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978-1-107-07237-4 - European Consumer Access to Justice Revisited

Stefan Wrška

Excerpt

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PART I

Setting the scene: access to justice 2.0

And, if it is true that effective, not merely formal, equality before the law is the basic ideal of our epoch, the access-to-justice approach can only lead to a judicial product of far greater ‘beauty’ – or better quality – than that we now have.¹

(Mauro Cappelletti, 1927–2004, and Bryant Garth, 1949–)

¹ 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, Book 1* (Alphen aan den Rijn: Slijthoff and Noordhoff, 1978), p. 124.

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1

At the very outset

Teaching someone a foreign language and teaching a child to speak require the ability to explain terminology in a plain, simple and intelligible language. Writing a law book, in the present case a book about access to justice in the context of European consumer law, cannot, of course, be directly compared to teaching a language. Nevertheless, the situation more or less resembles language teaching, especially if the book is to be understood not only by legal scholars specialising in the particular field at hand, but by a broader audience. Even if one wanted to address only the first group, writing a book on the somewhat vague term ‘access to justice’ would clearly benefit from a precise definition. The problem with this, however, is that there is not just one legitimate definition of access to justice. While it can be assumed that the meaning of ‘access’ is easy to understand, the term ‘justice’ can be interpreted in different ways; it has been a prominent object of academic writing, not only in legal academia and in recent times, but also in various other fields and for hundreds of years, as will be seen in the course of this book.

To make matters even more complicated, combining both terms, ‘access’ and ‘justice’, leads to a number of further questions of how to define the result. ‘Access to justice’ reveals some additional and controversial issues, especially in light of recent developments in the field of European consumer law, which is why this book was written. It will define and discuss the issues at hand and offer additional food for thought. At the same time, the analysis in this book tries to provide the reader with an alternative definition of consumer access to justice by taking stronger account of more recent developments. For the sake of simplicity, I decided to refer to this concept as ‘access to justice 2.0’. The key question in this context is whether the chosen path leads in the ‘right’ direction for consumers in Europe or, to put it differently, whether the recent trends provide consumers with the proper procedural *and* substantive rights to effectively protect their interests.

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To avoid a leap in the dark, I should first clarify the meaning of access to justice in the present context. This will also answer the question that the attentive reader would certainly have: what does ‘access to justice 2.0’ mean? To answer this, it makes sense to take a brief look at the components of the term: access, justice, access to justice and 2.0. This will allow the construction of a legal framework, or at least offer some parameters to analyse current trends in the field of European consumer law from the perspective of the consumers’ benefit.

2

Access to justice 2.0: breaking it into pieces

Access

The first component of ‘access to justice 2.0’, access, might cause the fewest difficulties. It can be generally understood as the chance or means to reach or accomplish something. The *Oxford English Dictionary*, for example, defines access as ‘[t]he action of going or coming to or into; coming into the presence of, or into contact with; approach, entrance’.¹

Access thus stands for some kind of gateway or movement, leading from one point to another or from an actual state to a different one, from the viewpoint of the acceding person (hopefully) to a desired condition. One can also say that access, if granted, enables a person to enter a certain condition.

Justice

Unlike access, the term justice can have several different meanings. It is clearly beyond the scope of this analysis to go into too much detail, but taking a slightly closer look will make it easier to understand the argumentation in later chapters.

For the purpose of the current discussion, one can basically distinguish between two divergent definitions. Several non-English languages clearly draw a linguistic line between the two definitions. English, however, uses the word justice for two, not necessarily always intertwined concepts: one rather technical definition free from value judgements, which for the sake of simplicity I will refer to as ‘non-valuing justice’ in the context of this book, and a definition that is more morally inclined or with added values, which I shall call ‘value-oriented justice’. Although differing in meaning, both definitions have their own *raison d’être* when discussing access to justice.

¹ J. A. Simpson and E. S. C. Weiner (eds.), *The Oxford English Dictionary* (2nd edn, Oxford University Press, 1991), p. 72.

Non-valuing justice

The non-valuing justice concept can be seen as a synonym for the court system, its proceedings and judges, who play the leading role in solving disputes brought to court. The *Oxford English Dictionary* refers to this meaning as the '[j]udicial administration of law'² when referring to dispute resolution proceedings or as the 'administrator of justice'³ as an equivalent for professional judges and other members of the judiciary.

In this sense, one can understand the term justice as standing for the judicial apparatus, its main decision-making actors or court proceedings. Non-valuing justice does not take any value judgement into consideration, but rather refers to the judicial system in a more technical way.

Value-oriented justice

Justice can, however, also have a more philosophical or interdisciplinary meaning. If one understands it in this way, then justice can be described as fairness, equality or moral correctness. The *Oxford English Dictionary* further uses terms such as 'uprightness, equity'⁴ or '[t]he quality of being (morally) just or righteous'⁵ as synonyms for this second understanding of justice. To distinguish it from non-valuing justice, it might be helpful to refer to it as 'value-oriented justice' to differentiate it from a plain, basically non-valuing definition of justice.

One might be tempted to argue that value-oriented justice resembles what others call 'substantive justice'.⁶ Value-oriented justice in the context of this book, however, goes beyond this concept and also includes certain

² *Ibid.*, p. 326. ³ *Ibid.* ⁴ *Ibid.* ⁵ *Ibid.*

⁶ Allan Horwitz and Michael Wasserman define substantive justice as a concept 'to decide particular cases on their individual merits or to refer to substantive goals' (A. Horwitz and M. Wasserman, 'Formal Rationality, Substantive Justice, and Discrimination', *Law and Human Behavior*, 4 (1980), 103, 104). Michael Quinn links substantive justice to 'the reasons which ground the rules' which, under the concept of formal justice, require a 'consistent application' (M. Quinn, *Justice and Egalitarianism: Formal and Substantive Equality in Some Recent Theories of Justice* (New York: Garland, 1991), p. 6). For further definitions and comments see, for example, David Lewis Schaefer's analysis of substantive justice in D. L. Schaefer, 'Procedural Versus Substantive Justice: Rawls and Nozick', *Social Philosophy and Policy*, 24 (2007), 164–86; Rawls's reference to substantive justice in J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 58–60. For a purely legal context see, for example, Wojciech Sadurski's definition of substantive justice as 'the justice of outcome [of a legal process]' (W. Sadurski, 'Social Justice and Legal Justice' in H.-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011), p. 73).

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ideas of formal justice, such as applying legal rules equally in comparable cases.⁷ Thus, for the later argumentation, it might make more sense to draw the distinguishing line in accordance with English dictionaries at the point where they differentiate between the mere technical apparatus of the judiciary on the one hand and a more value-centred system on the other. As will be shown later, this might better suit the more comprehensive justice debate in this book.

In the literature, one can also find other ways to refer to ‘value-oriented justice’. In their comparative study of European access to justice concepts, Eva Storskrubb and Jaques Ziller, for example, call it ‘Justice with a capital J ... expressed in German as *Gerechtigkeit* rather than *Justiz*’.⁸ Although

⁷ Agnes Heller refers to formal justice (or what she calls ‘static justice’) as follows: ‘[T]he norms and rules which constitute a human cluster, should be applied consistently and continuously to each and every member of that cluster. Members of the same cluster are constituted as equals ... while members who belong to different and interrelated clusters are constituted as unequals’ (A. Heller, ‘Rights, Modernity, Democracy’, *Cardozo Law Review*, 11 (1990), 1377, 1385. For some of her more detailed argumentation see A. Heller, *Beyond Justice* (Oxford: Basil Blackwell, 1987), pp. 1–47). John Rawls defines formal justice as the ‘impartial and consistent administration of laws and institutions, whatever their substantive principles [are]’ (Rawls, *Theory of Justice*, p. 58). In a legal–political context, this kind of justice can further be referred to as the ‘equality of the citizens before the law’ (K. Popper, *The Open Society & Its Enemies* (1st single-volume edn, Princeton University Press, 2013), p. 88). Craig L. Carr refers to formal justice as the ‘equal treatment’ of subjects and argues that the concept ‘is ... reducible to the unbiased, impartial, and consistent adherence to rule or principle’ (C. L. Carr, ‘The Concept of Formal Justice’, *Philosophical Studies*, 39 (1981), 211, 222 and 223). As I will explain in the following, determining ‘equality’ definitely requires some kind of value judgement. Nevertheless, formal justice must be distinguished from substantive justice. The latter goes beyond the equal application of rules and also touches upon questions of material ‘fairness’ or ‘justness’. David Lyons comments on the difference between these two concepts by defining formal justice as ‘identif[y]ing conformity to law not with justice overall [note: this refers to ‘substantive justice’] but with justice in the administration of the law, and thus with justice in the conduct of public officials’ (D. Lyons, ‘On Formal Justice’, *Cornell Law Review*, 58 (1973), 833, 836). John Rawls succinctly explains that ‘[t]reating similar cases similarly [note: this refers to formal justice] is not a sufficient guarantee of substantive justice’ (Rawls, *Theory of Justice*, p. 59). Rawls adds that ‘the strength of the claims of formal justice, of obedience to system, clearly depend upon the substantive justice of institutions and the possibilities of their reform’ (*ibid.*). For a description of the interplay between formal justice, the equal application of procedural rights, the rule of law and substantive justice see T. Campbell in P. Cane and J. Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press, 2008), p. 660, where it is explained that formal justice understood as a ‘narrow conception of the rule of law ... does not require any judgment as to the justice of the rules themselves ... , but strong feelings of resentment are aroused when an authorized rule is not applied in the same manner to all persons who are similarly situated. Moreover, formal justice may be necessary for the attainment of substantive justice’.

⁸ E. Storskrubb and J. Ziller, ‘Access to Justice in European Comparative Law’ in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007), p. 188.

law, at least to some extent, does undeniably function as a tool to guarantee certain values,⁹ or, as Roger Cotterrell puts it, ‘promotes justice’;¹⁰ value-oriented justice goes beyond mere legal concepts and also touches upon sociological, political or philosophical ideas.

In all objectivity, value-oriented justice cannot be defined in a standardised way. It does make sense though, to briefly look at some influential commentators in the long-established debate on value-oriented justice. The selection is, undeniably, not exhaustive and cannot do ‘justice’ to all influential commentators – it would clearly go beyond the purpose and scope of this book to do so. Nevertheless, the short excursion will hopefully make it easier to understand some of the underlying ideas of the concept of value-oriented justice as used in this book.

Hans Kelsen

Admittedly, Hans Kelsen, especially with his *Pure Theory of Law*,¹¹ cannot be regarded as a true advocate of value-oriented justice.¹² However, he does not deny the fact that the concept of value-oriented justice is heavily debated when he, on a different occasion, vividly comments that ‘[n]o other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant’.¹³

Kelsen also rightly realises that it is very difficult, maybe even impossible, to come forward with a one-size-fits-all definition of justice. In his quest to find an answer to the question of what (value-oriented) justice is, Kelsen comes to the following conclusion:

I started ... with the question as to what is justice. Now, at ... [the] end
I am quite aware that I have not answered it. My only excuse is that in

⁹ With respect to European contract law the Study Group on Social Justice in European Private Law comments that ‘any system of contract law expresses a set of values, which strives to be coherent, and which is regarded as fundamental to the political morality of each country’ (Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: a Manifesto’, *European Law Journal*, 10 (2004), 653, 656). For a more general discussion on the interplay between law and equality and law and morality and values in general see S. Jørgensen, *On Justice and Law* (Aarhus University Press, 1996), pp. 96–8 and 103–5; S. Ratnapala, *Jurisprudence* (2nd edn, Cambridge University Press, 2013).

¹⁰ R. Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984), p. 73.

¹¹ H. Kelsen, *Reine Rechtslehre* (Leipzig: Franz Deuticke, 1934).

¹² See D. Miller, *Social Justice* (Oxford University Press, 1976), p. 17.

¹³ H. Kelsen, ‘What Is Justice?’ in H. Kelsen (ed.), *What Is Justice? Collected Essays* (Berkeley, CA: University of California Press, 1957), p. 1.

this respect I am in the best of company. It would have been more than presumptuous to make the reader believe that I could succeed where the most illustrious thinkers have failed. And, indeed, I do not know, and I cannot say what justice is, the absolute justice for which mankind is longing. I must acquiesce in a relative justice and I can only say what justice is to me. ... [J]ustice, to me, is that social order under whose protection the search for truth can prosper. 'My' justice, then, is the justice of freedom, the justice of peace, the justice of democracy – the justice of tolerance.¹⁴

As can be seen from this statement, Kelsen differentiates between two forms of justice, absolute and relative justice, and claims that only the second type can exist. With respect to the first, Kelsen argues that justice can neither mean absolute happiness¹⁵ nor absolute equality, understood as the postulate according to which the legal order should, in any event, treat every person in exactly the same way,¹⁶ nor can it stand for a state of absolute justness.¹⁷ In answer to two philosophical schools of thought – he refers to them as 'metaphysical-religious' and '(pseudo)rationalistic'¹⁸ – Kelsen explains that solving the question of what justice is requires a value judgement. However, as values cannot be absolute in the sense of being shared by every single individual living on this planet, justice cannot be defined in an absolute way.¹⁹ Thus, both the metaphysical-religious approach, based on transcendently existing absolute values, and its (pseudo)rationalistic counterpart, trying to explain justice with the help of rational thinking, must fail, as they, according to Kelsen, would presuppose that absolute values exist.

Still, Kelsen admits that certain *relative* values can be found in every society. General or societal values are the outcome of a certain kind of trade-off between conflicting individual values and interests. They lead to relative justice, a concept that results from majority decisions and that could be used to achieve and secure a stable society. Understood in such a way, justice is a flexible system, which might lead to different results depending on the cultural or geographical background, and one that can change from one generation to the next or even within the same generation, if the outer parameters are altered.

¹⁴ *Ibid.*, p. 24.

¹⁵ '[I]t is ... inevitable that the happiness of one individual will, at some time, be directly in conflict with that of another' (*ibid.*, p. 2).

¹⁶ However, this, according to Kelsen, does not mean that it is at the legislator's discretion to introduce or maintain a law that (without any good reason) differentiates between two individuals (see *ibid.*, pp. 14–16).

¹⁷ *Ibid.*, pp. 7–11. ¹⁸ *Ibid.*, p. 11. ¹⁹ *Ibid.*

Aristotle

In his analysis, Kelsen comments on some of the most influential early value-oriented justice advocates. Plato with his concept of ideas is a paramount example of a representative of the metaphysical-religious school. Aristotle, one of Plato's students and an advocate of the (pseudo)rationalistic school, might however be regarded as being even more influential, or at least more often referred to and studied in the field of value-oriented justice.

In Book V of the *Nicomachean Ethics*, Aristotle outlines his understanding of value-oriented justice. According to Aristotle, (general) justice is an expression of moral virtue, and the one who follows the law is considered as being just.²⁰ In the second chapter of Book V, Aristotle introduces a more specific form of justice: particular justice.²¹ Particular justice stands primarily for equality²² and can further be subdivided into two forms: distributive justice on the one hand and corrective on the other.²³

To a certain extent, both distributive justice and corrective justice deal with the 'right balance' of rights, duties and goods between two parties. Aristotle explains both with mathematic formulas, which – in his opinion – lead to a logical and correct allocation by the state. Simply put and in a more generalised way, one could say that distributive justice deals with dispute avoidance by preventing inequality from occurring. Corrective justice on the other hand can be seen as a mechanism to solve a dispute between two individuals caused by some wrongdoing, which can result from either a voluntary or involuntary transactional relationship.²⁴

This is not the place to go into further detail about Aristotle's description of value-oriented justice. Nevertheless, it should be registered that Aristotle (like Kelsen) does not claim that it can be described in a standardised way, as he uses different definitions for different scenarios.

²⁰ Book V, chapter 1 of Aristotle's *Nicomachean Ethics*; for details see D. Ross, *The Nicomachean Ethics of Aristotle* (Oxford University Press, 1954), p. 107; F. H. Eterovich, *Aristotle's Nicomachean Ethics: Commentary and Analysis* (Washington D.C.: University of America, 1980), p. 90.

²¹ Eterovich, *Aristotle's Nicomachean Ethics*, p. 92.

²² Ross, *Nicomachean Ethics*, p. 109.

²³ Aristotle refers to these two groups in chapter 3 (distributive justice) and chapter 4 (corrective justice) of Book V.

²⁴ Some commentators identify a third form of particular justice in Aristotle's concept of proportionality introduced in chapter 5 of Book V of the *Nicomachean Ethics*. David Ross refers to this concept as reciprocity. Unlike distributive justice (which aims at the equal allocation of rights, duties and goods among the public in general) and corrective justice (which deals with the rectification of a result of some unlawful activity),