

EDITORIAL

Access to justice in the digital era

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1. Access to justice in the digital era

Developments in digital technologies have induced profound changes in the way that legal services and legal dispute resolution bodies operate. Websites and internet-based tools offer individuals help with specific legal problems such as divorce, debts, small claims, employment problems, neighbour disputes, parking fines and compensation for delayed flights. Some provide information only, others provide sample letters, and some online service providers file a complaint or claim on individuals' behalf. Online dispute resolution has been used by e-commerce businesses such as eBay and PayPal to help many buyers and sellers resolve their disputes for more than a decade. In some legal systems, state courts are using online applications to facilitate dispute settlement (e.g. British Columbia's Civil Resolution Tribunal in Canada).¹ Analytic tools have been developed to predict outcomes of court cases, which may help people to make better decisions.² And finally, during the COVID pandemic courts were encouraged to introduce remote access to case files, digital exchange of case documents and remote hearings.

Although digitalization has brought about a change in the operation of legal services and of legal systems in general, little is known about how the use of digital technologies in the field of law affects access to justice (A2J) for individuals and businesses. A2J is considered an essential part of effective judicial protection, a core element of the rule of law and of democratic societies. Individuals and their collectives, as well as businesses, should be able to defend and protect their rights and legal interests. State courts of law are often deemed to be too slow, expensive and difficult for people to access without (legal) help, which might be either unaffordable or unavailable. Digital techniques are often seen as a remedy for these problems, which could provide new ways of improving A2J.³ However, empirical research into the (expected) advantages and disadvantages of the use of digital applications in law for A2J is lacking.⁴ This special issue seeks to contribute to the body of empirical evidence on the consequences of the use of digital technologies for A2J in different areas of law: commercial, civil, family, administrative, migration and criminal law.

1 Salter 2017, p. 112. See also contribution from Geurts and Teeuwen in this issue.

2 Katz et al. 2014.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2020/710 final; Susskind 2019.

4 Austin 2017; Schmitz 2020.

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The Introduction is structured as follows. Part 2 presents the definition of the concepts ‘A2J’ and ‘digitalization.’ It describes ‘A2J’ as a multi-dimensional concept and introduces the term ‘digitalization of legal problem resolution’, which as we argue should be preferred to ‘digitalization of justice’ or ‘digitalization of legal dispute resolution’ in the context of A2J. Part 3 describes the objectives of this special issue, namely: more in-depth, empirical exploration of the presumed advantages and disadvantages of the use of digital technologies across the specific dimensions of A2J formulated in part 2. Part 4 summarizes the findings that emerge from the various contributions concerning benefits and challenges of digitalization and formulates recommendations for further research.

2. Key definitions: A2J and digitalization

2.1. Access to justice

In this special issue, we rely on a broad definition of A2J given by the World Justice Project. According to the World Justice Project, A2J is ‘the ability of all people to seek and obtain effective remedies through accessible, affordable, impartial, efficient, effective and culturally competent institutions of justice’. In a broad sense it is defined as the ability of people (as well as their collectives and businesses) to obtain just resolution of justiciable problems in compliance with human rights standards: if necessary, through impartial formal or informal institutions of justice and with appropriate legal support.⁵ However, there is no single definition of this concept⁶ and existing definitions, as well as the research contributions in this issue may focus on different inter-related dimensions of A2J.

First, studies differ in the focus of the type of **subjects** that seek A2J. Some stress the right of all individuals to obtain justice, while others focus on the needs of people in ‘vulnerable’ conditions stating that these persons in particular experience difficulties in accessing justice.⁷ The view of ‘vulnerability’ as a fixed and constant characteristic of particular persons or groups based on their inner qualities is increasingly being questioned.⁸ Instead, it is argued that all persons can be ‘vulnerable’, and that ‘vulnerability’ may also be situational and socially determined, manifesting itself in situations characterized by (extreme) imbalance of power between the parties of a legal relationship, for example, in the context of criminal detention and imprisonment (McKay, Bruquetas et al. in this issue), determination of migration status (Bruquetas et al. in this issue), decisions on child protection measures (Janssen in this issue) or maladministration or mistreatment by public bodies (Dahlvik). At the same time, social or economic marginalization may, in combination with situational factors, lead to greater vulnerability and thus accentuate the need for A2J (Nielsen and Hammerslev in this issue).

5 OECD 2019; Pleasence et al. 2020.

6 Cappelletti et al. 1982; Westerveld et al. 2015.

7 Bedner & Vel 2010.

8 Fineman 2008.

Second, definitions or studies differ about how they frame the **problems** that A2J subjects (presumably) seek to resolve. Earlier definitions tended to focus narrowly on legal disputes, namely problems that A2J subjects themselves defined as ‘legal’ and ‘justiciable’ (to be resolved via formal action, usually in court).⁹ This narrow approach was challenged by the ground-breaking work of Genn¹⁰ in the 1990s, which triggered a large body of socio-legal research into so-called ‘justiciable events’ and ‘legal needs’. These include problems that have a legal dimension (or that can be (partially) solved with the help of the law), but which are not necessarily defined as ‘legal’ by the subjects themselves, and/or resolved via a formal judicial path. Most of the contributions in this issue deal with legal issues in the sense that they relate to cases pending in court (e.g. McKay, Janssen, Bruquetas et al., Dubois and Pelssers) or extrajudicial authorities (Geurts and Teeuwen, Dahlvik). The contribution of Nielsen and Hammerslev, however, focuses on the prevention of problems and general access to legal (welfare) rights.

Third, definitions and studies differ in the type of legal problem-solving **institutions** that are covered. Some definitions are ‘narrow’ in the sense that they only include access to a lawyer or to the court,¹¹ whereas others are ‘broad’ in the sense that they also include access to information, access to legal advice, negotiation and representation and access to a binding decision by (extra)judicial (non-state) institutions.¹² The contributions in this issue focus on access to institutions like ombuds persons (Dahlvik), online dispute resolution bodies like the British Columbia’s Civil Resolution Tribunal (Geurts and Teeuwen), or the role of professionals such as community workers (Nielsen and Hammerlev), lawyers (Bruquetas et al.) and clinical assessment professionals (McKay) in a digitalized setting.

Finally, the studies differ as to whether they incorporate the **quality** of a (particular) service, procedure or outcome as a necessary element of A2J. Some studies of A2J do not include this dimension and thus limit A2J to access to legal institutions.¹³ Others, however, consider (also) the quality dimension, which encompasses access to an impartial, just, fair and timely procedure and an understandable, executable and effective decision or remedy. Several contributions in this issue pay attention to the effect of remote ways of communication on the effective participation in procedures (Bruquetas et al., Janssen, Dahlvik), the reliability of clinical assessments (McKay) or timeliness of procedures (Geurts and Teeuwen).

2.2. *Digitalization in the context of legal problem resolution*

‘Digitalization of legal dispute resolution’ and ‘digitalization of justice’ are concepts that are commonly used in literature. In the context of A2J, we prefer to use the term ‘digitalization of legal *problem* resolution’, rather than ‘digitalization of legal

9 Cappelletti et al. 1982.

10 Genn 1999.

11 Especially the earlier definitions of A2J: see Cappelletti et al. 1982.

12 OECD/Open Society Foundations 2019.

13 Hubeau 2015, pp. 10-11.

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dispute resolution'. The latter might imply that the scope is limited to issues that are explicitly defined by the parties as legal and are brought to a respective institution. This perspective, as explained above, is too narrow from our A2J standpoint, as A2J focuses also on issues that the subjects themselves do not define as 'legal' or requiring an intervention from an institution for legal dispute resolution.

The concept 'digitalization of legal problem resolution' relates to the process of implementing digital or IT tools in any step of an (extra)judicial legal procedure, and its impact. Such tools may be implemented with the purpose of automating processes or (elements of) decision-making, or to mediate relationships and interaction with justice seekers. The contributions in this issue relate, in particular, to online dispute resolution procedures (Geurts and Teeuwen), remote hearings (Bruquetas et al., Janssen), remote clinical assessments in criminal cases (McKay), digital interfaces for justice seekers (Dahlvik, Nielsen and Hammerslev) and digital interfaces for professionals (Dubois and Pelssers).

3. Objectives of this special issue

As described earlier, 'digitalization of justice' is often viewed as a way to improve A2J. Policy documents from the European Union and national governments stress the benefits of digitalization of justice. Digitalization is viewed as a pre-condition to ensure effective justice in the modern era, enhancing 'resilience' of justice systems. It is presumed to help tackle delays, enhance legal certainty, and make justice cheaper and more accessible for all.¹⁴

Technology can be used to improve and optimize our traditional ways of working, bring new efficiencies and make our professional lives easier. Susskind refers to this form of process improvement as 'automation'.¹⁵ It involves grafting new technology onto old working practices. Technology can also displace and revolutionize conventional working habits and bring radical change – doing new things, rather than old things in new ways. Susskind refers to this as 'transformation'. This is about using technology to perform tasks and deliver services that would not have been possible, or even conceivable, in the past.

One of the benefits attributed to digitalization of legal services is that online services are available to justice seekers 24 hours a day and from any geographic location. If individuals have access to the internet, it does not matter where or when they want to use these services. There is no travel time or travel costs involved, and physical contact is not necessary. Due to their high accessibility, it is assumed that individuals are likely to use online legal services to act upon problems that they used to leave unresolved due to costs or efforts involved. Thus, advantages

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2020/710 final; Susskind 2019.

15 Susskind 2019.

of such services are considered to be greater than their disadvantages (e.g. those stemming from the lack of personal contact). It is also expected that, as working processes will be more efficient (or more 'automated'), legal services will be cheaper and quicker. Furthermore, the COVID pandemic showed that in times of emergency, digital applications may be essential to keep the justice system running.

Critical accounts, on the other hand, note that assumptions about 'successes' of digitalization in the commercial sector cannot be easily extrapolated to the legal system. First, the use of digital solutions may simply be less 'effective' in the public sector because it is not run as a business.¹⁶ Second, (cost-)efficiency is not the only (and arguably not the primary) goal of the legal system: it must also protect public interests, such as fundamental rights and procedural justice. In this respect, digitalization presents challenges, such as ensuring equal A2J for people who cannot easily access internet and/or who have poor digital skills¹⁷; technological failures, malfunctions and biases (allegedly) inherent in automation; possible negative impacts of digital technologies on the quality of communication and perceived procedural justice;¹⁸ and ensuring security and privacy of digital solutions.

Despite these criticisms, national and European policymakers expect that the use of digital tools in legal problem resolution will enhance A2J.¹⁹ However, there is still little empirical evidence as to whether digital applications deliver the benefits that are attributed to them. Empirical research into their (presumed) advantages and disadvantages is still rather scarce.²⁰ Moreover, continuous development of digital technologies brings with it the need for ongoing assessment of its impact. This special issue contributes to the evidence concerning the impact of 'digitalization of legal problem resolution' on A2J by examining empirically, and thus more in-depth than much of the existing literature, the various advantages and disadvantages of the use of digital technology across the various dimensions of A2J.

4. Main findings and suggestions for further research

As the definition of A2J is multi-dimensional, so is the possible answer to the central question of this special issue: what is the impact of digitalization of legal problem resolution on A2J? Most contributions in this issue examine how the institutional dimension of A2J (i.e. the particular legal problem resolution processes, institutions and actors) is affected by digitalization. However, they also

16 Danielsen et al. 2022.

17 Murray 2021; Ranchordas 2020.

18 Ter Voert et al. 2022.

19 See note 16. According to the Belgian government coalition agreement, the government pledges to further relieve the administrative burden from citizens and business through further digitalization of public services and realization of e-government. See *Het regeerakkoord van de federale regering* 30 september 2020, pp. 24-26.

20 Austin 2017; Schmitz 2020.

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pay attention to how the changes in the procedures and institutions might affect other dimensions of A2J, such as the type of problems and experiences of justice seekers. These dimensions represent the broader context, within which digitalized institutions operate.

Geurts and Teeuwen address the question whether online dispute resolution is cheaper and faster for justice seekers than the traditional litigation at court. Using empirical data from the public justice system in British Columbia, they examined the fees and case processing times of the (online) Civil Resolution Tribunal (CRT) and compared these with the Provincial Court and Supreme Court. They report both promising and discouraging results. The CRT can be cheaper and faster, but not in all types of cases.

Nielsen and Hammerslev focus on the importance of personal assistance in a world of digitalized public services. They investigate how encounters between socially marginalized individuals and professionals support individuals' access to rights in the Danish digitalized welfare state. The discourse on digitalization is based on the ideas of inclusion and equality. However, individuals' access to digitalized public services may depend on both their legal and digital capabilities, suggesting that those with few personal resources and greater needs for welfare support are likely to experience increased difficulties in navigating in digitalized administrative processes. Drawing on observations of encounters between socially marginalized individuals and professionals who assist them in accessing public welfare services, and on semi-structured interviews with individuals and professionals, Nielsen and Hammerslev suggest that the assistance of professionals can be decisive for individuals' ability to access their rights in a digitalized welfare state.

Dahlvik empirically explores the possibilities that citizens have both in the analogous (i.e. non-digital) and in the digital sphere to access public ombuds worldwide to complain about maladministration or mistreatment by public bodies. She studied the different ways citizens can file a complaint and the importance ombuds institutions attach to personal, other analogous and diverse online forms of contact possibilities for citizens. Theoretically, the coexistence of parallel (digital and analogous) structures and practices broadens the possibilities for access. However, there is a trend of governments implementing digital tools to reduce costs and optimize the delivery of public services, while at the same time eliminating traditional (personal or analogous) channels that are more costly. This development entails the risk that certain groups will no longer be able to participate. Drawing from qualitative interviews with and a survey among ombuds staff of member institutions of the International Ombudsman Institute, as well as from quantitative analysis of all members' websites, Dahlvik concludes that despite the diverse digitalization developments, the personal encounter between citizens and ombuds still plays an important role in many countries. Ombuds persons stress the importance of the psycho-social function of the personal encounter.

McKay examines the use of remote access technologies to clinically evaluate people-in-prison who may be experiencing a range of vulnerabilities. Based on

Australian case law, she identified several negative influences. Some cases showed the limited capacity for remote clinical experts to engage with people-in-prison to establish meaningful and sustained interaction. Remote technologies can diminish the quality of communication, connection, confidentiality and, ultimately, comprehension. The dearth of face-to-face contact may lead to an unwilling interviewee and their superficial participation, resulting in partial assessment. The situation of vulnerable digital subjects who require an interpreter during remote assessments is especially concerning. She concludes that when using remote assessments on vulnerable populations in closed carceral environments, there is a real possibility of digital vulnerability and the accumulation of inequalities.

Bruquetas, Dubelaar and Geertsema explore how the use of remote court hearings and the digital exchange of documents in Dutch criminal, immigration detention and asylum cases affect the role and responsibility of lawyers and their clients' A2J. The study is based on semi-structured interviews with various professionals (judges, lawyers, public prosecutors, policymakers) working in the field of criminal law and migration law. Remote hearings and the digital exchange of documents enabled Dutch courts to keep processing cases during the COVID pandemic. Despite this benefit, the study shows that there was a lack of provisions for adequate consultation between lawyer and clients, there were technical failures, and problems with digital access of their clients and with communications with interpreters. More so than before, lawyers became key players in making digital justice work. It depended on individual lawyers' willingness to enforce the rights of their clients and ensure their effective participation in the procedure. During the pandemic, lawyers in all type of cases had to develop technical skills to guarantee their clients' A2J. They dealt with communication problems with clients during online hearings and in the preparation of court cases through digital channels. The study shows that remote justice can put pressure on the clients' effective participation in legal procedures and their interests and needs.

The contribution of Janssen focuses on 'urgent family hearings', i.e. hearings about the care and living situation of children, conducted by Dutch courts in the first months of the COVID pandemic, which were fully or partially remote (conducted by telephone or Skype). She examines whether and to what extent lay participants could participate effectively in these hearings. The experiences of lay participants are indirectly based on interviews with legal professionals involved in such hearings. Janssen applies the three-level scale of participation developed by McKeever to describe experiences of unrepresented litigants. These include (full) participation, symbolic participation (having the impression of engagement, but not participating effectively in reality) and non-participation (complete disengagement). Janssen provides examples of family litigants participating only symbolically or being disengaged from remote hearings. She argues that, although litigants in physical hearings on family matters were probably also unable to attain full participation due to their sensitive nature and the inherent power imbalances between parents and childcare authorities, the element of remote presence has probably led to (even) lower levels of participation. This was due to various factors

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such as litigants being unable to access quiet and privacy-proof environments, or difficulties with engaging and maintaining attention when participating digitally.

Dubois and Pelssers describe how the Central Solvency Register, named RegSol, was designed and developed within the commercial courts in Belgium and the impact it had on the working context of its stakeholders. RegSol is a digital centralized platform for the registration of insolvency cases (bankruptcy and legal reorganization procedure), and the exchange of data between the different stakeholders of a bankruptcy procedure. The platform was supposed to make working processes more accessible and efficient in commercial courts. This objective was undermined by issues about data ownership, service continuity and courts' independence from third – and private – parties. On the one hand the tool realized remote access to the file and centralized information to actors involved; on the other hand it increased the heterogeneity of non-integrated tools. While the Bar Associations successfully mobilized lawyers to use RegSol, the tool has rather been contested within the commercial courts, particularly among magistrates and court clerks, who did not participate in its design and development. Their non-enrolment impacted their working practices, as RegSol does not meet their specific needs. Dubois and Pelsser conclude that without mobilizing and involving court practitioners in the design, development and implementation of the tool, its capacity to increase access to and transparency of justice will remain problematic and controversial. They argue that the implementation of RegSol involved not only technological but also institutional, organizational and normative factors. Therefore, it is necessary to study technological tools and A2J as social constructions.

The above demonstrates that in practical terms, 'digitalization' defined here as 'the use of digital applications in the process of legal problem resolution' may serve to enhance or to inhibit A2J, depending on the context of their use. This context represents, in addition to the way in which the digital tool is put into practice, a (complex) interplay of various dimensions of A2J described earlier in this Introduction.

The various contributions show that some types of digitalization provide better A2J in the sense that they broaden the ways to contact institutions, make access cheaper or enable case processing in times of an emergency, such as a pandemic. Despite these positive aspects, the studies show that there are also challenges related to A2J. Several contributions stress the possible negative consequences of remote ways of communication for the quality of the interaction and, hence, for the quality of procedures or outcomes. Furthermore, people with poor digital capabilities or persons in vulnerable conditions may need assistance in dealing with remote legal procedures or services, or remote procedures or services may not be suitable for them at all. Moreover, the presumed advantages of digitalized legal procedures, like lower costs or greater efficiency, are not always empirically proven. Failure to address the needs of all stakeholders when developing digital applications to facilitate legal procedures may benefit some parties, but increase workloads of others.

It is striking that most contributions in this special issue, except for that of Nielsen and Hammerslev, did not study directly the experiences of justice seekers themselves. The studies focused at the impact of digitalization on their position and examined their experiences indirectly through other sources. Future studies should incorporate justice seekers to learn more about the effects of digitalization on A2J from their perspective. Not only speed and cost-effectiveness but different dimensions of the possible effects of digitalization on A2J should be explored further. Especially, their impact on the quality of procedures and outcomes is important, as well as their suitability for certain types of justice seekers or types of cases. Finally, further research should address the conditions needed, like personal assistance or technical facilities, to address possible constraints in access to digital legal dispute resolution for particular justice seekers' groups.

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