

ACCESS TO JUSTICE AS HOPE IN THE DARK IN SEARCH FOR A NEW CONCEPT IN EUROPEAN LAW

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Abstract

This study elaborates on the concept of “access to justice” and analyses it in the framework of European law.² It complements existing research in the field of EU law by offering a broad overview of the concept in European human rights law and in international law. This exercise is necessary to build a new and better concept in European law. The author argues that the concept commonly used in EU law is not broad nor comprehensive enough as access to justice is understood in a limited way as equivalent to access to courts and effective judicial remedies. It is argued that a new concept is needed in European law which goes beyond formal aspects of procedural law and reflects better all stages of the justice process, such as awareness, information, rights and remedies. A second necessary dimension is to move from formal justice towards substantive justice and aim for legal and judicial outcomes that are just and equitable, thus reconciling law and justice together. By providing a higher firm standard that EU and Member States must comply to we will serve the real needs of citizens and the true purpose of the law. Revealing the shortcomings of the concept in EU law is not an end in itself, the ultimate aim of this contribution is to pave the way for the construction of a new theory and methodology on access to justice in Europe.

1. The lack of common concept. The imprecise definition of “access to justice“ in EU/EEA law

There is no common concept of “access to justice” in European Union (EU) law nor in EEA law. For lawyers, academics and specialists working in the field, access to justice is usually understood as a vague notion referring to how rights are applied and enforced in the European Union legal system, both at national and European level.³ Due to a historic lack of definition in the EU Treaties, a common understanding was forged in EU law. The common understanding being so that access to justice is equivalent to access to courts and/or the provision of an effective judicial remedy. This construction usually refers and focuses on judicial mechanisms and civil procedural law to enforce European rights both before national courts and the Court of Justice of the European Union (from now on ECJ), without connecting them systematically to other administrative remedies existing at national and EU level and/or to other mechanisms offered by international organisations such as the Council of Europe and the United Nations. The common understanding also tends to exclude from the scope of the concept the area of criminal law which has been traditionally outside the influence of EU legislation. Last but not least, most European law actors would consider legal aid intrinsically related to access to justice.

The ultimate reason for this lack of common concept is that the expression ‘access to justice’ has not commonly used as legal terminology in European law. The expression “access to justice” is neither expressly used in, for example, the European Convention of Human Rights (from now on ECHR) nor in the EEA Agreement.

However, the Treaty of Lisbon, has for the first time in the history of EU law constitutionalised the concept by introducing a specific reference to access to justice. The Treaty on the European Union (TEU) mentions the term “justice” in several of its provisions and Treaty on the Functioning of the European Union (from now on TFEU) which entered into force on 1 December 2009 offers a general legal basis for the EU to legislate in the field of (access to) justice in Article 67.1 of Title V – Area of Freedom, Security and Justice of the TFEU (ex Article 61 TEC and ex Article 29 TEU). This provision reads that:

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² When the author uses the generic term “European law“, she is referring to EU law, European Human Rights law (ECHR) and European Economic Area law (EEA law). When differences between these legal orders are emphasized, a proper distinction is made referring to one or another.

³ The concept, theory and methodology on access to justice was done by Mauro Cappelletti in the 1970’s - 1980’s at the European University Institute in Fiesole, see Cappelletti, M. and Garth, B. (eds.) (1978) *Access to Justice*, Milan: Sijthoff and Noordhoff. More recently see Francioni, F. (ed.) (2007) *Access to Justice as a Human Right*, Oxford University: Oxford University Press (OUP), also a professor of law at the European University Institute.

“The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”.

An its Article 67(4) refers specifically to the concept of access to justice by stipulating that:

“the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”

Along with these articles in the main EU Treaties,⁴ the EU Charter of Fundamental Rights (from now on EU CFR) which has gained the same legally binding status as the EU Treaties, provides for the “right to an effective remedy and to a fair trial” (Article 47 EU CFR).⁵ The third paragraph of Article 47 specifically refers to legal aid as an element of access to justice, but the term “access to justice” which inspires the article in its entirety is not defined nor explained.⁶

While the EU CFR summarises all the particular rights covered in the common understanding of ‘access to justice’ in European law, both in EU law and in European Human Rights Law (ECHR); the terms “effective remedy” and “access to justice” are used as equivalent and interchangeable:⁷

- the right to an effective remedy before a tribunal;
- the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law;
- the right to be advised, defended and represented; and
- the right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

In European law (both in EU law and in EEA law), for the time being, a common concept of “access to justice” is lacking.⁸ It is an expression used without a precise definition. The common understanding includes terms that at times are used interchangeably or that cover particular elements of access to justice, such as access to courts/tribunals, effective remedies or the need of a fair trial. In short, it tends to be identified with the judicial defence of rights. This is also applicable, to a certain extent, to the specific field of European equality and non-discrimination law.⁹

⁴ Other important provisions of the new EU Treaties. Art. 2 TEU mentions justice as one of the main values of the European Union. Article 3 TEU which lists the objectives of the EU, adds that the Union shall offer its citizens an area of freedom, security and justice without internal frontiers [...]. and that the Union shall combat social exclusion and discrimination, and shall promote social justice and protection [...]. It is for the European Council to define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice (new Article 68 TFEU). In order to comply with the strategic guidelines defined at the highest political level, further legislative action at European level is needed. It is now established in Article 81.2. e) that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: e) effective access to justice”. It is for the European Commission to draft the proposals to be adopted by the Parliament and Council, according to the ordinary procedure. Article 81(2)(f) TFEU refers specifically to the “elimination of obstacles to the proper functioning of civil proceedings”.

⁵ The status of CFR is provided in Article 6(1) TEU. See the Explanations relating to the Charter of Fundamental Rights of the European Union, OJ C 303/17 of 14 December 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF>.

⁶ CFR, Chapter VI, Justice, Article 47, Right to an effective remedy and a fair trial: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

⁷ See the Explanations relating to the EU Charter of Fundamental Rights (n. 14), p.30: where the relevant case law (ECtHR, *Airey v. Ireland*, No. 6289/73, 09 October 1979) of the European Court of Human Rights (ECtHR) is referred to.

⁸ The EFTA Court has ruled in a judgment of 27 December 2010, case E-5/10 that access to justice is an essential element of the EEA legal framework, as evidenced by the eighth recital in the Preamble to the EEA Agreement which stresses the value of the judicial defence of rights conferred by the Agreement on individuals and intended for their benefit. (para. 26 and 27) (case not yet reported). See also from the EFTA Court case E-2/02 *Bellona*[2003] EFTA Court Report, 52 at paragraph 36 and Case E-10/04 *Paolo Piazza v Paul Schurte* AG, 2005 EFTA Court Report, at paragraph 76.

⁹ Non-discrimination is a special area of EU law where access to justice has developed the most. See Méndez Pinedo, M. E. (forthcoming 2011), “Access to justice in European (non-discrimination) law: A critical view”, in *Equality into Reality*, Reykjavík: University of Iceland Press.

Figure 1 offers a schematic overview of the terminology used in EU law which reflects the common understanding of the concept.¹⁰

Figure 1: Access to justice and related terminology



Source: FRA, 2010

As a result of a lack of common definition of the concept, access to justice is usually constructed in general EU law as equivalent to access to courts, effective remedies and fair trial on the basis of literal provisions of several international and European sources of law.¹¹ By extension, in all 27 EU Member States, access to justice tends to be built around the following typology of elements:¹²

1. the right to effective access to a dispute resolution body;
2. the right to fair proceedings;
3. the right to timely resolution of disputes;
4. the right to adequate redress;
5. the principles of efficiency and effectiveness in European procedural law.

The consequences of this restrictive interpretation of the notion of access to justice are visible in the European legal order. Both the European legislator and the European judges tend to use a narrow and outdated formal construction of access to justice as referring simply as access to courts and effective judicial remedies. The European legislator has adopted the approach to deal horizontally with the topic mainly through justice and civil law, based mostly on the mutual recognition of national civil procedural laws on selected cases where a European dimension exists. From a substantive point of view, due to its limited legal basis in the EU Treaties up to the Lisbon Treaty, in reality the EU *acquis* in the field of access to justice has followed a vertical and fragmented approach focused on specific sectors where the competence of the EU to act was clear in an internal market context (thus we find scattered provisions aimed at increasing access to justice for areas such as consumers, environment, non-discrimination and civil justice, preferably on cross-border disputes).¹³ The EU has not yet justified on a conceptual level why some European rights –i.e. non discrimination rights- deserve better access to justice provisions than others.

¹⁰ Fundamental Rights Agency (FRA) (2011), *Access to Justice in Europe: an Overview of challenges and opportunities*, Luxembourg: Publications Office of the European Union.

¹¹ See the right to a fair trial as well as the broader right to a remedy contained in Articles 6 and 13 ECHR; Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (ICCPR); and Article 47 of the Charter of Fundamental Rights of the European Union (CFR). Studies usually refer to 'civil' rights as protected by Article 6(1) of the ECHR and Article 14 ICCPR.

¹² Fundamental Rights Agency (FRA), Country thematic studies on access to justice. See comparative overview and 27 national studies on key elements of access to justice produced by the EU Fundamental Rights Agency's network of legal experts FRALEX. These reports analyse the judicial systems in the 27 EU Member States according to the abovementioned typology. All FRA projects available at: http://fra.europa.eu/fraWebsite/research/projects/proj_accesstojustice_en.htm; and all FRA publications at:

http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.

¹³ See, for instance, Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ [2003] L026/41; Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters OJ [2001] L174/25; Council Decision 2005/371/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters OJ [2005] L124/1 and Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ [2008] L 136/3.

In a parallel way, the judicial protection and effectiveness of rights at European level have also been affected by the limitations of the current European model lacking a proper concept and theory. While the case-law of the CJEU has recognized the right to effective legal protection before national courts on the basis of the requirements of Articles 6 and 13 ECHR and the right to obtain an effective remedy before a competent court (principles of equivalence and effectiveness together with liability for breaches of EU law), other elements of access to justice such as information, legal awareness and oversight have been totally forgotten in the case-law of the court.

As a result of the lack of a proper concept, legislation and case-law are inherently handicapped and citizens rights are diminished in practice. No one can deny that many barriers to access justice still persist today in Europe: lack of information and awareness (competence to recognise and pursue a claim), the excessive cost of litigation, necessary expensive litigation for small claims which do not necessarily involve less important legal principles, undue length of procedures, unbalance of financial resources between private parties and organisations, and, specially worrying for consumers, environmentalists and public health advocates, lack of standing for collective, general or diffuse interests.¹⁴ All these barriers are of a varying nature and can be ‘operational’ or ‘structural’.¹⁵ Barriers to justice affect diverse groups of people in different ways. It is now accepted in comparative and international law that access to justice must tackle all kind of barriers, not only those appearing at the latest stage, and should aim for substantive equality in practice.¹⁶

Last but not least, the narrow construction and understanding in the European legal order of the concept has led to a limited development of a real EU policy on access to justice, which is now falling behind current standards and trends in international and comparative law. While the European Council has outlined several justice priorities at the summits held in Tampere (1999), The Hague (2004) and Stockholm (2009) promising a “Europe of law and justice”, the understanding remains that priority should be given to civil procedural law and judicial defence of rights, that is to say, to mechanisms that facilitate access to justice so that people can enforce their rights (accessing courts) throughout the Union.¹⁷

2. A similar imprecise concept of “access to justice“ in European human rights law (ECHR)

As EU law, the ECHR contains provisions on fair trial and the right to a remedy which are considered by many filling the scope of the concept of access to justice (Articles 6 and 13 ECHR). Lacking a proper definition of the concept of “access to justice”, European human rights law is based therefore on the same formal and restrictive concept of judicial application and enforcement of individual rights once these rights have been infringed. However, a different European organisation, the Council of Europe, established under the ECHR, has done extensive research on access to justice promoting through research and knowledge a better understanding of many different issues falling under this topic. In fact, the Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ) has developed a series of studies which study the concept and praxis in the different legal systems of the 47 Member States belonging to the Council of Europe.¹⁸ The research done by this institution shows some interesting conclusions. It is now acknowledged that all the goal of improving access to justice (understood as a right to a remedy and a fair trial) is not problematic in Europe as a concept or a doctrine. Rather, it is at the stage of implementation that difficulties arise. Access to justice problems often require that all practitioners, professionals of justice and citizens look at a complex interplay of different factors all contributing in one way or another to creating obstacles between those seeking justice and the courts.

¹⁴ Classification done by the author on the basis of the work of Cappelletti and Garth, op. cit. n 2.

¹⁵ Barriers to justice can be grouped into two categories: operational (‘related to the efficiency and effectiveness of the administration of the justice system’) or structural (which reflect ‘problems that have to do with the very basic form of societal organizations’). See Abregu, (2001), ‘Barricades or Obstacles: The Challenges of Access to Justice’ in Van Puymbroeck (ed), *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century*, Washington: World Bank, at pp.69-85.

¹⁶ A good recent analysis on European and international standards on access to justice can be found in: McBride, J. (2009) *Access to Justice for Migrants and Asylum Seeker sin Europe*, Strasbourg: Council of Europe Publishing, see specially pages 5-7.

¹⁷ FRA (2011) op. cit. n 10 at p. 20.

¹⁸ See European Commission for the efficiency of justice (CEPEJ), (2008 – 2006 data), *European Judicial Systems: Efficiency and quality of justice*; as well as CEPEJ (2007), *Access to Justice in Europe*, CEPEJ Studies No. 9. This institution has collected judicial data from all Member States, showing all shortcomings and new trends, and is thus promoting a more homogenous data collection at national level. See the comprehensive report, *European Judicial Systems (2008-2010)* which provides data, for instance, on public expenditures on courts and legal aid, types of legal aid in criminal cases, number of cases involving legal aid, conditions for granting aid, systems of court fees, length of procedures, availability of legal representation in court, and execution of court decisions. See also CEPEJ (2010) *European Judicial Systems (2008-2010)*, Strasbourg: Council of Europe, available at: www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp.

By offering empirical data, this organisation looks into a number of these factors, the way they inter-relate, and illustrates how the different justice systems in Europe are trying to address them.¹⁹ Together with the work of the CEPEJ, the Committee of Ministers of the Council of Europe adopted a recommendation in 2010 on effective remedies to fight against excessive length of proceedings which is a specific problem in some European countries.²⁰ The Recommendation makes reference to all relevant case law of the European Court of Human Rights (ECtHR) located in Strasbourg and calls on all Member States signatories of the ECHR to provide greater access to justice. Also under the Council of Europe, it is worth mentioning the Magna Carta of Judges adopted also in 2010 which refers to judges and judicial systems and constructs access to justice as one fundamental pillar of the rule of law in Europe.²¹

3. The development of a broader concept of “access to justice” in international law (United Nations and World Bank)

A similar approach to EU and ECHR law is followed by the sources of international law which, once more, reflect access to justice as equivalent to access to courts and put strong focus on judicial remedies. The Universal Declaration on Human Rights (from now on UDHR) states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”²² Other classic sources of international law offer similar concepts pointing in the same direction.²³ However, more recently, we find a better and broader concept in other international instruments. In the first place, we must mention the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.²⁴

This Convention defines access to justice as “access to a review procedure before a court of law or another independent and impartial body established by law” (Article 9(1)). The public has the right to judicial or administrative recourse procedures in case a contracting party violates or fails to adhere to environmental law and the convention's principles. And, in the second place, we must not forget the 2006 Convention on the Rights of Persons with Disabilities, as the notion of effective ‘access to justice’ is now defined in a broad manner in a United Nations treaty, calling for flexibility in procedural law and training.²⁵

¹⁹ All CEPEJ studies are available at: www.coe.int/t/dghl/cooperation/cepej/series/default_en.asp. The work done by this commission is so relevant for the EU that the European Parliament, in its resolution of 19 May 2010 (2009/2241(INI)) on the accession of the Union to the ECHR, called on the Union to become member of the CEPEJ.

²⁰ Council of Europe, Recommendation CM/Rec (2010)3 of 24 February 2010. This Recommendation calls all 47 Member States to ensure mechanisms that identify excessive length of proceedings; to provide effective remedies for a trial within a reasonable time; to grant compensation, including nonpecuniary damages; and to consider alternative non-monetary redress where trials have run for an excessive length of time, such as reduction of sanctions.

²¹ On 18 November 2010, the Consultative Council of European Judges (CCJE, an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, composed exclusively of judges, adopted the Magna Carta of Judges (Fundamental principles). This Magna Carta reiterates, among other issues, the fundamental criteria of the rule of law, the independence of the judiciary, access to justice, and the principles of ethics and responsibility in a national and international context. For the text, see <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJEMC%282010%293&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>

²² UN General Assembly, Universal declaration of human rights, Resolution 217 A(III), UN Document A/810 at 71 (1948), Article 8.

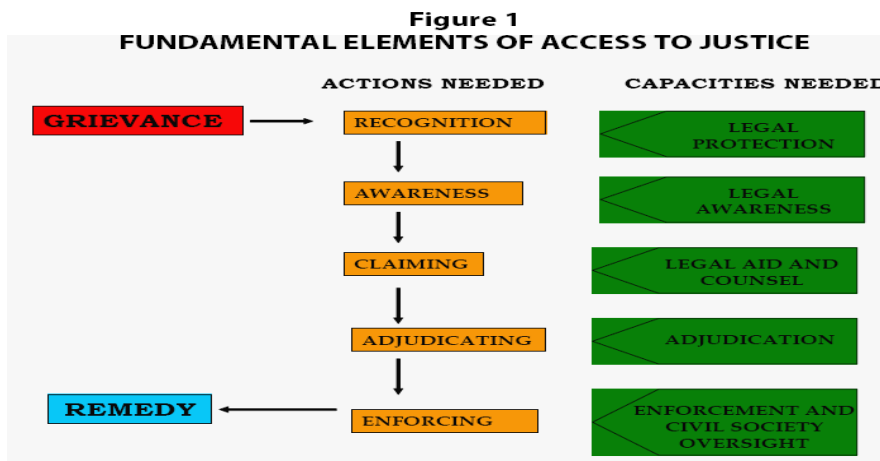
²³ The International Covenant on civil and Political Rights (ICCPR) refers in a similar way to an “effective remedy” (Article 2(3a)) for all the rights in the convention and further guarantees the right to “take proceedings before a court” (Article 9(4)), the right to a “fair and public hearing” (Article 14(1)), and the right to be tried without undue delay (Article 14(3c)). At the international level the United Nations Human Rights Committee (UN HRC), since its establishment under the ICCPR, has led the way among the UN treaty bodies on interpreting concepts related to access to justice. See for example UN HRC, General Comment No. 32 (n. 7), paragraphs 8-13.

²⁴ This is a Convention of the UN Economic Commission for Europe (UNECE) focused on transparency and accountability which links human and environmental rights. The concept of access to justice is referred to in the title, the preamble and in Articles 1, 3, 9 and 10. According to this concept, positive obligations are imposed upon the States parties. The most important feature of the Convention is that it establishes quite firm parameters and standards which must be satisfied in order to fulfil the States’ duties and grant adequate enjoyment of the right of access to justice for individuals and the general public.

²⁵ Article 13 of the Convention places an obligation upon states to ensure equal access to justice to persons with disabilities: “1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

These instruments will be very useful to develop a broader concept of access to justice in European law as they have been incorporated into the EU legal order. While the definition of the concept of “access to justice” is developing in the field of international law, it relies greatly on a formal consideration of judicial protection of individual rights. However, other international organizations such as the United Nations Procurement Division (UNPD) and the World Bank have contributed greatly to the development of the concept through study, research and policy-making. Some important documents produced by these organisations offer a more sophisticated approach taking into account the knowledge created by academic research. De facto, these institutions have already recognized the merits of a renewed theory and empirical approach to access to justice which is based on a broader concept of access to justice, not limited to access to courts.²⁶

While in European law, the notion of access to justice has been restricted to ‘access to courts’ and the existence of a judicial remedy, it is now obvious that this is not so anymore in international law. For the United Nations Development Program (UNDP) the concept extends to all different stages of a justice process, starting at the moment an individual recognizes a grievance and ends with the exercise of a concrete procedural remedy that respects fundamental rights.²⁷ As the UNDP states in its note from 2004, each stage of this process is associated with distinct challenges or barriers to accessible justice and calls for specific actions to overcome them. As it can be seen in the following chart, recognition and awareness of rights are included in the concept.



Source: United Nations Development Programme (UNDP). *Access to Justice: Practice Note*. 2004, 6

Following this note, a different document followed with a roadmap for progress. The Practitioner's Guide developed by UNDP in 2005 identifies all possible obstacles to access to justice focusing specially on the needs of the poor.²⁸

The UNDP also proposes reform strategies to overcome the obstacles at national level so it is first of all a policy document. The UNDP uses a broader definition: “access to justice involves a process which enables people to claim and obtain justice remedies through formal or informal institutions of justice, and in conformity with human rights standards.”²⁹ As this institution notes, in many societies there are obstacles to obtaining access to justice, and people's inability to claim justice remedies may be caused by a variety of reasons. For this reason, the first step of the access to justice reform battle is the identification of these barriers which is facilitated by a questionnaire.³⁰ Barriers to justice must be therefore categorized and identified in order to promote better law-making and policies.

²⁶ For a comment see Golub, (2003), 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative' in Carnegie Endowment for International Peace, *Democracy and the Rule of Law Project Rule of Law Series* Carnegie Endowment for International Peace 41, Washington: Carnegie Endowment for International Peace.

²⁷ United Nations Development Programme (UNDP), (2004), *Access to Justice. Practice Note*, New York: United Nations - UNDP. See also United Nations Development Programme, (2008), *Making the Law Work for Everyone*, Report of the Commission on Legal Empowerment of the Poor (vol. 1), New York: United Nations -UNDP. See Practice Note at <http://hrbaportal.org/?tag=access-to-justice>

²⁸ United Nations Development Programme (UNDP), (2005), *Programming for Justice: Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Thailand: UNDP. See Practice Note at <http://hrbaportal.org/?tag=access-to-justice>

²⁹ Ibidem at p. 5.

³⁰ Ibidem. UNDP. See document available at the website of the World Bank

Figure 2. Barriers to access to justice

From the user's perspective, the justice system is frequently weakened by:

- Long delays; prohibitive costs of using the system; lack of available and affordable legal representation, that is reliable and has integrity; abuse of authority and powers, resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws and implementation of orders and decrees.
- Severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.
- Gender bias and other barriers in the law and legal systems: inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.
- Lack of de facto protection, especially for women, children, and men in prisons or centres of detention.
- Lack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.
- Lack of adequate legal aid systems.
- Limited public participation in reform programmes.
- Excessive number of laws.
- Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures).
- Avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.

Source: UNDP. *Access to Justice: Practice Note. 2004, 4.*

For the UNDP access to justice is not merely restricted to access to courts. New legislation, subsidized legal services, alternative dispute resolution, citizen education programs, court fee waivers and information technology, are other important means to improve access.³¹

In the words of Hon Justice Michael Kirby AC CMG, *Justice of the High Court of Australia. One-time President of the International Commission of Jurists* who writes the foreword of the UNDP publication in 2005:

“The principle of “equal justice under law”, carved into stone over many a courthouse, needs to be translated into action in our world. And we have to realize that gaining real access for all to the justice system is only the beginning of the attainment of justice. Thus, many people who, after a struggle, obtain access to courts, find indifference to their concerns; lack of sympathy for their vulnerability; antagonism to their claim of rights. Or they find that the law is completely out of date, with no reform mechanism to improve it and no real interest to repair its injustices and inefficiencies. Sadly, it is in such circumstances that corruption breeds; because corruption is all too often the solution that economics provides to remedy outdated, unjust and inefficient laws. We do not cure corruption only by imposing big punishments. We must tackle the inflexibilities of the justice system with precisely the same energy with which we endeavour to promote access to it.”

Strategies to overcome access to justice barriers are important and various reform strategies are known in international law: legal empowerment, legal information and public awareness, right to court access, legal aid, pro bono work, public interest litigation, small claims tribunals and informal justice systems. The UNDP note from 2005 emphasizes the need to focus on capacities to seek and provide remedies for injustice and outlines the normative principles that provide the framework within which these capacities can be developed.³²

The World Bank follows the same approach and relies on the documents produced by the UNDP. Furthermore, it has organised over the past decades workshops and seminars evaluating different approaches aimed to expand citizens access to justice all around the world in both the developed and the developing world.

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/accesstojusticebarriers.doc>.

³¹ See also World Bank, see page on access to justice at

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,contentMDK:20745998~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>

³² UNDP (2005) op. cit. note 28 . Document available at <http://hrbaportal.org/?tag=access-to-justice>

Literature and research produced by and for the World Bank reflects on mechanisms such as: advice bureaus, legal aid clinics, prepaid legal assistance schemes, small claims courts, alternative dispute resolution, contingency fee arrangements, to name but a few. All these elements are considered essential part of the concept of access to justice. International law shows that the construction of a broad concept is essential for the development of a legal reform strategy of access to justice reform and social justice. For this reason, it can be argued that a broad perspective on access to justice – based on a new paradigm and no longer on the classic approach - is needed in European law for legal, economic, political and societal reasons. By restricting the concept of access to justice to access to courts, we simply restrict justice. There is no reason why the concept cannot be updated and expanded in European law to the new standards set by international law.

4. Searching for inspiration to reconstruct the concept: the lessons from the “access to justice” movement

Inspiration to reconstruct the concept of access to justice in European law comes certainly from the present but also from the past. The access to justice movement is a classic reference that must be rescued from the dusty shelves of university libraries and inspire international and European legislators and judges. Since the 1960s, critical legal voices have advocated changes in national legal systems to promote and secure ‘access to justice’ for citizens in general.³³ But 1978-79 saw the publication of the research project entitled *Access to Justice – A World Report* in six books edited by Cappelletti and Garth. Thanks to the work and dedication of these legal pioneers in the field, the concept of access to justice grew into a full theory and methodology.³⁴ Today the conclusions of the access to justice movement are still valid. The rule of law and equal justice for all do not happen naturally, we need to fight the fundamental gap between legal declarations and reality on the ground concerning the exercise of rights granted at domestic level, European and international level. In their classic work and final report, Cappelletti and Garth identified the most common barriers or obstacles which usually render the legal system inaccessible to ordinary citizens; they described the three waves of reform commonly undertaken and necessary to promote access to justice and recommended the adoption of a formal right to justice as an effective tool in practice.³⁵ The first stage or wave concentrated on *legal aid*.

Here, attempts were aimed at making the legal system of ‘justice’ more accessible to the economically disadvantaged, especially through the creation of more efficient systems of legal aid or advice.³⁶ The second wave aimed at providing legal representation for *diffuse interests*, representing group, collective and even public/diffuse interests other than those of the ‘poor’, through mechanisms such as class actions, public interest lawyers, and the granting of standing to sue to consumer and environmental groups. The third wave includes, but goes much further than, the earlier approaches, and represents an attempt to attack access barriers in a more articulate and comprehensive manner, moving the focus to the full panoply of procedures, rules and institutions comprising our dispute-processing machinery. It re-evaluates the entire justice system, in particular, through simplification of the substantive law and the creation of other administrative or civil alternatives to courts, lawyers and litigation. Together with the identification of obstacles and barriers to justice and a methodology to overcome classical barriers, the most important contribution of the access to justice theory and methodology was, however, a fundamental change in the concept of justice and ‘procedural justice’.

In the context of our formal courts and procedures, justice had essentially meant the application of the correct rules of the law to the true facts of the case. In the view of the 70s reformers, this concept of justice under a legal positivist approach was the standard by which procedural law was measured. The new theory proposed by Cappelletti and Garth and a team of international experts reflected a radical change in the hierarchy of values served by civil procedure where the paramount concern became social justice. For them, it was essential to find procedures facilitating the pursuit and protection of the rights of ordinary people. Justice had to be re-evaluated according to their needs. In their view ensuring access to justice in this broad sense would increase social justice.

³⁷ The theory and methodology of access to justice provoked some criticism. On a doctrinal level, in the early 80s Sarat and Grossman argued that it demonstrated the limits of law in changing society.³⁸

³³ See Sinnar, (2000) ‘The Access to Justice Movement’ (Topic brief. Legal Institutions Thematic Group), Washington: World Bank publications, online publishing www.worldbank.org

³⁴ Cappelletti and Garth, (1978), op. cit. n 3.

³⁵ Ibidem.

³⁶ Cappelletti, Gordley and Johnson, (1981), *Toward equal justice*, 2nd edn, Milan: Giuffrè Editore.

³⁷ Cappelletti and Garth, op cit, n 3.

³⁸ Sarat, (1981), ‘Review: Access to Justice by Mauro Cappelletti; Bryant Garth; John Weisner Klaus and. Friedrich Koch’, *Harvard Law Review* 94/8, 1911-1924; and Grossman and Sarat, (1981), ‘Access to Justice and the Limits of Law’, *Law and Policy Quarterly* 3/2, 125-140.

Access to justice reform, in the view of its critics, had a very limited capacity to insure justice or social reform in the end and, beyond a certain level, expanded access might be even costly because any system, when overloaded, becomes unable to deliver justice. The access to justice movement fell out of fashion due to political and economic factors such as the rise of economic liberalism in the 80s and 90s in Western economic democracies.³⁹ During the last 20-30 years, the rise of neo-liberal politics stimulated cuts in social spending and an emphasis on efficiency and de-regulation in many countries. These changes affected traditional, rights-conscious concepts of access to justice and imposed models that focused on the resource constraints of the state where societal choices had to be made.⁴⁰ At the same time, the most important criticism directed at the theory appeared at a conceptual level. Traditional access to justice ideas were criticized as being narrowly directed at procedural access rather than substantive justice. From the perspective of the access to justice reformers, the particular focus had been on developing the means of overcoming obstacles faced by certain groups in making use of the processes established to provide redress where rights were not respected.⁴¹ For these early reformers if barriers to justice were overcome, citizens would obtain redress and justice and a fairer society would naturally appear.

Unfortunately and paradoxically, contrary to the goals proclaimed by Cappelletti, the access to justice movement became equated with a narrow procedural approach to justice (as access to courts) which was perhaps not the intention of the early reformers. The debate has now regained global attention in the aftermath of the financial and economic crisis which has encouraged discussions on other possible ways to construct our societies. Some public international actors have already pointed out the necessary transformation from procedural access to substantive justice, shifting the emphasis from guaranteeing the availability of lawyers or court procedures to producing legal, administrative, judicial and social outcomes that are more fair and equitable. The reports produced by UNDP⁴² have shown that access to the courts *per se* does not help in cases of systemic inequality; it does not aid individuals when it is the legal system which has provoked the social and economic exclusion of certain groups. Academics have argued that we need to adopt a broader view of access to justice particularly concerned with the substantive aspect of justice – notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives. It is also argued that empirical assessments of people's needs are needed, to ensure that we do not continue to rely on largely impressionistic accounts of the barriers to access which may serve to misdirect legal and economic resources.⁴³

5. Looking forward: A new research agenda needed to reconstruct a better concept in European law

Unfortunately, the conclusions reached by the access to justice movement at the end of the 70s are still fundamental goals that are not fully achieved in Europe. Although many national legislators are struggling these days with most of these issues in order to ameliorate access to justice, including the European Union, this doctrine and methodology are almost never mentioned as a backbone of their laws and policies.⁴⁴ By contrast, as stated before, international organizations such as the United Nations Procurement Division (UNPD), the World Bank and, to a certain extent, the Council of Europe through research and study, have recently recognized the merits of a renewed theory and empirical approach to access to justice and are based on the findings produced by academic scholarship (Cappelletti and Garth).⁴⁵ We should now look back on a history and learn the lessons from the access to justice movement because this doctrine and approach provided the best framework and intellectual tools to understand our legal systems and proposed challenging solutions with a positive, creative and world-wide comparative perspective.⁴⁶

³⁹ A process brilliantly summarised by Mattei (2009), 'Access to Justice. A Renewed Global Issue?' in Katharina and Van Erp (eds), *General Reports of the XVIIth Congress of the International Academy of Comparative Law*, Geneva: Eleven International Publications, at pp.383-408.

⁴⁰ Ibid, at pp.384-386.

⁴¹ McBride, *op cit*, n 16, at 6.

⁴² UNDP, *Access to Justice. Practice Note* (2004) and (2008), 'Making the Law Work for Everyone', *op. cit.* n 27.

⁴³ Mc Bride, *op cit*, n 16, at 7.

⁴⁴ On Access to justice within the EU with a focus on consumer law and policy, see Mendez-Pinedo, (1997), 'El acceso de los consumidores a la justicia comunitaria: hacia un Derecho procesal común', *Estudios sobre Consumo*, 43, 9-15; and by the same author, (1998), *La protección de consumidores en la Unión Europea. Hacia un Derecho procesal comunitario de consumo*, Madrid: Marcial Pons; and (2001), *La solución de litigios de consumo: El talón de Aquiles de la Unión Europea*, I Premio de Ensayos Jurídicos sobre Derecho de Consumo, Madrid: Ayuntamiento de Madrid.

⁴⁵ McBride, (2009), *op cit*, n 16, at 5-7. See also UNDP (2004) and (2005) *op. cit.* n. 27 and 28.

⁴⁶ Generally on access to justice see Rhode, (2005), *Access to Justice*, Oxford: Oxford University Press and Parker, (2000), *Just Lawyers: Regulation and Access to Justice*, Oxford: Oxford University Press.

The Lisbon Treaty has brought new promising clauses that need to be further developed in the field of justice. Together with the EU Charter of Fundamental Rights, it can be said that there has been a “constitutionalisation” of access to justice in European Union law in the sense that, for the first time in the Treaties, the EU has been given explicit power or competences to legislate in this area.⁴⁷ It will be now the task of the European legislator to develop in practice the engagements that EU law has promised in the field of access to justice. And here the most difficult question is still unresolved as the European institutions have not yet completely understood that a proper construction of the concept of access to justice is essential for the future development of EU law and policy. The same applies to EEA law. Further efforts are needed at European level to promote fundamental principles of access to justice not only for cross-border situations and to ensure that legal and judicial outcomes are just and equitable.

As the UNDP in 2004 already acknowledged, “access to justice is, therefore, much more than improving an individual’s access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.”⁴⁸ As Kofi Annan declared back in 2004, access to justice is about fulfilling the true purposes of the law.⁴⁹ While some promising examples can be pointed out and the trend is overall positive in Europe,⁵⁰ unfortunately, it also seems to be the case that civil justice reform efforts face common problems in increasing access to justice and reducing costs and delays. Reformers seem to face a common obstacle -- the legal profession’s interest the status quo.⁵¹ We should not be discouraged by resistance to change. Faced to the limits of legalism in procedural law, with a strict adherence, to law or prescription, especially to the letter rather than the spirit; countries such as the Australia⁵² have already paved the way to

construct the concept of access to justice in a broader sense.⁵³ In the words of Attorney General of Australia Robert McClelland:

“Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well-functioning democracy.

The critical test is whether our justice system is fair, simple, affordable and accessible. It is also important that the system provides effective early intervention to help people resolve problems before they escalate and lead to entrenched disadvantage. People must be able to understand the law if it is to be effective.”⁵⁴

And the evolution moving beyond a formal approach of access to justice has already taken place in United States, where an important initiative has been taken to try to balance the notion of individual justice with social justice. In fact, the USA Department of Justice adopted the “Access to Justice Initiative “ in 2010 with the aim of to improving access to justice for all Americans, regardless of status, income, or wealth.

⁴⁷ The doctrine in European law refers to “European constitutional law” even if the new Treaties are not formally the EU Constitution. This is because the EU’s treaties regulate the exercise of public authority at EU level, establishing a hierarchy of norms and legitimizing legal acts, providing for citizenship, and granting fundamental rights. In this way the treaties shape the relations between legal orders of the EU and the 27 national states. In view of many authors, a constitutional approach is necessary to understand the core issues of EU law. On the constitutionalisation of EU law see Armin von Bogdandy and Jürgen Bast (eds) (2009), *Principles of European Constitutional Law*, Oxford: Hart Publishing.

⁴⁸ UNDP (2004) op. cit. n 27 at p. 6.

⁴⁹ UNDP (2005) op. cit. 28 at page iii.

⁵⁰ FRA, (2011), Country thematic studies on access to justice , publication online

http://fra.europa.eu/fraWebsite/networks/research/fralex/national_report/cr_access-to-justice-2011_en.htm

⁵¹ World Bank, (2000), *Reforming civil justice systems: trends in industrial countries*, Prem Note no. 46, Washington: World Bank. Document available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PREMnote_46.pdf

⁵² The Australian Government adopted a Strategic Framework for Access to Justice in the Federal Civil Justice System in September 2009 in order to ensure that new initiatives and reforms to the justice system best target available resources to improving access to justice. The strategic framework comprises both principles for access to justice policy-making and a proper methodology for translating the principles into practice. See the website www.ag.gov.au/a2j and also <http://www.accesstojustice.gov.au/agnet/accesstojustice.nsf/home.html>. See Mary Anne Noone, “Australia’s New national Partnership Agreement on Legal Assistance”, paper presented at the conference “Re-visioning legal aid in an age of austerity”, International Legal Aid Group Conference, Helsinki, Finland, 15 to 17 June 2011.

⁵³ Ibidem at page 5: “Access to justice has traditionally been seen as access to the courts or the availability of legal assistance, but this is a narrow view. Courts are not the primary mechanism through which people seek to resolve disputes or potential disputes. Legal assistance programs are only one part of a complex system. Improving access to justice requires a broad examination of how the system and its various institutions influence each other and work together to support or limit people’s capacity to address legal problems and resolve disputes.”

⁵⁴ Ibidem at page ix.

The final goal is “to encourage and catalyze civil and criminal reform efforts that are evidence-based, are cost effective, and lead to more just outcomes”.⁵⁵ The search for justice in outcomes is already there.

Conclusions

The Lisbon Treaty has brought new promising clauses that need to be further developed in the construction of a Europe of law and justice. The European concept of access to justice understood traditionally as access to courts (thus based on litigation and on the defence of individual rights) is inherently limited. A focus on formal justice - the traditional view that courts are the exclusive central ‘suppliers’ of justice- is no longer enough. A broader concept is needed, aiming for a better definition of all stages of a justice process and incorporating other elements such as information, awareness, advice, assistance, education, etc. Our final goal is to re-examine whether our judicial and administrative system provide “daily justice“ or effective rights for citizens. So far, EU law has been unable to construct and provide proper access to justice for European citizens and this is mainly due to the limited construction of the concept. We should learn from the pioneers of the past and search inspiration in current international law as well as in comparative law. In spite of its inherent limitations to change society, the classic theory and methodology of “access-to-justice” (Cappelletti and Garth, 1978) developed a horizontal comprehensive strategy to construct a new procedural law based on the needs of the ordinary citizens.

The approach is still valid as international organisations such as the UNDP and the World Bank rely upon its finding for policy-making suggestions. Countries such as Australia and United States are already advancing in that direction, leading the way by adopting broader definitions of access to justice. There is no reason why Europe and European citizens should be left behind. Furthermore, the approach on access to justice should move beyond its current formal dimension of guaranteeing equal access to a legal system (equal opportunity of justice through adjudication) and incorporate a substantive goal (access to justice aiming at just and equitable outcomes of justice). This calls for a more sophisticated concept of access to justice in the light of a broad system of European social justice and equality. We should ask ourselves who is benefitting from the newest constitutional promises brought by EU law. The European legal order should not make promises it cannot deliver. The European institutions must fulfil the promise of justice recently enshrined by the EU Treaties for all citizens. A new research agenda is born. Researchers are invited to participate in this task and construct the theory and methodology needed to develop European law and policy in the right direction. Complete access to justice and getting law and justice together are certainly utopias but it is precisely this utopia what the rule of law promises: access to justice is hope in the dark.

⁵⁵ USA, Department of Justice, Access to Justice Initiative. See document at <http://www.justice.gov/atj/ex-initiative-work.html>. This is a summary of the initiative: “Since March 2010, the Access to Justice Initiative’s director and staff have met with state and Federal judges; prosecutors; defense attorneys; legal-aid practitioners; advocacy and policy-based organizations; community groups; representatives from local, state, and Federal agencies; and everyday people who need legal help — part of a sweeping effort to study areas of need and to identify innovative programs that effectively address the justice system’s most acute problems. From these alliances and collaborations, the Access to Justice Initiative has begun to develop and implement projects in several discrete issue areas that focus on community-based solutions to the crises in the criminal and civil justice systems. The Initiative also works closely with a wide range of government agencies — Federal, state, local, and tribal — as well as advocates and community members, to encourage and catalyze civil and criminal reform efforts that are evidence-based, are cost effective, and lead to more just outcomes.” See D. Oppenheimer, “Sources of United States Equality Law: The View from 10.000 Meters”, keynote adress for the Legal Seminar on the Implementation of EU Law on Equal Opportunities and Anti-Discrimination, October 6, 2009, Brussels, Belgium.