

Access to Justice and Sentencing Realities for Marginalized Poverty: The Systemic Biases within the Criminal Justice System

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Access to justice remains a unique concept that remains pertinent in society throughout history. Whether there has been a recent development to the sentencing regime within Canadian society or legislative reform that promises to get tough on crime. Access to justice often comes at a price, of how much people can pay to defend themselves against the justice system.

The sentencing regime of the Canadian justice system does recognize the inherent biases that have crystalized over the years. One example of this is displayed in section 718.2(e) of the *Criminal Code*:

“all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders”. (1)

Alternative measures other than imprisonment has shifted in its meaning over the years. Ideally this could range from programming or counselling, a fine, mediation or community service work.

Another key issue arises where social inequality is prevalent in the justice system. Reality of non-economic and economic costs of the system are considered barriers to actually accessing justice, meaning that procedural and substantive equality can actually be hidden behind a barrier. (2)

Another interesting turn in how access to justice can be universal raises the question of accessing Charter justice. “The difficulties experienced by most people in gaining access to the courts are generally acknowledged to be at crisis level”. (3) The central issue is how does one access that justice or in turn access the legal services that one needs. (4)

Funding is the number one barrier to the legal system and has a direct negative relationship with how the legal system changes over time. “The lack of stable funding has turned Canadian justice system into an *ad hoc* approach to rights advocacy, placing incredible pressure on individual lawyers and groups. It tends to inhibit the development of comprehensive litigation strategies”. (5) Realistically this creates a significant risk within the justice system. Individuals who do not qualify for Legal Aid but do not make enough money to hire a lawyer, those individuals within the gap or middle class have less options.

Access to justice has become a critical component in the justice system. Individuals seeking a Charter challenge often do not have the financial means to bring claims to court, or to see the claim through to the Supreme Court of Canada. In the limited number of times an access to a section 15 claim has been made, the Court frequently ignores equality claims or often finds against equality rights. (6)

Two areas that stand in the way of accessing the justice system relate to standing and the costs associated with litigation. (7) The truth is “access to justice is a way of describing a major goal of our legal system, one that is informed by but not entirely defined by the *Charter*”. (8) This means to bring a typical claim through the court system, it has become a norm for Public Interests groups

to bring a Charter challenge. Typically, the rules relating to standing deter public interest litigation because such cases are perceived as frivolous with an inadequate foundation to bring such a case. (9)

The equality section of the Charter was thought to be a promise of alleviating inequity and creating fairness in society where other avenues have created injustices. Unfortunately, Charter litigation is an expensive process that has created greater divides in individuals being able to access equality guarantees. There exists some non-profit groups such as the Court Challenges Program that provide means in which individuals can challenge whether their equality rights have been infringed by way of funding of those running the Court Challenges Program. The Court Challenges Program as a methodology to alleviate the inequities will be analyzed later in greater detail. To understand the Charter properly, a historical analysis of the evolution of how the Charter has progressed over the years, as well as how the changes to the jurisprudence has led to a complex understanding of rights.

Beyond cynicisms, lack of funding, or no funding, something significant still needs to happen to the justice system to adequately address the access to justice issues Canadian society faces. Those individuals who are marginalized are again pushed to the back burner and are marginalized further because there is no band-aid solution. It becomes essential and necessary for our justice system to be remodeled with wide ranging access to justice as the focal point.

1. *Criminal Code* s 718.2(e)
2. Nikki Kumar (2005) "Critical Comment: Social Inequality and Youth Sentencing" 19 Windsor Rev Legal & Soc Issues 131
3. Carissima Mathen (2009) "Access to Charter Justice and the Rule of Law" 25 Nat'l J Const L 191.
4. *Ibid.*
5. *Ibid.*
6. Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63:1 SCLR 261 [Ryder, "Strange Double Life"].
7. Robert J Sharpe, "Access to Charter Justice", online: (2013) 63:1 SCLR 1 <<http://digitalcommons.osgoode.yorku.ca/sclr/vol163/iss1/1>> at 3 [Sharpe, "Access to Charter Justice"].
8. Hughes Patricia (2011) "Defining Access to Justice: The Charter and the Courts and the Law Commission of Ontario" 29 Nat'l J Const L 119.
9. *Supra note 7.*