

General information

Date and place:	2017-05-08 Skype video call, Utrecht / Vienna
Interviewee:	Janneke Gerards, Professor and Chair of Fundamental rights law, Utrecht University School of Law [JG]
Interviewer:	Elena Šimukovič [ES]

[start of recording]

ES: So we can start then with rather an introductory question, if you could shortly introduce me on your main research questions or maybe there is some specific project that you are currently working on

JG: Well I am working on a variety of projects and they almost all concern fundamental rights, which is my most important topic, so that is ranging from freedom of expression to right to life to freedom of religion and that kind of issues, and in Europe there are various instruments protecting these rights and they have a very complicated inter-relationships, so we have the European Court of Human Rights, which is competent to deal with cases on all these human rights issues, but we also have the Court of Justice of the European Union, which increasingly also deals with this type of complaints and of course we have many national courts, including constitutional courts, which also deal with all these cases, so well my main research topic is, well it revolves around the inter-relationship between these different courts, so do they deal with divergent case law, but also given that many of fundamental rights cases are extremely sensitive and hard cases, such as cases about, well, to what extent can politicians really express their opinions, even if they are extremist right-wing, discriminatory speech, that kind of issue, well, to what extent is European Court of Human Rights or Court of Justice of the European Union not only competent but also legitimised to deal with this type of cases, and if they deal with them how can they reason their judgements in such a way that they are legitimate and will be accepted also by the general public, so it's quite a, yeah, it's a more or less theoretical field, it's very European, but also very national and comparative, and it is partly very normative, philosophical almost, and partly it's very empirical, to the extent that I am analysing lots of judgements of all these courts and see how they themselves, well, give shape to their argumentation and how they deal with these inter-relationships, how they try to avoid this kind of divergences, that is the kind of topics that I'm mainly working on, so there is a number of things but almost everything is connected to these issues

ES: Mhm, okay and I read, of course, the interview with you in this KNAW booklet about open access, there you say that in the field of law open access options are not that mature probably

JG: Yeah, that's absolutely true, it still is, the only thing is that indeed, well, my last publication purely incidentally is one of the first open access publications in an international law journal, so you were speaking of the new agreements that were made by the VSNU and a number of publishers, and one of them is SAGE Publishing and well, they decided to provide for open access and they asked me, whether I would be, whether I would accept such open access publication, well I was just very happy to do that, so it's seems that it's finally changing a little bit, but well, so thus far that's the only exception I know of, so for the rest it's mainly very much closed access by almost all legal publishing houses

ES: I have heard that there are also agreements not only with the biggest publishers, but also middle-size and smaller ones

JG: Yeah

ES: And there was also recently one agreement with Brill, in which also they tried to test out in the area of international law, I think

JG: Right, yeah

ES: So there might be some changes probably as well in that area...

JG: Yeah, yeah

ES: And on the website of the university I have also read that you are on the editorial board of several journals, so that one would be published by SAGE and the other one?

JG: I am on the editorial advisory board of the journal, it's "Netherlands Quarterly of Human Rights", and that's indeed an international law journal, the ones that I am also on the boards of are Dutch law journals, they are also published in Dutch by Dutch publishers and we have just, well, we had some difficult negotiations because one of them had the "Nederlands Tijdschrift voor de Mensenrechten", which is law journal for human rights, and it's a very small law journal with a very small publisher, and we were not part of the, well, the bigger publishing houses, but that had the disadvantage that we were unable to have a digital access to our publications, so we only had the paper law journal, and in order for us to make it possible to get our law journal also to be read by people who do not have subscription to the paper copies, we had negotiated with Kluwer as a publishing house and they were willing to do that for free, but that also means that it's now behind the closed paywall of the Kluwer Navigator, but still, what we managed to do, is that they accepted that people will post their own publications on their personal websites, they did not like us to, well to, actually what we tried to negotiate, is that we could also post all the digital versions of the articles on the websites of our law journal or the organisation that is actually, well, sponsoring the law journal, but Kluwer did not accept that, so the thing they accepted is that we, for some kind of internal use purposes, we are not allowed to put it on Academia or on ResearchGate, so it's just on our own personal web pages that we are allowed to post, well, own articles that we have written ourselves, for us that's closed access, and the same is true for the other journal I am working on, [which] is "European Human Rights Cases", that also is purely only on the basis of subscription to digital platform

ES: And in that interview you also mentioned, especially in the field of law, this information is very relevant to practitioners like practising lawyers

JG: Oh yes

ES: Did you notice any issue or any need for them to get access, more access to these journals?

JG: Yeah, so everyone would really love to have access to these journals and, well, especially these digital platforms are extremely expensive, of course, especially smaller law firms or, well, solicitors who are just one person's offices, they find it very difficult to have access, so what they do is that they circumvent all official publications and they just hope that there will be some weblogs or any other kind of commentaries of recent cases of law, this kind of thing, so they simply do not have had this access and, well, I think that's really problematic, problematic for the law as a discipline, problematic for academics, who are not able to share their knowledge with the people who need it, so yeah, I really very much dislike that but it's the only way, and the thing is that I'm in close contact at least with a publisher of the "European Human Rights Cases", and they noticed that, because it is so expensive, that many smaller law offices, but also the bigger ones, refuse to have, well, they either take a very limited subscription to the platform or they don't do that at all, especially for the very small, specialised area I am working on, so the fundamental rights cases, well, these law firms and also courts and small municipalities, who I think should have access to these data, well they simply don't think it's sufficiently relevant for them to pay a lot of money for that

ES: Well this corresponds, I think, also to this core argument in favour of open access, that most of the researchers [are] funded by public money, so researchers also in a way should give it back to the society, right

JG: Yeah, I fully agree

ES: And I've noticed also on the website that you are also starting a MOOC on Coursera platform

JG: Yeah, yeah

ES: It started today, right?

JG: Yeah, one of them, so there are different [ones], we had two runs thus far, so this is the third one, yeah

ES: And of course I was very interested by the title as well, because it says "Human Rights for Open Societies", and I was thinking whether open access would be [in] some way one of the elements for the functioning of open societies somehow?

JG: It's a very good point, I think, yeah, we mainly think of open societies as societies that are open to criticism and to being challenged all the time, so if you compare Russia to the Netherlands, for instance, in Russia it's extremely difficult to demonstrate or to publish about the government in a critical way or to comment on a non-governmental organisation, so it's really a closed society that is keeping all kinds of influences that it doesn't like as much as possible outside the country, while in an open society, well, if this is really open, interchanges between all kinds of people, and refugees can come in, and immigrants can come in, and it's just completely free world, and that's, of course, very important for respect of human rights, well, to the extent, you could say, open access is an important element of that because it also opens up, well, academic knowledge to the outside world, and the outspoken free criticism is not behind closed walls but it's, yeah, it's related but usually it's not regarded as some kind of core issue or a relevant factor to that, so it's all starting with whether your system is very much more intrinsically open to outside influences than, yeah, rather than closed

ES: And because you are scholar in law field, I was also very interested to ask you on one of the arguments that I also quite often meet in all the open access advocacy materials, where they refer also to the Convention of Human Rights and say that access to knowledge is actually a universal human right

JG: Yeah, that's right, that's true, so indeed, well, we have the freedom of expression, but that also of course involves the freedom to obtain information, and indeed, access to that information is an extremely important right for you to be able to inform yourself about what is happening in a society which your opinions are on, in that functioning, so I guess that indeed open access would be an important element, the one thing, that is always complicating this kind of matter, is that usually these fundamental rights and human rights, also the European Convention on Human Rights protects individuals against the states, so if the state is blocking your access to information or if the state is censoring or blocking access to certain websites, that really is a problem, but in this case, of course, the access is not so much directly blocked by the states but rather by publishing houses, who say "well, we make this information available as long as you want to pay for it"

ES: Yeah

JG: So they consider it not as closed in a way that human rights conventions think of access to information, because they also say, if you want to watch television, for instance, it's also reasonable to ask for some kind of fee or some kind of taxation, in order to be able to fund the provision of this kind of information, or if you want to have a newspaper, you still pay for your subscription, so why should you not pay for access to academic information if it's published in a law journal to which you should subscribe, so that's the line of thinking, it's not the government's impediments, but it's rather a commercial kind of issue and it's increasingly thought that human rights also should protect against, well, perhaps a monopoly or against exercise of too much power by, well, commercial players on the markets, and I think that's much to be said on paper on that, but it's very difficult to see how far that should go and what kind of responsibility all that private players have on market

ES: I found it also interesting, that on the other side of that argument is also a critique that making the PDF available is sort of set equal to making the knowledge itself accessible, so it might involve actually even much more work, of translation work, like Dutch-language journals and then English international journals, and even all the terminology that is used there, so you have to have quite a substantial knowledge base and skills in order to understand what is written in that article

JG: Yeah, sure

ES: And that's why I was thinking that maybe offering such a MOOC on Coursera would be also, in some cases, maybe even a more effective way to communicate knowledge to broader societal groups

JG: Yeah, absolutely, so if it's, of course, you can communicate in different ways, I mean, the scholarly work that we do is probably mainly of interest for our own colleagues who are working in the same field, and together we try to build new insights and really try to be innovative and creative, but that's something different than trying to share your knowledge with people in society above all, it's somehow related because lots of the kind of work that we do is directly relevant for lawyers and judges working in the fields, so there is a more direct, I think, connection between legal scholarship and legal practice, but I think in many other disciplines indeed some kind of translation is necessary, and that's, of course, why we have academic studies trying to well prepare students for four years or more to the academic world, so also to enable them to understand what is being said and done there, and you can not simply say, well, open access means that everyone should be able to understand all the information that is presented, and perhaps we have an obligation or responsibility as academics to provide for that kind of thing, and indeed, a MOOC is, I think, a great way to make a start in doing that, but that has much more to do with the valorisation, I think, than it has being open access, so open access is just enabling academics all over the world to have access to this kind of information, and even in states which do have less funding or state universities have less funding, in order to be able to provide for all these subscriptions and, but in the Netherlands, in the law field it is indeed true that it's the same kind of journals being read by legal academics as well as by legal professionals, so that makes it a bit of a specific area, I think

ES: Okay, and thinking again of the policies and of the government work that is done in this area, like a few years ago the State Secretary announced that he wants to have 100% open access in the near future

JG: Mhm

ES: So either 2024 or 2020, depends on which document you read, but then in your interview I also read, if there would be a mandatory open access publishing policy, it could also cause some acute problems, especially for PhD candidates. How do you see this requirement in your field or from your perspective, would it be possible or even desirable for you to comply and publish in open access only in a few years?

JG: Well, given that we have so few open access journals, it would be almost impossible to do that, so in fact first we should have more open access journals before I would be able to do that, so I could hardly publish anything at the moment if I would have to do that open access, the only thing that we could do to circumvent that is just illegally publish all our articles also on a variety of websites which everyone connects with, which is not, I think, the official meaning of open access, so that makes life difficult, I think, here, so yeah, I would consider that extremely difficult, it's hard to say, of course, which way it should work, should we first try to publish open access and say "well, I'm not going to publish as long as there are no open access journals", hopefully that would put some pressure on the matter, but, yeah, I think we also just want to share our insights and knowledge, and as long as there are no open access journals it's very difficult to achieve anything, and, of course, perhaps we could say "well, we create an open access journal in a certain field" but then again, that's also very difficult, of course, because you will, would have to build up certain reputation in the area, have to find a lot of people together who would like to work on this, so it would require enormous efforts to do that, and it don't feels that it might be acceptable, but then others get much more difficulties, and then there is also this fact that, of course, even in the legal discipline, it matters in what journal you publish your article, and as long as there are very prestigious journals, in which everyone would like to publish, are not open access, you can not really require people to try to avoid all these journals, because they are not open access

ES: I was also thinking that sometimes there is also this counter-argument saying that actually science and research, they are protected by freedom of conducting research, so that some people then answer that there

can not be any obligation to say where someone has to publish because as a researcher he or she is able to choose where to publish, right

JG: Yeah, that's true, too, so it's a bit, yeah, contrary to that to say where you should, well, officially, of course, the government is smarter than that and say "well, of course you can do that, but then you get no funding"

ES: Yeah

JG: So they are not really prohibiting you, but they are just providing incentives to publish your articles open access, but I don't think they are really fair kind of incentive, they don't really take into account the reality of academic life

ES: That's exactly probably why more and more public funding policies or funding body policies now require also to publish in open access in one way or another

JG: Yeah

ES: And going already to the end of the questionnaire, I have a few rather open questions

JG: Mhm

ES: One of them is "how do you think would academic publishing, or maybe open access in more specific terms, evolve in the future" or on the other side, what would you wish kind of system in an ideal world, if you could change something?

JG: Ghm, yeah, well I would like to have a really open access world in which the publishing houses have a far less important role to play, and I think it's old-fashioned in a way, too, because the publishing houses were extremely important when we still had journals on paper, but mainly, what they do now, is, well, of course, they distribute, they provide a platform, but it should relatively easily be possible to do it without them, there are many open access journals and they do provide for peer review and they do provide for good quality, too, in fact, we do not really need the publishers as some kind of intermediary between the academics and their audience, so I worked on one, on the board of editors of one other journal, which was a newly created journal, which we made immediately open access, it's the "Dutch Journal for Constitutional Law", and that worked greatly, it's really fine to do it, so the only thing indeed is, because once we also wanted to have a paper version, we still needed someone who would pay the cost of printing that, but almost all the other costs just can be borne by the academics themselves or by the universities, and it doesn't cost too much and, well, currently the publishing houses also don't pay me for my peer reviews, so they mainly, I don't know what kind of things they spend all their money on, but the only thing, it's different for books, so I think that for journals I might see a future without the intervention of publishing house and perhaps existing law journals, well, trying to be autonomous and independent and saying "goodbye" to the publisher, and do it all themselves by hiring a good kind of person, who can work on websites and use manuscripts and try to do the practical things that are related, of course, to publishing, but for books, of course, still, because they are still on paper and they require a lot of work in terms of editing and printing. I'm afraid it's not easy to get the really open access mechanism for, and so as long as you want to publish books or edited volumes, I think we still need publishing houses, and then I can imagine that they say "well, we can not do that all open access, because then we would have no possibility to earn any money to compensate for the costs we make for publishing", all that, so, yeah, it might be that we, that matters change there, too, and that perhaps just like newspapers also have all kinds of internet versions, where commercial advertising makes up for the loss of subscriptions to the paper versions, publishing houses also might say "well, we limit our core business to books and next to that we maintain some websites, where, and we organise another set of activities, which will earn us an income", and for the rest, yeah, they don't really have a future, I think, but it might be more of a hope than actual prediction, I'm not sure, and it would probably take a lot of time

ES: But do you think there will be some day on which all the journal articles will be published in open access?

JG: Yeah, I think if some prestigious journals take the first step and their boards of editors say “well, we are going to do this alone”, just as easily as, for instance, if Nature would do that, well, the International Journal of Constitutional Law or whatever kind of law journal in my field, that would be a lot of help, I think, as long as only small journals do that, nothing will change

ES: Yeah, yeah, the very last question is just if there is anything else you think is important for me to consider carefully when I do my analysis, or any aspect that I didn't touch upon that you think is important

JG: Well, I think these are very interesting issues that you raise, also the access to the information point more generally, and the right to have access to information is also, I think, a very valid point, which is not often heard in these discussions, to my mind, so I think that's a good point and, yeah, of course, I also do understand the position of the publishers, who of course want to, well, maintain their own position and, well, save their own futures, but, yeah, I'm not sure, I'm really, I do respect their position, but I think as academics, we have the right to share our work and society has the right to receive it, not only society, but also other scholars in the world, and we can do so in many different ways, of course, but not through the paywall of very influential international publishers, who just try to block this kind of access eternally almost, but it's bad, it's something, I'm afraid that, yeah, given that I'm not having, not much experience with open access publishing, I'm not sure if I can add very much more to this

ES: Well, it was really a very insightful conversation for me and I have many notes, so thank you very much, it will be a really good contribution and good addition to my project, and of course, I will let you know when I have something readable from my analysis

JG: It would be really nice, yeah, great, thank you for that, and please, of course, we had little time now, so if there are any further questions or issues or things which were unclear in what I've been saying, that might be due to the fact that I'm just not able to express myself more clearly, but please let me know and I will try to clarify

ES: Sure, maybe there will be something when I'm transcribing then, where I will have more details then, so I will let you know then anyway

JG: Okay, great, well, thanks a lot

ES: Thank you very much, it was a really great [interview]

JG: Okay and have a good day then

ES: You too, have a good day, thanks, good bye

JG: Bye

[end of recording]