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The Florence Access-To-Justice Project: Descriptive Aspects

El Proyecto Florencia de Acceso a la Justicia: Aspectos descriptivos

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Abstract: This article presents a descriptive overview of the classic Florence Access-to-Justice Project, an important and globally recognized work published in the 70s that still has a significant influence on the world's thinking about the subject. The analysis considers not only the general report that summarizes the content of the research, and that is well known and widely circulated, but also lesser known aspects taken from all the books of the Project in the English language. The interest of the article lies in its explanation of all these more particular aspects of the work, which are very important for a precise understanding of its content and scope.

Keywords: access to justice; Florence Project; renewal waves; civil law.

Resumen: Este artículo presenta una descripción general del clásico Proyecto Florencia de Acceso a la Justicia, un trabajo importante y reconocido mundialmente, publicado en los años 70, que aún tiene una influencia significativa en el pensamiento mundial sobre el tema. El análisis tiene en cuenta no solo el informe general que resume el contenido de la investigación, y que es de sobra conocido y de amplia difusión, sino también aspectos menos conocidos extraídos de todos los libros sobre el proyecto en idioma inglés. El interés del artículo radica en la explicación de todos estos aspectos más particulares del trabajo, que son muy importantes para una comprensión precisa de su contenido y alcance.

Palabras clave: acceso a la justicia; Proyecto Florencia; olas renovadoras; derecho civil.

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Introduction

This article presents a descriptive overview of the Florence Access-to-Justice Project, an important and globally recognized work that, although it requires new reflections, still has a significant influence on the world's thinking about the subject, especially with regard to the expansion trend extracted from its renewal waves. The analysis will take into account not only the general report that summarizes the content of the research, and that is well known and widely circulated, but also lesser known aspects taken from all the books of the work in the English language, accessed from the library of the University of Perugia. The interest of the article lies in its explanation of all these aspects of the work, which are very important for a precise understanding of its content and scope.

Florence Project

Perhaps the main theoretical framework on access to justice, even today, is the Florence Access-To-Justice Project. The actions that led to the creation of the Project began in Italy, in 1971, with the International Conference on fundamental guarantees of the parties in the Civil Procedures, and were concluded in 1978.

The result was an ambitious publication, with the support of the Ford Foundation, by the European University Institute in Florence and others, containing four books, distributed in six volumes in the English language. Contributors to these volumes included lawyers, sociologists, economists, anthropologists, psychologists, politicians and thinkers in general, on various continents (Cappelleti, 1979, p. 53-60), creating what was a comprehensive study and a work that has influenced various cultures in the areas of civil law and common law, particularly the first.

Panorama of the work

Systematically, the series of the Florence Project, in its four books, as mentioned earlier, began with a general survey of Access to Justice (volume I) before progressing to a study of promising methods of reform in legal systems (volume II). It then proposes a reflection on the various issues raised (volume III). It also develops and approach regarded as innovative, related to anthropological studies (volume IV) (Cappelletti & Garth, 1978-1979a, p. XVII). A panoramic description of the work is presented below, giving a general overview of the books and the way they are organized.

The entire research was based on a comparative view and an empirical and multidisciplinary approach to the problem of Access to Rights, and, in a visibly delimited way, access to the Judiciary. As the organizers clarify, the work was prompted by the historical moment of transition from classical liberalism to the social welfare state, in which, alongside the negative freedoms, the rights of second dimension and welfare nature were introduced, authorizing people to demand positive state conducts (Cappelletti, 1979, p. 54-55). Also according to the organizers, the study has a *policy oriented* address, aiming to go beyond the library shelves in order to provide legislators, judges and administrators with data and practical models for the expansion of Access to Justice (p. 59), considered in its constitutional, social and supranational dimensions. The starting point of the project was a social problem corresponding to a requirement of modern democracy: the existence of accessible rights, including diffuse and collective rights. And its point of arrival was the search for solutions to this problem that will make the system accessible to all (p. 55).

Book I, called *Access to justice: a world survey*, contains two volumes. The first part begins with what we can call a summary of the Access to Justice movement, containing the known *general report* (Cappelletti & Garth, 1978-1979c, p. 01-124), which was translated into Portuguese and was widely circulated in Brazil. It is in this volume that, among other subjects, the known renewal waves of Access to Justice are indicated. This volume also includes questionnaires and responses from various parts of the world, aimed at gathering data and identifying common problems and solutions. The questions, which were prepared by the Florence Center of Comparative Legal Studies in 1974, relate to the costs of the machine for formal resolution of disputes and the mechanisms to reduce these costs, such as the simplification of procedures, the creation of special courts with jurisdiction for certain types of cases, and the promotion of reconciliation.

The questions also cover means of reducing the cost of resolving disputes outside the judicial apparatus, whether or not subsidized by the Government, such as compulsory arbitration in certain matters or the opening of public or private spaces for signing up voluntarily to this form of resolution. The questions also bring a calculated approach to reducing the costs of resolving certain categories of disputes, through the modification of substantive legislation, simplifying the legal rules, replacing general principles of justice with strict rules, or providing remedies that make resolution unnecessary, such as insurance in small traffic accident claims that do away with the need to define the guilty

party. Finally, the questions inquire about the mechanisms for resolving disputes involving homogenous groups and public interests, whether collective or individual, including legal advice (Cappelletti & Garth, 1978-1979a, p. 127-138). The first volume also includes responses from Australia, Austria, Bulgaria, Canada, Chile, China, Colombia, England and France (p. 143-523). The second volume received the reports of the experiences of Germany, Holland, Hungary, Indonesia, Israel, Italy, Japan, Mexico, Poland, the Soviet Union, Spain, Sweden, the United States and Uruguay (Cappelletti & Garth, 1978-1979b, p. 527-1037). It is noted that that Brazil was not included in the list of the countries surveyed.

Book II, entitled *Access to justice: promising institutions*, also consists of two volumes. Within the aims of the Project, to identify barriers to Access to Justice and investigate promising solutions from various countries to mitigate these barriers, the volumes of Book II are dedicated to a doctrinal analysis of the responses given to the questionnaires, studying the techniques and institutions that emerged (Cappelletti & Weisner, 1978-1979, p. III), including their socio-historical context.

The subjects covered range from the imposition of specific rites for resolving formal disputes, such as causes of low economic value and consumer protection, to the use of reconciliation as an alternative method in official and extra-official institutions, self-representation, and the importance of legal advice services. They also discuss the recruitment of paraprofessional judges and the role of bodies such as the ombudsman and Public Prosecutor in resolving collective conflicts in the broader sense, complemented by the commitment of private actors to the protection of these legal goods.

Thus, the first volume contains four assays (Friedman, 1978-1979, p. 03-36; Bierbrauer, Falke & Kock, 1978-1979a, p. 39-101 & Bierbrauer, Falke & Kock, 1978-1979b, p. 103-152; Kurczeswi & Frieske, 1978-1979, p. 153-427) and the second volume another seven assays (Bender; 1978-1979, p. 432-475; Bender & Eckert, 1978-1979, p. 477-487; Eisentein & Hellner, 1978-1979, p. 491-593; Taylor, 1978-1979, p. 594-682; Applebey, 1978-1979, p. 683-763; Cappelletti, 1978-1979, p. 767-865; e Johnson, 1978-1979a, p. 869-903), all of which go into further detail on the topics described.

Book III is entitled *Access to justice: emerging issues and perspectives*. Consisting of a single volume, its eleven assays address various topics. The volume evaluates possibilities and typologies of procedural reforms in the scope of Access to Justice (Johnson, 1978-1979b, p. 03-168). It reports on the relations between the judicial institution and the middle class, and how overcoming and individualistic justice can solve

problems (Calabresi, 1978-1979, p. 169-190). It studies Access to Justice under the aspect of the weighing of the cost of the reforms and the collective benefits that they bring to the productive efficiency of a judiciary institution (Busch, 1978-1979b, p. 191-256). It addresses the issue of the survival of traditional and popular justice, within a framework of modernization, focusing its analysis on third world countries such as Africa and India (Busch, 1978-1979a, p. 259-310; Saltman, 1978-1979, p. 309-340; Baxi & Galanter, 1978-1979, p. 341-386), as well as the role of the legal professions in the provision of services in the area, including in relation to a possible breach of the monopoly of the legal class (Zander, 1978-1979, p. 421-442). Finally, it goes into the topic of public interest litigation and the possible creation of services to protect these interests, by government or agencies or private actions (Trubek, 1978-1979, p. 445-494; Borrie, 1978-1979, p. 513-564).

Book IV, the last one, also consisting of only one volume, is entitled *Access to justice: the anthropological perspective (patterns of conflict management: essays in the ethnography of law*). Its proposal is to introduce an anthropological contribution to the studies, emphasizing the importance of informal mechanisms such as mediation and conciliation for resolving disputes in primitive communities. Brought to modern society, such mechanisms involve the appreciation of a coexisting justice, rather than an adversarial and strictly legal one.

The lesson of anthropology indicates the creation of simple and low-cost methods of resolving disputes, and the awareness that the written law is sometimes given over-inflated importance, and is not always a crucial component of the judicial system (Cappelletti & Koch, 1978-1979, p. VI-VII). The volume begins with an introductory essay on the theme (Koch, 1978-1979a, p. 01-16) followed by a further eight assays (Hickson; 1978-1979, p. 17-40; Arno; 1978-1979, p. 41-68; Marcus, 1978-1979, p. 69-104; Greenhouse, 1978-1979, p. 105-124; Freeman, 1978-1979, p. 125-46; Craig, 1978-1979, p. 147-170; Koch, 1978-1979b, p. 171-190; Dredge, 1978-1979, p. 191-216).

A panorama of the work is essential in order to perceive its magnitude and view it as a whole, in a binocular context. Due to the scope of the project, many of its aspects cannot be included in this article. Some of its topics for example, go into very concrete institutional and procedural issues of the national experiences. Therefore, the presentation of the central and conclusive results will be given below.

General Report and central ideas of the Access to Justice movement

The Florence Project arose out of research on the general needs, and, more especially, the needs of the Judiciary, through theoretical and practical analyses of Access to Justice in reality in the period, to be able to extend it. Although the studies include both Access to the Judiciary Power and Access to Rights, the organizers give more weighting to the first focus, related to the prospect of entry of claims in the institutionalized judicial system. Despite this, the Florentine Project does not deny the connection between this way of studying the theme of Access to Justice and that other, more extensive theme, linked to the need for the legal system to lead to fair outcomes.

This is clarified as follows, in passage converted to English by the authors of this article:

> The expression "access to justice" is admittedly difficult to define, but serves to determine two basic purposes of the legal system - the system by which people can claim their rights and/or resolve their disputes under the auspices of the State. First, the system should be equally accessible to all; second, it must produce results that are individually and socially just. Our focus here will be primarily on the first aspect, but we must not lose sight of the second. Without a doubt, a basic premise is that social justice, as desired by our modern societies, presupposes effective access (Cappelletti & Garth, 1988, p.08).

Within this proposal, the authors emphasize that with the overcoming of the Absent State *(laissez faire)*, and with the constitutionalization of welfare rights (*welfare state)*, a similar exchange operated in the concept of access to the justice system (Cappelleti & Garth, 1988, p. 09). The idea of judicial protection provided only formally, for the exclusive use of those who could access it, that was prevalent in the liberal era, came to be regarded as inadequate, making it necessary to broaden social rights and remove the traditional barriers to effective access to the Judiciary (p.10-11), based on the experience of reality and the real concerns of the majority of the population (p.10) at the historical time of the research.

For the authors of the project, the paths to Access to Justice have varied origins. Factors of an economic order are prevalent, such as the expenditure on legal costs and fees borne by the defeated party. They were also influenced by the negative valuation of cost-benefit analysis carried out by interested parties before filing small claims. The temporal element appears as a cause of discouragement of claims on tributing to the preponderance of interests on the part of the owner of resources, and forcing those without

resources to accept less favorable agreements. In addition, the options the parties have act as brakes on the litigation, because not all parties have adequate information about their rights, or the psychological disposition to taken recourse in legal proceedings. Moreover, habitual litigants have advantages over occasional litigants (Cappelleti & Garth, 1988, p.15-16). Added to these are obstacles of an organizational nature, reflected in the difficulties in mobilizing individual interests for the representation of collective and diffuse rights (p. 26-29). Finally, there are barriers of a procedural nature, such as the inadequacy of the ordinary rite for the protection of certain material situations, or the inadequacy of the traditional dispute resolution process for certain types of dispute, prompting a need for procedural reforms that could rectify these deviations (p. 69).

In an assay published in Book II, Volume II, the main problems faced by Access to Justice, in addition to the above, was summarized in six key points: "“case-load overload”, “delay”, “cost to government”, “inaccessibility for many disputants and disputes”, “lack of equity in results”, and “inferior psychological outcomes from the process” (Johnson, 197-1979a, p. 872). The classification does not consider only the barriers to entering the gates of the judiciary, but also the ineffectiveness and injustice suffered by many of those who enter (Johnson, 1978-1979b, p. 11).

Having diagnosed the barriers to Access, the authors note that the obstacles created by our legal systems are more pronounced for small claims and for individual claimants, especially the poor. They also affirm that the advantages of these systems belong, in particular, to organizational litigants, which uses the systems for their own interests (Cappelleti & Garth, 1988, p. 28). From this point on, the authors propose practical solutions to the problems of accessibility to Justice, noting that such problems are interconnected in the sense that a change to one of these barriers can impact on the others (p. 29).

They record that attempts to bring down barriers to Access to Justice originated around the year 1965, and gave rise, in the western world, to three renewal waves arranged in almost chronological sequence (Cappelleti & Garth, 1988, p. 31).

The first wave, which occurred mainly in Europe and the United States of America from the 1960s onwards, aimed to expand legal assistance for the poor, providing legal or extrajudicial consultancy and sponsorship of actions by private lawyers paid by the State (*judicare* system), or defenders and neighborhood offices maintained by the Public Authority, or alternatively, combining both models (Cappelleti & Garth, 1988, p. 31-48). This movement was intended to remove the so-called economic barriers to Access to

Justice, a problem that goes back to a trend of major industrial countries in the Nineteenth Century. The development of a modern legal system, committed to the idea of a rational and consistent body of laws, operated by formal bureaucratized institutions, occupied by trained judges and only accessible through costly professionals, ended up impoverishing Justice by moving it away from a segment of the population. It was necessary to close this gap (Friedman, 1978-1979, p. 15) buy continually increasing the advice available, raising awareness about rights, and enabling greater Access to them (Bierbrauer, Falke & Kock, 1978-1979b, p. 104).

The second wave began between 1965 and 1970, in the United States of America, subsequently extending to Europe and other Western countries. The note consisted of protecting the collective and diffuse interests emerging with the complexification of social relations, such as consumer rights and the environment. This wave faced organizational obstacles, reviewing the individualistic procedural culture and envisioning techniques such as collective actions, creating specialized regulatory agencies and expanding active legitimacy based on the figures of the private Attorney General, private lawyers of public interest, associations, and other entities (Cappelleti & Garth, 1988, p. 49-66).

The third wave, which began in the 1970s and still continues today, originated in the previous wave, and is connected to what the authors call a new approach to Access to Justice. It is articulated against the plexus of barriers in a more comprehensive way, acting on the general set of institutions and mechanisms, people and procedures used to process and prevent disputes in modern societies (Cappelleti & Garth, 1988, p. 67) The proposal includes changes in the forms of procedure, in the structures of the courts or the creation of new courts, the use of lay persons or paraprofessionals, either as judges or defenders, changes in substantive law intended to prevent disputes or facilitate the solution and the use of private or informal mechanisms for resolving disputes (p. 71).

It is worth inserting a brief aside here, within the scope of this third wave, to describe the typology in an assay found in Book II, Volume I, of the work (Friedman, 1978-1979, p. 03-36). For the author, there are, among others, two striking types of procedural reforms: those that focus on routinization, and those that strive for individualized treatment of cases.

While the first option demands of Justice the speed and efficiency of which modern society is capable, the second reserves time for each case, and often prioritizes new forms of lay justice (Friedman, 1978-1979, p. 15). By leading to greater automation,

routinization contributes to avoiding paternalism and discretion in the decision-making, functioning through the incorporation of techniques such as insurance for traffic accidents without fault, and other forms of insurance that are indispensable in welfare states. However, routinization faces the criticism regarding the cost, time, and uncertainty of the system. It only proves to be the best way when one analyzes Access by the average human to Justice (p. 17-19).

On the other hand, individual justice, which tends to be non-juridical when it comes to small causes, is governed by specific analyses of the merits of each case, giving the interested party the right to have the cause evaluated in its uniqueness as a human being. By enabling greater attention to the postulations, this option responds to complaints that justice is blind, impersonal, poorly conceived, or simply too busy to hear the parties (Friedman, 1978-1979, p. 22), but it runs the risk of criticisms of slowness and paternalism.

As we can see, the third wave has a systemic claim that covers, among other possibilities, reforms in judicial procedures in general, revision of the mode of action of judges and the specialization of procedures for some types of causes, such as the small claims courts and the neighborhood courts. In addition, it combines trends such as the imagination of executive bodies for resolving consumer conflicts, the establishment of an independent protector (ombudsman) in lawsuits of an administrative nature, and the implementation of specialized mechanisms to advise, prevent and resolve disputes related to new rights. Other options lie in alternative methods for resolving conflicts, such as arbitration, reconciliation and economic incentives for out-of-court settlements. There is also a prospect of changes to the methods of provision of legal services, using paralegal persons with various degrees of training, conceiving plans for legal assistance through agreements, or simplifying the operationalization of the law (Cappelleti & Garth, 1988, p. 76-159).

The horizon is vast. In any case, the organizers warn that the reforms to expand Access to Justice may not be universally imported without attracting criticism from all the legal and political systems. But through empirical and interdisciplinary research, it is necessary to diagnose the need for changes, study the compatibility of the measures, and monitor their implementation. Moreover, there is a risk that reforms aimed at introducing modern, low-cost and efficient procedures could violate the typical guarantees of the legal process, particularly those of the judge's impartiality and of the contradictory. But it is inconceivable to admit that pressure on the Judiciary resulting from the expansion of

Access to Jurisdiction would violate these basic pillars of a fair trial (Cappelleti & Garth, 1988, p. 162-164).

Conclusion

As final considerations, following an essentially descriptive presentation, we finalize this study with a timely note: the interpretations, not uncommon, appear not to be as precise, in that the Florence Access-to-Justice Project restricts its focus to Access to the Judiciary, or defends an unconditional extension of this form of Access as a panacea for the vicissitudes of a welfare state that is not implemented. Although the majority of approaches prioritize Access to Justice through the legal process – and the focus is clearly on removing barriers to the judicial route – there is an underlying concern throughout the entire work, albeit an embryonic one, with broad access to rights and with the interactions between both forms of Access taken together (Friedman, 1978-1979, p. 06).

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