Title	Access to justice in democratization movement
Sub Title	
Author	松尾, 弘(Matsuo, Hiroshi)
Publisher	慶應義塾大学大学院法務研究科
Publication year	2014
Jtitle	慶應法学 (Keio law journal). No.30 (2014. 10) ,p.21- 36
JaLC DOI	
Abstract	
Notes	論説
Genre	Departmental Bulletin Paper
URL	https://koara.lib.keio.ac.jp/xoonips/modules/xoonips/detail.php?koara_id=AA1203413X-20141006-0021

Access to Justice in Democratization Movement*

Hiroshi Matsuo

Ⅰ. Introduction

Access to justice has been an object of study for around half a century and its agenda have been expanded toward various directions. They include the provision of legal aid, improvement of case management, cost reduction and related reforms of formal procedures as well as the use of informal justice, availability of a petition requiring government actions for public interests, and various forms of political participation.

---

* This paper is based on the keynote speech made at the International Symposium on "Access to Justice in Asia" on 11 February 2014 in Phunom Penh, the Kingdom of Cambodia, co-organized by the Bar Association of the Kingdom of Cambodia (BAKC) and the Japan Federation of Bar Associations (JFBA) and spported by the Japan International Cooperation Agency (JICA). I am grateful to Mr. Bun Honn (President of BACK), Ms. Sachiko Matsuda (Vice President of JFBA) and Mr. Kimitoshi Yabuki (Chair of Committee on International Relations, JFBA) for giving me the opportunity. I also thank Ms. Miha Isoi, Mr. Siphana Sok, Mr. Lasonexay Chanthavong and Ms. Yoko Fujimoto for their kind support and the participants for the useful comments and questions during the discussions.

Now access to justice is recognized in a broadest sense to mean the availability of various measures for every citizen to claim "justice" or "right thing" either individually or collectively not only in the court procedures but also in daily activities and general discourses. Claiming justice is as important as eating, drinking and breathing for all of us, and we need a space which is filled with the flesh air of justice.

From the viewpoint of this broad conception, it is worth paying attention to the citizen's movements after the Arab spring. On January 14th and 15th 2014, the national referendum was held in Egypt to ask the nation for the approval of the Draft Constitution prepared by the interim government. This process was administered by the head of the Supreme Court as a provisional president. The Draft was approved by 98.1% of the voters, although the voting rate was 38.1%. This was the third referendum after the resignation of the former president in February 2011 and it was based on the unilateral constitutional declarations which had been issued by the interim government headed by the military council which had denied the former constitutional declarations issued by that interim government but under the influence of progressive political leaders. On the one hand, this process, involving the Supreme Court, was positively evaluated as a type of "judicialization of politics." On the other side of the view, however, not only the rightness（justness）but also the legitimacy of the order based on the political declarations may be questioned and characterized as "politicization of judiciary," if the judiciary is only used to authorize the present regime.

Also in Asian countries, the judicialization of politics may be found such as in the establishment of constitutional court in Thailand, Korea, Indonesia, Cambodia, and Myanmar. The judiciary in Taiwan and Philippines have also been empowered, though they do not have a constitutional court. But, at the same time, we find the political movements initiated by the anti-government demonstration in Thailand, where Constitutions had been changed under the political movements. The head of the Supreme Court was impeached in Philippines in May 2005 and in Sri Lanka in January

2013 in the political struggles which involved civil movements.

Thus the borders between the politics and justice have been fluctuating in the tense relation between the strength of competing political powers, that of judiciary, and the actions or reactions of civil societies which seem to have had a casting vote. In the countries where the political leaders have promoted policies for economic growth with little consideration of equity in accordance with the development process, citizens seem to have had a tendency of claiming justice in a more radical way, which led to the political struggle and affected the growth of civil societies. In order to prevent such a result, the recognition of current agenda for enhancing access to justice should be significant for countries in the process of democratization by coordinating the economic growth with political development.

Ⅱ. Development of the Agenda for Access to Justice

1. Since 1960s to 1980s

The agenda for access to justice have been developed and expanded. Since 1960s to 1980s,（1）the provision of legal aid（Cappelletti and Garth 1978）,（2）the availability of public interest law and litigation（Craston 1997）, and（3）the use of informal justice（Trubek 1990）were the major topics of access to justice. These agenda have been developed under the ideal of welfare state, where the guarantee of social access to justice for every citizen was regarded as one the reasons for existence of the state.

2. After 1990s

（1） Implementation of competition policies

However, these major topics of access to justice had been declined with the ideal of liberal state since the end of 1980s. Instead, the implementation of competition policies for the liberalization of legal service market including deregulation of lawyer's fees and advertisement became an important agenda for access to justice（Seron 1996）. It might

have contributed to the benefits of private companies and they demanded the improvement of economic access to justice.

(2) Access to environmental justice

At the same time, as a result of the expansion of economic activities, the special access to environmental justice has been emphasized since 1990s（Harding 2007）, especially triggered by the Rio Declaration on Environment and Development in 1992. In order to implement the access to environmental justice, guidelines for environmental and social considerations have been developed and adopted by development organizations and financial institutions. The compliance of those guidelines are reviewed by the independent accountability mechanisms established within those institutions. They also provide consultation and mediation at the request of complainant in accordance with their guidelines（World Bank, the Inspection Panel 2013）.

(3) Enhancing access to justice to reconcile collective and multilayer interests

In addition, collective actions have been developed by legal reform so as to enhance access to justice to reconcile collective and multilayer interests including those of consumers（Webka, van Uytsel and Siems 2012）.

(4) From universal approach to looking into the diversified context in locality

On the other hand, with the spread of multiculturalism, it has been noted that the meaning of "justice" may not be identical, rather may have some differences as a result of the different history and social structure. The investigation of the differences in "justiciable problems" in each local context has been conducted（Moorhead and Pleasence 2003）.

(5) Access to justice for deliberative democracy

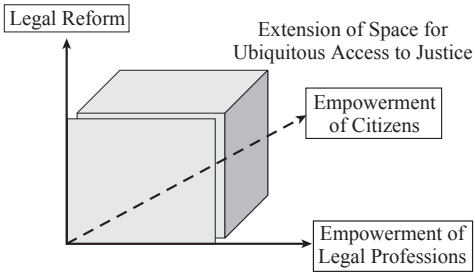
Finally, access to justice has included the free participation of every citizen in the

political decision making in a right manner to claim how his or her society should be organized and resources distributed（Parker 1999: p. 43）. In this sense, various types of political participation, not only in the election but also in informal and social movement, have been recognized as access to justice for participatory or deliberative democracy. This conception of access to justice would have a profound meaning for the promotion in the democratization movements and the growth of civil societies in Asian countries.

Ⅲ. Definition and Measurement of Access to Justice

1. What is Access to Justice?

Thus we can confirm how the agenda for access to justice have been expanded and diversified, and none of them have been achieved enough so far. It looks so fragmented that it would be hard for us to draw any common core of access to justice. However, as I have mentioned above, access to justice can be defined now as the availability of formal and informal measures or processes for every citizen to claim justice individually or collectively in a right manner complying with the rule of law principle in his or her own society. We know well that it is an ideal and a rhetoric that cannot be achieved completely in everywhere and in every moment. But, without that ideal, we cannot live our life with any hope for justice. In this sense, it is worthwhile for us to promote access to justice by filling the gap between the legal system（formal and informal）and the reality of the provision of law with the various types of available measures to claim justice in a legitimate manner in the society. The promotion of access to justice can be conceived as expanding a space filled with the ubiquitous access to measures or processes in accordance with the rule of law measured by multiplying the functions of（a）laws and regulations,（b）judicial system, and（c）legally empowered citizens（see Figure 1）（Matsuo 2014）.



Source: Matsuo 2014: p. 275.

［**Figure 1**］ **The Conception of Access to Justice**

2. Measurement of Access to Justice

This conception of access to justice by three dimensions may reflect on the method to measure access to justice（Uzelac and van Rhee 2009; Gramatikov, Barendrecht and Verdonschot 2011）.

The first dimension should be measured by（1）the integrity of law which asks whether there exist contradictions among laws or lacks of laws to be enacted in the constitutional structure of the country.

As for the second dimension,（2）time and costs for judicial procedure would be most important and crucial factors which actually influence access to justice. It also measured by（3）the existence of impunity and the uncertainty of enforcement of laws and judgments,（4）the existence of corruption in judiciary and other branches of government,（5）function of informal or non-formal justice.

The third dimension should be measured by（6）the status of legal empowerment which would be facilitated by the dissemination of laws and legal information, the provision of legal aid, etc.

Ⅳ. Promotion of Access to Justice

1. Promotion of the Individual Components

(1) Legal aid and legal empowerment

The precise measurement of access to justice and its technical improvement are important because they provide the basic information for the promotion of access to justice.

As for the promotion of individual component of the three dimensions mentioned above, most difficult one is the improvement of the limited capacity of legal aid programs and the citizen's empowerment toward access to justice. We know that this is the oldest and still most difficult phase of access to justice, but worth challenging even though it cannot be fully achieved.

On the one hand, whatever small case, a careful treatment of one case of legal aid is more important, rather than the nominal increase in the number of accepted cases.

On the other hand, some instruments which leverage the good practices will be needed. For that purpose, firstly, the use of press and mass media including the internet media and networks must be effective. According to a survey conducted by the UNDP Vietnam reported that most people interviewed positively assessed the role of press and mass media as well as their impacts on the protection of people's rights. It indicates that the people tend to be fonder of law dissemination programs published on television, press and media, which are more vivid, practical, and easier to watch (UNDP Vietnam 2011: pp. 35-36, 56).

Secondly, specialization in the provision of adequate relief for particular interests may be effective. Land disputes, labor disputes, disputes on transactions of immovable property and construction contracts, small amount claim, domestic violence and other family relations, etc. may well be treated by the special organizations and procedures, which cover both social and economic access to justice (Ghai and Cottrell 2010).

In addition to this division of labors, the collaboration of various types of civil

society organizations and public organizations will be effective in arranging legal aid programs. The survey mentioned above evaluated the role of socio-professional associations or civil society organizations（for instance, Vietnamese Fatherland Front, Party cells, Women's Union, Farmer Association, and Veteran Association）was highly appreciated by the people（UNDP Vietnam 2011: pp. 36-37, 56）. Local community may arrange the regular consultation with the collaboration of lawyers, accountants, judicial and administrative scriveners, social workers, and local officials. It is a type of legal aid program which is practiced in Japan, though it does not limit the application within legal matter.

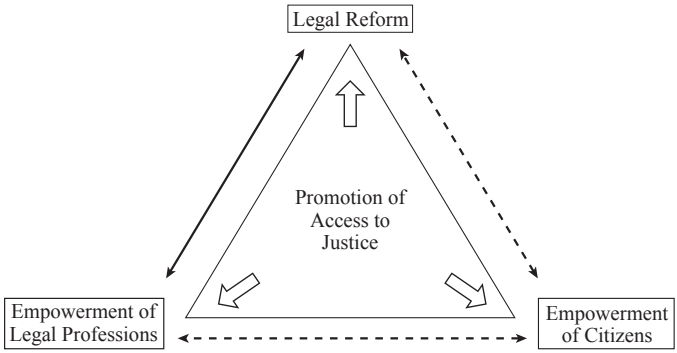
Thirdly, but related with the second point of division of labors and collaboration, the source of funding of legal aid must be secured. Now the legal aid programs are conducted by the combination of（a）pro bono activities by the lawyers（Rhode 2004）,（b）public provision, and（c）private sources. In European countries, the privatization of the funding for enhancing access to justice has been promoted by the introduction of legal expenses insurance（LEI）（Zuckerman and Cranston 1995; Moorhead and Pleasence 2003; Nash 2013）. While it relates with the people's attitude toward litigation, consciousness of justiciable problems, the roles and numbers of lawyers, judges and other officials, the availability of that mechanism, which is partly introduced in Asian countries, needs to be studied.

2. Integrated Approach for the Promotion of Access to Justice

(1) Possible cooperation between the civil societies and the government

Not only to leverage the legal aid programs but also to promote access to justice more comprehensively, the improvement of three dimensions of access to justice, i. e., legal reform, judicial training, and legal empowerment should be combined（UNDP Vietnam 2011; Matsuo 2014）. So far some legal reform programs have been combined with those of professional training for judges, prosecutors, and lawyers. However, there seems to be a room to combine the programs of legal aid and dissemination of law with

those of legal reform and training for legal professions（see Figure 2）.



Source: Matsuo 2014: p. 275.

［Figure 2］ Integrated Approach of Access to Justice

（2） Promotion of access to justice as a governance reform

（a）It should be noted that the promotion of access to justice would influence the division of powers in the state as a part of the rule of law priniciple. For instance, positive promotion of judicial review may influence the activities of legislature and executive. In order to avoid the confusion which may lead to the political struggle, it should be important to define the proper role of judiciary in the division of powers in each state to coordinate development policies with the principle of rule of law.

（b）In order to promote access to justice, structural reforms of the society are also indispensable in education, employment, and poverty reduction.

Thus the promotion of access to justice can be regarded not only as a legal reform, but as a part of governance reform in the country.

3. Significance of Monitoring

（1） Standard index for the promotion of access to justice

The regular monitoring of access to justice is very important for several reasons. First, it will improve the measurement technique. For instance, the World Justice Project has been improving the index of access to civil justice and criminal justice as a

part of the rule of law index（World Justice Project 2012-2013）.

(2) International networking of monitoring

Second, an international networking of monitoring is also effective. I understand this is one of the important functions of this meeting.

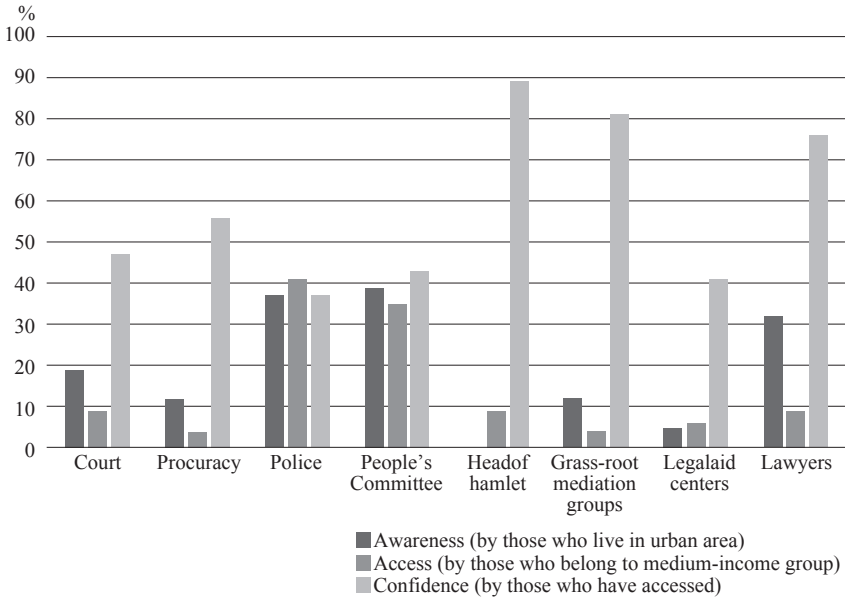
There are other networks managed by organizations such as the Asia-Pacific Rights and Justice Initiative（AP-A2J）, Asia-Pacific Regional Center, UNDP, the Global Forum on Law, Justice and Development（GFLJD）, etc. Each network should know the activities of other networks more regularly and institutionally for the further improvement, division of labors, and collaboration.

(3) Diversified context of access to justice

Third, the regular monitoring is also indispensable for the further understanding of the differences among societies in the recognition of justiciable problems, although the notion of justiciablity may be gradually changed as a result of the mutual communications and social change. Also the citizen's expectation on the judiciary and the consciousness of the judges and prosecutors about the role of state in dispute resolution may be different but changing. It will influence, for instance, the applicability of the adversarial principle in the civil procedure（Andrews in Zuckerman and Cranston 1995; Matsuo 2014）. From this point of view, the survey conducted by the UNDP Vietnam in 2003 and 2010 seems interesting.

On the one hand, according to **the 2003 survey** based on the interviews to 1,000 people who lived in different regions and belonged to different classes of income, the awareness of legal institutions among the interviewed Vietnamese people was ranked as follows: 1）the People's Committee, 2）the police, 3）the grass-root mediation groups, 4）lawyers, 5）the courts, 6）the procuracy, 7）the Legal Aid Centers（UNDP 2004: p. 8）.

As for the accessibility to those institutions, the police and the People's Committee



Source: UNDP Vietnam 2004: pp. 8, 12, 17 (figures are partly combined and rearranged by the author).

［**Figure 3**］ **Access to Justice Survey in Vietnam 2003**

stood out again with ranks 1 and 2 respectively, each reaching around 40% of positive poll responses. Lawyers followed with around 10% in rank 3, and the head of hamlet, the grass-root mediation groups, the courts, the procuracy, the Legal Aid Centers came last with less than 10% in a collective rank 4（UNDP 2004: p. 12）.

Interviewees who actually accessed legal institutions were questioned about their confidence in these institutions. The responses revealed the following ranking: 1）the head of hamlet, 2）the grass-root mediation groups, 3）lawyers, 4）the procuracy, 5）the courts, 6）the People's Committee, 7）the Legal Aid Centers, and 8）the police（UNDP: 2004, p. 8）. However, the confidence in the Legal Aid Center was higher within the interviewees who actually used it（40%）rather than that within those who had no experience to use it（10%）. Anyway the result suggests the persistence of the dual justice system in Vietnam（see Figure 3）.

The survey shows that the awareness, accessibility and confidence of the people towards the legal institutions did not correlate and that the gap was serious especially between the awareness and accessibility indicators on the one hand, and the confidence indicator on the other. The gaps suggest four further conclusions as follow.

First, the people generally had a difficulty to access typical legal institutions such as the courts.

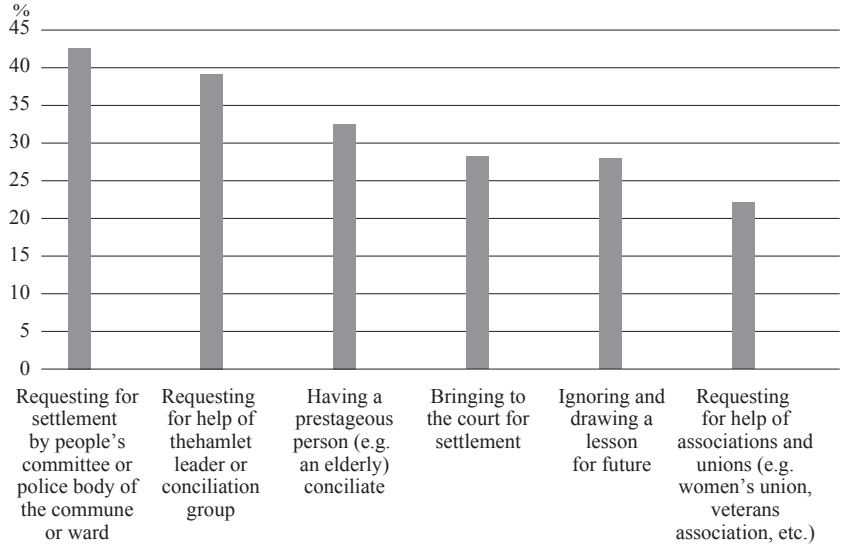
Second, the people might have had to use the legal institutions reluctantly even though they had no great confidence in them.

Third, there seems to be a tendency that administrative organizations such as the People's Committee and the police seem to be more familiar and accessible than the judicial system such as the courts. This tendency seems to exist in other Asian countries. This fact shows that access to justice will be largely influenced by the governance structure, which has long been established in the historical development of the society.

Forth, even the gap between the awareness and access indicators cannot be overlooked, especially in view of the results concerning the head of hamlet and the grass-root mediation groups. As a basic condition the people seem to have a feeling that they do not like to give conflicts a legal dimension. This reluctance may be changed by increased knowledge and understanding of ordinary people about their rights, the law and legal relief, by improved popularity of lawyers, and by an emerging custom of solving conflicts by way of the legal system. The consciousness of legal problems and strong feelings about them may be influenced by the government's policies toward the citizens and in turn influence those policies.

On the other hand, according to **the 2010 survey**, the following implications may be drawn.

First, average rate of respondents having knowledge about institutions in relation to protection of rights such as the **court, procuracy, police, People's Committee, grass-root mediation groups, lawyers, legal aid centers,** etc. has increased from 62.3％ in



Source: UNDP Vietnam 2011: p. 42 (table is transformed into figure by the author).

［**Figure 4**］ **Access to Justice Survey in Vietnam 2010**

2003 to 74.6 % in 2010. However, it is analyzed that it was not because of actively conducted activities of propaganda but thanks to the development of mass media such as press and internet.

Second, the reasons for those who answered that they did not bring the case to **the court** were the lack of knowledge about the courts and court proceedings（59.6%）, a waste of time（33.7%）, a waste of cost（21.9%）, no confidence in a fair judgment（12.4%）.

Third, respondents who did not know about lawyers' services were 39.3% in 2003, but they reduced to 24.7% in 2010. Those who recognize that **lawyers** played an important roles in dispute settlement were 44.2% in 2003, but they increased up to 75.8% in 2010.

Fourth, although 50.6% of the respondents could not assess the usefulness of legal aid operation in 2010 survey, 73.2% of those who ever accessed **legal aid centers** positively assessed their role and confirmed as useful（see Figure 4）.

The continuation of monitoring would contribute to improve the measurement technique, to make a pressure on the government to open the information and to facilitate the promotion, and to know precisely about the needs of the citizens.

Ⅴ. Concluding Remarks

It should be crucial for Asian countries in its own context to recognize the current agenda for access to justice and take effective measures to promote them so as to prevent the excessive "politicization" of judiciary or legal system. Without activities to enhance access to justice, citizens are easily moved by the political agitation which will easily lead to the violent reactions, and they will repeat time and again. The key is held by the growth of civil societies consisting of as many as citizens who have available processes to claim justice in the right manner.

In order to facilitate the growth of civil society in this sense, the role of lawyers is indispensable as a conductor of such civil society by telling the citizens the most appropriate way of action in each political and social situation. For that purpose, the lawyers are expected to make access to possible clients who would need a proper advice how to behave. Once Mr. Kimitoshi Yabuki came to our law school and talked to my students at Law and Development class about his experience he had when he visited the refugee camp affected by the Tunami disaster in March 2011. He prepared everything to open the legal consultation for the refugees and sat at the consultation table with his colleagues, but nobody came up to them. So he changed his mind and enter into the refugees who sat on the floor of the gymnasium and talked to them and asked "how are you?" "how is your health condition?" "how about your family?" Then they began to talk about their problems they were facing including legal ones, and then the consultation started. This story tells us what "access to justice" means for lawyers.

Further, in addition to **access to client**, the lawyers are also expected to make

another **access to government** to leverage the legal aid, to arrange integrated programs, and to encourage governance reforms necessary for the further promotion of access to justice in the country. It is worth challenging and most appreciated task of the just lawyers.

References:

- Cappelletti, Mauro and Bryant Garth（1978）,“Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective,”*Buffalo Law Review*, Vol. 27, pp. 181-292.
- Cranston, Ross（1997）,“Access to justice in South and South-east Asia,”in: Julio Faundez, *Good Government and Law*, McMillan, pp. 234-255.
- Galanter, Marc, and Jayanth K. Krishnan（2004）,“‘Bread for the Poor’ Access to justice and the rights of the needy in India,”*Hastings Law Journal*, Vol. 55, pp. 789-834.
- Ghai, Yash and Jill Cottrell（eds.）（2010）, *Marginalized Communities and Access to Justice*, Routledge.
- Golub, Stephen（2006）,“Legal empowerment: impact and implications for the development community and the World Bank,”*World Bank Legal Review*, Vol. 2, pp. 167-184.
- Gramatikov, Martin, Maurits Barendrecht and Jin Ho Verdonschot（2011）,“Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology,”*Hague Journal on the Rule of Law*, Vol. 3, pp. 349-379.
- Harding, Andrew（ed.）（2007）, *Access to Environmental Justice: A Comparative Study*, Martinus Nijhoff Publishers.
- Matsuo, Hiroshi（2014）,“Access to Justice in Indochinese Countries,”in: Michéle and Henrik Schmiegelow（eds.）, *Institutional Competition between Common Law and Civil Law*, Springer, 2014, pp. 249-277.
- Maxeiner, Jamess R., with Gyooho Lee and Armin Weber（2011）, *Failures of American Civil Justice in International Perspective*, Cambridge University Press.
- McGrew, Laura, and Virorth Doun（2010）, *Access to Justice Project in Cambodia: Final Evaluation Report*.
- Moorhead, Richard, and Pascoe Pleasence（eds.）（2003）, *After Universalism: Re-engineering access to justice: Journal of Law and Society*, Vol. 30, No.1, Blackwell Publishing.
- Nash, Richard（2013）,“Financing Access to Justice: Innovating Possibilities to Promote Access for All,”*Hague Journal on the Rule of Law*, Vol. 5, pp. 96-118.
- Parker, Christine（1999）, *Just Lawyers*, Oxford University Press.
- Rhode, Deborah L.（2004）, *Access to Justice*, Oxford University Press.

・Seron, Carroll（1996）, *The Business of Practicing Law: The Work Lives of Solo and Small Firm Attorneys*, Temple University Press.
・Steffek, Felix, and Hannes Unberath in cooperation with Hazel Genn, Reinhard Greger and Carrie Menkel-Meadow（2013）, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing Ltd.
・Stone, Christopher（2006）,“Crime, Justice Systems, and Development Assistance,”*World Bank Legal Review*, Vol. 2, pp. 215-233.
・Trubek, David（1990）,“Critical moments in access to justice theory: 'The quest for the empowered self',”in: A. C. Hutchinson（ed.）, *Access to Civil Justice*, Carswell, pp. 107-128.
・Uzelac, Alan, and C. H.（Remco）van Rhee（eds.）（2009）, *Access to Justice and the Judiciary: Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication*, intersentia.
・Webka, Stefan, Steven van Uytsel and Mathias Siems（2012）, *Collecitve Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?*, Cambridge University Press.
・Zuckerman, Adrian A. S. and Ross Cranston（eds.）（1995）, *Reform of Civil Procedure: Essays on 'Access to Justice'*, Oxford University Press.
・UNDP, Programming for Justice: *Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, available at: http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/tools/（accessed: 30 June 2014）.
・UNDP Vietnam（2004）, *Access to Justice in Viet Nam: Survey from a people's perspective*, Ha noi.
・UNDP Vietnam（2011）, *Access to Justice in Vietnam: From A People's Perspective, Updated Survey in 2010, Official Report*, Ha Noi.
・World Bank, the Inspection Panel（2013）, Annual Report, July 1, 2012 - June 30, 2013, World Bank.
・World Justice Project（2012-2013）, *The Rule of Law Index 2012-2013 Report*, available at: http://worldjusticeproject.org/rule-of-law-index（accessed: 30 June 2014）.