

**ACCESS TO JUSTICE:
Preliminary Considerations**

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A LITERARY APPROACH

Strictly speaking, the theme referred to by the expression “access to justice” usually means access to the legal system established by the State. That is also our theme, yet we must remember that the underlying, fundamental principle is access to justice proper, justice as a principle and as a value, which is something that is not circumscribed by the act institutionally considered as “legal activity”, above all when we know that there are deep - and apparently insoluble – economic, social and cultural inequalities that change the reductive view of an expression such as “access to justice” into an involuntary act of verbal cruelty, or at least one of infelicitous irony.

To make such a complex terrain smoother, it is always useful to look for perspectives different from the legal sphere. Accordingly, one of the first approaches to the theme could serve to entertain us for a while in our search for the subject of law in literary works. Of course, we shall not do this here, yet we could invoke as tutelary images the memorable examples taken from the pages of one of the most important writers of the 20th century, Franz Kafka, whose work, as you will recall, has much to do with access to justice.

Before referring to the examples, let us say a few brief words about the author:

Franz Kafka, as you know, was a strange and estranged man in permanent struggle with the world around him: his house, his father, Law, insurance companies, the city. He was born in Prague on 3 July 1883, in the famous Jewish ghetto, which was to mark him all through his lifetime. He could not be a non-Jew, but neither could he be one in the terms that the obscure laws of blood and religion imposed on him. The permanent debate with the world – in particular the debate of being Jewish or not – ended up enthroning him, with eternal honor, in the history of literature, for which he lived so intimately almost all his life and whose glory he wanted to renounce.

When Franz Kafka managed to escape from his vital, secret cloisters, Law surrounded him completely. He studied law with a grudge and was far from being an outstanding student. And so he became a lawyer, without really wanting to. He exercised law as an employee of two insurance companies for which he wrote legal texts that today feature as curiosities of literary archeology. He had to attend many courtrooms, with more apprehension than pleasure, gathering from the atmosphere the necessary impressions to describe it in his masterpiece “The Trial”. Let’s take a look at the first images in the book.

On his thirtieth birthday, Joseph K., a bank employee, is arrested at home for no apparent reason. He is notified of his arrest, but is allowed to fulfill his obligations. On the following Sunday he is summoned to court for a first questioning which starts an inexplicable legal process constructed by means of impersonal mechanisms in the center of the law of K’s life. He sees the lawyers as “mere shysters” and describes the room where he exercises his profession as “the same narrow enclosure with a very low ceiling ... the finest demonstration of disdain for justice ... all that treatment inflicted upon the lawyers was not gratuitous. This was how justice tried to suppress the defense so that the accused would have to face it all on his own ...”.

Isn't this Kafkaian perspective the same perception that many of us have had at some time when we enter the somber premises of certain chambers of "justice"? Isn't the sensation of being defenseless and without shelter the same as many people feel who think they have "accessed justice"?

Probably the most emblematic text of Kafka's philosophy concerning the law is the one entitled precisely "Before the law". Here we find an indelible image of "access to justice". Let us recall the circumstances:

A peasant presents himself to the doors of the law and asks to come in. The door opens, but a fearsome, ominous doorman guarding the threshold tells him that he can't come in "for the moment". The peasant decides to wait for a while until they let him in. He thinks that this moment has to arrive some time, some day. And so his life is spent in fruitless waiting. He gets neither hope nor the least consolation from the unmovable doorman. After some years, when he is about to die, the peasant realizes that the door was there to prevent others from entering, but not him. It would have sufficed for him to ignore the doorman's fallacious warnings to have access to the only path reserved for him. He was the only one meant to enter freely, and he did not do so. He did not know that he could avoid the false taboo, the confused imposition of a norm, arbitrariness disguised as law. To his disgrace, he failed to follow the example of Antigone, who imposed natural law on written law.

Up to here, the force of symbolic irradiation behind Kafka's images goes beyond the literal and allows for clear associations with the legal world familiar to us. Let's allow these images to do their work in silence before we proceed to the necessary investigation of the theme, which, as a member of a Juridical Committee, I must do by virtue of formality and good academic practices.

ENUNCIATING SOME PRINCIPLES:

1. Access to justice, albeit an inalienable human right, should also be seen as a social right.
2. Equal access to justice is a necessity of the Rule of Law. Legal exclusion of important segments of the population means, on the contrary, de-legitimizing democratic institutions.
3. The State has the duty to guarantee access to justice for everyone and to endeavor to achieve maximum equality in what it provides, how it functions and the results it produces.
4. The policies addressed to balancing social access to justice should not be circumscribed to a sort of "legal charity" (free defense, tax exemption, and so on). They should respond to an authentic system of effective (rather than simulated) protection of the weakest.
5. Democratization of the legal system is not limited to equal access, but rather implies greater social participation in how it is managed. The monopoly of legitimate justice on the part of the State is not incompatible with forms of social or community self-organization.
6. Administration can also be an alternative to prevent judicializing all matters that require the decision of a third party. Many fair decisions must be made in the administrative sphere.
7. A legal culture should be promoted to enable harmonization of forms of conciliation in cases where there is no reason for courts. And even when they do reach the courts, this culture should seek in *limine litis* to resolve them by using reparatory arrangements or agreements.
8. Effective independence of the administration of justice should be guaranteed. Not only independence from the other public powers but also from the factual powers that use all sorts of pressure to jeopardize the freedom of decisions. Better training of our judges, as well as due social control, can help to strengthen judicial autonomy.
9. The juridical and ethical training of judges should be a permanent concern of society and the State. We are aware that law schools are basically geared to training litigation lawyers and that the programs of law studies are limited to sporadic courses administered by the Judiciary. A system of integral legal training should be created from the undergraduate level.

10. Reform of the legal system meant to guarantee full access to justice calls for political decisions that should be given priority status in all spheres of international law, since this is a fundamental right that permeates all the vicissitudes of human life.