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978-1-107-02154-9 - *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?*

Edited by Stefan Wr̄bka, Steven Van Uytsel and Mathias Siems

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Access to justice and collective actions

‘Florence’ and beyond

STEFAN WR̄BKA, STEVEN VAN UYTSEL, AND
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Introduction

In modern societies, guaranteeing or enhancing access to justice is an important feature of legal systems. However, to support this ideal state, we must pose some questions regarding the meaning and relevance of this term: What exactly is meant by ‘access to justice’? Who shall enjoy it? And how can it be accomplished? These questions touch on various issues cutting across not only legal subjects, but different academic fields in general: In addition to law, access to justice is closely interlinked with the fields of economy, sociology and politics, just to name a few. The practical impact of the non-legal fields must not be underrated and – to a certain extent – will be borne in mind and reflected throughout this book. The main emphasis, however, will be put on current legal questions closely related to access to justice.

The term ‘access to justice’ itself consists of two parts, ‘access’ and ‘justice’, which – when read together – can be seen as a kind of abbreviation. ‘Access’ often comes together with ‘equal’¹ or ‘effective’.² It embodies the older, more technical and procedural side of the overall concept: It is the question of enabling those in need to pursue their legal interests. ‘Justice’, on the other hand, has a more result-oriented meaning which should be reached through equal or effective access: The outcome of the procedure

1 E.g. M. Cappelletti and B. Garth, ‘Access to Justice: The Worldwide Movement to Make Rights More Effective – A General Report’ in M. Cappelletti and B. Garth (eds.), *Access to Justice – A World Survey* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978), p. 6.

2 E.g. Cappelletti and Garth, ‘General Report’, 8.

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should be ‘just’³ or at least be made on fair (i.e. unbiased) grounds. We can thus say that the concept of access to justice embodies the ideal that everybody, regardless of his or her capabilities, should have the chance to enjoy the protection and enforcement of his or her rights by the use of law and the legal system.

This idea is reflected by procedural as well as substantive laws, and is often enshrined in human rights concepts.⁴ Pertinent constitutional provisions generally contain rather technical state obligations aimed at empowering individual citizens to bring cases to courts.⁵ The wording of such provisions can be quite simple, such as ‘[n]o person shall be denied the right of access to the courts’,⁶ but it can also include more substantive requests directed at the state, for example asking for legal aid to be provided to those who cannot afford to finance court proceedings.⁷ Legal aid can take the form of genuine financial assistance, but can also be accomplished by granting fee-free lawyer’s services, free services of an interpreter or ‘open-court-days’.⁸ Without a doubt, effective access to justice as a ‘new social right’⁹ stands for the smooth functioning of the legal system and plays an important role as a key feature of ‘the welfare state ideal’.¹⁰

Ensuring effective access to justice has been on the agenda not only of national governments,¹¹ but also at an international level, as the examples of the ALI/UNIDROIT Principles of Transnational Civil Procedure,¹²

3 M. Cappelletti and B. Garth, ‘Foreword’ in M. Cappelletti and B. Garth (eds.), *Access to Justice – Emerging Issues and Perspectives* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), p. ix.

4 For a general discussion, see F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007).

5 For a summary of the situation in Europe, see E. Storskrubb and J. Ziller, ‘Access to Justice in European Comparative Law’ in F. Francioni (ed.), *Access to Justice as a Human Right*, pp. 180–182.

6 Art. 32 of the Constitution of Japan.

7 See e.g. Art. 18 (2) of the Dutch Constitution: ‘Rules concerning the granting of legal aid to persons of limited means shall be laid down by Act of Parliament’.

8 See e.g. Arts. 63 to 73 Austrian Civil Procedure Act or Art. 29 Austrian Court Organization Law.

9 Cappelletti and Garth, ‘General Report’, 49.

10 Storskrubb and Ziller, ‘Access to Justice in European Comparative Law’, 179.

11 See e.g. in this book Annina H. Persson’s Chapter 13 ‘Collective Enforcement: European Prospects in Light of Swedish Experience’, Benoît Allemeersch’s Chapter 14 ‘Transnational Class Settlements: Lessons from *Converium*’ or Kunihiko Nakata’s Chapter 7 ‘Recent Problems of Group Rights Protection for Consumers in Japan’.

12 American Law Institute, *Principles of Transnational Civil Procedure* (Cambridge University Press, 1995).

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the European ‘Legal Aid Directive’¹³ or the discussions within the international Academy of Comparative Law¹⁴ show. In all cases the central issue seems to be the same: Although legal systems try to protect various rights, there is often a gap between what legal systems are aiming at and the practical result. In other words, whereas there is little doubt about the importance of effective access to justice, there has traditionally been uncertainty about how to guarantee it effectively.

The Florence Project and access to justice

One of the most important studies in the field of access to justice is the Florence Access-to-Justice Project (Florence Project) carried out under the leadership of Mauro Cappelletti at the European University Institute, Florence, in the 1970s. The Florence Project was a response to earlier research on issues concerning the quality of justice, or, as Cappelletti and Bryant Garth expressed it, ‘the minimum standards of judicial fairness’.¹⁵ It confirmed what had already been claimed for a long time: Present legal systems neither sufficiently nor effectively protect citizens’ rights and interests. Various obstacles to a sound system of access to justice can be detected, of which the cost issue might be considered one of the most serious and perhaps the oldest of these barriers.

The Florence Project divides the efforts to improve access to justice into three different phases or ‘waves’. The first phase focuses on legal aid for the poor; the second aims at providing legal representation for ‘diffuse interests’; and the third takes a more comprehensive approach, which Cappelletti and Garth call the ‘access-to-justice approach’.¹⁶

The first wave is based on the general assumption that litigation is costly, and that the less financially strong individuals are, the less likely it is that affected citizens will pursue their interests and bring a case to court. Private parties usually bear a great portion of the litigation costs. They might have to pay attorneys’ fees and court costs. Not everybody can afford this. Deborah L. Rhode, for example, observes that in the United States, ‘about four-fifths of the civil legal needs of the poor, and two- to

13 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 No. L26.

14 See U. Mattei, ‘Access to Justice: A Renewed Global Issue?’, *Electronic Journal of Comparative Law*, 11.3 (2007), available at www.ejcl.org/113/abs113-14.html.

15 M. Cappelletti and B. Garth, ‘Foreword’, pp. vii–viii.

16 Cappelletti and Garth, ‘General Report’, 21.

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three-fifths of the needs of middle-income individuals, remain unmet'.¹⁷ Francesco Francioni takes a similar line by saying that 'access to justice can be used to describe the legal aid for the needy, in the absence of which judicial remedies would be available only to those who dispose of the financial resources necessary to meet the, often prohibitive, cost of lawyers and the administration of justice'.¹⁸

Affordability of court proceedings can be realized by different means. In addition to the proportionality cost schemes mainly used in some European countries¹⁹ and small claim procedures,²⁰ the 'Judicare' system²¹ is one of the most widely used approaches and may be the oldest one to overcome the obstacle of high litigation costs. Developed in Western Europe, persons who fulfil – or rather, do not meet – certain financial criteria determined by statute have the right to free legal representation.

In addition, although financial resources are important factors in the decision to bring a claim,²² and state support is without doubt important for fostering individuals' access to justice, it was soon realized that financial hurdles go hand in hand with other non-financial impediments. Raising the awareness of those who are not familiar with the legal system so that they can recognize and understand their rights and possible recourses is one of these additional factors. Marc Galanter points out that those who know how to make use of the court system – he calls them

17 D. L. Rhode, *Access to Justice* (Oxford University Press, 2004), p. 3. Later in that book she suggests that '[t]hose who need but cannot realistically afford lawyers should have the opportunities for government-subsidized services' indicating that limited financial resources of individuals still pose a major threat to the guarantee of access to justice – see Rhode, *Access to Justice*, p. 185.

18 F. Francioni, 'The Rights of Access to Justice under Customary International Law' in F. Francioni (ed.), *Access to Justice as a Human Right*, p. 1.

19 See e.g. C. Hodges, S. Vogenauer and M. Tulibacka, 'The Oxford Study on Costs and Funding of Civil Litigation' in C. Hodges, S. Vogenauer and M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation – A Comparative Perspective* (Oxford: Hart Publishing, 2010), pp. 85–90.

20 For the European Union, see e.g. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, OJ 2007 No. L199.

21 Cappelletti and Garth, 'General Report', 24–28.

22 Still, more than thirty years after the launch of the Florence Project, some consider financial incapability to be the most important obstacle to an increased access to justice for individuals – see e.g. I. van den Meene and B. van Rooij, *Access to Justice and Legal Empowerment – Making the Poor Central in Legal Development Co-operation* (Leiden University Press, 2008), p. 6.

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‘repeat-players’²³ – enjoy an enormous advantage over those who are not familiar with the judicial system (‘one-shotters’²⁴). Galanter argues that isolated and infrequent contact with the judicial system will discourage persons from bringing a claim. On the other hand, persons with long-term experience would be much more likely to frequent the judicial system. The repeat-players’ ongoing contact with the judicial system allows them to better plan their litigation, spread litigation costs, build up information relationships with the decision-making institutions, spread the risks of litigation and develop strategies for future actions.²⁵

The second wave covers access problems going beyond those of the poor and one-shotters. The Florence Project realized that a practical limitation of access to justice is not only because of a lack of financial resources or a lack of legal knowledge. The central message of the second wave is that generally more than just one person’s interests can be affected by legal wrongs. Cappelletti and Garth use the term ‘diffuse interests’ to describe the interests at stake and define them as ‘collective or fragmented interests, such as those in clean air or consumer protection’²⁶ with ‘the basic problem . . . that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action.’²⁷

The impediments for these kinds of interests are thus basically twofold: On the one hand, the monetary amount (if any) involved in an individual’s disputes might not reach a level where one would be willing to pursue his or her interests; and on the other, standing may become an issue. Regarding the first issue, to be effective, an aggregation of individual claims would be desirable. Such aggregation of claims would solve the problem of diffuseness; however, new issues would appear. Even if interested persons are allowed to organize themselves, the affected persons may still be too dispersed, show a lack of information or fail to agree on a strategy. The free-rider problem is another issue that may arise. When a person does

23 M. Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’, *Law and Society Review*, 9 (1974), 95, reprinted (with corrections) in R. Cotterrell (ed.), *Law and Society* (Aldershot: Dartmouth, 1994), pp. 165–230; M. Galanter, ‘Afterword: Explaining Litigation’, *Law and Society Review*, 9 (1974), 347.

24 Galanter, ‘Afterword’, 347.

25 Galanter, ‘Afterword’, 347.

26 Cappelletti and Garth, ‘General Report’, 18.

27 Cappelletti and Garth, ‘General Report’, 18.

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not contribute to the lawsuit, but cannot be excluded from the benefits, the other interested persons may not be willing to aggregate their claims. In addition, time is an important negative factor in cases where only a comparatively small amount of money is involved, as the loss of time would outweigh the possible benefits of winning the case and thus would disincentivize individuals from pursuing or aggregating their claims. It just may not be economically reasonable to go to court, for example, when the costs of the formal court proceedings exceed the amount of the claim. Eva Storskrubb and Jacques Ziller refer to the triangle-shaped interplay among the outcome of a positive access to justice and the individual factors influencing the decision making of whether to sue as balancing ‘truth, time and cost’.²⁸

Regarding the second issue, even if an individual had a personal interest in resolving an issue which is not of a ‘small amount’, there could be other, more technical obstacles preventing access to justice. Depending on the kind of legal dispute, individuals may simply not have the right to bring a case to court: They lack legal standing in those situations.

In both scenarios, the problem is more or less the same: In such situations, affected individuals would be ‘un- or underrepresented’²⁹ if the law did not provide for effective access to justice tools. Such collective and fragmented (i.e. diffuse) interests can be found in many different legal fields, of which four will be more closely dealt with in this book: competition, consumer, environmental and corporate law.

At the centre of the second-wave discussion, one finds the search for the ‘adequate representative’³⁰ of diffuse interests. In order to base solutions on a wider variety of legal mechanisms, Cappelletti and Garth make an important observation, which will be further elaborated by some contributors to this book: With reference to Abram Chayes they argue that safeguarding diffuse interests is also an ‘important public policy issue’.³¹ Public and diffuse interests (e.g. the interests of ‘the poor . . . consumers and environmentalists’³²) are thus closely interlinked with each other.

28 Storskrubb and Ziller, ‘Access to Justice in European Comparative Law’, 193 with reference to A. A. S. Zuckerman, ‘Justice in Crisis: Comparative Dimensions of Civil Procedure’ in A. A. S. Zuckerman (ed.), *Civil Justice in Crisis, Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999), pp. 46–47.

29 Cappelletti and Garth, ‘General Report’, 49.

30 Cappelletti and Garth, ‘General Report’, 36.

31 Cappelletti and Garth, ‘General Report’, 36, with reference to A. Chayes, ‘The Role of the Judge in Public Law Litigation’, *Harvard Law Review*, 89 (1976), 1281.

32 Cappelletti and Garth, ‘General Report’, 35.

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One way to satisfy the public interest in addressing diffuse interests is that the government itself, representing the public interest, takes action. In Cappelletti and Garth's view, however, this 'governmental approach' has not shown any major positive results for individual or collective access to justice.³³ They identify various reasons for the general passiveness of governments, with political pressure and an alleged lack of expertise being the most important factors.³⁴

To overcome this standstill, they ask for more active involvement by private actors, either by taking a 'private attorney general'³⁵ or an 'organizational private attorney general' approach.³⁶ Whereas the first concept refers to 'individual private actions for the public or collective interest[s]',³⁷ the second approach puts the emphasis on *organizing* plaintiff groups, leading to sub-concepts such as class actions, public interest actions, public interest law firms or public counsels culminating in what Cappelletti and Garth call a 'pluralistic (mixed) solution'.³⁸ On the basis of the argument that none of the presented single approaches is perfect, they suggest mixing existing tools to meet the needs of diffuse interests.³⁹

The third access to justice wave goes one step further, beyond the question of who should represent affected citizens at court. The emphasis is put on rethinking the judicial system itself to make substantive rights more effective.⁴⁰ Various suggestions have been made within this framework. Litigation procedures have been reformed to introduce alternative procedures supplementing the normal litigation process. Small claim courts with special procedures are one of them. Alternative methods for dispute resolution (ADR), such as arbitration, mediation or conciliation, are another example. Economic incentives have been provided to encourage settlement outside of the courts. Specialized courts have been set up to deal with specific issues, such as tribunals for consumer complaints.

No matter which wave one refers to, the key challenge to enhancing access to justice is rightly seen in installing 'forums that will be so attractive

33 Cappelletti and Garth, 'General Report', 36–39.

34 Cappelletti and Garth, 'General Report', 37.

35 Cappelletti and Garth, 'General Report', 40.

36 Cappelletti and Garth, 'General Report', 40–48.

37 Cappelletti and Garth, 'General Report', 40.

38 Cappelletti and Garth, 'General Report', 48.

39 Cappelletti and Garth, 'General Report', 40–48.

40 Cappelletti and Garth, 'General Report', 49–54.

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to individuals, not only economically but also physically and psychologically, that they will feel comfortable and confident in using them, despite the resources and sophistication of those they tend to oppose.⁴¹ This is the ultimate goal that eventually must be reached.

From 'diffuse' to 'multilayer' interests

In the course of the Florence Project, Cappelletti and Garth created the category of *diffuse* interests, which formed the key point of interest in the second access to justice wave. Diffuse interests were seen as their own category covering the un- or underrepresented interests of groups of people who – for whatever reason – lack access to justice. Interests of consumers and environmentalists have traditionally been considered as parade examples for this group of interests,⁴² thus expanding the research focus on access to justice beyond the older concept of the poor and middle-income individuals.

According to the Florence Project, in general, 'disputes have collective as well as individual repercussions.'⁴³ Cappelletti and Garth go on by rightly noticing that for these two groups of interests, 'collective [i.e. diffuse] and individual [interests or] dimensions can be addressed by different measures'.⁴⁴ Without any doubt, differentiating between these two interest groups is important; however, we would like to mention a third group, which Cappelletti and Garth on some occasions⁴⁵ include in the group of diffuse interests holders: the public. If one understands diffuse interests as collective or fragmented interests belonging to groups of people who are usually un- or underrepresented, but still directly affected by a dispute, *public* interests should be separately mentioned. Repercussions for the public itself can be manifold, but they principally show different and rather indirect effects compared to the classical understanding of diffuse interests: Negative results caused by a lack of access to justice for public

41 Cappelletti and Garth, 'General Report', 72.

42 M. Cappelletti and B. Garth, 'Access to Justice and the Welfare State: An Introduction' in M. Cappelletti (ed.), *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1981), p. 11.

43 Cappelletti and Garth, 'General Report', 53; see also Cappelletti and Garth, 'Access to Justice and the Welfare State: An Introduction', 50, where they again differentiate between these two forms of potentially affected interests by referring to representation 'either of individuals or of diffuse interests'.

44 Cappelletti and Garth, 'General Report', 53.

45 See e.g. Cappelletti and Garth, 'General Report', 49 and 67.

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interests normally do not emerge as directly or as fast as would be the case with diffuse interests – for example, product defects having an impact on a bigger group of consumers, short-term health issues of people living in the neighbourhood of a factory responsible for environmental accidents or shareholder interests impaired by stock price losses based on illegal company practices. In the case of public interests, it is more a matter of consequential damages showing results in the longer run, such as negative effects on national economies stemming from consumers' distrust in certain products or the market as a whole, rising health care costs resulting from an increase in diseases caused by environmental accidents or the malfunction of court systems because of inappropriate legal mechanisms. It thus makes sense to consider public interests as a special, third form of potentially affected interests, adding an additional pillar to the overall discussion of access to justice.

By dividing possibly affected interests into the three groups of individual, collective (or, as Cappelletti and Garth would call it, 'diffuse') and public interests, one can approach access to justice from three different angles. This is especially useful as different legal fields have traditionally chosen different ways of discussing how to improve access to justice. For example, whereas consumer and environmental law scholars have shifted the focus towards the direct protection of collective interests relatively early,⁴⁶ in other areas, such as competition law in Europe, the focus has traditionally been on governmental enforcement, and collective interests were initially only indirectly protected by public enforcement. Direct protection of other groups with possibly affected interests became a target comparatively late.⁴⁷

Still, in many cases, disputes affect all three categories of interests: individual, collective and public. One can also say that disputes can have different *layers*: Access to justice might be at stake for not just one layer of interests, but for two or even all three categories. This is why we believe it makes sense to refer to this situation as *multilayer* interests, standing for

46 See e.g. Storskrubb and Ziller, 'Access to Justice in European Comparative Law', 179; C. Redgwell, 'Access to Environmental Justice' in Francioni (ed.), *Access to Justice as a Human Right*, pp. 153–175; Cappelletti and Garth, 'Access to Justice and the Welfare State: An Introduction', 11.

47 See especially the Green Paper on damages actions for breach of the EC antitrust rules, 19 December 2005, COM(2005) 672 final and White Paper on damages actions for breach of the EC antitrust rules, 2 April 2008, COM(2008) 165 final which both discuss the issue of more direct involvement of affected private individual and/or collective interests.

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cases in which at least two, but usually all three, groups of interests (i.e. individual, collective and public) are affected.

The role of collective actions in the context of multilayer interests

The discussions summarized and further intensified by the Florence Project have not lost their importance. On the contrary, even more than three decades later, many issues raised by the Florence Project remain unsolved, as heated access to justice discussions in various fields show.⁴⁸ All three waves identified by the Florence Project have their place in the discussions, and it would not make sense to further elaborate by focusing only on one or two. No matter how one looks at it, traditional barriers such as the lack of individuals' financial resources or legal knowledge, the issue of collective (i.e. diffuse) interests as well as the legal system itself have to be considered. Instead of dividing the discussion into the three waves of the Florence Project, we focus on the interests fundamentally affected by disputes that go beyond classical conflicts limited to two parties – that is, on the concept of multilayer interests as outlined earlier.

When talking about multilayer interests and the enhancement of their access to justice, one inevitably has to deal with collective actions, as they are seen as a legal tool that can be used to improve access to justice. One of the most widely discussed forms of collective actions in this regard is the instrument of class actions. Bernard Murphy and Camille Cameron purport that 'promoting access to justice is a central aim of the class action regime'.⁴⁹ They go on by stating that '[i]t is intended to create power in numbers that would be non-existent if claims were pursued individually, and to provide a mechanism that ensures that a greater number of those claims can be litigated'.⁵⁰ In a similar vein is the work of Rachael Mulheron.⁵¹ After noting that access to justice is the cornerstone of class proceedings, she continues her analysis by pointing out that the class action is a 'remedy to those in the community who individually

48 See e.g. the international discussions mentioned earlier in this chapter.

49 B. Murphy and C. Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia', *Melbourne University Law Review*, 30 (2006), 399, 402.

50 Murphy and Cameron, 'Access to Justice', 403.

51 R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004), pp. 52–57.