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Access to justice: a dynamic concept

Mies Westerveld, Bernard Hubeau & Ashley Terlouw

This special issue is dedicated to the progress that the theme of 'access to justice' has made in the past 50 years. Access to justice was conceived – or rediscovered – in the early 1960s as a means of demonstrating that inadequate access to justice leads to or reinforces inequality and as a signal to initiate social change.
Although much has been written about access to justice, even today there is no consensus regarding its exact meaning. We have therefore provided our own interpretation of the concept, distinguishing three dimensions: access to the law, which represents the possibility for people to realize their legal rights irrespective of their personal status, power, knowledge, or income; access to courts, which implies the right to a fair trial with expert representation when and where needed; and access to the possibility of achieving 'justice' outside the existing body of law.
We asked various authors to reflect on the relevance of access to justice in the current rule of law and on the question of whether access to justice remains unequal. The starting point for analyzing these questions are the contributions from *Hubeau* and from *Currie*, who – both in their own way – discuss the emergence and development of public awareness of access to justice, as well as inquiry into the social reality surrounding access to justice and the means of increasing it, and who give their views on the ongoing justice debate. An important outcome of this debate is the conclusion that citizens attach less value to the 'realization of their rights' at the predominantly legal level, than to achieving a good solution for their legal or social conflict. These solutions do not always go through the traditional legal channels, nor do they always correspond to the 'correct' outcome according to positive law.
Cohen & Clarke then discuss the potential of the Internet and digital tools for access to justice. They conclude that access to justice is going well and that it is only set to improve in the future because, in short, citizens are better informed than before and they can be offered more possibilities to realize the solutions themselves which are encapsulated in private law. These possibilities are also in line with the wishes of the citizens themselves, whose own solutions generally suit them better than litigation or settlements that are negotiated for them. On the other hand, online tools, however consumer-friendly they may be, do have their limitations in achieving access to justice. As the authors put it so aptly: not everyone is able to swim along with the tide of digitalisation. And it may very well be that among this group one finds those who need 'justice' the most. What's more, online tools for access to justice may even put up other barriers, as they give the impression that justice or legal answers are no more than a simple do-it-yourself menu. But that is something that only time will tell.
The final two contributions to 'access to justice from a general perspective' centre on equal access to the law. These contributions discuss not only the realization of

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rights but also standards that are not always made explicit, such as 'justice' and 'equality'.
Terlouw & Westerveld discuss the allocation of responsibilities to the key players in realizing justice for citizens: the state, the judiciary, and legal-aid lawyers. An important conclusion from their contribution is that interest in solutions outside the appropriate legal channels remains strong, perhaps even more so than when *Cappelletti & Garth* analyzed the approach to access to justice worldwide. This interest is presented in many countries as being 'good for citizens', although it is also motivated by the desire to lighten the load on the judicial system.
Hoevenaars describes the way in which the EU court has intervened in national legal systems consistently from the perspective that justice is here for citizens instead of the other way around. This approach fits within the third dimension of access to justice: judicial lawmaking outside the existing legal framework. Although a link will always need to be maintained with a rule of law (also at the European level), in this instance going outside the bounds of law concerns the *national* rule of law.

Going beyond the more generic considerations, access to justice is discussed from the perspective of various branches of the law. We have divided these analyses into two categories, with the caveat that it is not always possible to classify everything perfectly under the headings: 'citizens in need of solutions' and 'citizens in need of protection'. It is not wholly coincidental that the jurisdictions of the former category predominantly concern private law and that of the latter primarily concern conflicts between citizen and state. But, again, this is not a black and white matter. Disputes are also conceivable in private law conflicts in which the weaker party (the citizen as a one-shotter) requires protection against the more powerful repeat player.
In this respect, *Moons* (rental law) examines the limitations of paper rights for realizing justice and assesses the problem that citizens, for whom rights are written, are unaware of those rights. We would like to mention here that the most important conclusion from his contribution is that preventive law in this legal field is probably more effective than access to courts.
Loos discusses the possibilities of recourse for citizens when they have made a bad bargain or have been duped by the manufacturer. Lack of familiarity with rights once again emerges as a major obstacle in Loos's discourse, although he couples this conclusion with specific recommendations to rectify this problem, which are in line with the observations of *Cohen and Clarke*. Another major obstacle on the road to realizing justice is the costs associated with litigation, both for lodging a claim and for legal aid. This poses a serious problem for access to justice, particularly in cases where the plaintiff is the consumer. As more citizens fail to take action, even when they have the law on their side, manufacturers are increasingly tempted to ignore complaints altogether. In order to rectify this, Loos names the European Small Claims Procedure as good practice, which offers a low-threshold, inexpensive means of realising consumer rights and reprimanding negligent manufacturers.

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Under 'health care', *Hendriks* discusses the position of patients in relation to health care providers, as well as the position of health care providers themselves. Both elements are relevant to the theme of access to justice: citizens/patients have an interest in good and effective health care and in accessible avenues for complaining or talking to health care providers whenever they fall short. By definition, health care providers operate in an area that is sensitive to complaints: doctors are not able to 'deliver' health, and if something goes wrong, someone must be to blame. Hendriks concludes that patients in the Netherlands have many avenues for complaining, but that these were never placed in the context of access to justice. The landscape of access to justice therefore looks much more like a jungle than a sign-posted park. For health care providers, the situation is even more precarious. Their role in the legal system is limited to that of defendant, and their ability to defend themselves against accusations, which may be made public, is limited by their duty of confidentiality. This too involves a gap in access to justice, albeit of a different order than in the traditional sense. Indeed, health care providers are not the first to come to mind in the context of a lack of access to justice. If, however, 'right' is also taken to mean the right to defend oneself against unjust allegations or outright slander, e.g. via social media, then this subject fits well in a modern interpretation of the concept of access to justice.

For the 'citizens in need of protection' category, the themes of social security/social welfare and legal aid for asylum seekers were selected.
Paz-Fuchs places the first theme in the context of legal realism and identifies various factors of the British legal system that stand in the way of achieving justice. In doing so, he approaches the theme from the perspective of a concept of justice positioned above positive law. This may partly be why his conclusion is the most pessimistic. He states that *Cappelletti and Garth* were too optimistic at the time in their expectation that a trend of enhancing access to justice mechanisms would emerge. In many ways, that trend has reversed. And yet, his contribution does not finish on a wholly gloomy note. Perhaps, he concludes optimistically, desperate times will lead to interesting responses, which will reverse the swing of the pendulum.
Butter discusses her research into the application of the right of asylum by legal-aid providers in England. In particular, she tackles the question of what the existence of a test that forces legal-aid providers to help the government consider the 'merits' of a particular asylum application means for the professional practice of these legal-aid providers and, by extension, for the asylum seeker's access to justice. Interestingly, her contribution demonstrates how the legal-aid provider's method of professional practice influences the asylum seeker's access to justice. A second interesting conclusion is that the existence of a merits test as a precondition for financing the legal aid increases the likelihood that legally contestable asylum policy remains undisputed. Butter places this element in the context of the third dimension of access to justice: an expert and creative legal-aid provider can activate rights that were not clear or recognized by the law before (law shaping or law reforming legal aid).

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What lessons can be drawn from these exercises? We would like to highlight four of these. For the average citizen – not uneducated, not particularly disadvantaged – access to justice is quite reasonable. The possibilities for receiving what he/she is entitled to or achieving suitable compromises have increased. However, 'getting justice' is becoming more expensive and this can act as an impediment. This latter aspect applies *a fortiori* to middle-income citizens and to small and medium-sized enterprises. For them, the proposition that justice is expensive remains undiminished, particularly when their own solutions are unsuccessful and they have to call on legal aid.

Receiving alternative forms of justice, such as mediation or alternative dispute resolution (ADR), can contribute to the need for citizens to come up with good solutions for themselves and help reduce the cost issue surrounding public litigation. However, a number of basic values for public dispute resolution will also need to be safeguarded for such 'paths to justice'. A creative application of the concept of 'fair trial' in the context of these alternative paths could also possibly help safeguard these basic values and perhaps, in doing so, reduce the gap between supporters and opponents of these alternative forms of dispute resolution.

For those citizens who are in the disadvantaged areas of society, access to justice remains a concern. Here is less cause for optimism, and attention is still required to prevent social inequalities from increasing and to prevent justice from reinforcing this, rather than playing a corrective role. The same applies to areas of justice that come up less often in mainstream discourse on access to justice. It cannot hurt to emphasize once again that justice is also intended for social outsiders, such as criminals, recidivists, the mentally disturbed, the homeless, and asylum or fortune seekers. It is precisely these people who need protection through justice against, on the one hand, government bodies who are keeping an increasingly tight grip on gateways and purses and, on the other hand, 'fellow' citizens who see their rights eroded, or fear as much, or who are simply more apprehensive about people who are 'other'.

In the area of access to justice, the factors of 'power' (justice as a countervailing power) and 'social justice' (justice as a corrective instrument) are constants for both groups. In line with the theme of 'social justice', the observation of Charles M. Schultz (the spiritual father of Charlie Brown) is perhaps fitting here: "Security and happiness cannot be taken for granted; they are values that need to be fought for time and time again".

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