

PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/151752>

Please be advised that this information was generated on 2018-04-24 and may be subject to change.

EDITORIAL

How to look at access to justice?

Bernard Hubeau, Ashley Terlouw & Mies Westerveld

In this special issue of 'Recht der Werkelijkheid', the ever important theme of access to justice is discussed. The notion of access to justice has changed over time due to changes in the target groups and in the role of the legal professionals but also due to developments in ideas about the concept. Debates on access to justice are significantly influenced by the actors inside and outside the justice system.

We distinguish two positions in these debates. The first is the optimist view: the evolution of the concept offers opportunities. The average justice seeker is better informed, legal knowledge is more easily accessible, and the Internet has facilitated the birth of national or even global knowledge groups. The second is the pessimist view: the Internet/network society creates other types of outsiders. This is enhanced by (false) presumption of self-preservation: not every justice seeker is able to stand up for his or her rights.

Access to justice is a broad criterion. For this issue, we define access to justice as encompassing access to the law, access to the court, and access to a just and fair solution.

Access to the law irrespective of personal status, power, knowledge, or income presupposes knowledge about the rights that the law grants and of the possibilities to claim these rights.

Access to the courts includes all elements of a fair trial and effective remedy (Articles 6 and 13 ECHR, Article 47 EU Charter) and assumes that this access is financially affordable.

These first two elements of the concept of access to justice stand for the ability to achieve justice *within* the existing body of law.

Access to a fair and just solution implies the possibility to end a situation of conflict in an acceptable way for the persons concerned. This type of justice can very well be reached outside the law and the legal institutions and actors. Furthermore, a fair solution does not necessarily mean a fair solution according to the law. It can also concern a solution according to rights that are claimed but are not yet recognized by law. A pertinent example of this type of situation is the right of access to the EU claimed by migrants trying to cross the Mediterranean or of the right to reception (bed, bad, and bread) claimed by illegal residing migrants. Another example would be that a judge can give an interpretation of one of the fundamental social rights, such as the right to housing, which opens new horizons for tenants. Furthermore, access to justice does not necessarily mean that the person seeking justice is fully confirmed in what he sees as justice.

Bernard Hubeau, Ashley Terlouw & Mies Westerveld

The question of the accessibility of justice and law appears to be a recurrent public and social problem, which has consistently been on the political agenda for a few decades in most of the Western democracies. Sometimes it is a major issue, often it is routine, and there are a lot of periods of 'reformulation' or 'redefinitions' of the various aspects of the problem. Central evolutions concern the relationship between the State, the legal professions, and the non-for-profit sector. Questions which ask for a political answer are 'how do we deal with costs and financing; what is the orientation (individualistic or collectivistic; justice to some or justice to all); and what is the role of the legal professions?'

This special issue is divided into two parts.

Part I deals with old and new issues of access to justice. In this part, access to justice is placed in a historical and in a future perspective. What are the responsibilities and function of the different 'carriers' of access to justice? Have they changed, in what way, are they truly 'carriers', or are they obstacles to access? What is the influence of Europeanization and digitalization? In what way has the Internet changed the central issues of access to justice?

In Part II, the issue of access to justice is approached from the perspective of different legal fields. Traditionally the access to justice debate tends to concentrate on citizens in need of solutions, for instance, citizens with problematic debts, or involved in a conflict with their employer or landlord. This approach does not touch all aspects of access to justice, however. Outside this realm, one finds citizens in need of protection, predominantly from the State, such as suspects of a criminal offence, citizens in need of social assistance, or refugees and asylum seekers. For this reason we have made a subdivision of the several contributions into issues of 'solutions', such as Rental law, Consumer Law, and Health Care and 'citizens in need of protection', such as Social Security and Asylum Law.

Although this distinction is arbitrary: asylum seekers are also in need of solutions and consumers also need to be protected, we aspire to make clear with this distinction that there is a difference between seeking access to justice when being in conflict with a fellow citizen or private organization and seeking access to justice in a conflict with the State. For one thing, conflicts with the State are not easily included in problems that both parties want to be solved. One could even regard them as a three-party conflict: the citizen confronted with the law, the State as actor, and the collective of citizens in name of whom the State is deemed to act.

This work hopes to offer the reader an overview of the richness of the literature about access to justice, insight into how the concept and the discussions about access to justice have developed, a view on new questions and problems the subject opens up, and a stimulus to elaborate on the suggested solutions.

Finally, we would like to express our gratitude to Hannie van de Put for organizing the layout of this special.