A Right of Access to Law – or Rather a Right of Legality and Legal Aid?

Janneke Gerards

43.1 INTRODUCTION

Human rights evolve continuously. Sometimes entirely new rights spring up, for example in response to technological developments. Most ‘new’ human rights, however, are refinements of existing rights, which somehow have come to be regarded as deserving protection in their own right. An intriguing question is when such new (aspects of) rights deserve to be formally recognised or even codified in international treaties or national constitutions. In these comments I will try to answer this question for the right that Simon Rice suggests should be recognised: the right of access to law. I will focus on the added value of recognising such a right, rather than dealing with its theoretical foundations.¹

After pinpointing three perspectives which could help to determine the usefulness of recognising new human rights (Section 43.2), I will examine how they work out for the right of access to law – mainly based on my knowledge of the European Convention of Human Rights and constitutional law (Section 43.3). In Section 43.4 I will raise a number of more practical issues related to the suggested normative content of this right. My tentative conclusion will be that, in light of the values the right of access to law would serve to protect, it might be more useful to codify the principle of legality and the right to legal aid instead (Section 43.5).

¹ Rice purports that human rights should find their basis in the ‘central identity’ of human rights, which, in his view, is the idea of human dignity. Interestingly, he does not mention other possible rationales for recognising a right of access to law, in particular rationales related to democracy, participation or the rule of law (see e.g. C. Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd ed. (Oxford: Oxford University Press, 2014), p. 91). Relying on that rationale might have the advantage of clarity, since it would help to distinguish between recognition of human rights based on ‘intrinsic’ values (such as human dignity) and those based on more ‘extrinsic’ values (such as societal participation and legal protection). This could make it clear that the first category of human rights can only be invoked by human beings (or organisations directly representing them), while the second can also be invoked by legal persons. See in more detail (in Dutch) J. H. Gerards, *Grondrechten onder spanning: Bescherming van fundamentele rechten in een complexe samenleving* (Fundamental Rights under Pressure: Protecting Fundamental Rights in a Complex Society) (Utrecht: Utrecht University, 2017), www.uu.nl/files/reborglgerardsoratie-uu-2017grondrechten-onder-spanning2017pdf; J. D. Ohlin, ‘Is the Concept of Person Necessary for Human Rights?’ (2005) 105 *Columbia Law Review* 209; J. W. Nickel, *Making Sense of Human Rights*, 2nd ed. (Oxford: Wiley-Blackwell, 2007).

43.2 DETERMINING THE USEFULNESS OF RECOGNISING NEW HUMAN RIGHTS

The question as to *why* and *when* new human rights should be recognised or even codified is not very easy to answer.² Mostly, it seems that the *symbolic* value of recognition of new rights is at the forefront. Introducing a new human right conveys a clear message: the right is important, it should be seen and cared about, and it should be respected and protected by those in power. Further, codification may serve the value of *cognisability*. If a new right is accepted but it is not a cognisable or discernible part of international or national law, it will be difficult for individuals to know they can claim such a right. Finally, recognition of new rights may have *legal* value in that they make clear that public authorities can be held accountable if they do not comply with the concomitant obligations to respect, protect and fulfil.

Generally, it can be expected that the symbolic and cognisability values of the recognition of new human rights are high. This may be different for the legal value of codification, especially if the ‘new’ human right is an aspect or an extension of an existing human right. After all, from a legal perspective the ‘new’ human right is then already protected. Recognition of such an aspect as a self-standing human right would have legal value only if it does not simply entail highlighting the new right, but there is an actual process of specification and definition that helps to give the right a new legal shape or fills important gaps in the protection it currently offers.

43.3 THE ORIGINS OF THE RIGHT OF ACCESS TO LAW

In his chapter, Simon Rice describes the right of access to law as an obligation on states to ensure that law, in its many manifestations, can be known. It is

for the state to ensure that the law – *its* law – can, first, be readily found; second, be readily understood; and third, be readily complied with or used by those who are subject to it.³

Effective access to law would guarantee that all individuals can know about the *regulation and control* exercised by means of law, for example through punitive or administrative sanctions, entry bans, regulation of property or contractual liability rules. In addition, it would allow individuals to understand how the law may *facilitate* them in advancing and realising their plans and aspirations. To fully benefit from the possibilities offered by the law, they may want to know all about protective measures, measures on access to compensation or social security, or licensing rules.

Both the *control and regulation aspect* and the *facilitating aspect* of the right of access to law already form part of several human rights. Human rights treaties typically require a legal basis for legitimate restrictions of the exercise of human rights. Implicit in this requirement is that this

² I have developed these standards in relation to the recognition and codification of general principles of good administration and of human rights in Dutch law; see in Dutch, J. H. Gerards, ‘Meer rechtsbeginselen in de Awb? Gezichtspunten voor toekomstige codificatie’ (More Principles of Law in the General Administrative Law Act? Perspectives for Future Codification), in T. Barkhuysen, W. den Ouden and J. E. M. Polak (eds.), *Bestuursrecht harmoniseren: 15 Jaar Awb* (Harmonising Administrative Law: 15 Years General Administrative Law Act) (The Hague: Boom, 2010), and J. H. Gerards, ‘Beginselrecht “in de regel”: De juridische meerwaarde van het vastleggen van algemene rechtsbeginselen’ (Legal Principles ‘as a Rule’: The Legal Value of Codifying General Principles of Law), in R. Schlössels et al. (eds.), *In de regel: Over kenmerken, structuur en samenhang van geschreven en ongeschreven regels in het bestuursrecht* (As a Rule: About the Characteristics, Structure and Coherence of Written and Unwritten Norms in Administrative Law) (Deventer: Kluwer, 2012).

³ S. Rice, in this volume, p. 554.

should be a cognisable legal basis, as is well expressed in the case law of the European Court of Human Rights (ECtHR):

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁴

Thus the ECtHR has clarified that individuals should be able to have access to law and should be able to foresee the consequences of their own behaviour in relation to that law. In addition to this, the ECtHR has read a prohibition of arbitrariness into the 'prescribed by law' requirement, which is particularly relevant in relation to secret surveillance.⁵ In *Roman Zakharov*, the ECtHR explained this as follows:

Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.⁶

The ECtHR also held that this implies that all relevant legal provisions should be publicly accessible.⁷

The right of access to law is furthermore closely related to the right of access to information.⁸ Somewhat similar to the International Covenant on Civil and Political Rights (ICCPR),⁹ the ECtHR has held that persons or organisations acting as 'public watchdogs' (such as journalists or non-governmental organisations) should be given access to readily available government information if they need such information in order to adequately exercise their freedom of expression.¹⁰ Another line of ECtHR case law grants individuals access to government information if it is directly related to their private lives, for example because documents contain health risk assessments.¹¹ As Rice has mentioned, this aspect of the right of access to law is therefore already covered by existing codifications.

All the same, it must be admitted that these two requirements of access to information and of foreseeability and accessibility are instrumental or accessory in nature. They are not defined as objectives or rights in their own right, but rather as means to an end. For secret surveillance

⁴ ECtHR, *Sunday Times v. The United Kingdom* (No. 1) (Appl. no. 6538/74), judgment, 26 April 1979, para. 49.

⁵ But it is not limited to this; see e.g. ECtHR, *Ternovsky v. Hungary* (Appl. no. 67545/09), judgment, 14 December 2010, para. 23.

⁶ ECtHR, *Roman Zakharov v. Russia* (Appl. no. 47143/06), judgment, 4 December 2015, paras. 229–230.

⁷ *Ibid.*, paras. 239–242.

⁸ See also S. D. Jamar, 'The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law' (2001) 1 *Global Jurist Topics* 1.

⁹ Which is addressed more properly by Rice, in this volume, pp. 549f.

¹⁰ ECtHR, *Magyar Helsinki Bizottság v. Hungary* (Appl. no. 18030/11), judgment, 8 November 2016, para. 156.

¹¹ ECtHR, *Guerra and Others v. Italy* (Appl. No. 14967/89), judgment, 19 February 1998, para. 60.

measures, the main problem is that one's private life and one's private behaviour are affected by the constant uncertainty about whether one's internet and e-mail behaviour are monitored. Similarly, if journalists have no access to government information, the main issue is that they can exercise their freedom of expression less effectively. Perhaps, therefore, some gaps could be filled if the right of access to law were to be regarded as a separate, self-standing right. But arguably even then, existing codifications do not contain significant gaps in protecting the underlying values of the right of access to law.

First, the *control and regulation* aspect of the right of access to law is covered by the principle of *nulla poena sine lege* or 'no punishment without law'. This principle can be found in the Universal Declaration of Human Rights (Art. 11(2)) as well as in several international treaties and many national constitutions. Indeed, it is considered so important as to qualify as a non-derogable right or peremptory norm (*jus cogens*).¹² Even in times of war or emergency, it is only permitted to convict someone for certain acts if that person, at the time they committed the acts, could reasonably have known they were forbidden.¹³ Core to this principle is that everyone should be able to foresee the legal consequences of their behaviour, which comes very close to the right of access to law. The ECtHR has understood this right to mean that criminal law provisions should be readily accessible and offences should be 'clearly defined', which means that 'the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable' (the *lex certa* requirement).¹⁴

This also shows that legislation is not the only relevant source of information about the potential consequences of one's acts. Legislation is necessarily general in nature and 'there is an inevitable element of judicial interpretation', because of 'a need for elucidation of doubtful points and for adaptation to changing circumstances'.¹⁵ In the ECtHR's view, such gradual clarification still meets the requirement of legal certainty, 'provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'.¹⁶

Another question is what to do when an act has been committed in the past and/or in obeying orders (think of soldiers shooting fugitives trying to cross the wall between East and West Germany), that is, at a time when there was no effective access to the applicable criminal law.¹⁷ Here, too, the ECtHR usually probes rather deeply into what reasonably could have been known and expected at the time, once again respecting as much as possible notions of foreseeability.¹⁸

Hence, the *nulla poena* principle covers important values of foreseeability, legal certainty and individual responsibility. However, the principle only applies in relation to punitive sanctions and it does not protect the right of access to law for other control mechanisms, such as liability rules or non-punitive administrative law measures. Moreover, the *facilitating* aspect of law is

¹² See W. A. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford: Oxford University Press, 2015), p. 328.

¹³ E.g. ECtHR, *Korbely v. Hungary* (Appl. no. 9174/02), judgment, 19 September 2008, para. 69.

¹⁴ ECtHR, *Scoppola v. Italy* (No. 2) (Appl. no. 10249/03), judgment, 17 September 2009, para. 94.

¹⁵ ECtHR, *Korbely v. Hungary*, para. 71.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.* See also e.g. ECtHR, *K.-H.W. v. Germany* (Appl. no. 37201/97), judgment, 22 March 2001; ECtHR, *Streletz, Kessler and Krenz v. Germany* (Appl. nos. 34044/96, 35532/97 and 44801/98), judgment, 22 March 2001; ECtHR, *Kononov v. Latvia* (Appl. no. 36376/04), judgment, 17 May 2010.

also not covered by the principle. It can be maintained, however, that this gap is filled by the constitutional principle of legality.¹⁹ In states governed by the rule of law, the legality principle is considered of great importance.²⁰ Values encompassed by the legality principle are recognised in many international law documents. The Universal Declaration, for example, in its preamble contains an explicit reference to the rule of law,²¹ and the ECtHR has emphasised that the rule of law forms part of the common heritage of all forty-seven contracting states.²² It is generally understood that the constitutional legality principle requires that powers of government be exercised in accordance with the law instead of individual capriciousness, thus offering a safeguard against arbitrariness and a guarantee for individual liberty. The legality principle further ensures equality before the law and, perhaps most importantly for the purposes of these comments, it guarantees legal certainty and foreseeability. The principle starts from the presumption that, in a free and open society, individuals need to be able to adjust their behaviour in accordance with the rules governing that society. This can only be ensured if access to the law is guaranteed and the law is formulated with sufficient precision and clarity.²³ The principle of legality thus can form a legal basis from which individuals can claim a right of access to the law, also outside the area of criminal law and also in relation to interests other than human rights.

All of this shows that the legal value of separate recognition of a right of access to law is relatively limited. Most, if not all its aspects are already covered by broadly accepted principles or international law provisions. The main reasons why recognition would be useful, then, would be to make the right cognisable and to boost its symbolic value. If that is the aim, however, the question still arises whether Rice's conceptualisation of the right of access to law is the best possible way to achieve it.

43.4 THE NORMATIVE CONTENT OF THE RIGHT OF ACCESS TO LAW

As mentioned above, Rice suggests that the normative content of the right of access to law would be

¹⁹ See L. Mommers, 'Access to Law in Europe', in S. van der Hof and M. M. Groothuis (eds.), *Innovating Government* (The Hague: TMC Asser Press, 2011), p. 392.

²⁰ See classically A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 5th ed. (London: Macmillan, 1897) p. 120 and more recently, e.g., T. Bingham, *The Rule of Law* (London: Allen Lane, 2010); Y. Roznai and N. Mordechai, 'Access to Justice 2.0: Access to Legislation and Beyond' (2015) 3 *The Theory and Practice of Legislation* 333; European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist* (Strasbourg, 2016), CDL-AD(2016)007, A-C. See also L. L. Fuller, *The Morality of Law* (Yale: Yale University Press, 1969) and J. Raz, *The Authority of Law* (Oxford: Clarendon, 1979). The notions of 'rule of law' and 'legality' are sometimes conflated, but it may be said that 'rule of law' is broader than 'legality', especially if a more substantive conception of the rule of law is adhered to. For a broad definition of 'rule of law', see e.g. Juan Carlos Botero and Alejandro Ponce, 'Measuring the Rule of Law', The World Justice Project – Working Paper Series no. 001, SSRN id=1966257, <http://dx.doi.org/10.2139/ssrn.1966257>. On formal and substantive conceptions, see P. P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', (1997) *Public Law* 467. For a narrow definition of the rule of law, which overlaps with legality, see B. Z. Tamanaha, 'A Concise Guide to the Rule of Law', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart, 2009). I opt for a formal reading of the legality principle (or a narrow reading of the rule of law) here, since this comes closest to an 'overlapping consensus' between the different understandings of the principle (see S. Beaulac, 'The Rule of Law in International Law Today', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart, 2009), p. 201).

²¹ See Bingham, *The Rule of Law*, pp. 6 and 110ff.

²² E.g. ECtHR, *Nejdet Sahin and Perihan Sahin v. Turkey* (Appl. no. 13279/05), judgment, 20 October 2011, para. 57; ECtHR, *Roman Zakharov v. Russia*, para. 56.

²³ Bingham, *The Rule of Law*, p. 37; Jamar, 'The Human Right of Access to Legal Information'.

for the State to ensure that the law – *its* law – can, first, be readily found; second, be readily understood; and third, be readily complied with or used by those who are subject to it.²⁴

To make this more concrete, he explains that the state might meet its obligations by providing:

timely publication of promulgated laws in a range of media and the official languages of the state, a plain language explanation of its law in all principal languages spoken in the state, and means-tested legal advice and representation services to supplement privately available legal services.²⁵

In Rice's view, these obligations would be similar to those resulting from socio-economic rights, which means that states at the very least would have to ensure the satisfaction of the minimum essential level required to guarantee effective access to law.

This definition and the socio-economic nature of the purported right raise several questions. First, it is far from obvious what the scope of the right (or state obligation) should be, and when and to what degree it could be justiciable. In a maximalist account, the right probably would entail that full and effective access should be given to all legislative texts as well as to all information relevant to understanding their meaning, such as case law (of higher as well as lower courts), government decrees, by-laws, soft law and policy documents. But which part of this extensive body of information should be made readily accessible to individuals in order for the state to meet its minimum core obligations? When and how could individuals go to court to enforce their rights, and how would they know? Such lack of clarity as to the extent and justiciability of the right of access to law is rather contradictory in light of the aim of the right's codification, which is to offer individuals ready and effective access to information about their rights and obligations.

The suggested concretisation of this right further shows that meeting the state's obligations would involve considerable costs and practical difficulties. This is true in particular for the obligation to provide for plain language explanations in all of the principal languages spoken in the state. This obligation is almost bound to be controversial and, as a result, may easily remain a dead letter in practice. In turn, this may have a negative impact on the symbolic and cognisability value of the right, which, in terms of the ECtHR, then would become 'theoretical and illusory' rather than 'practical and effective'.²⁶

This would probably be different for the right to access to legal advice services. Indeed, access to legal aid and representation are of great importance to the values supported by the right of access to law, as is also recognised in international human rights law. Moreover, to the extent that international courts already hold that individuals have a responsibility to obtain legal advice if they are unsure about the meaning of a piece of legislation or a line of case law,²⁷ it would be reasonable to impose a concomitant state obligation to make such legal advice readily available and affordable. It is not entirely obvious, however, whether and why it would be useful to codify such rights and obligations as part of a wider, socio-economic and rather underdetermined right of access to law. To all expectations, their symbolic and cognisability values would be supported just as well or even better if these aspects were defined as self-standing rights.

²⁴ Rice, in this volume, p. 544. For another definition of the right, see Roznai and Mordechay, 'Access to Justice 2.0', 3.

²⁵ Rice, in this volume, p. 547.

²⁶ See ECtHR, *Airey v. the United Kingdom* (Appl. no. 6289/73), judgment, 9 October 1979, para. 24.

²⁷ ECtHR, *Scoppola v. Italy* (No. 2), para. 102.

43.5 TOWARDS CODIFICATION OF THE PRINCIPLE OF LEGALITY AND A RIGHT TO LEGAL AID?

Seen from the perspectives briefly sketched in Section 43.2, it is questionable if codifying the right of access to law in the way suggested by Rice would serve their purpose. In legal terms, it seems that many aspects of this right are already given protection. The suggested definition is, moreover, rather underdetermined and is almost guaranteed to give rise to controversy, which may detract from the right's potential of having symbolic and cognisability value.

Still, the underlying values of the right of access to law are too important to leave it at that, and its codification deserves serious consideration. Perhaps a feasible way of doing so would be to codify the principle of legality and extend the right to legal aid to cover access to legal advice services. As explained in Section 43.3, the legality principle can cover access to legal information as well as the *lex certa* principle, equality before the law and a prohibition of arbitrariness. Moreover, it probably would be possible to define a 'right to legality' in terms of a justiciable right, since elements such as legal certainty, foreseeability and the prohibition of arbitrariness already function as standards for judicial review. Such a justiciable right would provide for stronger legal protection than the suggested obligation for the states. Another advantage is that the legality principle is well established in legal doctrine, both in domestic legal systems and in international law and human rights treaties. This may make it easier to come up with a sufficiently precise and generally shared definition that can be usefully applied by international human rights bodies and national courts, and that is less controversial for states.²⁸ Codification of this principle could then be complemented by expressly including a right to access to legal advice or by stating the right to legal aid as a separate right. This right could not only cover (government-financed) assistance by a lawyer in court proceedings, but also legal assistance in accessing and understanding the law. Again, this could be made into a justiciable right.

Recognising these new human rights and extending their meaning would not only help all people to be able to know the law, but it would also guarantee a number of essential rule of law requirements. Doing so in a clearly visible way would thereby also contribute to the symbolic significance of the rule of law. Since that, indeed, could only be widely embraced, express recognition of these two rights would seem to provide for a highly useful addition to the existing body of human rights.

²⁸ Although the notions of rule of law and legality spark considerable controversy, it seems there is general agreement on its minimum core; see above, n. 20.