

Access to Justice, a multi-layered concept

Abstract

Few concepts have received as much attention as access to justice. A theory has been dedicated to the development of this concept and, in the words of Genn, there have been ‘many forests felled in pursuit of providing definitions of access to justice’. However, the definitions currently in vogue do not tell the whole story. In particular, these definitions do not do justice to insights from the past relating to access to justice. This contribution presents a model which can accommodate all elements which are or can be attributed to access to justice.

Access to Justice, theory of waves, systemic legal aid, preventive law, criminal law.

1. Introduction

The term ‘access to justice’ (hereinafter A2J) is regularly used, with various meanings. Sometimes, but not always, the author takes the trouble to indicate what he or she means by the term. There is quite a range of definitions. Some publications concern ‘access’ in a particular area of law (environmental justice, Redgewell, 2007; digital justice, Appelman et al. 2021), others discuss A2J from a specific perspective: (public views on A2J, Farrow 2014; A2J through specialised women’s police stations, Carrington et al. 2020). There is a good reason why Currie states that A2J “can reflect a wide range of different values and objectives in relation to a great diversity of issues and activities” (Currie 2000). Indeed, Smith believes that it is best to avoid using the term. “In its original concept it (A2J, MW) had quite a precise definition, but taken away from its roots it is completely meaningless.” (The Guardian, 2011) That was in 2011. A year later the World Justice Project (WJP) came up with a definition that, according to this organisation, has in the meantime been accepted worldwide (Agrast et al., 2012/2013).

This is not the end of the discussion on the meaning of A2J. The definition is a working definition, intended to facilitate a worldwide comparison of data. Other manners of providing meaning thus remain possible. This definition has, however, become the starting point for research or analysis for many people.

In this contribution I will show that this approach to A2J does not tell the whole story. I will do so on the basis of insights from the ‘theory of waves of law reform’ (paras. 3 and 4). I do not view the waves in that theory to be a matter of progressive insight, whereby the second wave brings about an improvement compared to the first and so on, but as developments which have each had their own merits. On the basis of that analysis, I come to an alternative model (para. 5) in which all aspects of A2J have a place.

Before I do that, I will go into the Dutch case which gave rise to this exercise.

2. The Dutch scandal with fiscal allowances.

In the late 2010s, Dutch society was shaken by signals of merciless and possibly even unlawful practices of the Dutch Internal Revenue Service. The IRS demanded repayment of social benefits that had been provided to compensate costs or to prevent people from falling under what was deemed the social subsistence minimum. The demand for repayment was ruthless, without any consideration for personal circumstances. The media jumped on it and members of parliament bombarded the responsible cabinet member with questions about disproportional repayment demands, where 20 or 30 euros of alleged ‘fraud’ could result in debts of many thousands of euros, evictions due to rent arrears and even out-of-home placements of young children. A parliamentary enquiry followed, and the related report contained devastating conclusions for all representatives of the rule of law: all fell short in their core task of protecting citizens against injustice.¹ The legislature: by creating a system of disproportional rules on penalties and repayment demands for every action which raised even the appearance of fraud. The IRS: by implementing the rules without any criticism and without paying

¹ “Ongekend Onrecht”, (*Unspeakable Injustice*), report of the Parliamentary Committee for the Childcare Allowance Enquiry dated 17 December 2020.

any attention to personal circumstances. The judiciary: by failing for a long time to take corrective action. When the full scope of the scandal became clear, the highest administrative judge publicly apologised for the institutional blindness of ‘his’ court for this ‘systemic injustice’,² which can be deemed a unique occurrence. What makes the matter even worse is that in the implementation, the IRS made use of algorithms, in which a form of ethnic profiling had been embedded. Consequently, this made the injustice racist as well as systemic.³ The impact of the scandal was substantial. According to two SGs (Secretary-Generals) it cast ‘a shadow over the reputation of the civil service’. One said: “It is not the government we want to be.” The other said: “This is a widely shared feeling in the entire government: never again.” (NRC, 2023). Nevertheless, the cabinet member responsible at the time believed that you could not claim that these people had not had A2J. “Ultimately, they did reach the highest administrative court. Except there they were held to be in the wrong” (NRC, 2021). That approach - where A2J was placed on a par with ‘access to the court’ or ‘access to the justice system’ – is, to quote Rhode, ‘a dubious proposition’. After all, according to Rhode: “Those who receive ‘their day in court’ do not always feel that ‘justice has been done’ and with reason. The role that money plays in legal, legislative and judicial selection processes often skews the law in predictable directions. Even those who win in court can lose in life.” (Rhode 2004).

However, the determination that A2J is not the same as access to the court does not answer the question as to what A2J actually is. This formalistic approach of a cabinet member whose portfolio includes legal protection does indicate the importance of remaining critical of (policy) decisions on A2J.

3. Waves and definitions of access to justice

3.1 The theory of waves

One of the first reports about A2J starts with a parable for clarifying the term ‘equal justice’:

On one occasion, when the medieval justices of the king of England went out (...) one Alice, the daughter of Piers Knotte, came before the court and begged for help, saying that “Alice can get no justice at all, seeing that she is poor and this Thomas is rich.” (Cappelletti et al, 1975).

In this quotation, ‘Justice’ not only stands for the fact that someone without money has fewer opportunities of getting justice, it also stands for the intended result. Both elements recur in the approach to A2J by Cappelletti and Garth of 1978. After the determination that “the words ‘access to justice’ are admittedly not easily defined”, they continue that “they (i.e. the words A2J, MW) serve to focus on two basic purposes of the legal system, the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just. Our focus here will be primarily on the first component, access, but we will necessarily bear in mind the second. Indeed, a basic premise will be that social justice, as sought by our modern societies, presupposes effective access” (Cappelletti and Garth, 1978).

Over the years, the views on the best way to achieve a system that satisfies those two conditions changed. For that development the authors introduced a ‘theory of waves of law reform’, the third of which had just ended in that year (1978). In the first wave the focus was on mechanisms to provide access to courts and legal representation of individual interests. After that (second wave) the concept of A2J was expanded to questions of institutional design. The third wave defined A2J as a problem of equality, particularly regarding outcomes.

Twenty-five years later MacDonald updated the development with a fourth and fifth wave. The fourth wave draws attention to dimensions of A2J beyond disputes: ADR processes as strategy for avoiding

² Lessen uit de kinderopvangtoeslagzaken (*Lessons from the the child-care allowance cases*), reflection report of the Administrative Jurisdiction Division of the Council of State, November 2011, p. 49.

³ After initial denials, the R word was first used in a policy letter to the Dutch House of Representatives of 30 May 2022 from the Minister of Finance.

litigation, involving the public in institutions making and administering law, and giving more attention to the regulatory capacity of non-public bodies. The fifth wave, finally, introduces an applicability of A2J to every aspect of citizens' lives. Or, as MacDonald put it: "The correlation between health, social services, employment, protection from victimization by violence and real access to civil justice is understood to require proactive A2J strategies" (Cappelletti and Garth, 1978; MacDonald 2005; see also Marsden 2020).

There is broad consensus on the existence of the waves, although different people place the emphasis in different places. Currie describes the development as one in which "subsequent waves of change progressed from an emphasis on assuring the right to legal representation in the first wave, to an emphasis on group and collective rights in the second 'wave'. In this phase, test case and public interest litigation began to address systemic problems of inequality". And in the 'third wave' "one sees the development of a range of alternatives to litigation in court to resolve disputes and justice problems, as well as reforms that simplify the justice system and thus facilitate greater accessibility" (Currie, 2005). Sage-Jacobson summarises the essence for Australia as a focus on:

FW: equality of access to legal services;

SW: structural inequalities within the justice system;

TW: informal justice and preventing disputes from occurring and escalating;

FoW: efficiency and competition to drive down costs;

FiW: integration of the previous four waves, drawing on "self-regulation and democratic theory to promote normative notions of substantive justice within the community" (Sage-Jacobson 2015).

MacDonald made another interesting observation about the waves, especially considering his analysis is now 20 years old. According to MacDonald, such waves run in approximately ten-year cycles. If this observation is correct, the 2020s must have seen at least one further wave of law reform.

Personally, I think this is the case. I would call this wave 'digitization' and divide it into two episodes.

One, the incorporation of digital tools in legal services, both in courts and in legal information and advice. Two, the 'stampede' of AI in all segments of the rule of law. This paper is not the place for a long discussion of that particular topic, but one (recent) finding must be mentioned, as it shows both the potential of AI and the possible impact of this development. This finding is, again, from the world of medicine. According to a cross-sectional study of patient questions, most patients preferred the responses to medical questions given by a chatbot over those of physicians. The preference related to both quality and empathy (Ayers, Poliak and Dredze, 2023). According to the authors, this finding shows that AI assistants may be able to aid in drafting responses to patients' questions. In addition, I believe it also shows a need to rethink the means to achieve A2J. Can AI, which is often presented as an enemy of the rule of law, actually be a companion in enhancing A2J?

3.2 Definitions

After this very topical note, I will go back to the time the first 'closed' definition of A2J was formulated. This was in 2012, in a report of the World Justice Project, a body, founded in 2006, set as its goal 'to create knowledge, build awareness, and stimulate action to advance the rule of law worldwide'. Toward this end definitions were designed that are 'tested and refined in consultation with a wide variety of experts worldwide'. That framework of definitions is the basis for delivering data that are published in Rule of Law Indexes.

According to this definition, rule of law stands for 'a durable system of laws, institutions, norms, and community commitment that delivers four universal principles:

- 1) Accountability; the government as well as private actors are accountable under the law.
- 2) Just law; the law is clear, publicized, and stable and is applied evenly. It ensures human rights as well as property, contract, and procedural rights.
- 3) Open government; the processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient.
- 4) Accessible and impartial justice; justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve' (Website WJP, 2022).

A2J is defined as ‘the ability of all people to seek and obtain effective remedies through accessible, affordable, impartial, efficient, effective, and culturally competent institutions of justice’ (Agrast et al. 2012/2013). Sabatino therefore calls A2J ‘the core element’ of the rule of law and the rule of law its ‘parent concept’ (Sabatino 2020). In that same year Genn - ‘godmother’ of the Path to Justice research method⁴ - also provided a description of A2J. In a lecture on ‘Do-It-Yourself-Law and the challenge of self-representation’ she established that “it is reasonable to assume that essential elements include: knowledge of rights and responsibilities and of systems for redress, both formal and informal; the ability to access those systems and to participate effectively in order to achieve a just outcome on the basis of rules or legal principles in accordance with the rule of law” (Genn, 2012).

Genn thus further divides A2J than in the definition of the WJP and the intended end result is also described differently. Where the WJP speaks of ‘effective remedies’, Genn uses the wording ‘just outcomes on the basis of rules or legal principles in accordance with the rule of law’. In addition, Genn does not give the closed definition (A2J “is”...) but she names the essential elements. The Canadian Community Legal Education of Ontario also opted for this approach, which indicates ‘when A2J ‘exists’. This is the case when people “can pursue their goals and address their law-related problems in ways that are consistent with fair legal standards and processes, and when they can obtain, understand, and act on information and services related to the law, where necessary, to achieve just outcomes” (Matthews and Wiseman 2020).

4 Flaws in the mainstream approach

The above-mentioned definition and approaches leave specific insights which were gained in the subsequent ‘waves’ unnamed; I call it ‘left unnamed’ briefly ‘flaws’ and will discuss them on the basis of these waves. Before I do so, I will go into the position of criminal law in the A2J discourse.

4.2 Criminal justice, stepchild or member of the family?

A2J and criminal law are not logical bedfellows. Criminal fundamental rights issues, such as the right to remain silent and the presumption of innocence, do not fit in with striving for optimal results or good outcomes. In criminal cases there is often also a triangle of interests: state / suspect / victim. For the suspect, A2J stands for fair treatment, as of the day that he is deemed a suspect up to and including the criminal trial and perhaps even after that in the period of enforcement of the punishment. For the victim, A2J means acknowledgement of the injury caused to him and a suspect who ‘takes his responsibility’. ‘Poor truth-finding’ by the police therefore leads to things going wrong at all three levels, according to Van Koppen: a suspect is wrongly convicted, the guilty person goes free and the family of the (murdered) victim is confronted with their case remaining unresolved (NRC, 2022). Views on the question whether criminal law forms part of the A2J ‘family’ differ. The parable from the study of Cappelletti et al. leaves the precise issue unstated. Alice, daughter of Knotte, may be a poor woman who is evicted by a rich landlord, but she may also be a maid who is accused of theft by her employer and must appear before a criminal court. Both fear ‘undue influence’ of money on the justice system. The definition in the study of Cappelletti & Garth (1978) also offers scope to consider access to criminal justice as part of A2J. “The system which A2J ‘serves’ (“the words A2J serve to focus on two basic purposes of the legal system”) is for them ‘the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state” (underscore MW).

However, in many publications about (and research on) A2J, criminal justice is silently placed outside the domain of A2J. For example, Roberg starts an article on ‘perspectives on A2J and dispute prevention’ with the following two sentences. “Access to justice has been a major issue for Canada for over thirty years. Despite the many efforts made by legislators, legal administrators and public policy makers, Canada is not ranked on the best in the world in terms of fostering access to civil justice for its

⁴ The report *Paths to Justice* was published in 1990 (Genn 1990), a study of the ‘legal needs’ of people and the actions they take to satisfy these needs. The research method in this report has been followed up worldwide: these days PtJ researches are conducted in many countries. See Pleasance et al. (2013), for Australia Sage-Jacobson (2015) and for the Netherlands WODC (2020).

clients.” (Roberge 2012). Albiston and Sandefur in turn argue in favour of ‘a broader framework for understanding A2J’ with the argument that “recognizing the pervasiveness of civil justice needs makes it possible to frame A2J as a universal issue rather than a concern limited to stigmatized groups....”. (Albiston & Sandefur, 2013, underscore MW).

In this part I will first go into approaches or definitions from which it could be deduced that (access to) criminal justice does not fall under A2J; after that there will be a discussion of authors who see A2J as an important principle, including in relation to criminal law. I will conclude with a brief (interim) conclusion.

The definition of the WJP explicitly excludes criminal law. The wording ‘the ability to seek and obtain an effective remedy’ does not apply to a suspect who wants a fair trial. Shortfalls in the criminal justice system are measured in this Project, but this takes place under other factors, like ‘fundamental rights’ and ‘criminal justice’.⁵ That first factor also covers (the absence of) ‘discrimination with respect to public services, court proceedings and the justice system’. Later definitions are ambiguous about the subject. The wording ‘the ability to access’ (Genn) does not offer any scope for matters in which it will not so much be a citizen who decides to go to court, but whom the government involves in court action. Genn also defines the term she introduced, ‘judicable problem’ as “a problem which raises civil legal issues, whether or not this is recognized by those facing them and whether or not any action taken to deal with them involves the legal system” (Genn 1990, underscore MW). The wording of the Community Legal Education of Ontario can, with some good will, be interpreted as inclusive, due to the part ‘to address’ (“pursue goals and address law-related problems”). After all, being suspected of a criminal offence or having to appear before a criminal court are ‘law related problems’. Nor does (access to) criminal justice take a significant position in the theory of waves. In 2004, Currie attempted to apply the theory to criminal law, but the really ‘serious’ criminal topics remain unnamed in that analysis. There was, however, discussion of ‘the Canadian Body of Charter litigation about the right to receive legal aid in criminal cases’ (second wave) and under third wave ‘programs to assure that accused persons fully understand their rights’ and ‘the re-emergence of restorative and other holistic approaches to justice’. He (Currie) refers to the last two elements as ‘possibly the first major third wave development in access to criminal justice’ (Currie 2004).

Access to criminal justice is prominently discussed in Rhode’s book on A2J (Rhode, 2004). In this comprehensive work she discusses shortfalls in the American criminal law system, such as what she calls ‘the presumption of guilt’, the consequences of plea bargaining in relation to the poor remuneration and (thus?) the deplorable quality of state financed legal aid and the death penalty as ultimate consequence (Rhode 2004). Seven years later, Stunz went through her analysis again by mentioning ‘three keys to the system’s dysfunction’: official discretion rather than legal doctrine or juries’ judgment came to define criminal justice outcomes; the deterioration of discrimination, both against black suspects and black victims, ‘oddly’, in Stunz’s words, ‘in an age of rising legal protection for civil rights’; and a kind of ‘pendulum justice’ where the justice system first saw a sharp decline in the prison population, then saw that population rise steeply (Stunz, 2011).

These elements come together in an article on the lack of criminal prosecution in case of police brutality (Green 2016, ‘*Where are the Prosecutors?*’). The article starts with a reference to the demonstration following the funeral of Freddy Gray, “a twenty-five-year-old African-American man who died in police hands, his spinal cord virtually severed at the neck, after being taken into police custody, handcuffed, and driven in a police vehicle”. “Justice is a fundamental national aspiration”, Green argues, “but many believe that, as far as justice is concerned, they are not on the receiving end.” As example he refers to the Baltimore Racial Justice Action, that was founded on a commitment to social and economic transformation with an emphasis on racial equality. “These are all bound together when Baltimore residents ask not to be treated more harshly than others, Green continues his argument, and certainly not to fear the police, because they are African American and poor.”

⁵ The project distinguishes ‘eight primary factors’ for the division of ‘scores and rankings’: constraint of government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice (Website WJP 2022).

This wish – ‘not to be treated more harshly than others because of – in the Dutch case – a non-native family name’, will sound familiar to the victims of the fiscal allowance scandal. And for a good reason, this wish is universal. Green also denounces the mainstream interpretation of A2J in the US. “The meaning of justice also tends to be narrow when the bench and bar talk about access to justice”, he suggests. “For example, in Arkansas, the Equal Access to Justice Panel comprises lawyers who have agreed to help meet low-income clients’ civil legal needs without compensation. In Delaware, the state bar’s Access to Justice Program encourages lawyers to do pro bono work and helps connect them with civil pro bono opportunities. And in Washington, D.C., the Access to Justice Commission issued a report focusing entirely on civil justice, largely on low-income clients’ need for lawyers, and significantly on the need to expand lawyer’s pro bono services.” One might wonder, Green concludes, what happened to criminal justice. This question is also topical in a broader context. Indeed, what happened to criminal justice in all analyses about A2J-waves and people-centred justice?

As one can see, the academic and policy-based world appears to be divided on the issue. At this point I was struck by a contemplation by Farrow about his motivation for researching public opinion on A2J. “A2J is the most pressing justice issue today”, says Farrow. “Over the past number of years, I have been part of numerous research projects, policy debates, presentations, and conferences looking at the issue of access to justice, primarily in the areas of civil and family law. (...) However, the voices in the room have almost invariably been those of academics, lawyers, judges, government representatives, and the like. When voices of the public are heard, they are typically the voices of those who have been involved in the justice system – current litigants or those who have previously used the system in some way. All of these people and groups are clearly important and will ultimately be part of an access to justice solution. However, over that period of time, I have increasingly heard myself saying: ‘If we ask regular people on the street what they feel and understand about justice and access to it, we might get a very different view.’ Rather than continuing to wonder and speculate about what those people might say, I decided to ask them.”⁶

The respondents were asked eight questions, including ‘How do you define justice?’ ‘What does access to justice mean?’ and ‘Do you think that everyone is equally vulnerable to access to justice barriers?’⁷ The outcome that is relevant for this topic is in a footnote: A substantial number of respondents focused their responses on the criminal justice system (as opposed to the civil justice system). For this reason, a moderate number of interviews is directed on ‘justice issues related to crime, police, prison, and politics’.

My conclusion is that criminal justice appears to have been side-lined somewhat in the mainstream debate. For many people who are asked about the meaning of A2J, this domain is indeed relevant. The respondents are not referring to ‘restorative justice’ - bringing perpetrator and victim together out of what Currie calls the third wave - but to ‘justice issues related to crime, police’ etc.

4.3 First wave: legal aid

The first wave asked attention for mechanisms to provide access to courts and legal representation. Although many scholars do not fail to emphasise that A2J is so much more than that, there is a certain *communis opinio* that (legal) aid in many cases is not only practical, but is also particularly necessary. And not just in criminal law. After all, how else can people seek and obtain effective remedies (WJP) or just outcomes in accordance with the rule of law (Genn) in a complex legal system? The role of these professionals in definitions of A2J is nevertheless more or less eliminated. This may be related to the fact that attorneys in the A2J discourse do not have a very good reputation. For example, Rhode mentions as a problem of US society, the large number of ‘unmet needs’ in a society that is ‘overlawyered’ (Rhode, chapter 4: Access to what, Law without lawyers and new models of legal assistance). 2008 saw the publication of a book dedicated to ‘the end of lawyers’ (Susskind 2008, albeit with question marks).

⁶ Farrow 2014. For this research a written survey was sent to 494 people; of these 494 people, 99 responded positively to the question whether they were open to being interviewed (Farrow, 2014, Methodology).

⁷ The other five questions were: “Should citizens have a right to justice?” “Do you think justice is of fundamental importance to Canadians?” “Should the government do more or less to promote justice for Canadians?” “What are some examples of restrictions on access to justice?” and “Have you ever faced access to justice barriers?” Ibid.

For countries that subsidise legal aid from government resources, the increasing demand for subsidised legal aid is a problem. In England this fact formed the basis of initiating the PtJ research, in the Netherlands the government has - also - been busy for years attempting to reduce the demand of subsidised legal aid. This does not detract from the fact that affordable legal aid is deemed a human right in Europe. In criminal cases this is explicitly laid down in the European Human Rights Convention, for civil cases of a certain complexity, the European Human Rights Court recognised this right in 1979⁸, and these days both are in the European Human Rights Charter. This makes a definition of A2J without reference to (affordable) legal aid problematic.

4.4 Second wave: systemic justice

The attention for ‘questions of institutional design’ (MacDonald), ‘group and collective rights’ (Currie) or ‘structural inequalities within the justice system’ (Sage-Jacobson) resulted in the 1970s in the discovery of systemic legal aid. Aid that - in the words of law sociologist Schuyt - is not directed at that one case, but at structures that encourage injustice (Schuyt, 1973). The example of the Dutch scandal with fiscal allowances shows why this type of aid is sometimes necessary to effect justice. Moreover, systemic legal aid often is many times more efficient than litigating a large number of similar cases at an individual level, according to Rhode. As an example, she refers to a class action, whereby a group of plaintiffs joins together to bring a shared interest before the court, such as against the tobacco industry or against producers of defective breast implants. Class actions are not just about efficiency, sometimes the plaintiffs wish to bring about a political or social change. For example, the US Tobacco Master Settlement Agreement was established because a great number of States filed lawsuits against the tobacco industry for compensation of the costs of Medicare for persons with smoke-related illnesses. And the lawsuit of the Dutch Urgenda Foundation and its co-plaintiffs forced the State to increase its efforts to prevent climate change.⁹

Some scholars do include systemic (in)justice in their definition of A2J. For example, the director of the Canadian Community Advocacy and Legal Centre distinguishes five elements of A2J, including

- promotion of justice through reform of unjust law and adopting new laws
- systemic advocacy to improve policies and practices and programs and
- making enforcement of laws possible and easy (Leering 2019).

The British lecturer Moorhead sees in A2J five instruction standards, including ‘public authorities behaving properly’ and ‘making law less complex and more intelligible’ (The Guardian 2011).

4.5 Third and fifth wave: substantive justice

With regard to ‘substantive justice’ another observation of Green is relevant. After having presented the question what is this ‘justice’ for which the Baltimore residents marched, he cites a policy speech of a presidential candidate in response to the demonstration. This candidate referred to criminal justice, says Green, but it seems obvious that Baltimore residents seek more than that: “They seek social, economic, and racial justice as well” (Green 2016). In the Rule of Law Index these elements are discussed under the factor ‘fundamental rights’, which relates to the question whether individuals are free from discrimination – based on socio-economic status, gender, ethnicity, religion, national origin, sexual orientation, or gender identity – with respect to public service, etcetera.

The connection between non-discrimination and ‘justice’ or ‘A2J’ is regularly made in the Farrow study. For the respondents, both terms stand for, inter alia, ‘access to society’, ‘fighting for women’s rights’, ‘native rights’, ‘enforcing what’s right in the world ... in terms of stuff like racism or sexism or ... assault or theft’ and ‘taking care of the disenfranchised’. At the same time, ‘justice’ is not as such about discrimination. “Most striking to me (Farrow) is the notion that ‘justice’ is in the eyes of the respondents about (...) helping people to achieve the good life – whatever that might mean – and in some cases, even the minimally acceptable life: ‘food’, ‘shelter’, ‘security’, and ‘opportunities for ourselves and our kids’.”

⁸ Airey v. Ireland, EHRC, October 9, 1979, no. 6289/73.

⁹ For an explanation of the case and its outcome see <https://www.urgenda.nl/en/themas/climate-case/climate-case-explained/>.

A link is also made between A2J and ‘an active role as a participant in a democratic society’, and with prevention ‘such as (Farrow) modern health care initiatives’. In relation to A2J, such initiatives should enable citizens ‘to take hold of their legal issues, to understand them, and ultimately to prevent and resolve them’. Finally, ‘education’ is mentioned as an important value. “For people to be empowered to make good choices when it comes to justice-related issues and prevention, they need to be educated”. However, this element has two sides: “In addition to focusing on the public’s knowledge, some suggest that more understanding is needed on the part of those who provide justice.” (Farrow, 2014).

4.6 Fourth wave: preventive justice

The fourth wave (for Sage-Jacobson the third wave) puts ‘litigation avoidance’ and ‘preventing disputes from occurring and escalating’ on the agenda. Both can also be referred to as an exponent of ‘preventive justice’, as a counterpart of justice ‘after the fact’. “The idea of prevention is not new, according to Farrow. The health care system has been promoting ideas of healthy eating and exercise for decades as ways both to improve health and reduce the burden of an unhealthy population on the health care system. Prevention in the context of justice, however, is not as well developed. Comparing justice prevention to a fence at the top of a cliff as opposed to an ambulance at the bottom, recently popularized by Richard Susskind, makes the point” (Farrow 2014 with reference to Susskind 2008, pp. 224-228).

Nor was the concept ‘justice prevention’ ‘new’ when it was introduced by Susskind. A few decades earlier Brown had developed the idea of ‘preventive law’, an approach – according to Bagwell – to the practice of the law oriented toward preventing legal risks from becoming legal problems (Brown 1986, Bagwell 2014 with reference to Barton 2009). For both - Brown and later also Susskind - the message is that a fence is better than an ambulance geared to the legal profession. Their skills should be more focused on the prevention of legal problems and conflicts (Van den Luijngaarden 2022, with reference to Brown, 1986).

A lot can be said about directing this message at the government. Governments too – no, governments in particular – have an interest in their residents not unnecessarily ending up in the ravine called ‘injustice’. When looking at the cartoon, one can even ask whose *fault* it is that there was no fence at the top of the cliff. Governments also take that responsibility, albeit that said initiatives are not always noticed in or involved in the A2J discourse. I will mention as an example the setting up of ‘specialized women’s police stations’ in countries in the Global South (Carrington et al., 2020). According to Carrington et al., there is ‘a small, but growing, body of evidence’ that such stations ‘increase access to justice, empower women to liberate themselves from the subjection of domestic violence – thereby preventing re-victimisation – and work with the community to disrupt the patriarchal norms that sustain gender violence’. A comparable example is the Dutch initiative to combat labour exploitation of migrant workers by introducing a registration obligation for temp agencies and making violations subject to high fines. One could call Carrington’s example preventive social policy, the Dutch example is a form of preventive legislation – the term ‘preventive law’ has already been taken (Brown, 1986, Barton 2009).

As a last example of preventive policy, I mention the Dutch project to prevent unnecessary legal proceedings between government and citizens. According to the Secretary of State, unnecessary litigation can arise due to laws and regulations, the implementation thereof and by the way in which the government conducts litigation against citizens.¹⁰ With this project, that is part of a larger operation to reduce the demand for subsidised legal aid, civil servants are encouraged not to see those persons who turn to them with a question or a complaint as a potential opponent, but to sit down with him or her and see if a joint solution can be found.

5 A different Approach

The definitions and approaches of A2J which are most in vogue fail to highlight two dimensions: the insight from the fourth wave that prevention is better than cure and the social dimension which is

¹⁰ Letter to Parliament from the Secretary of State of January 23, 2023.

expressed in the norm of Cappelletti and Garth that results should be not only individually, but also socially ‘just’. For prevention – or, the term I use, ‘preventive justice’ – Susskind once used the term ‘outcome thinking’ to indicate why *lawyers* should change their attitude. This message also applies to the government and government agencies: a ‘good’ government (Moorhead) is also a preventive government.

This responsibility aligns with the social dimension of A2J or ‘societal justice’. The desire for results which are also socially just, led to class action and systemic legal aid. Taken together and aligning with the approach of Matthews and Wiseman (“A2J exists when...”) I come to the following premise. A2J exists when:

- Fundamental human rights are respected;
- Legislation is straightforward and understandable;
- Policy making is preventive;
- Public servants behave properly and proactively;
- Systemic legal aid and independent institutions of justice function as a counterbalance;
- Institutions of justice are accessible, affordable, impartial, efficient, effective, and culturally competent;
- People can
 - obtain, understand, and act on information and services related to the law;
 - pursue their goals and address their law-related problems, in ways that are consistent with fair legal standards and processes to achieve just outcomes;
 - acquire affordable legal assistance or aid where and when necessary.

This list shows two things:
 One, the importance of a preventive approach as counterpart of one that is restorative;
 Two, the importance of an institution-centred approach as counterpart of one that is people-centred.
 Graphically, the two opposites provide a quadrant, where there is a place for all instruments to achieve A2J.

This quadrant is as follows:

Tools for A2J	<i>Individual</i>	<i>Institutional</i>
<i>Ex ante</i>	Information, education Preventive (socio-)legal aid Problem solving ADR, mediation Restorative justice / mediation	‘Good’ legislation (comprehensible, no hidden traps) Decent and preventive behaviour of public servants Transparent outcomes
<i>Ex post</i>	Individual legal aid Case law Prosecution, adjudication, execution	Systemic legal aid; class action Corrective case law

The value of ‘transparency’ which has been placed in the block *ex ante* / social, also belongs in the individual-oriented left block. ‘Information’ - being able to know one’s own rights and obligations - also includes knowledge about earlier results in comparable cases. Without that knowledge, at a certain point in time the supporting base of a system of problem solving / ADR / mediation disappears. For the combination A2J / criminal justice in this quadrant, too, it is searching for qualifications that do justice to all complications that come with this combination. This particularly applies to cases in which the suspect denies guilt, in situations in which the offence is admitted, the interests can move in conjunction and there will be scope for restorative justice. This type of ‘justice’ belongs both with ‘*ex ante*’ (prevention of future abuses), but also with ‘*ex post*’ as part of the process of adjudication.

Difficult or not, criminal law does belong to the A2J family. Being wrongly accused of a criminal offence may not be considered a 'legal need' in terms of the PtJ studies, that does not make the wrongdoing that it causes any the less. The same applies to having to experience that a conviction is more likely to occur or that a sanction will be higher if (because) one belongs to a specific population group.

6 In conclusion

This contribution is a mix of a study into the research and analyses of others, and personal views on A2J. The motivation for this study was my consideration that A2J involves more or should involve more, than helping people to deal with the legal problems they encounter within the existing legal system. Consequently, Farrow's question regarding what ordinary people understand by 'justice' or 'access to justice' greatly appealed to me. Unfortunately, it is not possible to conduct a similar study in my own country. The Dutch translation of A2J is so limited that the answers to those questions will not provide the information desired. It was also probably that substantively poor Dutch equivalent that explains the blooper of a cabinet member who deems A2J to be the same as access to the justice system.

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