government Bill currently before Parliament proposes new rules on legal aid and advice. The Bill which consolidates and replaces present provisions, *inter alia* raises the existing income limits, extends the competence of the courts to grant legal aid and enables advocates to grant free legal advice up to a limit of 10 hours work.

<sup>46</sup> Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (*Beratungshilfegesetz*) of June 10, 1980, BGBl. I 689. The law went into effect Jan. 1, 1981. See generally *Grunsky*, *Die neuen Gesetze über die Prozeßkosten- und Beratungshilfe*: NJW 1980, 2041.

Important changes have been introduced also in the field of *legal aid and legal assistance*. The »Gesetz über die Prozeßkostenhilfe« of June 13, 1980, BGBl. I 673, has a) raised the income eligibility limits; b) simplified the method for proving eligibility; c) improved the compensation to lawyers. The law went into effect on Jan. 1, 1981. See generally *Schneider*, *Prozeßkostenhilfe*: MDR 1981, 1; *Schuster*, *Das Gesetz über die Prozeßkostenhilfe*: ZZP 93 (1980) 361; *Schneider*, *Prozeßkostenhilfe – eine Zwischenbilanz*: MDR 1981, 793.

<sup>47</sup> See, e. g., *Bischof*, *Praxisprobleme des Beratungshilfegesetzes*: NJW 1981, 894; *Blankenburg*, *Zur Implementation des Beratungshilfegesetzes*: RuPol. 17 (1981) 84; *Reich*, *Rechtsberatung im Verbraucherschutz*: Z.f.Rpol. 1981, 53; *Lindemann*, *Beratungshilfe in der Praxis*: NJW 1981, 1638.

<sup>48</sup> See, e. g., *Kohlegger*, *Mehr Chancengleichheit bei der Rechtsberatung und Rechtsverfolgung in Zivilrechtsangelegenheiten*: RuPol. 1980, 141; *Machacek*, *Der demokratische Rechtsstaat streitet für den besseren Zutritt zum Recht*: Anwaltsbl. 1978, 95.



These judicare reforms help individuals with recognized legal problems – especially in family matters, such as divorce, and for criminal defense – to obtain an affordable lawyer. An increasing number of countries, however, have found that other legal aid reforms are needed to attract the nontraditional claims of the poor such as welfare, tenant, and consumer rights. One method to attract such claims is to have *publicly-funded, decentralized offices* such as the neighborhood law firms begun in 1965 in the United States. Analogues to such offices are now found in Australia, Canada, Great Britain, the Netherlands, Norway, and to some extent in Belgium and France.<sup>49</sup> These institutions are characterized generally by their efforts to inform the poor of their rights and help them through both individual and collective action to enforce them. Clearly, this is a more controversial form of legal aid than judicare, as shown by the recurring attacks on and the current plight of the Legal Services Corporation in the United States. Indeed, while there are good reasons to combine judicare with publicly-funded offices, and there is some movement in that direction in the United States,<sup>50</sup> some critics of activism see judicare as a way to avoid test cases, class actions, community education, and similar legal aid advocacy.

In the *United States*, President Reagan, who as Governor of California had some notable battles with publicly-funded legal aid offices, apparently is seeking to eliminate the *Legal Services Corporation*.<sup>51</sup> Surely this attack is partly a component of the effort to cut governmental nonmilitary spending, but the attack must be seen mainly as an ideological one on the comparatively small, 321 million dollars program. A major conservative force, the Heritage Foundation, called the Legal Services Corporation “one of the federal instrumentalities by which the personnel and institutions of the ideological ‘left’ in American life have been financed”.<sup>52</sup> The National Defeat Legal Services Committee, organized by Howard J. Phillip of the National Conservative Caucus, has stated that legal services personnel are an “elite corps” of “avowed Marxists.”<sup>53</sup> For anyone familiar with the American program, these characterizations would be amusing, were they not so dangerous. Evidently the idea of the government funding an advocate for the interests of the poor has upset many “conservatives” who, in fact, are also opposed to the extension and enforcement of rights on behalf of the poor. They have succeeded in making the future of the Corporation very much in doubt.

The effort to save the Corporation, however, is a strong one, motivated by a group who in many ways are more deserving than their opponents to be called

<sup>49</sup> See generally *Garth*, *Neighborhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession* (Alphen a/d Rijn 1980).

<sup>50</sup> See *Legal Services Corporation*, *Delivery Systems Study* (1979).

<sup>51</sup> See generally *Ehrlich*, *Save the Legal Services Corporation: Am.B.Ass.J.* 67 (1981) 434; *MacKerron*, *Legal Services Corp. Supporters Fear It May Be “Block Granted” to Death: National J.*, Feb. 28, 1981, at 358.

<sup>52</sup> See *id.* at 360.

<sup>53</sup> See *National Defeat Legal Service Committee*, *Letter from Howard Phillip*, *National Director (the Conservative Caucus*, Sep. 8, 1980).

conservative. The program's extraordinary growth from 1974 to 1980, when the budget went from 71 to 321 million Dollar, reflected a very strong, bi-partisan support. The American Bar Association in particular has long recognized that the legal aid system is a means to enhance respect for the law and prevent social disruption as well as a means for advocacy of the rights of the poor. And that advocacy, as spokesmen for the bar have noted, must include test cases, law reform, and law enforcement on behalf of groups of individuals. Others have recognized, as the first President of the Legal Services Corporation, Thomas Ehrlich, has recently emphasized, that the provision of legal services has a profoundly conservative dimension to it.<sup>54</sup> Ehrlich quotes then-President Nixon for the statement that "We have . . . learned that justice is served far better and differences are settled more rationally within the system than on the streets." It remains to be seen how successful the defense of the Legal Services Corporation will be.<sup>55</sup>

The utility of institutions similar to the American Legal Services Corporation has been recognized increasingly in *other countries*, such as Great Britain and the Netherlands, again building on the kind of logic that seemingly has been rejected by the Reagan administration. There is in these countries, however, also some political opposition and uncertainty about the idea of governmental subsidization of "social advocacy."<sup>56</sup>

In *Great Britain*, the Royal Commission on Legal Services, which reported in 1979,<sup>57</sup> evinced substantial hostility to what it felt was political activity by the thirty or so *law centres* now active there, even if the Commission also called for a substantial expansion in the number of such centres. The reaction among commentators, however, including the Law Society, has been much more favorable to the current activities of law centres. Most informed lawyers recognize that aggressive advocacy of legal rights is what they are supposed to do, even if it may appear to have a political impact. The law centres in Great Britain have a very strong need for secure and increased *central funding*. They appear to be holding their own, but expansion requires a material commitment. Given that the *judicare* scheme is already considered expensive, at 66.5 million pounds sterling for civil legal aid, no one expects at this point that the Thatcher government will expand suddenly the public sector.<sup>58</sup> The Law Centres Federation has therefore recently lamented, "Does the future never come?,"<sup>59</sup> and the Legal Action Group reported in March 1981 that "This has been a

<sup>54</sup> See Ehrlich (*supra*, note 51).

<sup>55</sup> *Id.* at 436.

<sup>56</sup> The term is from *Selznick*, *Social Advocacy and the Legal Profession in the U.S.A.*, in: *Lawyers in Their Social Setting* (Edinburgh 1976).

<sup>57</sup> See Royal Commission at 79-91.

<sup>58</sup> The Legal Action Group, in its "Annual Report to Members, Feb. 1980 to Feb. 1981", suggests that "the general feeling is that the Report is dead - it has not even been debated in Parliament": LAG Bull. 1981, 56. See also *Zander*, *Commission Examines English Legal Profession*: Am.B.Ass.J. 66 (1980) 568.

<sup>59</sup> Law Centres Federation, *Law Centre Funding - Does the Future Never Come?: Law Centres' News*, Winter 1981, No. 8, p. 1.

bad year for legal services."<sup>60</sup> Stinginess certainly has been a leading theme in a number of countries in their approaches to legal aid reform.

The *Netherlands* can perhaps be pointed to as a potential bright spot in the reform of legal aid. While not yet enacted into law, the Ministry of Justice has created a well-funded network of legal advice bureaux ("*Bureaux voor Rechtshulp*") that grant legal aid certificates for the judicare system and provide "first-line" legal advice themselves.<sup>61</sup> It is still not clear how much social advocacy will be encouraged under the system as enacted into law, but there are reports that the Ministry of Justice understands and sympathizes with those who are urging a commitment in that direction. Moreover, it should be remembered that, in part because of the well-funded judicare program and the liberal compensation for private attorneys, there is an active "social bar" in addition to the offices that are salaried by the government.<sup>62</sup>

There is thus activity in national legal aid reform, both in judicare and in staff programs, but it tends for the most part to be tinkering with some tentative movements to expand. The only really bold initiative appears to be the effort of destruction taking place in the United States. There are some *European institutional developments* also worth noting in this area that help to moderate any reaction in Europe and speed up the reform process in countries that have not kept up in this area.

In particular, the *European Convention on Human Rights*, now in force in twenty countries, is developing a strong jurisprudence in this field. Article 6 § 1 of the Convention provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The European Court of Human Rights has interpreted that clause to mean "the right to have any claim relating to . . . civil rights and obligations brought before a court or tribunal,"<sup>63</sup> and the Court has insisted that the right must be a "practical and effective" one.<sup>64</sup> Accordingly, the Court held in late 1979 that an Irish woman, Mrs. Airey, who sought from the High Court in Ireland a judicial separation, had the right under the circumstances to the assistance of a lawyer. This decision has forced Ireland to modernize its legal aid system, resulting in the adopting of a judicare and staff system in 1980,<sup>65</sup> and this line of jurisprudence may have a similar impact in countries such as Italy that also have been reluctant to enact legal aid reforms. The *Airey* case has already had an Italian impact in the *Artico* case, which followed it, involving an Italian man denied the effective assistance of counsel in a criminal proceeding.<sup>66</sup> While

<sup>60</sup> See LAG Annual Report (*supra*, note 58).

<sup>61</sup> See, e. g., *Cooper* (*supra*, note 44) at 68-70.

<sup>62</sup> See, e. g., *Garth* (*supra*, note 49) at 118-124.

<sup>63</sup> Judgment of Feb. 21, 1975 (*Golder v. United Kingdom*), YB. Human Rights 18 (1975) 290, § 36.

<sup>64</sup> Judgment of Oct. 9, 1979 (*Airey v. Ireland*), Publications of the European Court of Human Rights, Series A, Vol. XXXII (Köln 1980) 12.

<sup>65</sup> See, e. g., *Carmey*, The Growth of Legal Aid in the Republic of Ireland II: Ir.Jur. 14 (1979) 211, 221; *Roseingrave*, Summary on Present Position in Ireland (unpublished). The Scheme of Civil Legal Aid and Advice has been introduced in Ireland on Aug. 15, 1980.

<sup>66</sup> Judgment of May 13, 1980 (*Artico*), Publications of the European Court of Human

admittedly the Convention is more specific about right to counsel in criminal matters (Art. 6 § 3), the Court was careful to note that similar principles would apply under *Airey* to civil matters.

Two additional aspects of these cases enhance their potential importance for access to justice in Europe: First, the Court has increasingly applied Art. 50 of the Convention to them, which allows the Court to, "if necessary, afford just satisfaction to the injured party" as redress for a violation of the Convention. Thus, Mrs. Airey was awarded the sum of 3,140 Irish pounds, which covered her attorney's fees and other damages.<sup>67</sup> These awards under Art. 50 serve to encourage actions to enforce the European Convention and to increase the pressure on governments to reform their practices and comply with the Convention. The need to comply has been bolstered by the European Court's apparent willingness to confront the question of institutional reform underlying these individual cases. In the case of *Luedicke, Belkacem, and Koç*, decided November 28, 1978, the Court explicitly found that the German system for providing interpreters to criminal defendants failed to meet Convention standards, and had to be reformed.<sup>68</sup> In the *Airey* case a year later, the Court was somewhat more equivocal, but it clearly placed an affirmative duty on Ireland either to provide a lawyer free of charge or make judicial procedures sufficiently simple so that a lawyer would not be required. While recognizing that such reforms "have implications of a social or economic nature,"<sup>69</sup> the Court still held that the Convention's minimum standards must be met.

In Europe, therefore, the Convention provides a safeguard against the kind of demolition of legal aid envisioned by the Reagan administration. While a number of American commentators close to the legal aid movement in the United States have tried to find a constitutional means to insulate the program from such attacks,<sup>70</sup> the United States Supreme Court has not been willing to recognize a right of access to court, much less a right of counsel in civil matters. While it is difficult to predict how the current economic situation will affect the funding of legal aid in Europe and the United States, it may be significant that the European Convention provides at least a minimum standard below which its signatories will not be allowed to fall. It may even be that the European Convention, cut off from national pressures and the perceived institutional limitations of national courts in ordering legislatures to act or not to act, may be more effective in enforcing the right of access than would be national Constitutional Courts. The

Rights, Series A, Vol. XXXVII (Köln 1980) 4. See also *Pizzorusso*, Rossi di vergogna, anzi paonazzi: Foro it. 1980 IV, 150.

<sup>67</sup> Judgment of Feb. 6, 1981 (*Airey*), Publications of the European Court of Human Rights, Series A, Vol. XLI (Köln 1981) 9.

<sup>68</sup> Judgment of Nov. 28, 1978 (*Luedicke, Belkacem, and Koç*), Publications of the European Court of Human Rights, Series A, Vol. XXIX (Köln 1979) 4,23.

<sup>69</sup> Judgment of Oct. 9, 1979 (*Airey v. Ireland*) (*supra*, note 64) at 15.

<sup>70</sup> See, e. g., *Johnson/Schwartz*, Beyond Payne - The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants: Loy. L.A.L.Rev.11 (1978) 249.

specter of European-wide condemnation has proven very effective in obtaining respect for the judgments of the European Court of Human Rights.

## 2. The Representation of Diffuse Interests

The representation of diffuse interests continues to be a fundamental component of access-to-justice concerns. Effective advocacy on behalf of consumers, protection of the environment, and other interests that belong at the same time to no one and to everyone has been found generally to require more than the efforts of governmental organizations. In politics and in law, interests cannot be effectively promoted without *organized advocacy outside of the government*.<sup>71</sup> The traditional obstacles to non-governmental advocacy of group and collective interests, such as barriers to standing to sue in court by organizations, are continuing to break down in Europe, but it is still the case that no country has gone as far as the United States in permitting court access for lawsuits on behalf of diffuse interests (even if standing rights have been constricted somewhat there in the past few years).<sup>72</sup> These trends are best understood if we distinguish two ways of approaching the problem of the private representation of diffuse and collective interests. One, found in its purest form in the United States, centers on the "private attorney general" and class actions, while the second, typical of Continental Europe, centers on representation by established private organizations. While the distinctions are necessarily overdrawn, they provide a means to categorize recent developments and a key to some of the problems that are emerging in both Europe and the United States.

### a) Class Actions and Private Attorneys General

The class action device and its utility as a tool for the judicial protection of diffuse interests has been described elsewhere in some detail.<sup>73</sup> While the number of federal class actions has declined somewhat in recent years,<sup>74</sup> they remain of considerable importance in the United States. For our purposes

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<sup>71</sup> See, e. g., *Cappelletti*, *Governmental and Private Advocates for the Public Interest in Civil Litigation – A Comparative Study*, in: *Access to Justice II* at 767, 826 *et seq.*

<sup>72</sup> See generally *van Dijk*, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (Alphen a/d Rijn 1980).

<sup>73</sup> See, e. g., *Developments in the Law – Class Actions*: Harv.L.Rev. 89 (1975/76) 1318–1644.

<sup>74</sup> See Administrative Office of the United States Courts, 1979 Annual Report of the Director (1979) 78–79.

the class action can be seen as a means by which an attorney who has one client with the relevant stake in the litigation can sue on behalf of a large and otherwise unorganized collective interest. The client ostensibly represents the group, but generally it is thought that the lawyer runs the show. Many commentators have noted that it gives "lawyer-entrepreneurs" an incentive to organize lawsuits on behalf of a class when no single member of the class would have a sufficient incentive to take a case to court.

In the *United States*, class actions and these private attorneys general are still very controversial, but *recent statutory and case law developments* have nevertheless increased their importance for the vindication of the rights of many diffuse interests, particularly the interests of those who have been victims of unlawful discrimination. For example, the rules of the legal profession barring *advertising and solicitation* have been relaxed,<sup>75</sup> thus allowing private attorneys general to be more aggressive about finding clients willing to serve as class representatives. And, perhaps more importantly, a number of recent laws have been enacted providing for *attorneys' fees* to prevailing parties who vindicate federal rights.<sup>76</sup> Interestingly, a very recent enactment of this type, respecting actions against the United States, was called the "Equal Access to Justice Act".<sup>77</sup> These statutes, moreover, have been interpreted so that the American rule of each party paying his own attorney has been changed only half way: there is only a very small risk that losing plaintiffs will have to pay the attorneys' fees of their opponents. Thus, while the contingent fee and some other judicially created exceptions to the American rule already provided a monetary incentive to attorneys in class actions for large amounts of damages, these changes further encourage the bringing of actions where the monetary damages may be small or the aim is only to affect future behavior of the adverse party.

The American system maximizes *opportunities and incentives for private lawyers* to take action to see that laws are enforced in the interests of groups who would not otherwise sue. These opportunities are especially important given the recent relative decline in the funding base for the so-called public interest law firm.<sup>78</sup> There are also, however, several potential problems of giving lawyers too much incentive and power to mobilize lawsuits.<sup>79</sup> Lawyers may ultimately be unaccountable to the groups they ostensibly are helping. A lawyer-dominated class may also be ineffective, even if it wins a victory in court, because class actions brought without some degree of active support from the class may have little success in actually effecting the

<sup>75</sup> See *In re Primus*, 436 U.S. 412 (1978) (solicitation by NAACP permitted); *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977) (permitting advertising by a legal clinic).

<sup>76</sup> See, e. g., Civil Rights Attorney's Fees Award Act of 1976, 42 U. S. C. § 1988.

<sup>77</sup> Equal Access to Justice Act, Pub. L. No. 96-481, 96th Cong., 2d Sess., 1980.

<sup>78</sup> Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* (1976); *Trubek/Trubek*, *Civic Justice Through Civil Justice - A New Approach to Public Interest Advocacy in the United States*, in: *Access to Justice and the Welfare State* (*supra*, note 3) at 119-144.

<sup>79</sup> See, e. g., *Handler*, *Social Reform Movements and the Legal System* (1978).

desired changes. Moreover, lawyers may sometimes inhibit the formation of real organizations capable of monitoring lawsuits and protecting diffuse interests in other forums, such as legislatures and administrative agencies. Accordingly, many of those sympathetic to class actions also encourage the mobilization of organizational support to go along with class action lawsuits, and to date the jurisprudence has been sympathetic to actions by more or less formal organizations. The virtue of class actions is that they substitute for organizing the parties, which may be very difficult and expensive. But this is also a potential limitation on their effectiveness: numerous lawsuits may not lead to effective change, whereas organized groups may.

Class actions, in addition, are vulnerable to *political attack* by those who oppose the enforcement of laws on behalf of diffuse interests. Class action lawyers often have trouble asserting their independence from the client and the action. It is then difficult to defend the lawyers as mere agents of their clients. So far, however, the class action has survived criticism, and no one expects that its importance will decline appreciably in American civil process.<sup>80</sup>

The virtues of class actions have been noted by *Continental* scholars, but adoption of the American-style class action would be hardly conceivable.<sup>81</sup> But in a number of *common law countries*, notably Australia, Israel and Great Britain, there has been some activity to revive the importance of this remnant from equity.

In *Australia*, a remarkable series of reports examining problems of class actions, standing, and public interest law generally have been circulated by the Australian Law Reform Commission, and the proposals favor among other things the expansion of the opportunities for bringing class action.<sup>82</sup> And in *Israel*, Stephen Goldstein in 1978 published a long study on the class action device which is likely to prompt reform proposals from the Ministry of Justice.<sup>83</sup> In *England*, an important decision of the Chancery Division in 1979, *Prudential Assurance Co., Ltd., v. Newman Industries*

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<sup>80</sup> See, e. g., Miller, On Frankenstein Monsters and Shining Knights – Myth, Reality, and the “Class Action Problem”: Harv.L.Rev. 92 (1978/79) 664.

<sup>81</sup> See, e. g., Kötz, Public Interest Litigation – A Comparative Survey, in: Access to Justice and the Welfare State (*supra*, note 3) at 85, 96 *et seq.*, 112 *et seq.*; H. Koch, Kollektiver Rechtsschutz im Zivilprozeß, Die class action des amerikanischen Rechts und deutsche Reformprobleme (1976); Vigoriti, Interessi collettivi e processo (1979).

<sup>82</sup> See, e. g., The Law Reform Commission, Access to the Courts I. Standing: Public Interest Suit (Discussion Paper No. 4, 1978); II. Class Action (Discussion Paper No. 11, 1979).

<sup>83</sup> An article (in Hebrew) by Stephen Goldstein based on the report was published in Mishpatim 9 (1978) 416. This information as well as a helpful analysis of the British developments came from a letter of May 13, 1981 from Stephen Goldstein to Mauro Cappelletti.



*Ltd.*<sup>84</sup> may have signalled a breakthrough in English and perhaps Commonwealth jurisprudence generally with respect to the class action.<sup>85</sup> While class actions for damages had been effectively precluded by the requirement that there be a “joint” or “identical” interest among the members of the class, in this case the court held that a shareholder class could be represented in a fraud class action to ascertain whether the defendant would be liable. The court held that the issue of liability would be decided by a declaratory judgment that would bind both the members of the class and the defendant; individual members of the class could then recover their own damages without having to prove liability. In effect, the only significant difference between this approach and the American class action for damages is that the former requires additional action by each individual who claims damages. The additional actions, however, should be quick and inexpensive, since the only issue will be the amount of the damages. Of course, it remains to be seen what impact this English decision will have, but it may provide a key precedent for a transformation in the so far relatively little-used Commonwealth class action device.

#### b) Organizational Actions on the European Continent

Organizational actions in general are also brought more easily in the United States than on the European Continent. The rules of standing are more liberal in the United States and allow the formation of groups for litigation purposes much in the same manner as the formation of classes.<sup>86</sup> European courts have been more reluctant to recognize actions by and on behalf of groups, and the reluctance still dominates the judicial decisions. The situation is changing, however. Gone forever is the era when it was assumed that the public *Ministère Public* and its analogues could effectively represent the public interest in civil litigation. Case law in several countries, including the Federal Republic of Germany, the Netherlands, and Italy is beginning to allow a wider scope for the assertion of collective interests in court, and the case law has helped to stimulate the intervention of the legislature along the lines suggested in evolving court doctrine.

Special standing has increasingly been conferred in Europe on *private organizations* to enforce the rights of certain diffuse interests.

Examples of this approach already described in the Florence series include, in France, the “loi Royer” of 1973 for consumer protection<sup>87</sup> and the law of 1976

<sup>84</sup> *Prudential Assurance Co., Ltd. v. Newman Industries Ltd.*, [1980] 2 W. L. R. 339; [1979] 3 All E. R. 507.

<sup>85</sup> On class action for England generally, see, *e. g.*, Class Actions and Access to Justice: New L. J. 1979, 870; Bates, A Case for the Introduction of Class Actions into English law: New L. J. 1980, 560.

<sup>86</sup> See Federal Rules of Civil Procedure, Rule 23.2; Cappelletti, Vindicating the Public Interest Through the Courts – A Comparativist’s Contribution, in: Access to Justice III at 513.

<sup>87</sup> Law of Dec. 27, 1973, no. 73–1193, J. O. 1973, 14139.



concerning the protection of the environment,<sup>88</sup> and in *Germany* the amendments of 1969 to the 1965 Law Against Unfair Competition<sup>89</sup> and the Law of 1976 on Standard Terms of Contract.<sup>90</sup> Recent developments have added to the number of organizations and the number of laws that can be enforced through this system. In particular, some German Länder, most notably that of Bremen, have acted to allow environmental organizations to sue to enforce federal environmental laws.<sup>91</sup> *Austria* also has passed an October 1, 1979 law modelled on the German law on standard terms,<sup>92</sup> and *the Netherlands* by a law of July 14, 1980 gave consumer groups wider standing to enjoin misleading advertisement.<sup>93</sup> A number of European developments suggest further expansion of this approach. The *European Community* and the *Council of Europe* have both emphasized strongly the role of organizations in consumer and environmental protection (and in other important areas, especially anti-discrimination).<sup>94</sup>

These legislative efforts to confer standing on private organizations have a number of *advantages* unavailable to the class action approach. First, the problem of legitimacy is to a greater extent resolved, since the organizations that sue must qualify according to statutory criteria, and the organizations are also accountable to their membership. Class actions, in contrast, despite the judicial means for monitoring class counsel and class representatives, may often be primarily the creatures of "entrepreneurial" attorneys unaccountable either to society generally or to the members of the class whom the action is supposed to benefit. Second, the European system strengthens private organizations who, again in contrast to the groups represented by class actions, will then be able to undertake a number of strategies, not just litigation. Negotiation, lobbying, and the provision of information are vital

<sup>88</sup> Law of July 10, 1976, no. 76-629, J. O. 1976, 4203.

<sup>89</sup> Law of July 21, 1965, Against Unfair Competition, BGBl. I 635, as amended by Law of June 26, 1969, BGBl. I 633. For a recent discussion see *Ungern-Sternberg*, Verbandsklagebefugnis für Abmahnvereine?: NJW 1981, 2328.

<sup>90</sup> Law of Dec. 9, 1976, on Standard Terms of Contract, BGBl. I 3317.

<sup>91</sup> Law of Sep. 12, 1979; see *Lüthge*, Die Verbandsklage im Bremischen Naturschutzgesetz: NJW 1980, 1037.

<sup>92</sup> See, e. g., *Jelinek*, Die »Verbandsklage«, in: Handbuch zum Konsumentenschutzgesetz, ed. by *Krejci* (1981); *Bajons*, L'azione collettiva - Aspetti comparatistici di un nuovo tipo di azione a tutela del consumatore: Riv. Dir. Civ. 19 (1980) 292; *Eccher*, Sulla legge austriaca per la tutela dei consumatori: *ibid.* 275.

<sup>93</sup> See *Willems*, Civil Litigation and the Public Interest in Dutch Law (unpublished paper for Cambridge Conference on Civil Litigation and the Public Interest, 1980) 15.

<sup>94</sup> See, e. g., Comité Economique et Social, La mise en œuvre et l'harmonisation des moyens judiciaires et parajudiciaires de la protection des consommateurs dans la communauté européenne (Helkins Report) (1979); Council of Europe, The Collective Interests of Consumers (1980); *Reich/Micklitz*, Consumer Legislation in the EC Countries - A Comparative Analysis (New York 1980). See generally *E. von Hippel*, Verbraucherschutz in Europa: *RabelsZ* 45 (1981) 353-376; *Rapisarda*, Tecniche giudiziali e stragiudiziali di protezione del consumatore - diritto europeo e diritto italiano: Riv. Dir. Proc. 36 (1981) 685.

functions in order to, for example, enforce consumer protection laws and redress the traditional lack of power of consumer interests. Class actions may sometimes lead to an overemphasis on asserting interests in court. Such litigation may ultimately be less effective and more wasteful than negotiation among representative interest groups.

There are also, however, a number of *drawbacks* associated with a reliance on private organizations. One is the possibility that only a few organizations exist able to take advantage of the right to sue.<sup>95</sup> Even with public subsidies available to certain consumer groups, for example, virtually all the consumer group actions in the Federal Republic of Germany have been brought by a very small number of organizations.<sup>96</sup> A second and related limitation is that of resources. These organizations may be unable to afford litigation against large industrial organizations. A recent study in Germany, for example, found that enforcement actions by consumer organizations under the law on standard terms of contract had generally been brought only against relatively small enterprises.<sup>97</sup> If the resources are increased, the problem is that the organization then may become more or less another branch of the government, with a new set of potential problems. Third, there is the problem of redressing damages through organizational actions. In the Federal Republic of Germany, despite reform proposals, consumer organizations can only sue for injunctive relief,<sup>98</sup> and the same is true of the recent Dutch and Austrian reforms.<sup>99</sup> And in France, where consumer organizations can sue for damages, the organizations have not succeeded in recovering more than the damages they themselves have suffered – often assessed in a merely symbolic amount – rather than those suffered by the victims of the illegal practices.<sup>100</sup> It does not appear to date that consumer organizations, for these reasons, have been successful in furthering the enforcement in the courts of consumer legislation. Court actions, however, may serve to complement other strategies such as negotiation and lobbying.

<sup>95</sup> Under the recent Austrian reform, for example, only six named organizations get standing, and of those only two are likely to sue. See note 92 *supra* and accompanying text.

<sup>96</sup> Standing was granted to a number of organizations, but only consumer groups had sued. There were 212 judicial proceedings with consumer group standing from 1977 to Aug. 1, 1980 under the Law on Standard Terms of Contract. See, e. g., *Bunte*, *Erfahrungen mit dem AGB-Gesetz – Eine Zwischenbilanz nach 4 Jahren*: AcP 181 (1981) 31, 55; *Stillner*, *Praktische Erfahrungen mit dem AGB-Gesetz*: Z. f. Verbraucherpol. 1980, 142–143.

<sup>97</sup> The largest consumer organization, located in Berlin, has a budget of only 100,000 marks for legal actions. See *Bunte* (*supra*, note 96) at 56.

<sup>98</sup> Proposals to extend the statute to cover actions for damages as well have “met with strong resistance by the industry.” See *Kötz*, *Civil Litigation and the Public Interest* (unpublished paper for Cambridge Conference on Civil Litigation and the Public Interest, 1980).

<sup>99</sup> See notes 92 and 93 *supra* and accompanying text.

<sup>100</sup> *Malinvaud*, *La protection des consommateurs*: Rec. Dalloz 1981, Chron. VIII 49, 61.

Some environmental groups appear to have been in some sense more successful, no doubt owing to the fact that it is easier to mobilize public sentiment and effort against potential threats to the environment such as nuclear reactors.<sup>101</sup> The difficulty here, however, with the legislative formulas for organizational standing is that they tend to recognize only organizations that have been in existence for a given period of time. Spontaneous organizations do not receive legal recognition. Again, this is a problem that may be confronted, but at present it creates a serious disadvantage of this approach when compared to the liberalized standing and class actions characterizing the United States.

There has been, then, a fair amount of incremental activity in the representation of diffuse interests. There appears at least to be a consensus that, in fact, new laws on behalf of diffuse interests cannot be entrusted only to the traditional organs of enforcement, such as public attorneys general and *Ministères Publics*. Ways must be found to allow *private initiative* to supplement public resources, and we are witnessing efforts to adapt the courts to handle this new kind of litigation. Commentators in Europe, in the United States, and elsewhere, are increasingly noting that litigation is undergoing a subtle but important transformation to handle these conflicts that raise such different problems from private, traditional, two-party litigation.<sup>102</sup> In part these changes are a ratification of a trend much beyond civil procedures. Politics and society are divided into numerous groups who protect and assert the collective interests of their members, and those groups should not be prevented from advocacy in court as well as elsewhere for the rights of their members.

But there also is the point that in order to protect the rights of certain groups, those we call diffuse interests, special means must be sought to strengthen the power of the advocates of these interests. Some of the legal changes may in fact strengthen the power of certain groups, and independent variables, such as fear of nuclear reactors, can also stimulate activity, but there have been no particularly dramatic recent efforts to add power to advocates on behalf of diffuse interests. We shall soon learn just how powerful they are in the United States with the inevitable confrontations that consumer, environmental, and civil rights advocates are having with the Reagan administration, which appears to have in large part abandoned

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<sup>101</sup> See, e. g., *Willems* (*supra*, note 93) at 12–20 for a number of Dutch examples; *Kötz* (*supra*, note 98) at 26 (noting that “as a consequence of lengthy proceedings in the administrative courts the construction of both nuclear and conventional power plants has virtually come to a standstill”).

<sup>102</sup> See, e. g., *Cappelletti*, *La protection d'intérêts collectifs et de groupe dans le procès civil – Métamorphoses de la procédure civile*: *Rev. int. dr. comp.* 27 (1975) 571; *Chayes*, *The Role of the Judge in Public Law Litigation*: *Harv. L. Rev.* 89 (1975/76) 1281.

the effort to publicly enforce a number of new laws designed to protect diffuse interests.

### III. The Effort to Go Beyond the Provision of Legal Services: The "Third Wave" of the Access-to-Justice Movement

Our references to the "third wave" in access-to-justice reform referred to an increasing willingness to go beyond simply providing legal representation – whether it be to the poor, diffuse interests, or others – to a focus on the full panoply of institutions that characterize our dispute processing systems. Comparative research revealed a number of important recent reforms that involve, for example, changes in how the *courts* function, the development of *non-judicial alternatives*, especially those emphasizing conciliation and mediation, and modifications in the *legal profession* to make lawyers and non-lawyer advocates more accessible and effective in enforcing the new rights of ordinary people.

There has continued to be considerable activity in all these areas. The difficult and important problem of "*small claims*" is now perceived in a number of legal systems, and we still are seeing new efforts and experiments that address this problem.<sup>103</sup> – Another area of importance is the apparent trend, especially in the United States, toward the "*arbitration*" of certain types of claims by voluntary – or comparatively low-paid – attorneys who make a "decision" that is not in fact binding on the parties.<sup>104</sup> Each party may obtain de novo court review, subject only to a proviso in

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<sup>103</sup> See, generally, *Fasching*, Small Claims Courts, in: *Towards Justice with a Human Face – The First International Congress on the Law of Civil Procedure*, ed. by *Storme/Casman* (Antwerpen and Deventer 1978) 343; *Bourgoignie*, *L'aide juridique au consommateur* (Louvain 1980). On reforms in *Israel*, including the establishment of new small claims courts in 1977 and 1979, see *Goldstein* (*supra*, note 83). In *England*, the experimental London Small Claims Court is no longer in existence, but more attention is being paid to the country court arbitration scheme, which now applies to claims for up to 500 £; see *Economides*, *Small Claims and Procedural Justice*: *Brit.J.L.Soc.* 7 (1980) 111; *Egerton*, *The Birth and Death of the London Small Claims Courts*: *New L. J.* 1980, 488; *Small Claims Procedure and the "No Costs" Rule in the County Court*: *Law Society's Gaz.*, March 18, 1981, at 1. See also *Turner*, *Small Claims and the County Court in England – A Contrast to the Australian Approach*: *Anglo-Am. L. Rev.* 9 (1980) 150. An excellent recent study of the *United States* is *Steele*, *The Historical Context of Small Claims*: *Am. Bar Found. Research J.* 1981, 292.

<sup>104</sup> See generally *Rosenberg*, *Second Class Justice: Windsor YB. of Access to Justice* 1 (1981) 294. The *federal experimental arbitration system* is described and assessed in *Lind/Shapard*, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (1981). It applies in three federal districts – Connecticut, Eastern District of Pennsylvania, and Northern District of California. Three attorney panels make recommended awards in claims for damages of under 100,000 \$ (650,000 \$ in Pennsylvania). The *California system*, involving arbitration by single attorney-arbitrators, applies to claims for less than

some systems that if the appealing party obtains in court less than what the arbitrator proposed, then that party must pay additional costs. Recent efforts to implement such an arbitration scheme, which purports to reduce court congestion, include experiments in several United States federal district courts and an extensive system in the California state courts. It remains to be seen just how much such systems in practice can contribute to the reduction of court congestion, given that more than 90 percent of court cases are settled out of court in any event in the United States.<sup>105</sup> But a marginal increase in settlements may ease some of the pressure, especially if time-consuming, "complex" cases are resolved.<sup>106</sup>

For the purposes of this report, however, we shall emphasize developments in two areas: the trend toward conciliation, and reforms in the legal profession. These areas are where some of the most interesting and important recent changes have been made and are likely to be made in the near future, and they also can provide data upon which we can base our concluding remarks. An understanding of the conciliation aspect of the third wave of reform is indeed especially necessary to an assessment of the meaning of access to justice today.

### 1. The Trend Toward Conciliation

There clearly has been a surge of interest in informal "alternatives" to the courts in recent years.<sup>107</sup> Ordinary courts and lawyers have been criticized for being too costly and slow to handle the explosion of law generated by the modern state. They have also been criticized for being ill-adapted to the particular characteristics of modern disputes. Most disputes, of course, never reach the courts or even publicly-sponsored alternatives to the courts. They are usually resolved, as anthropologists have shown, by doing nothing, by avoiding the party with whom there is conflict, or by negotiation; and even if the intervention of a "third party" is sought, it is only in rare instances that a disputant will invoke the assistance of lawyers and/or the official justice system.<sup>108</sup> But the increasing belief appears to be that, for a variety of reasons, both those informal mechanisms and formal courts are unable to provide the requisite dispute resolution machinery. The trend,

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15,000 \$. It is described in *Yakutis*, Reform of Civil Procedure – A Quick Look at a Partial Picture: Cal. State Bar J. 56 (1981) 116.

<sup>105</sup> See Administrative Office of the United States, Federal Judicial Workload Statistics for the Twelve Months Period Ending December 31, 1980 (1981) A-20, A-21.

<sup>106</sup> Another approach to settling these cases is described in *Green/Marks/Olson*, Settling Large Case Litigation – An Alternative Approach: Loy. L. A. L. Rev. 11 (1978) 493.

<sup>107</sup> In addition to Florence Project materials, see *The Politics of Informal Justice*, ed. by Abel (New York 1982) (two volumes).

<sup>108</sup> See, e.g., *Merry*, Going to Court – Strategies of Dispute Management in an American Urban Neighborhood: Law and Society Rev. 13 (1979) 891.

therefore, is toward methods of processing disputes somewhere in between the public, formal courts and private, informal methods. Conciliation or mediation especially characterizes this new reform trend, which was already becoming apparent at the time of the publication of the Project series. The dimensions of this trend can be understood best by focusing on *developments in three areas*: a) conciliation for interpersonal neighborhood disputes; b) conciliation for disputes involving the legal rights of individuals against organizations; and c) conciliation for disputes involving only the interests of large groups and organizations. As will be seen, the implications of a conciliation system may be very different for each of these categories of disputes.

#### a) Conciliation of Interpersonal or Neighborhood Disputes

A particular aim of recent reformers has been to provide more effective conciliatory institutions to resolve disputes between or among individuals who live and work together. The idea, which appears to have united such diverse groups as police officials, politicians of the left and right, judges, and anthropologists, is that courts are congenitally ill-suited to such disputes because of their orientation toward the past, their all-or-nothing decisions, and their formalism. Alternatives to the courts are seen to be necessary to attack through conciliation a growing and already important number of disputes that disrupt normal relationships in the home, community, school, workplace and the like. Conciliation, it is argued, can mend broken relationships, look to the future, and maintain community harmony and peace.

We can begin by recalling several *German* institutions with an emphasis on conciliation, such as the *Schiedsmann* and the *ÖRA* (Öffentliche Rechtsauskunft- und Vergleichsstelle) in the Federal Republic of Germany, which were described in some detail in Florence Project publications.<sup>109</sup> Both were concerned to a great extent with interpersonal disputes that involved relatively minor property violations within the coverage of the criminal law. Conciliation was also given a very prominent place in the discussion of the *Stuttgart Model* of German civil procedure,<sup>110</sup> where active judges resolve most disputes through settlements prior to the final hearing of the witnesses. These institutional forms have in broad outline been available at least since the 1920s, when conciliation was the subject of considerable attention in the German legal literature.<sup>111</sup> While new experiments and reform cannot now be pointed to in the Federal Republic, except perhaps the growth of the *Betriebsjustiz* in the work setting,

<sup>109</sup> See *Bierbrauer/Falke/Koch*, Conflict and Its Settlement – An Interdisciplinary Study Concerning the Legal Basis, Function and Performance of the *Schiedsmann*, in: *Access to Justice II* at 39; *Falke/Bierbrauer/Koch*, Legal Advice and the Non-Judicial Settlement of Disputes – A Case Study of the Public Legal Advice and Mediation Center in the City of Hamburg, in: *Access to Justice II* at 103.

<sup>110</sup> See *Bender*, The Stuttgart Model, in: *Access to Justice II* at 431.

the last couple of years have seen a considerable renewal of interest in alternatives to the courts and especially in conciliation.<sup>112</sup> Established institutions of conciliation may be revitalized in the near future or new institutions developed. We can now question, for example, whether the Schiedsmann is still a "dying institution," as it appeared to be three years ago.<sup>113</sup> Indeed, its experience shows many similarities with the newly created institutions described below.

France has perhaps an even longer tradition of conciliatory justice, reflected in such Revolutionary reforms as the *juge du paix*, and there, too, has been a considerable revival of the earlier emphasis.<sup>114</sup> Most notable for the resolution of interpersonal or neighborhood disputes is the *conciliateur*, in part designed to fill the gap left by the abolishment of the *juges du paix* in 1958.<sup>115</sup> After a one-year experimental period commencing in 1977, the institution of *conciliateur* was extended by statute to all French départements. Although this institution was described briefly in Access-to-Justice reports, we can now provide some data on the early experience of *conciliateurs*, of whom there were already one thousand by the end of 1980.<sup>116</sup> In addition, several notable statutory changes were made in 1981 in response to the early experience.<sup>117</sup> Individual *conciliateurs*, nominated by the Premiers Présidents of the Cours d'appel, have thus far tended to be retired men (although the number of women is growing), especially from the professions connected to the administration of justice or public administration.<sup>118</sup> With a couple of exceptions (Bordeaux, Aix) the caseloads have been rather small – between 200 and 500 "affaires" per year per Cour d'appel, or something like 30 per year per *conciliateur* (although the great disparities among *conciliateurs* make the average somewhat misleading). Many

<sup>111</sup> See, e. g., *Blankenburg/Reifner*, Conditions of Legal and Political Culture Limiting the Transferability of Access-to-Law Innovations, in: *Access to Justice and the Welfare State* (*supra*, note 3) at 217, 228–243.

<sup>112</sup> See, e. g., *Metsger-Pregizer*, Summary and Consequences for Criminal Policy, in: *European Alternatives to Criminal Trials and Their Applicability in the United States*, ed. by *Felstiner/Drew* (Washington, D. C., 1978); *Jb. f. Rechtssoziologie und Rechtstheorie* 6 (1980): *Alternative Rechtsformen und Alternativen zum Recht*, ed. by *Blankenburg/Klausa/Rottleuthner*; *Gottwald*, Streitbeilegung ohne Urteil, Vermittelnde Konfliktregelung in den Vereinigten Staaten aus rechtsvergleichender Sicht (1981); *ders.*, Alternativen zum zivilen Justizverfahren: *Z.f.Rpol.* 1982, 28.

<sup>113</sup> Cf. *Röhl*, Vorschlag für einen Modellversuch zur Regelung von kleinen Streitfällen zwischen Verbrauchern und Waren- und Dienstleistungslieferanten (1980) 14, 129, 175, 259; *Seetzen*, Entlastung der Ziviljustiz durch Vorschaltung des Schiedsmanns?: *DRiZ* 1980, 177–180; *Schulte*, Zur Erweiterung der sachlichen Zuständigkeit der Vergleichsbehörde, insbesondere des Schiedsmannes: *SchiedsmannsZ* 51 (1980) 38–44.

<sup>114</sup> See generally *Bourgoignie* (*supra*, note 103) at 341–346.

<sup>115</sup> See, e. g., *Bellet*, Les conciliateurs en France, in: *Les conciliateurs* 37.; *Jobert/Rozenblatt*; (*supra*, note\*); *Faucher*, Réflexions sur les conciliateurs: *Gaz.Pal.* 1978, *Doctr.* 631. Developments can be followed in the *Rev. trim. d'information des conciliateurs*.

<sup>116</sup> See *Jobert/Rozenblatt* at *Résumé* p.1; *Bellet* (*supra*, note 115) at 5.

<sup>117</sup> Most interesting of the May 1981 modification was the specification that the *conciliateur's* assistance can be invoked by judicial authorities as well as a private person, and the clarification that an agreement can be given executory force by a *juge d'instance* if the parties so agree.

<sup>118</sup> The information in this paragraph is taken from *Jobert/Rozenblatt* at 25, 26, 44.



kinds of disputes have been brought to conciliateurs, including landlord-tenant, consumer, neighborhood, and family matters. A good portion of the work of conciliateurs, in addition, is simply to provide legal advice, helping to provide the advice still largely unavailable under the French legal aid system. It is too early to say whether conciliateurs have thus far been a "successful" institution; indeed, we cannot easily specify what the criteria for success are at this point. Conciliateurs appear, however, to have been able to promote resolution of most disputes that are brought to them.<sup>119</sup> Also, as will be seen from the discussion below, they have experienced many of the same problems and dilemmas that have been seen elsewhere with local conciliation, including in Germany and the United States. The potential and problems of this important new institution – 3,000 conciliateurs are contemplated in France – can be assessed better after a discussion of some of its other comparative counterparts. It will suffice here to emphasize the notable resurgence of this type of conciliation in France.

In the *United States*, the various governments became interested in conciliation at about the same time as the French government developed its interest. In both countries the idea at first captured the imagination of the highest executive official concerned with judicial matters – the French Garde des Sceaux and the United States Attorney General – and nationally funded experimentation then began. The French experimented with conciliateurs in four départements and the Americans with three *Neighborhood Justice Centers*, one each in Los Angeles, Kansas City, and Atlanta. Each experiment was proclaimed a success by its sponsors,<sup>120</sup> and legislation followed to implement the new scheme nationwide. Like the French in 1978, the United States government in 1980 enacted a new law, called the "*Dispute Resolution Act*."<sup>121</sup> This Act was to set up a *Dispute Resolution Center* to help fund further experiments and provide research data and technical assistance focusing on "minor disputes," "consumer mechanisms," "housing mechanisms," and "small claims mediation." Unlike in France, however, national policy in the United States did not continue to the implementation stage. No funds have yet been appropriated for the Dispute Resolution Center, and it does not appear that any will be in the near future. That reluctance, however, appears to be more a reflection of the current federal stinginess and the new emphasis on decentralized pluralism of the American political system than a waning of support for the conciliation alternative. Indeed, it was somewhat odd that a national policy did appear to be evolving about this especially local type of judicial or quasi-judicial institution. Not surprisingly, activity has now concentrated more on the local level, even if there is still some federal interest in spurring local experiments. A recent article on the conciliation-oriented dispute resolution centers in the United States reported that 50 were set up in 1980, bringing the total to 140.<sup>122</sup> The federal government, through an Urban Crime Prevention Program, has further

<sup>119</sup> *Jobert/Rozenblatt* at 80–81.

<sup>120</sup> For *France*, see *Faucher* (*supra*, note 115). For the *United States* see *Cook/Roehl/Sheppard*.

<sup>121</sup> Pub.L. No. 96–190, 94 Stat. 17 (1980).

<sup>122</sup> *Dispute Mediation Up Despite Funding Worries: Am.B.Ass.J.* 67 (1981) 294. For a list of the institutions, see American Bar Association, *Directory of Dispute Resolution Programs* (1981).



contributed to the expansion by helping this year to fund eleven new programs in seven cities.<sup>123</sup> – Several *empirical studies* are now available in the United States concerning Neighborhood Justice Centers, including the official evaluations of the Los Angeles, Atlanta, and Kansas City Centers.<sup>124</sup> As in France and Germany, it is notable here that caseloads of the Justice Department experimental Centers were also relatively small and diverse. The Kansas City and Los Angeles Centers had only 1600 cases between them in the fifteen month experimental period, and the 2,351 Atlanta cases are in great part the result of referrals from the regular courts.<sup>125</sup> These Centers, however, did have considerable success in resolving the disputes that reached them. About 65 percent of cases were “resolved”, according to the official evaluation, which concluded that the Centers “provide a needed and effective alternative mechanism for the resolution of minor disputes.”<sup>126</sup>

*Other countries* have also begun to discuss and experiment with new conciliatory institutions. In *Australia*, New South Wales has created several “*Community Justice Centers*,” and the Australian Federal Attorney General has indicated an interest in developing more such institutions in Australia.<sup>127</sup> There are several experiments in *Canada*, and the first National Workshop on Dispute Mediation was held in Saskatoon, Saskatchewan, in April 1981.<sup>128</sup> Further evidence of interest is the fact that several *national and international organizations*, including the International Association of Legal Science and the Italian Association for the Study of the Law of Civil Procedure, dedicated their recent meetings to the subject of conciliation.<sup>129</sup>

The trend toward conciliation, especially of disputes in the home, community, and workplace, has clearly gained considerable momentum and attention in the *Western world*, and that is of course not surprising. It confirms the growing recognition that regular courts and court procedures are inappropriate to resolve neighborhood and other interpersonal disputes. And, although we are emphasizing new developments in this paper, we should note that this growing recognition is not limited to the Western developed countries described above; it is well-established in

<sup>123</sup> See “Eleven Community-Based Mediation Programs Funded”: *Dispute Resolution*, Spring 1981, p. 1 (periodical published by the American Bar Association Special Committee on Resolution of Minor Disputes).

<sup>124</sup> See *Cook/Roehl/Sheppard/Felstiner/Williams*, *Community Mediation in Dorchester, Mass.* (1980).

<sup>125</sup> *Cook/Roehl/Sheppard* at 13–14.

<sup>126</sup> *Cook/Roehl/Sheppard* at 2.

<sup>127</sup> See, e. g., *Schwartzkoff*, *Community Mediation in New South Wales – Plans and Prospects* (1980); *Mediation and Backyard Justice: Reform 1981*, 5 (a periodical publication of the Australian Law Reform Commission).

<sup>128</sup> Reported in “Betting on the Resources of Dispute”: *Dispute Resolution*, Spring 1981, at 8.

<sup>129</sup> For the meeting of the International Association of Legal Science see *Les conciliateurs* (*supra*, note \*); see also *Kötz/Zajtay*, *Rev.int.dr.comp.* 1981, 1036–1040, and *ii*, *RabelsZ* 46 (1982) 177–182. For the 1979 meeting of the Italian Association see the general report of *Denti*, *I procedimenti non giudiziali di conciliazione come istituzioni alternative: Riv.Dir.Proc.* 35 (1980) 410. See also *Cappelletti*, *Appunti su conciliatore e conciliazione: Riv.Trim.Dir.Proc.Civ.* 35 (1981) 49.

Japan<sup>130</sup> and typical of a number of *Socialist countries*,<sup>131</sup> most notably *China*,<sup>132</sup> and of much of the *Developing countries* as well.<sup>133</sup> Very diverse societies have found it necessary to foster conciliatory institutions as complements to or as alternatives to the courts.

The *potential advantages of conciliation* for these common kinds of disputes are by now well-understood, especially the capacity to examine a dispute in its entirety, not merely its legal dimension; the possibility to shape a solution that need not be victory for one, loss for the other; and the opportunity to make an adjustment that permits harmony and coexistence for the future, not simply a decision as to who in the past was right and wrong.<sup>134</sup> Individuals who live and work together after all must coexist, and conciliation can be an effective tool to resolve conflicts that cannot be settled by the parties themselves but are inappropriate for judicial action.

The major *critique of conciliation* generally is that it promotes unfair results when attempted among parties of unequal bargaining power, but that criticism does not apply to much of this interpersonal conciliation. The problem of inequality of bargaining power may have some relevance here, but our analysis is facilitated by limiting discussion in this context to institutions designed for individuals – family members, neighbors, co-workers. There are several other issues, however, that merit some attention at this point.

The first problem common to these interpersonal conciliation agencies is their *independence*, i. e. determining how independent these agencies should be from regular court systems. In one sense this is a question of how much one wants a conciliation agency to be a genuine alternative to regular courts and court procedures. If the aim is merely a cheaper or faster version of the

<sup>130</sup> See *Kojima/Taniguchi*, Access to Justice in Japan, in: Access to Justice I at 687, 717–727. See also for an elaboration of the argument that the Japanese are not so non-litigious, *Haley*, The Myth of the Reluctant Litigant: J. Jap. Stud. 4 (1978) 359.

<sup>131</sup> See, e. g., *Kurczewski/Frieske*, The Social Conciliatory Commissions in Poland, A Case Study of Non-Authoritative and Conciliatory Dispute Resolution as an Approach to Access to Justice, in: Access to Justice II at 153.

<sup>132</sup> Of particular interest is *Sheng Yu*, Le système de conciliation populaire en République Populaire de Chine, in: Les conciliateurs 27.

<sup>133</sup> See, e. g., *M'Baye*, Le règlement des litiges en dehors des tribunaux: le cas de l'Afrique, in: Les conciliateurs 17.; *Marasinghe*, The Use of Conciliation for Dispute Settlement – The Sri Lanka Experience: Int. Comp. L. Q. 29 (1980) 389. For a useful study of an effort to use conciliation to transform society in a developing country, see *Spence*, Institutionalizing Neighborhood Courts – Two Chilean Experiences: Law and Society Rev. 13 (1979) 139.

<sup>134</sup> See, e. g., *Shonholtz*, A Justice System that Isn't Working and Its Impact on the Community (San Francisco Community Board Program 1981, unpublished); Dispute Mediation (*supra*, note 122). See also *McGillis/Mullen*, Neighborhood Justice Center – An Analysis of Potential Models (1977) 47–49.

regular courts, it is logical to link the agency closely to the court system. If, on the other hand, the aim is to develop a different kind or quality of justice, then it appears desirable to separate the institution as much as possible from the courts, to maximize local participation, and to allow the program to evolve in a somewhat autonomous direction. The trend in the American Neighborhood Justice Centers appears to be in the direction of local participation and autonomy, but the issue has certainly not been resolved.<sup>135</sup> In France, where the conciliateurs are linked to the court system at least through the system of appointment, the issue of independence is also very much a live one.<sup>136</sup> According to the recently-published CREDOC study of the conciliateurs:

»Du côté des conciliateurs deux opinions coexistent: celle de ceux qui souhaitent la plus totale indépendance par rapport au système judiciaire, ce qui n'exclut pas éventuellement une certaine coopération, et celle de ceux qui, au contraire, aspirent à une plus grande intégration pouvant aller jusqu'à une modification de leur mission actuelle.«<sup>137</sup>

One aspect of independence, it should be noted, depends very much on the existence of the court system as a possible and accessible alternative. It requires that disputants be given a choice between two kinds of justice, the regular courts and conciliation, but there will be no real choice if the regular courts are too expensive and slow. Disputants may then go to conciliation only because they believe it might offer them a remedy that they would like but cannot obtain from the courts.<sup>138</sup> For conciliation to be a real alternative, it is necessary for disputants to be able freely to choose between two types of justice.

A closely related issue is the *role of the law* in these conciliatory institutions. Here, too, the analysis depends largely on whether we want the conciliatory institution to be an extension of the regular court and police system or to be independent and autonomous from that system. And again opinion is divided.<sup>139</sup> It is clear, however, on the basis of several empirical studies that under normal circumstances French conciliateurs and the like cannot operate effectively without at least some knowledge of the law that would apply to the disputes that they seek to resolve.<sup>140</sup> The conciliator who

<sup>135</sup> See, e. g., *Cook/Roehl/Sheppard*.

<sup>136</sup> Note that the statute was amended to ensure that court referrals would be permitted, thus tending to enhance the ties to the courts. See note 115, *supra*.

<sup>137</sup> See *Jobert/Rozenblatt* at 103.

<sup>138</sup> Professor Taniguchi suggests that litigants in Japan often choose conciliation for this reason. See *Taniguchi*, *Extra-Judicial Disputes Settlement in Japan*, in: *Les conciliateurs* 109.

<sup>139</sup> See, e. g., *Jobert/Rozenblatt* at 75-76 (describing divided opinion among French conciliateurs).

<sup>140</sup> See *ii*; *Bierbrauer et al.* (*supra*, note 109) at 87 ("75.2 percent [of Schiedsmänner]

tries to promote a reasonable agreement will make reference to the law in at least two ways: first, as one reflection of a possibly “moral” or “just” approach to a given dispute; and second, and perhaps more importantly, as an indication of what might happen if the dispute is not resolved amicably and ends up in court. The ultimate solution of conciliation need not of course be consistent with the law, but the law is one factor considered in promoting an acceptable and fair settlement.<sup>141</sup> Lay conciliators will not become legal experts in many areas of the law, but they do need some acquaintance with at least those areas of law where they face recurring problems and where there is a background of legal policy.

Given the necessity for some familiarity with the law, we return to the question of how much the conciliated result should resemble the “legal” one. There are conflicting views, as we have noted. In her recent report on conciliation in China, for example, Sheng Yu insists that its role is to enforce the law in the spirit of equity – in essence to persuade the population to comply with the law.<sup>142</sup> Conciliators are quick to detect transgressions and seek ways of promoting behavior consistent with legal norms. Those norms in turn embody a desire for social change. For example, a good portion of Chinese conciliation helps persuade husbands to respect the new rights of their wives.

A recent report on conciliation in Senegal by Premier Président (Chief Justice) M’Baye makes a similar analysis of the relationship between conciliatory justice and social change in some developing countries.<sup>143</sup> Conciliators need not follow the precise letter of new laws and regulations, but the process helps to maintain a dialogue between the new norms of a changing society and strongly embedded legal traditions. The law is not resisted, but it is enforced in such a manner that continuity with tradition can be maintained. It eases the shock of laws aimed at transforming society.

The proponents of independent conciliation, however, have suggested that it can, and in certain societies should, offer *resistance to the law and social control of the state*.<sup>144</sup> The modern industrialized state, they argue, is one of centralism, bureaucratism, and a great proliferation of law and legal regulation into people’s everyday affairs. Community dispute resolution may help to conserve and even revive local, “indigenous”<sup>145</sup> norms that not only help

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regarded it as very important for bringing about a just settlement that they knew the legal aspects that would determine the outcome of a private criminal action before the court”).

<sup>141</sup> Cf. Mnookin/Kornhauser, *Bargaining in the Shadow of the Law – The Case of Divorce*: Yale L. J. 81 (1978/79) 950.

<sup>142</sup> See Sheng Yu (*supra*, note 132).

<sup>143</sup> See M’Baye (*supra*, note 133). See also Marasinghe (*supra*, note 133).

<sup>144</sup> Cf. Shonholtz (*supra*, note 134).

<sup>145</sup> See Galanter, *Justice in Many Rooms*, in: *Access to Justice and the Welfare State* (*supra*, note 3) at 147.

people to live and work together peacefully and fruitfully but also enable them to resist the invasion of the state. Thus Kurczewski and Frieske concluded on the basis of their empirical study of "social conciliatory commissions" in Poland that participants and the general public favored a "self-government-in-the-administration-of-justice" approach to conciliation.<sup>146</sup> And more recently, Kurczewski hypothesized that a certain recent decline in these commissions stems in part from the government's failure to encourage the kind of independence and autonomy that the public favors.<sup>147</sup>

In short, a large number of thoughtful proponents of conciliation in both Europe and North America argue for the necessity of decentralized, independent, voluntary institutions capable of building local unity at the same time they resolve disputes through conciliation.

Some would object even to these voluntary, autonomous institutions on the grounds that they, too, promote a *social control inconsistent with individual privacy*.<sup>148</sup> It should be admitted that that objection has some validity to it. Even if conciliation is voluntary, it is clear that the institutions will be able to assert a certain amount of social pressure, and they will certainly be involved with disputes that would otherwise never have been brought to such institutions. Relatively minor disputes that might have been forgotten may now be magnified and transformed into more serious matters.

Many thus argue that these minor disputes are best resolved by "avoidance,"<sup>149</sup> if not "negotiation," and that may be true. If your neighbor's child tramples your flowers, you may prefer to build a fence rather than turn the incident into a disruptive controversy. The problem, however, is that for many people such fences cannot be built. They are thrown together in housing, school, and work, and if negotiations fail, the dispute will fester and disrupt life and work. Moreover, if disputes do become disruptive, we can expect the modern state to step in with the official machinery of justice.

The choice in many places therefore may not be the idealized one between privacy and neighborhood justice, but rather may be between social control by the state or by some *locally-controlled form of neighborhood justice*. This local, decentralized, participatory form of neighborhood justice for interpersonal disputes thus has a number of advantages. Its proponents hope to revitalize home and work communities, build local strength, and help to resist the centralizing, bureaucratic excesses of the modern state. Conciliation institutions designed with that orientation may indeed be able to offer a

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<sup>146</sup> See Kurczewski/Frieske (*supra*, note 131) at 346-367.

<sup>147</sup> Kurczewski, at the Colloque in Pau (*supra*, note \*).

<sup>148</sup> See, e. g., L. M. Friedman, Access to Justice - Social and Historical Context, in: Access to Justice II at 35-36.

<sup>149</sup> Felstiner, Avoidance as Dispute Processing - An Elaboration: Law and Society Rev. 9 (1975) 695.

helpful corrective both to the inherent deficiencies of ordinary court systems and to the excesses of the modern state.

One problem, however, is whether even well-designed social experiments along these lines will really take hold among those whom they are supposed to serve. The one experimental Neighborhood Justice Center that sought especially to pursue the independent model – Los Angeles, or more precisely Venice/Mar Vista Center – has had a very small caseload indeed. It dealt with 751 cases over the fifteen month experimental period, only about half of which were initiated by the disputants themselves.<sup>150</sup> As the French data confirm, the caseloads of such institutions have been small generally,<sup>151</sup> not just in the United States, and it may be very difficult to attract a sufficient clientele without court and police referrals. Court referrals, however, tend to push the institutions toward a position subsidiary to the courts and the official legal system. It remains to be seen, in short, whether this experiment with conciliation will succeed in addressing the problems of excessive bureaucracy, legalization, and centralization. If it does not, we must now ask what the result will be of a proliferation of such institutions. It may very well be an extension of the law and power of the state, even if moderated somewhat by the reliance on a conciliatory form of justice. These alternatives to the court clearly can serve several disparate social goals.

This legalization or delegalization of interpersonal disputes raises a number of issues, but the issues are even more complicated concerning conciliation of disputes involving an individual on one side and a business or organization on the other. We must analyze the conciliatory approach to those kinds of disputes, and then to disputes between or among organizations, before we make any effort to assess this general trend.

#### b) The Consumer Problem

By the “consumer problem” we refer to disputes that may arise between *individuals* on the one hand and *organizations*, such as businesses and governments, on the other.<sup>152</sup> The modern welfare state in Western societies has been characterized by a great extension of law into such typical unequal relationships as buyer-merchant, borrower-lender, employee-employer, environmentalist-polluter, and tenant-landlord. The Florence Project discussion of the access-to-justice movement gave particular attention to this

<sup>150</sup> See *Cook/Roehl/Sheppard* at 13–14.

<sup>151</sup> See generally *Felstiner/Williams* (*supra*, note 124) at XI, 46–47; *Jobert/Rozenblatt* at 43–44; *Bierbrauer et al.* (*supra*, note 109) at 47–49. It is interesting to compare the enormous caseloads generated immediately by new public legal aid offices. See *Garth* (*supra*, note 49) at 166–167.

<sup>152</sup> This terminology is used also by *Steele* (*supra*, note 103) at 320.

problem and to approaches purporting to confront it, including legal aid and public interest representation. Conciliation is now increasingly being advocated as a means to promote inexpensive, quick, and amicable resolutions of disputes between unequal parties.

While our discussion of Neighborhood Justice Centers, conciliateurs, Schiedsmänner, and the like focused on interpersonal disputes, it is nevertheless clear that a good portion of their caseloads included disputes that do involve the claims or defenses of consumers generally against organizations.<sup>153</sup> In the *United States*, the data on Neighborhood Justice Centers, in fact, suggest further that individuals are more likely to bring exactly these kinds of disputes to the Centers rather than interpersonal disputes. Thus, "The Venice/Mar Vista NJC caseload was dominated by disputes of a civil nature between landlords and tenants, consumers and merchants, and employees and employers."<sup>154</sup> These disputes thus seem to be treated in the same manner as those which involve just individuals or parties of equal bargaining power.

Other conciliatory mechanisms, however, have been designed recently for these disputes involving unequals, and they may represent a different approach. Specialized institutions such as the "Public Complaints Board", established first in *Sweden* and now found in all the *Nordic countries*,<sup>155</sup> the "boîte postale 5000" system for consumer complaints in *France*,<sup>156</sup> and some more general institutions such as small claims courts,<sup>157</sup> seek to combine conciliation with an effort to overcome disparities in legal knowledge and bargaining power.

The Recommendation of the *Council of Europe* of spring 1981, noted earlier,<sup>158</sup> could promote a whole range of reforms in the field of access, but what is notable here is that the Ministers have also emphasized the virtues of conciliation ("increased recourse to an amiable resolution"). The *European Economic Community* is similarly working on a Community model for small claims and consumer disputes.<sup>159</sup> These efforts will possibly be significant, but we cannot yet know how to characterize them. They may look like Neighborhood Justice Centers or like more specialized institutions, or they may result in new models.

Given this activity and the prospects for further reform, a critical question that now must be addressed is whether the emphasis on conciliation in these settings, even if promoting inexpensive and quick access, represents a *retreat from the effort to enforce new laws* that bolster the power and rights of consumers.

There is evidence that general conciliatory institutions such as Neighbor-

<sup>153</sup> See, e. g., *Jobert/Rozenblatt* at 43-50.

<sup>154</sup> See *Cook/Roehl/Sheppard* at 13.

<sup>155</sup> See *Mangård*, *Le règlement des litiges des consommateurs*, in: Ministère de l'Économie, *Le pouvoir économique des consommateurs* (1980).

<sup>156</sup> See generally *Bourgoignie* (*supra*, note 103) at 341-346; *Cappelletti/Garth* (*supra*, note 9) at 95-99.

<sup>157</sup> See *ii* at 69-84; *Steele* (*supra*, note 103) at 347-357.

<sup>158</sup> See *supra*, note 4, and *infra*, p. 814.

<sup>159</sup> See generally *Röhl* (*supra*, note 113).



hood Justice Centers do not perform well with these consumer problems,<sup>160</sup> even if they may help to “resolve” disputes. In an informal setting, with no credible threat of coercion by the weaker party, the party with the greater bargaining power tends to come out better. The other party may not even know of his or her rights. A generally trained lay conciliator can probably provide little help in these rather technical areas, and a party with more power is able to rely on that power. In this sense the third wave, as Sarat points out, can be seen as “a retreat from the commitments and possibilities of the first two.”<sup>161</sup> There is no doubt that many who favor the third wave in a number of countries favor just such a retreat. Neighborhood Justice Centers and the like may promote social control and the extension of some law, but we may get only the social control where conciliation is tried among parties of unequal bargaining power.

But that need not be the case. If, for example, strong consumer, employee, or tenant organizations exist, or other effective advice agencies serve the same purpose, they can ensure at least that the individual obtains appropriate advice and assistance. The individual then will not settle without some awareness of the law that would be applied, and often an interested organization can supply the added resources to make a lawsuit a credible threat. Second, as noted before, if there are otherwise available real and accessible alternative means to enforce the rights effectively, then conciliation will necessarily take place against that bargaining background.<sup>162</sup> The conciliated result may then end up being a means to enforce the spirit of new law while maintaining an ongoing relationship. This can be especially useful for tenant-landlord or employee-employer problems, for example. It may, in fact, be more effective than would be a court decision. It is thus notable that in Sweden, where the welfare state ideology of law enforcement is still secure,<sup>163</sup> the consumer protection system is designed so that consumers can choose either the route of the reformed

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<sup>160</sup> According to *Cook/Roehl/Sheppard* at 12, “Interpersonal disputes were more likely to reach a hearing than civil cases and were more apt to be resolved via mediation or conciliation; half of the interpersonal disputes were mediated. In contrast, only 23% of the civil cases reached a hearing but many others were resolved prior to a hearing.” Cf. *Ruhnka*, *Housing Justice in Small Claims Court* (1979) 109–119 (on problems in small claims courts with landlord-tenant disputes and the law); *Ruhnka/Weller/Martin*, *Small Claims Courts – A National Examination* (1978) 195–196 (on some problem re: small claims generally).

<sup>161</sup> *Sarat* (*supra*, note 22) at 1919.

<sup>162</sup> See notes 139–142 and accompanying text *supra*.

<sup>163</sup> In Professor *Ekelöf*'s review of *Access to Justice* (*supra*, note 7), for example, the author urges that the “mediator ought to get as good as possible an idea of the legal position before making advice.”



small claims court, where the decision is binding, or the Public Complaints Board, where it is not.<sup>164</sup>

Sweden's system illustrates another point: informal, conciliatory justice need not be the domain only of lay conciliators uninformed in the law and spirit of the new consumer or tenant rights. *Specially-trained conciliators*, whether formally lawyers or not, can develop an expertise sufficient to see that for at least one class of claims the litigants can be made aware of the implications of the law. It appears indeed that in the People's Republic of China the conciliators are well versed in the law.<sup>165</sup> With different political aims, but with the same idea of using law as an instrument for state sponsored change, the Chinese also use conciliation to enforce the law.

Finally, as Eric Steele points out in a recent study of small claims in the United States,<sup>166</sup> a balanced assessment of conciliation as part of an entire legal system requires us to consider which cases are being dealt with in *aggregate ways* rather than through individual actions. We obviously will be less concerned with how laws are enforced in the conciliation setting involving the individual and the organization if compliance with the law is fostered through other means, such as public prosecutions or class or group actions. However much we see theoretical problems in Neighborhood Justice Centers that handle housing and consumer disputes, for example, it may be that as a practical matter the real conflicts and the enforcement of social policies involving such groups are focused elsewhere. Here, too, the third wave does not dictate one or another political outcome.

#### c) Conciliation Between or Among Interest Groups and Organizations

A report on the trend toward conciliation should also consider the *development of institutions* that seek to resolve disputes between various organizations or groups. This use of conciliation is related closely to the general tendency, regardless of state intervention, for groups of more or less equal bargaining power to negotiate and resolve their conflicts amicably.<sup>167</sup>

The history of *labor relations* in almost any country after the growth of unions certainly illustrates this tendency.<sup>168</sup> That history also shows that for socially important conflicts such as labor-management, incidents of government intervention tend to be through conciliation or mediation rather than

<sup>164</sup> See generally *Eisenstein*, The Swedish Public Complaints Board – Its Vital Role in a System of Consumer Protection, in: Access to Justice II at 491.

<sup>165</sup> See *Sheng Yu* (*supra*, note 132).

<sup>166</sup> See *Steele* (*supra*, note 103).

<sup>167</sup> This phenomenon is described by *Galanter*, Why the "Haves" Come Out Ahead – Speculations on the Limits of Legal Change: Law and Society Rev. 9 (1974) 95, 110–114.

<sup>168</sup> See generally the data reported in the National Reports to the Access-to-Justice Project, cited in *Cappelletti/Garth* (*supra*, note 9) at 167 and notes 341–342.

through law and litigation. There are strong reasons for this tendency, some of which were mentioned before. To reiterate, such complex disputes cannot often be resolved effectively through an all-or-nothing approach; there is a necessity for the relationship to continue; and the resolution of the dispute must look toward subtle mutual adjustments in future behavior. Law and the regular courts have not been well-suited toward the resolution of such disputes.<sup>169</sup>

These reasons are now being asserted for non-labor disputes, such as those which require a balancing of interests related to the *protection of the environment*. Litigation in this field may be slow and wasteful and it may involve “phony issues” based on procedural details rather than on the real questions of policy.<sup>170</sup> The administrative process may put an end to conflict in some disputes, but if it does not, the concern must be whether judges are appropriate agencies for balancing the interests and framing a decree. It is true, as Professor Chayes suggests, that American federal judges in “public law” litigation have often come to adopt a role resembling more a conciliator than a judge as traditionally envisioned.<sup>171</sup> But this judicial role is not universally admired or appreciated,<sup>172</sup> and it tends to come at or near the end of a long and expensive litigation process. There has therefore been an effort, pioneered in the United States through a Ford Foundation sponsored program at the University of Washington, to make available mediators to help settle environment conflicts out of court.<sup>173</sup> The office of Environmental Mediation in Washington has reportedly been very successful in this task.<sup>174</sup>

Here, too, however, we must be cautious. The Washington organizers emphasize that this mediation or conciliation cannot be separated from litigation and other coercive means of handling such conflicts:

“‘Mediation’ is a specific approach to resolving conflicts and is useful in a limited number of situations . . . [T]here is an expectation on the part of observers that

<sup>169</sup> See *Kahn-Freund*, On Uses and Misuses of Comparative Law: *Mod.L.Rev.* 37 (1974) 1.

<sup>170</sup> See *L. M. Friedman*, Claims, Disputes, Conflicts and the Modern Welfare State, in: *Access to Justice and the Welfare State* (*supra*, note 3) at 251, 264.

<sup>171</sup> *Chayes* (*supra*, note 102).

<sup>172</sup> Compare *Chayes* (*supra*, note 102) and *Diver*, The Judge as Political Powerbroker – Superintending Structural Change in Public-Law Litigation: *Va.L.Rev.* 65 (1979/80) 43; *Horowitz*, The Courts and Social Policy (1977).

<sup>173</sup> See generally, Roundtable Justice Case Studies in Conflict Resolution, Reports to the Ford Foundation, ed. by *Goldman* (1980).

<sup>174</sup> See *Dembart/Kwartler*, The Snoqualmie River Conflict – Bringing Mediation into Environmental Disputes, in: Roundtable Justice (*supra*, note 173) at 39; *Cormick*, Resolving Environmental Conflicts Through Mediation – Experience, Process and Potentials (unpublished paper presented to American Sociological Association, Annual Meeting, September 7, 1978, San Francisco).

mediation will replace litigation. However, litigation will continue to be a necessary element in establishing the relative power required to achieve meaningful negotiations and, while actual litigation may be avoided in some situations, the potential must remain."<sup>175</sup>

In other words, a *balance of power* is necessary for mediation to succeed, and to date the threat of litigation has been a necessary element in establishing such a balance – at least in the environmental field. Conciliation may be a superior way to resolve these complex collective conflicts, but with no balance of power it may simply turn into a way of neglecting the interests of the less powerful. Again our discussion of the third wave leaves us with a sense of its ambiguity. What is important is the legal and social background against which conciliation takes place.

## 2. Changes in the Legal Profession

While we have emphasized changes in the style and structure of dispute processing institutions such as courts and quasi-courts, of increasing importance are also changes within the organization of the legal profession.

Recent changes in the legal profession of the *United States* have been prompted by the Supreme Court's liberalizing decisions in cases such as *Goldfarb*,<sup>176</sup> attacking minimum fee lists; *Bates*,<sup>177</sup> permitting advertising; and *Primus*,<sup>178</sup> allowing solicitation in the public interest. These cases illustrate a growing trend, also being felt elsewhere, to hold the profession up to public scrutiny and force changes in the profession's traditional way of doing things. – In the *United Kingdom*, in particular, Royal Commissions for England and Wales and for Scotland have reported somewhat critically on many of the profession's traditional practices,<sup>179</sup> and some changes will probably be made in response to this challenge, including some in the field of advertising.<sup>180</sup> – The *Federal Republic of Germany* has now begun to discuss these issues as well. There already is German case-law suggesting some right to publicity by lawyers,<sup>181</sup> and it may even be, as one German commentator opined, that the

<sup>175</sup> Roundtable Justice (*supra*, note 173) at 17.

<sup>176</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

<sup>177</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>178</sup> *In re Primus*, 436 U.S. 412 (1978).

<sup>179</sup> See *supra*, note \*.

<sup>180</sup> See the prognosis of Zander, Commission Examines English Legal Profession: Am. B. Ass. J. 66 (1980) 568, 569. See also Marshall, Lawyers and the Public – Time for Reform?: Law Society's Gaz., Oct. 8, 1981, at 1089. The Law Society has already embarked on a greatly expanded advertising campaign emphasizing the need to see lawyers before problems go too far and the availability of legal aid. Full-page advertisements, for example, ran in such newspapers as the Daily Mail from May to July 1980, at a cost of 350,000 £. See Law Society Advertising Campaign: Law Society's Gaz., May 14, 1980, at 472.

<sup>181</sup> See, e.g., BVerfG May 13, 1981, BVerfGE 57, 121. Generally *Brangsch*, *Speziali-*

heralded recent Sunday Times "free speech" decision<sup>182</sup> of the European Court of Human Rights will put further pressure on the Federal Republic and other participants in the European Convention to modify some of their practices.<sup>183</sup>

There seems to be an interesting *convergence of two factors* that promote increasing awareness and change in the legal profession: First, public scrutiny has come in part from the development of a kind of "legal needs" approach which has been associated also with the access-to-justice movement. Lawyers and policymakers note that people with problems that have a legal dimension do not very frequently consult a lawyer.<sup>184</sup> Therefore, there has been a search for ways, including of course more legal aid, to bring down the obstacles to consulting a lawyer. The prohibition of advertising is especially seen as a barrier that inhibits the intelligent choice of a lawyer and, to some extent in the United States at least, lessens price competition that will increase accessibility. A second factor that works to promote measures to increase the use of legal services is simply the increase in the number of lawyers. Virtually all Western countries have recently experienced a tremendous increase in the number of persons in the legal profession.<sup>185</sup> While one cannot easily separate the relative contribution of this pressure and the access-to-justice concerns mentioned before, there is no doubt that this factor enhances the attractiveness to lawyers of many of these reforms. Other efforts to bring lawyers and potential clients together include the continuing developments in the provision of group and prepaid legal service plans in both the United States and Europe,<sup>186</sup> and there is no

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sierung und Werbung im Bereich des Anwaltsberufs: NJW 1980, 1818; *Pietzke*, Standesrechtliche Wettbewerbsverbote des Rechtsanwalts in den USA und in der Bundesrepublik Deutschland: GRUR/Int. 1979, 147; see also the report on "Tagung für Rechtsvergleichung 1981" by *Basedow et al.*, *RabelsZ* 46 (1982) 168-176 (168-170).

<sup>182</sup> *The Sunday Times Case*, [1979], YB. Human Rights 22 (1979) 400.

<sup>183</sup> See *Brangsch* (*supra*, note 177).

<sup>184</sup> See *Garth* (*supra*, note 49) at 1-13.

<sup>185</sup> See, e.g., Royal Commission at 24 (from tables on the growth there); Zur wirtschaftlichen Situation der Anwälte: DRiZ 1980, 43; *Abel*, Legal Services: What Are the Problems?, in: *Frontiers of Applied Sociology*, ed. by *Holt et al.* (New York 1982).

<sup>186</sup> See *Cappelletti/Garth* (*supra*, note 9) at 111-180. The continuing growth of legal expense insurance in England is described in: *Legal Expenses - A Risk Worth Insuring?: Law Society's Gaz.*, May 13, 1981, at 514. A recent advertisement posted on French store windows by La Protectrice, a French company, offers at 142 francs per year to protect those who confront: »Des litiges dans votre vie courante, des problèmes avec de puissants organismes, une certaine angoisse face au maquis juridique; un particulier a souvent des difficultés à faire valoir ses droits . . . « On developments in Germany see *Blankenburg/Fiedler*, Die Rechtsschutzversicherungen und der steigende Geschäftsanfall der Gerichte (1981) 11-33. A useful recent discussion of alternatives in the United States is Note, *An Assessment of Alternative Strategies for Increasing Access to Legal Services: Yale L. J.* 90 (1980/81) 122. A recent American Bar Foundation report states that there are now some five million families that are covered by prepaid plans. *Andrews*, Regulation of Group

doubt that similar innovations in the profession will progress further in coming years. As we have suggested before, however, changes such as an increase in legal advertising or even a reduction in the cost of legal services, while helpful, do not address the real access-to-justice problems of disadvantaged groups and diffuse interests. The history of the movement has indeed been one of going much beyond subsidized lawyers. Nevertheless, the current ferment in the legal profession must continue to be examined and discussed, for it illustrates one undeniably important feature of the emerging situation – lawyers (in addition to the judicial system generally) are increasingly being evaluated by the standard of how they serve the public interest, including how they promote or retard access to justice.

#### IV. Access to Justice Today

We have described widespread developments in legal services for the poor (and in fact legal services generally), in the representation of diffuse and collective interests, and in an effort to go beyond traditional courts and court procedures to a “warmer way” of disputing.<sup>187</sup> At the risk of oversimplifying, we can suggest that the last three years or so have not seen many “pro-active” reforms that, for example, became institutionalized as neighborhood law firms, lawyers’ collectives, public interest law firms, and the like. Such institutions seek to reach out to individuals and bring them within the legal system to assert and vindicate their rights. The last three years have been characterized more by an emphasis on alternatives to the court, and especially on conciliatory mechanisms applied to a variety of types of disputes.

It is tempting to argue, as Sarat has done, that this recent emphasis implies a negation of waves one and two. We no longer are trying to mobilize individuals and groups to enforce and extend their rights. Rather, we are trying to *curb the explosion of rights through conciliation and diversion from courts*. As we have suggested, however, that scenario need not be the case,<sup>188</sup> and our conclusion here will reiterate and expand on that observation.

To begin, we should reemphasize that conciliation is a technique, not a result. It is a process that connotes relatively open discussion, an expanded focus on the full dimensions of the dispute, and an effort to find a resolution

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Legal Services Under State Ethics Codes: Am. Bar Found. Research Reporter, Summer 1981, p. 1, 7.

<sup>187</sup> Smith, A Warmer Way of Disputation – Mediation and Conciliation: Am. J. Comp. L. 25 (1978), Suppl. 205.

<sup>188</sup> See also the discussion in Johnson, The Justice System of the Future – Four Scenarios for the Twenty-First Century, in: Access to Justice and the Welfare State (*supra*, note 3) at 183.

that looks toward normal future relations; but the exact outcome of conciliation depends on a large number of factors external to the immediate dispute and a conciliator's idea of how to resolve it. Therefore a movement toward conciliation need not suggest an abandonment of the rights orientation that we pointed to in our characterizations of waves one and two.

Conciliation can mean a retreat from promises that welfare state rights – or more generally, rights that purport to redistribute power – will be enforced. It can mean a neglect for new laws and an effort to persuade the weak to compromise and to accept terms favorable to organizations with whom they are likely to come into conflict. Conciliation may also or instead be part of a large-scale effort to extend legal regulation into new geographic and social areas, as the Chinese experiment illustrates. It may be an effort, in particular, to extend the social control of the police and the criminal law into areas – urban ones especially – where it is feared that there is instability. And conciliation might also have the potential to promote indigenous law and local control able to resist the spread of law and regulation characteristic of the modern state.

There is a movement toward conciliatory forms of justice, but it can go in several different directions and will not necessarily mean the same thing in every country. As stated before, that depends on other social and political factors, how other dispute processing institutions operate, and how the particular conciliatory agencies are organized. We need to know what kinds of disputes are processed, how the balance of power issue is addressed in practice, and what the results are of conciliation. If, for example, work safety is negotiated by agreement among labor unions, employers, and the government and monitored by unions in such a way that few disputes ever make it to court, we should not exaggerate the social significance of a dissatisfied worker's weaknesses in trying to make a particular claim. That worker's lack of effective redress raises access-to-justice problems, but in the example given the question of the general enforcement of a mandate for better working conditions is simply not implicated.

A sustained political commitment, promoted by a powerful political party or interest group, can do much to see that welfare state rights are of more than symbolic value. The Swedish system's long commitment to the welfare state illustrates well how the third wave can be channeled in the interests of law enforcement of rights considered socially important. When the best judges are small claims judges, for example, consumer-oriented law has a better chance of being enforced by individuals.<sup>189</sup>

The legal culture of the United States is rather different from Sweden's, and it often fools those who neglect its peculiar features. There is less of a commitment to political programs, partly because of the remarkable plural-

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<sup>189</sup> See *Hellner*, Access to Justice in Sweden: *RabelsZ* 40 (1976) 744.

ism and corresponding absence of a strong party system. This means that there is also less of a commitment to follow through on legislation and other legal reforms. The comment that the welfare state has "developed step-by-step, reluctantly and involuntarily,"<sup>190</sup> applies especially well to the United States. The United States relies to a greater extent than other countries on an array of private or at least largely independent institutions like neighborhood and public interest law firms to enforce welfare state rights. We have been reminded that some portion of the reform effort represented by such institutions is "symbolic politics,"<sup>191</sup> but then we must also realize that the attack on such institutions may in part be symbolic as well. There is an attack in the United States. It looks like the third wave may be used as a substitute for the first two waves and the promises they embodied. But symbolic politics can go both ways, and we cannot yet reach clear conclusions.

Moreover, before we conclude that the third wave of access to justice necessarily means a retreat from the ideals of the welfare state, in the United States or elsewhere, we should reflect on what has so far been the *access movement's legacy*.

First, access to justice has irrevocably politicized issues about the reform of courts and court procedures. Max Weber observed some seventy years ago that the system of civil procedure in England had promoted economic growth by helping the interests of merchants and employers over those of the poor and the working class,<sup>192</sup> but most scholars then paid little attention so such issues. Now, however, the political connections between procedure and substance are recognized to a much greater extent. Legal sociologists, political scientists, and anthropologists, among others, are detailing the role of procedures in the "transformation of disputes,"<sup>193</sup> and we are learning precisely how and when laws and legal policies are enforced. It has become impossible, therefore, to ignore the problem of enforcement when new legislation is debated or enacted. The political focus is increasingly on the machinery for enforcement as much as on the law's substantive provisions, and that in turn leads to further important consequences. It has become much more difficult to pretend that a particular law has solved a problem just because the law is in the books.

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<sup>190</sup> *Offe*, *Advanced Capitalism and the Welfare State: Politics and Society* 2 (1972) 479, 485.

<sup>191</sup> See notes 19–21 and accompanying text *supra*.

<sup>192</sup> Max Weber on Law and Economy in Society, ed. by *Rheinstein* (1954) 353.

<sup>193</sup> See, e. g., *Felstiner/Abel/Sarat*, *The Emergence and Transformation of Disputes Naming, Blaming, Claiming . . .*: *Law and Society Rev.* 16 (1981) 631; *Mather/Yngveson*, *Language, Audience, and the Transformation of Disputes: Law and Society Rev.* 16 (1981) 775. A model study of consumer laws and lawyers is *Macauley*, *Lawyers and Consumer Protection Laws: Law and Society Rev.* 14 (1979) 115.



The recognition of enforcement difficulties also helps to maintain a certain momentum for reform, since a law's purported beneficiaries and other reformers can rally around a demand for the benefits offered by the law.<sup>194</sup> They can assert a claim of right based on what appears to be accepted public policy, and policymakers can address their arguments for better and more efficient enforcement mechanisms. Access-to-justice concerns push toward the fulfillment of the promises embodied in legislation. Similarly, the recent focus on access-to-justice issues makes a decision to reduce enforcement a politically visible and therefore painful one. The political consequences for the substantive law are now too well known.

The second legacy of the access-to-justice movement builds on the first. The political consequences of inadequate enforcement are not only increasingly recognized, but also there is a growing constituency insisting that the structural and practical barriers to enforcement of laws on behalf of the "have-nots" ought to be overcome. This constituency includes those who, because of recent developments in standing and in the representation of diffuse interests, already have been taking an active role in private law enforcement. It is difficult at this point to take away that enforcement power. Two examples from the United States illustrate the situation which has emerged. First, despite the efforts of the Reagan administration, federally-funded legal services for the poor have not yet been killed; at the very least this program has held on much longer than other programs targeted for elimination. Second, the American Bar Association has apparently killed or at least weakened considerably the efforts that would have deprived federal courts of jurisdiction to enforce certain politically unpopular claims, such as claims for school desegregation.<sup>195</sup> The access-to-justice constituency, represented in part by the legal profession in such organizations as the Association, has now made it politically very difficult to strip away substantive rights by altering procedures.

A third legacy is probably a result of the first two. The concern with access has no doubt enhanced the sense of crisis associated with welfare states. The recent attention to enforcement has promoted reforms that have enhanced the penetration of welfare state laws and regulations and has given us an idea of what it might cost really to enforce all such laws. Costs have gone up, often beyond what legislators might have predicted, and we see what the true cost of an "effective" welfare state might be. Costs include those imposed on business and government, the general cost of a prolifera-

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<sup>194</sup> This phenomenon appears, for example, to have happened in Britain with respect to race relations, where the procedures have been changed several times to enhance their effectiveness. See *Wilson*, *Alternative to Litigation: Recent British Experience*, in: *Les conciliateurs* 67.

<sup>195</sup> For the ABA position, see, *e. g.*, *Editorial Opinion and Comment – Backdoor Amendment: Am. B. Ass. J. 67 (1981) 1082.*

tion of bureaucracies, and of course those of excessive law, legalization, and litigation – not to mention the specter of too many lawyers. The welfare state tendency toward countless new laws followed in most countries by somewhat lax legal enforcement has been called into question. Access-to-justice concerns have helped force us to ask questions about priorities. We must ask which laws and policies are of great importance, how much enforcement do we want, and at what cost. We must consider, for example, when is it more useful to resolve a dispute than enforce a legal policy, and when the mandates of the law should take precedence.

The legacy, in conclusion, is one of a *changed politico-legal climate*, where procedure and substance are inextricably linked. That recognition of this link might lead to cutbacks in laws, regulations, and bureaucracies with a view toward a “reprivatized economy”. The costs of enforcement may be considered too great to justify the substantive benefits that laws and regulations have promised. Instead, or in addition, however, the political result may be a decision on priorities, with legal machinery tailored to assure that those priorities are respected and accomplished. Finally, there might be efforts to move further toward the equality promoted by the welfare state without relying so much on more and more law and more and more legal or quasi-legal proceedings. The movement toward informalism can be consistent with either of these possibilities. What is clear, however, is that the courts and lawyers have now been swept into discussions of political problems and their proposed solutions. Some individuals and groups may prefer the policies and approaches of Reagan and some those of Mitterrand, for example, but there is no doubt that legal policy will occupy more of this political generation’s time than it did for their predecessors.<sup>196</sup> And it appears that legal policy, whatever the political aim, will include an increasing effort to develop and use alternatives to the courts (or normal court procedures) that rely on persuasion and conciliation rather than simply on traditional “adversary” proceedings.

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<sup>196</sup> It is interesting that one of President Mitterrand’s first speeches after his election concerned his proposed plans to “rapprocher la justice du peuple français.” See *Le Monde*, June 27, 1981, at 14.