Xandra Kramer · Alexandre Biard
Jos Hoevenaars · Erlis Themeli *Editors*

New Pathways to Civil Justice in Europe

Challenges of Access to Justice

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Preface

Access to civil justice has been a topic of academic debate and a concern of policymakers, legislators and practitioners for a number of decades. In recent years, new trends in civil justice have evolved that reveal current challenges to accessible civil justice as well as opportunities for a civil justice system of the future. These not only develop at the national level but increasingly also at the European level. National, European and global dynamics in civil justice provide a fascinating insight into how justice systems try to adjust to these challenges and make use of new opportunities. Cuts to public spending on legal aid on the one hand and opportunities opened up by technological developments on the other force policymakers, administrators, judges and legal professionals to adapt to a quickly changing legal environment. With all these developments, innovations and experiments in civil justice happening in a very patchy and often divergent fashion, there exists a need for a more systematic approach to a twenty-first century civil justice. This book brings together a collection of perspectives from different corners of the civil justice field and by authors with different (academic, policy or professional) backgrounds, with the aim to gain a more comprehensive understanding of current and new pathways to civil justice.

This book is part of the European Research Council (ERC) consolidator research project 'Building EU Civil Justice: Challenges of Procedural Innovations—Bridging Access to Justice' (2017–2022), carried out at Erasmus School of Law. The project aims to investigate current trends shaping access to justice in Europe and beyond. The focus is on four developments in civil justice: namely, the digitisation of procedures and the use of artificial intelligence (AI); the privatisation of civil justice and in particular the rise of alternative dispute resolution (ADR) mechanisms; the increase in self-representation and the simultaneous disappearance of the legal profession from large parts of the judicial system; and specialisation of courts, in particular the establishment of international business courts in recent years. The contributions to this book result from the conference 'Challenge Accepted! Exploring Pathways to Civil Justice in Europe' that took place at Erasmus University Rotterdam on 19 and 20 November 2018. We had the privilege of welcoming

top-notch speakers and over one hundred participants, including academics, judges, lawyers, policymakers and consumer and business representatives from Europe and beyond. One of the goals of this conference was to exchange insights regarding transformations that are taking place in civil justice systems. The great wealth of insights, developments and outlooks that was brought to light during the conference's keynotes (given by Judith Resnik and Ruth de Bock), presentations and lively discussions solidified our conviction that a book bringing together those perspectives would be of great interest to everyone who wants to stay informed about the frontlines of current trends in civil justice.

We are grateful to all conference speakers and contributors to this book, each of whom drew on their experience as an academic, policymaker or practitioner in the field of civil justice to provide, specifically for this book, a unique perspective on the past, current and future pathways to civil justice. We would like to thank the other members of the ERC team who have all contributed to the success of the conference and this book in some capacity. Georgia Antonopoulou, Emma van Gelder, Kyra Hanemaayer and Betül Kas, thank you for your collaboration, insights, creativity and sense of humour. A special thanks to our splendid former student assistant Kyra, whose relentless dedication to our project and hard work in editing this book have been indispensable. We are happy that she will stay in academics to pursue a PhD research. Finally, many thanks to our student assistant, Wouter Hoogeveen, for helping finalise this book, and to Edward Frisken for assisting in the language review.

This book has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 726032). Information on the ERC consolidator project 'Building EU Civil Justice' is available at www.euciviljustice.eu. The editors are principal investigator, postdoc researchers and associated researcher.

While completing the book in COVID-19 times, unfortunately one of the conference speakers and contributors to this book, Roland Eshuis, passed away on 20 April 2020. His empirical work on lead times in civil justice for his PhD research and his passion for empirical data as a researcher for the Research and Documentation Centre (WODC) of the Dutch Ministry of Justice have greatly contributed to evaluating justice reform in the Netherlands. His from time to time confronting but extremely useful comments as a supervisory board member of a study on debt collection carried out for the Ministry of Justice in 2012 was an important and unforgettable pathway to improving the empirical study of civil justice for the PI and first editor of this book.

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Chapter 1
Introduction: The Future of Access to Justice—Beyond Science Fiction

Alexandre Biard, Jos Hoevenaars, Xandra Kramer, and Erlis Themeli

1.1 New Pathways: A Project for the Future

Access to civil justice has been on the research and policy agenda for a number of decades. Nevertheless, old hurdles—including costs and delays—continue to challenge access to justice, while changes in the justice system and society—the rapid technological advancement at the forefront—create both new challenges and opportunities. At the national, European and international level developments are taking place that merit comprehensive study and discussion. These evolve around four key issues that are central in this book: digitisation and in particular the use of AI in courts; privatisation of civil justice by means of ADR; increased self-representation and its repercussion on the civil justice system and legal professions; and increased specialisation of courts and procedures.

In this introduction, we would like to invite you on a short journey. Close your eyes, relax, and let your imagination run free. Imagine that you have been selected to travel in a time machine to an unknown future, far beyond 2021. Things around you look familiar, albeit somehow different. On the way, you remember that at the turn of the century several observers had written about what was called a 'crisis in civil

This research has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 726032), ERC consolidator project 'Building EU Civil Justice: challenges of procedural innovations – bridging access to justice'; see <www.euciviljustice.eu>.

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justice' systems,[1] and for that reason, you decide to have a look at how the situation has evolved. You observe that a vast majority of citizens use their mobile phones and engage with robots and virtual assistants to obtain personalised, tailor-made advice when facing legal issues. Individuals are channelled automatically to specific procedures, depending on the nature of their claims and their needs: for small value cases, they are channelled to one of the out-of-court settlement bodies that will solve their disputes in only a few days and at little or no cost. Where the stakes of the disputes are higher and require judicial intervention, claimants are directed to courts. However, here as well you notice that the profile and functioning of these courts have been transformed in the most surprising manner. Most of them are now operating online. Costly, burdensome, and complex court procedures have disappeared. The use of advanced management systems and artificial intelligence (AI) in courtrooms, which you recall was highly controversial back in 2021, has finally come to facilitate the work of judges considerably. Advanced management systems and AI are now commonly accepted by the legal profession and society at large. You also observe that specialised courts have multiplied to address complex and technical issues and to provide tailor-made justice. Finally, you notice that for a number of disputes many citizens no longer need lawyers. Aided by digital technologies and as a result of simplified procedures, they can represent themselves, and the entire legal system tends to support this practice.

For many of us, this situation will sound like science fiction. Yet, in many aspects, several of these changes are already happening today, albeit at various paces and along very different paths across the globe. Over the past several years, economic and societal needs together with the digital revolution have triggered important innovations for improving access to civil justice. In particular, four trends in justice systems have been fundamental: namely, the digitalisation of procedures and the use of AI; the privatisation of civil justice and the rise of alternative dispute resolution (ADR) mechanisms; an increase in self-representation and the simultaneous disappearance of the legal profession from parts of the judicial system; and a move towards specialisation of courts and procedures.

Many of these changes are currently taking place in a patchy and unsystematic way, without an overarching framework guiding their ongoing developments. Nonetheless, digitalisation, privatisation, self-representation, and specialisation share similar problems: for example, concerning the quality of processes and outcomes, the emergence of new players, the need to rethink and redistribute roles among actors, and the need to enhance visibility and trust among users as well as to foster inclusiveness and accessibility. In a step towards a more comprehensive approach to today's civil justice challenges, this volume brings together insights, developments, and outlooks regarding all four trends. It includes mostly academic contributions, but also a number of policy and practice-oriented contributions to encompass views and experiences from different stakeholders.

[1] Zuckerman (1999).

1.2 The Challenge of Artificial Intelligence in Courts

Fast internet connections, massive data collection, technological development, and inexpensive hardware have made digital technologies omnipresent. The technology that stands out as the most futuristic and most promising in the legal realm is AI. Artificial intelligence is an umbrella term that covers many technologies and techniques that try to replicate[2] traits of human intelligence. Using algorithms and data analysis, AI systems perform their tasks much faster than humans and at a much lower cost, and offer considerable benefits with regard to labour-intensive jobs. With technology's ability to simplify, speed up, and, most importantly, lower the cost of court procedures, it is no surprise that government and court officials are looking at it to resolve many of these problems.

The first part of the present book takes on some of the challenges facing the digitalisation of courts and the use of AI in particular. The first three chapters consider different issues of equal importance in the design, implementation, and development of digital innovations in courts. **Dory Reiling** highlights the hypes, hopes, and dreams of digitalising courts. She suggests that court digitalisation should not simply ride the wave of digital optimism but identify the various court procedures and the way information is processed in them. Only after completing this step can court digitalisation proceed to allocate the appropriate technique and technology to the appropriate process. In the end, digitalisation should not be a goal but a means towards better courts. Subsequently, starting from the hype surrounding legal technology and the constant bombardment of news about humans being replaced by robots—even in courts—**Nicolas Vermeys** explores the impact of artificial intelligence on the legal process. For Vermeys, current AI is not sufficiently developed to replace judges in courts. However, AI can be used to support the judges in their decision-making tasks. AI can be used, for example, to prevent conscious and unconscious biases in judges, and in predicting the predisposition of judges to rely on certain arguments. Evidently, there is already a great deal of work AI can do in courts as well as considerable room for further development. Nevertheless, in the third chapter of this section, **Amoroso** and **Tamburrini** argue that technologies that might replace humans with machines also come with ethical challenges. The authors highlight that from a deontological perspective, replacing human judges with machines is questionable, while from a consequentialist perspective such replacement is promising. However, any form of AI in courts should have meaningful human control. To accomplish this, the authors argue, we should divide the tasks of courts into layers, and, for each layer, decide how the human controller should perform his or her task.

AI may be the appropriate tool to overcome the hurdles of access to court in the future, as it can help courts and court users reach their goals with less effort. At present, an obstacle to access to court for many users is the lack of information or the inability to obtain information about their situation. Is it a case that can go to court?

[2]Not replicate but mimic, as one of the scientists in Kubrick's 2001*: A Space Odyssey* would rebut.

What are my rights in this situation? Can I claim damages? These are just some of the unanswered questions that many people grapple with when faced with a legal problem. And without a proper answer, many of these problems never reach the courts. Here too AI might be of assistance. AI-powered systems that can communicate with the parties and help them in assessing the legal connotations of their problem could go a long way in bridging this very first gap in access. Subsequently, such systems can make a list of the documents that are needed to start a court proceeding, can suggest draft documents, or can suggest relevant legislation. Chatbots are one example of such systems, and recent developments show great potential.[3] Law firms have been using chatbots for some years to answer questions from clients or to suggest appropriate documents.[4] Automated systems may also conduct the service of documents or support the collection or presentation of evidence. While this seems futuristic, we should not forget that every day more and more objects are connected to the internet, and many communications and transactions take place online. In the future, we may expect both the service of documents and the provision of evidence to be mostly or entirely digital. For court users, this may translate into better access to information, faster and cheaper court services, and, consequently, fewer obstacles to accessing courts. In addition, AI may be used as a pre-trial mediator with a duty to bring parties together and to try to resolve their dispute before they consider starting court proceedings. This may have enormous benefits not only for small claims, where claimants want to avoid a long and costly trial, but also for many disputants who are interested in a fast and inexpensive settlement.

From the court administrators' point of view, AI can be used to manage court infrastructure, predict the complexity of a case, allocate the appropriate resources, and reduce costs. While these systems do not directly reduce the number of obstructions to access to court, they help the court better manage their resources, which can improve access in multiple ways. Court automatisation may be the first stage in a wholesale deployment of AI in courts.[5]

In addition, AI can assist in the actual administration of justice. Sophisticated and data-fed machines are able to assist judges by reading long documents and summarising them or highlighting important parts. Machines can browse databases to find legislation, case law, and academic or non-academic articles that can be used in deciding a case. Even more advanced machines can draft court decisions based on the documents presented or the input of the judge. It is then the duty of the judge to review and approve the document drafted. This support may reduce the time needed to decide a case or may simply give judges more time to spend on other cases. Courts

[3]The Beijing Internet Court in China is specialised in the resolution of online disputes. With an ever-growing number of e-commerce transactions, China has created similar courts also in Hangzhou and Guangzhou. The Beijing Court became the first to use AI in the form of chatbots to resolve cases. See: Liangyu (2019).

[4]Brown (2018) and Goodman (2017).

[5]Wu (2019).

will see an increase in capacity, process times will go down, and, as a result, court users will see their costs diminish.

As noted above, however, a good balance is necessary between what technology can achieve and what is appropriate. AI development and quality depend on the data available. This data should be enough for the system to understand its duty and clean enough to avoid mistakes after deployment. Numerous examples indicate that AI systems have indeed failed due to gaps in the data used in the development phase.[6] The development of AI itself may also be problematic. Who is going to develop court systems: private companies with public supervision? Maybe. But are public institutions able to supervise the development of complex algorithms? Will these algorithms be available for the public to review? Transparency indeed might be the biggest problem for algorithm-based systems. Anyone who wants to review these algorithms will have a difficult job because reviewing algorithms requires very specific skills. Even specialists find it difficult to review an algorithm without data to run it. So how can we make sure that algorithms are transparent for the general public? If people have little confidence in these algorithms, deploying them in courts may be futile.

More specific problems or dilemmas exist, especially when we look at technology from the user's perspective. As humans, is it more appropriate for us to be judged by other humans rather than by a machine? Courts and the court process have been created, shaped, and adjusted to accommodate human-to-human communication. Therefore, the introduction of machines that partially or entirely replace humans may have negative effects on the perception of courts and justice. But not all cases are the same. Some cases are so simple and clear-cut that machines can solve them without much difficulty. If we accept this, we may witness justice delivered both by humans and by machines: namely, some problems will be judged by humans, while others will be judged by machines. Will we have a problem with this idea? Is the machine or the human a premium service, and does this mean that some receive a better service than others? For the common court user, perhaps the most important problem is digital literacy, or the ability to understand how the new system works, and the possibility of accessing and using these systems. If users fail in any of these requirements, electronic systems and AI become ornamental rather than functional. It is the duty of court administration to educate and reach out to court users who lack digital literacy, while system developers are tasked to create systems that are easy to use and understand.

Finally, we should consider the perspective of the judge when deploying AI in courts. As noted above, AI systems are trained by data that represent past experiences, and function by trying to emulate these past experiences in the present context. Some argue that AI systems will not be able to develop new jurisprudence, but will only reinforce past choices and with them also past biases.[7] The same may be true if AI is used to draft or suggest final court decisions, because judges in

[6] Fenton and Neil (2018), Zhang et al. (2003).

[7] See Amoroso and Tamburrini in the present book, Chap. 2.

overwhelmed courts may rely on these systems to finish their job quickly, and thus fail to correct past errors or biases. And what if AI is a good judge and resolves many court cases? Will governments deploy them in higher courts? But if we have good AI and we deploy it in the first instance court, will it still make sense to deploy similar AI in a second instance? Replacing human judges with AI judges may signal the twilight of appeals.

Evidently, there is a long and winding road ahead in the development of good AI systems. But more importantly, governments and stakeholders should engage in an open discussion about principles, objectives, and fundamental values that AI can uphold or alter, and can bring or destroy. It is in our hands to decide how smart court artificial intelligence will be.

1.3 Privatisation of Dispute Resolution: The Controversial Rise of Consumer ADR in Europe

Within just a few decades, alternative dispute resolution (ADR) mechanisms have increasingly been described as one of the key components of modern civil justice systems. In 2002, the EU Green Paper on ADR in civil and commercial law highlighted that 'ADRs are an integral part of the policies aimed at improving access to justice'.[8] Similarly, EU Directive 2008/52/EU of 21 May 2008 on certain aspects of mediation in civil and commercial matters stressed that 'the objective of securing better access to justice (...) should encompass access to the judicial as well as extrajudicial dispute resolution methods'. The added value of ADR has been discussed extensively. It has been presented as an informal, accessible, fast, and cost-effective way to access justice while preserving court resources.[9] Yet voices have also warned against the development of a second-class and opaque justice, as ADR schemes may not be subject to the same procedural constraints and requirements as those usually applying in courtrooms.[10]

To remedy these issues, to enhance trust and ultimately to ensure that ADR fully delivers its potential, the European Union adopted Directive 2013/11/EU (the 'Consumer ADR Directive'), which has renovated the regulatory framework applying to consumer ADR in Europe.[11] Among others, the Directive ensures that consumers can turn to quality-certified entities.[12] It sets several binding quality

[8]EU Commission (2002) Green Paper on Alternative Dispute Resolution in Civil and Commercial Law COM/2002/0196 final, para 9.

[9]EU Commission (2002), para 9.

[10]Eidenmüller and Engel (2014), Haravon (2011), Lindblom (2008).

[11]EU Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.

[12]Biard (2019a) Impact of Directive 2013/11/EU on Consumer ADR Quality: evidence from France and the UK; Cortés (2015).

requirements applying to ADR schemes and their procedures: namely, the principle of accessibility, expertise, independence, impartiality, effectiveness, transparency, fairness, liberty, and equality. Compliance with these requirements is ensured by a network of national 'competent authorities' monitoring the quality of their national ADR bodies on an ongoing basis.[13] As the Directive was one of minimum harmonisation, Member States were also free to adopt additional quality requirements to ensure a higher degree of consumer protection in their countries. In its report of September 2019 on the implementation of the consumer ADR Directive, the EU Commission noted that the 'Directive has consolidated and complemented consumer ADR in the Member States and upgraded its quality'.[14] The Commission further noted, 'Overall, the transparency of ADR entities and procedures has increased considerably, case handling times have been reduced, ADR entities offer more staff training and users are more satisfied with the services provided by ADR entities. The establishment of high-quality ADR infrastructures has also provided an incentive for traders to review and improve their internal complaint handling processes'.[15] Despite these improvements, the EU Commission highlighted that the perceptions of traders and consumers still remain an issue, as many misconceptions about ADR and ADR entities continue to exist.[16] Some consumers and traders, for example, still hold the view that ADR bodies are not fully impartial or that they propose a form of 'justice behind closed doors'. This situation tends to prevent the diffusion of a climate of trust among all stakeholders.

During the conference, we asked our speakers coming from various parts of Europe to reflect on the development of consumer ADR in their respective countries. In addition, we asked them whether, in their views, ADR was indeed a synonym for 'justice behind closed doors'. Contributions presented in this book come from academics and practitioners from Belgium, France, Germany, and the United Kingdom, and who are actively involved in the daily functioning of ADR schemes.

Christopher Hodges sets the scene and puts ADR in a broader perspective, by placing it into the context of all existing dispute resolution mechanisms. He considers that improving access to justice may first require looking at all existing dispute resolution pathways from a holistic perspective. He stresses that many different pathways have emerged progressively, depending on the type of disputes and the needs at stake. However, these different pathways may compete with each other, and the multiplication of options ultimately makes the situation difficult for users to understand and to navigate. As Hodges points out, 'What users of disputes resolution services need are easily identifiable and effective pathways rather than a multiplicity of different options'. **Lewis Shand Smith** builds on his experience as a former ombudsman in the United Kingdom, and highlights the different functions of an ombuds service, which is one particular type of ADR scheme. As he highlights, trust

[13] Biard (2018).

[14] EU Commission (2019b) Report from the Commission, p. 8.

[15] *Idem.*

[16] *Idem.*

is a fundamental component of all ADR bodies and can only emerge 'through transparency and openness, easy access, clarity of procedures, sharing of data and insights in order to drive learning, and regularly reporting to key stakeholders on its own performance'. As Shand Smith concludes, 'To build trust in the service and in the way by which it delivers justice, the doors of an ombuds service must never be closed, but be visible, open and accessible to all comers'. **Stefan Weiser** and **Felix Braun** from the General Consumer Conciliation Body ('*Universalschlichtungsstelle*', the German residual entity) present the state-of-play of ADR in Germany, and provide practical insights into the work carried out by the Universalschlichtungsstelle as well as highlight the various challenges faced by ADR entities in their country. **Frédérique** Feriaud and **Pierre-Laurent Holleville** from the French energy ombudsman (*Médiateur national de l'énergie*) emphasise that several safeguards exist to avoid opacity and to enhance trust. According to the authors, confidentiality, which is different from the notion of 'secrecy', remains an essential aspect of ADR. As they point out, 'by ensuring that discussions remain confidential, the law enables parties to speak freely, which is in their best interest'. However, as Feriaud and Holleville also underline, there can be situations where public interest may supersede the need for confidentiality (in particular where rogue practices may harm a high number of consumers). Finally, **Pieter-Jan de Koning** from the Consumer Mediation Service (*Service de Médiation pour le Consommateur/Consumentenombudsdienst*, the residual consumer ADR entity in Belgium) presents the functioning of the Belgian Consumer Mediation Service, and stresses that consumers' and professionals' perceptions about its work remain a challenging issue. Together, these contributions shed light on a multi-faceted European consumer ADR landscape that is consolidating, albeit at different speeds in different countries. If confidentiality is one of the key elements of ADR procedures, it will continue to attract criticism.

In *Nadja*, the French writer André Breton (iconic figure of the French surrealist movement) wrote:

> I myself shall continue living in my glass house where you can always see who comes to call; where everything hanging from the ceiling and on the wall stays where it is as if by magic, where I sleep at night in a glass bed, under glass sheets, where who I am will sooner or later appear etched by a diamond.[17]

Building an 'ADR glass house' where transparency is ensured for all their activities and decisions is and will continue to remain a daily challenge for all ADR entities. However, this also represents a *sine qua non* condition for their full integration into modern civil justice systems.

[17]Breton (1928), p. 18—in French: "Pour moi, je continuerai à habiter ma maison de verre, où l'on peut voir à toute heure qui vient me rendre visite, où tout ce qui est suspendu aux plafonds et aux murs tient comme par enchantement, où je repose la nuit sur un lit de verre aux draps de verre, où qui je suis m'apparaîtra tôt ou tard gravé au diamant").

1.4 Self-Representation in Civil Justice: Taking Lawyers Out of the Equation?

With legal procedures often designed to be adversarial and, as a result, hard to navigate for the uninitiated, attempts at reducing material and immaterial barriers to accessing the legal system have historically relied heavily on a privileged legal profession. For a long time, the general supposition has been that in order for people to exercise their right to access the justice system they need the help of lawyers or other legal professionals to translate their everyday problems and conflicts into legal claims. As such, legal representation has always been at the centre of the quest for accessibility in the administration of justice. At the same time, professional legal assistance tends to constitute a large share of the cost of litigation and may turn out to be a barrier to effective access in and of itself.

Over the past three decades, the seemingly entrenched position of the legal profession has been challenged by several dynamics. Firstly, public legal aid systems established during the post-war *Access to Justice movement* have undergone significant overhauls. These have been partly due to financial crises and a related increase in demand for legal aid, but are predominantly a result of successive economic austerity policies and related cutbacks and reforms. Many jurisdictions have seen a stark reduction in the public expenditure on legal aid.[18] Consequently, especially in common law jurisdictions, lawyers are—directly, through permitting more self-representation, and indirectly—through public legal aid cuts—being removed from the civil justice process.

Secondly, technological developments are significantly changing the landscape of legal advice. As discussed above, automated document assembly, predictive AI, and online diagnostic tools are among the 'disruptive technologies' Richard Susskind identified as altering the face of the legal profession.[19] Similarly, technological innovations in the administration of justice itself—aimed at reducing the time, costs, and complexity of legal procedures—are chipping away at the need for litigants to hire a lawyer altogether. Susskind's *The End of Lawyers?* has underscored the existential need of the legal profession to adapt to an ever-changing landscape of legal services under the influence of the increased use of information technology.

Lawyers are not only subject to change in the way they work; lately, we see that, in attempts at making the administration of justice cheaper, faster, and accessible, lawyers may not be part of the equation at all. With policymakers trying to minimise the cost of litigation but recognising the challenges for citizens to navigate the legal system without professional assistance, attempts at reducing the need for professional help—through simplified procedures, aforementioned technological innovations, and expanding alternative dispute resolution options—aim to find a balance

[18] Moore and Newbury (2017).

[19] Susskind (2013).

between the accessibility of court procedures and effective legal protection. Experiments with, among others, full digital procedures, mediation-like courts, and low-threshold local civil courts all try to provide simple, fast, and inexpensive procedures with the aim of reaching a solution to disputes in joint consultation, often without the costly inclusion of legal professionals.

While all jurisdictions deal with their own particular dynamics, we can witness an international trend in constricting public spending on the civil justice system in general and subsidised legal aid specifically, with significant consequences for justice seekers of limited means. In particular, the fairly recent reforms in England and Wales following the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) of 2012 have led to a dramatic increase in the number of litigants appearing in court unrepresented.[20] However, such dynamics are not limited to common law jurisdictions without mandatory representation rules. In the Netherlands, the threshold for cases in which legal representation is not compulsory was raised from 5000 to 25,000 EUR in 2011, drastically increasing the pool of cases that can be litigated without legal assistance. At the EU level, several new procedures—for small claims and debt collection claims—are designed to be predominantly digital in nature and are explicitly geared towards litigation without a lawyer.

As a result of these trends, the number of parties to civil proceedings who do not have legal representation has risen steadily in a number of jurisdictions, creating very specific challenges to the effective administration of justice. In legal systems designed for an adversarial process in which both sides are assumed to be represented by legal professionals, self-representing litigants are often viewed as challenges to the efficient administration of justice. As such, they are treated as a potentially frustrating factor in the day-to-day practices of the institutionalised judicial system. Lawyers, however, are seen progressively as an excessive financial burden on both legal aid budgets and litigating parties themselves.

The issue of (self-)representation effectively encapsulates a host of civil justice challenges for the 21st century. It urges the question of accessibility for those without means, the issue of rising costs of public legal aid, and questions of effective legal protection and the integrity of the legal system. The rise in litigants appearing unrepresented in court reveals the problem of the complexity of the law and legal procedures, while at the same time providing a proving ground for the promising developments of technological innovations.[21] The third section of this book deals with the trend towards increased self-representation in civil courts, and questions the future role of lawyers in the administration of civil justice. It bundles three contributions that approach the issue from, respectively, a policy, an empirical, and a theoretical perspective.

Paulien van der Grinten raises the question 'what is self-representation?' Is it just taking the lawyers out of the equation of justice administration or is it more than that? Van der Grinten notes that within the Dutch Ministry of Justice there is more

[20] Grimwood (2016).

[21] Barton and Bibis (2017).

focus on solving the actual problem underlying legal disputes than on ensuring that all matters are effectively dealt with in court. There is a wide call for cheaper and more simplified procedures, and the goal is for civil procedure to reduce conflict between parties. Van der Grinten questions how lawyers fit into this new type of procedure, and uses the recent debates and experiments in the Netherlands to tackle the issue. She concludes that while many procedures are open to innovation—which often results in a diminishing role for the legal profession—in complex cases lawyers will not disappear any time soon. **Roland Eshuis** presents results from empirical research on legal representation in Dutch civil court cases. This research studied the effect of a relatively recent increase in the threshold for small claims in civil commercial cases from 5000 to 25,000 euro, effectively bringing a broad range of cases under the jurisdiction of the sub-district courts before which representation is not obligatory. The data shows that self-representation is more popular among defendants, and, although they rarely win a case, they experience the procedure as fair to the same extent as litigants who have professional help. Eshuis presents some lessons to be learned from these insights. The conclusion that still very few claimants use the opportunity to start a court case without professional help raises the question of whether it is in fact possible to shape the law and its procedures in a manner simple enough for anyone to understand. He posits that the fact that we still need lawyers to handle most of our court cases is a symptom of our failure to design a legal system that is accessible to all. **John Sorabji** subsequently tackles the idea of diminishing the role of legal professionals, and directs our attention to the consequences of the wholesale removal of lawyers from the administration of justice. Analysing the main challenges to the legal profession—funding and technological innovation—Sorabji warns us not to throw the baby out with the bathwater. He points to two important risks associated with this development. Firstly, there is the risk of deskilling lawyers who are then effectively reduced to being process managers in a technological environment. And secondly, taking lawyers out of the courtroom also takes away the essential function of lawyers in keeping judges accountable. Sorabji concludes that while in certain classes of litigation the presence of lawyers advising and representing litigants may not be an essential feature of the administration of justice for some purposes, overall they remain a crucial feature of any civil justice system that is committed to securing effective participation, open justice, and democratic accountability.

The movement in many jurisdictions towards more 'Do-It-Yourself Justice' and a diminishing role for lawyers provide a fertile testing ground for procedural innovations that allow for greater access and simpler, more cost-effective procedures, while maintaining the integrity of the justice system as a whole. With the trends pointing in the direction of more justice without lawyers, the pressing question is how much the role of lawyers in the administration of justice can be scaled back without undermining their integral part in the administration of justice. The focus of considerable debate on the civil justice system has to do with the precarious balance between cost-efficiency and substantive justice in addressing civil disputes. Nonetheless, the goals of an effective civil justice system go beyond the quick and

low-cost resolution of disputes.[22] In addition to resolving disputes, an effective civil justice system serves the important social function of demonstrating the effectiveness of the law and allowing judges to perform their function of applying, clarifying, and developing the law.[23] With that in mind, the question remains as to what extent a civil justice system can be designed in a way that it can perform this function in any real sense without the presence of legal professionals to assist litigating parties in effectively claiming their rights. It is clear that the question of representation will remain a pressing topic for years to come.

1.5 Court Specialisation and the Rise of International Commercial Courts

The fourth part of this book focuses on court specialisation. While court specialisation is not a new phenomenon, in recent years this topic has gained a lot of attention because of the rise of international business or commercial courts in Europe and beyond.[24] This trend of establishing business courts is also important in the context of access to justice in the broad sense, because it furthers customised court adjudication of international commercial disputes. The present section will briefly address court specialisation as a perceived need to improve access to justice as well as the rise of international business courts in this context.

Specialisation in the judicial system, either by establishing special courts or having divisions or chambers within the general court, has a long history. In France, for instance, the commercial court, the *Tribunal de commerce*, was already established in 1563, and this makes it the oldest court in the French judiciary.[25] For civil law cases, countries usually have a number of special courts or court divisions for certain cases; these include, for instance, labour law, family law, consumer law, and commercial and maritime cases. Civil procedural codes often include special rules for these types of cases, tailored to the parties involved (e.g. weaker parties) and in line with the substantive law. Having separate courts or court divisions also enables judges to acquire the necessary expertise and experience. In some cases the court composition also differs from the general civil court (e.g. the inclusion of lay persons). In that respect, court specialisation is in alignment with Adam Smith's ideas on the division of labour,[26] and furthers access to justice by

[22] Clark (2007), para. 9.

[23] Jolowicz (2000).

[24] See *inter alia* Kramer and Sorabji (2019a).

[25] Royer et al. (2016), no. 717.

[26] Smith (1779).

enhancing the efficiency and quality of the judicial process.[27] Specifically in relation to commercial courts, it is not surprising that the World Bank's Doing Business Reports highlight their importance. In the 2019 Report, for instance, it is commented that the 'top 10 economies in the ease of doing business ranking share common features of regulatory efficiency and quality, including [. . .] specialized commercial courts'.[28]

As **Elisabetta Silvestri** also points out in the present book, specialisation is, however, not the solution for poor access to justice. The risk of tunnel vision or monoculture, compartmentalisation, two-tiered justice, and the pressure on impartiality are some of the disadvantages attributed to court specialisation. Silvestri draws attention to the fact that there is little empirical evidence that specialisation improves procedural efficiency and leads to judgements that reflect higher judicial expertise. She discusses developments in Italy, where in recent years the courts designated in the commercial law area have been advertised as providing justice of the highest quality, but so far in practice they have not been able to demonstrate the advantages of specialisation. As Silvestri argues, pros and cons need to be balanced in making decisions about the desirability of court specialisation and how far this specialisation should go.

The rise of international commercial or business courts in recent years cannot be explained only on the basis of the desire to improve access to justice by securing the appropriate expertise and accompanying procedural rules. The emergence of internationally focused courts has also been triggered by other considerations. Firstly, establishing such courts is often activated by economic motives and the desire to raise the profile of the jurisdiction so that it is seen to be an attractive venue for international business litigants. While virtually all initiatives to set up these courts in Europe date from before the Brexit vote of June 2016, discussions have been fuelled by uncertainty about the international litigation framework, by business relocation, and by the opportunities this may create for boosting local legal markets. Secondly, bigger and more complex commercial disputes are increasingly not confined to one jurisdiction. This requires not only subject-matter expertise but also knowledge of the details regarding international business relations, foreign legal systems, and private international law rules. A common feature of the recently established courts is that they offer parties the possibility of litigating in English, and therefore require appropriate language skills from the judges. These courts could further access to justice by providing tailor-made justice and could strengthen the rule of law. Consistent with this aim is the desire expressed explicitly in some countries, including the Netherlands, to offer business litigants an alternative to commercial arbitration. Over the last couple of decades, commercial arbitration has taken over a substantial part of commercial litigation. In fact, the 2018 White & Case and Queen

[27] See, *e.g.* Mak (2008), Silvestri (2014). See in relation to the Unified Patent Court: Schovsbo et al. (2015). Research conducted for the Council for the Judiciary on court specialization in the business context in the Netherlands: Böcker et al. (2010) and Havinga et al. (2012).

[28] World Bank (2019), at 1.

Mary survey concluded that 97% of the respondents prefer international commercial arbitration.[29] To counter what has been called the vanishing trial—a phenomenon that was first evidenced in the United States[30]—some governments justify the creation of international business courts governed by procedural regimes that in part are modelled on arbitration rules (e.g. the Belgian legislative proposal). These courts should provide a high-quality and less costly alternative to international commercial arbitration. That the creation of these courts is not unproblematic is illustrated by the fate of the proposal for the Brussels International Business Court (BIBC). Political parties started to withdraw their support at the end of 2018 and early 2019, arguing that the proposal would lead to a two-tiered justice system, and joining earlier critiques qualifying the court as a 'caviar court'.[31] It seems unlikely that this court will see the light of day in the near future, if ever.

In the present book, **Marta Requejo Isidro** discusses the development of international business courts in Europe and beyond. Starting in the Middle East, with the Dubai International Financial Center (DIFC) being the most prominent, in recent years other countries have created similar courts. In Asia, this includes Singapore and China, and in Europe most notably France, Germany, and the Netherlands, while proposals for the creation of international commercial courts elsewhere are on the table.[32] She highlights the Dubai project "Courts of the Future" which aims at establishing a division with the DIFC Courts to deal with technically complex claims, having no or multiple geographical nexuses or involving parties from different jurisdictions. Finally, the author reminds us not to pay attention only to specialisation but also to the need for international cooperation. In this regard, the adoption of the Hague Judgments Convention in July 2019 is a true highlight that—together with an increased number of ratifications of the 2005 Hague Choice of Court Convention—will hopefully better regulate the enforcement of judgments at the global level.

Ianika Tzankova focuses on what may in part be considered a reversed trend, using the image of the 'Global Village' where cases like the Volkswagen case, Trafigura, Apple v Samsung and Philip Morris are subject of transnational litigation and arbitration. She positions the (anti)specialisation trend in judicial law-making against that background. She argues that modern international commerce and consumerism give rise to disputes on a worldwide scale but that national legal systems are not fit to deal with these disputes and at the same time the 'inhabitants of the Global Village' use the divergences between systems to maximise their interests. She concludes that the future of dispute resolution is being shaped by these big players while their interests may not be aligned with those of national legislators and ordinary consumers.

[29]White & Case and Queen Mary University of London (2018), at p. 1.

[30]See, e.g. Galanter (2004). In England and Wales: Dingwall and Cloatre (2006).

[31]Kramer and Sorabji (2019b), pp. 1–2; Van Calster (2019), pp. 107–114.

[32]See also Kramer and Sorabji (2019a).

1.6 Concluding Remarks, Future Pathways, and New Frontiers

In the concluding chapter **Judith Resnik** takes a step back from the discussions on the procedures to pose questions about the 'normative aspirations, the doctrinal mandates, and the pragmatics of contemporary civil justice systems'. She focuses on three highly relevant intertwined aspects: the substantive entitlements civil justice protects; the extent of governmental support for courts, other forms of dispute resolution and for those seeking justice; and the role of the public in dispute resolution systems. As regards the latter, she stresses the importance of the public, referring to Jeremy Bentham who already two centuries ago taught that 'access by the public is requisite to the capacity to scrutinize, let alone to discipline, the decision-making and the norms that undergird it'. She concludes by stating 'We lose the very capacity to debate what our forms and norms of fairness are. Whether called "court," or "ADR," or "ODR," we cannot, without all forms of openness, decide whether the paths, processes, or resolutions are just'.

It is clear that today civil justice finds itself at multiple crossroads. Technological innovations, political turmoil, and economic constraints all contribute to a situation in which civil justice systems are forced to continuously reinvent themselves. The persistent development of technological innovations, and especially the promises of AI, stand to significantly change the face of civil justice and rightfully take up a central spot in the current access to justice and the justice innovation debate. Ostensibly positive moves towards a system of justice in which the regular citizen is able, without the assistance of legal professionals, to access the courts and has his case decided on by a judge, have resulted in an increase in the number of people that enter the courtroom without professional legal assistance. Alternative dispute mechanisms have, over the past couple of decades, proven themselves to be a viable alternative to traditional court procedures while also attracting criticism for creating a two-tiered legal system and 'justice behind closed doors'. Court specialisation is yet another measure to further access to justice, as it leads to increasing both the efficiency and the quality of adjudication. However, a multitude of courts and procedures may also have the opposite effect, and specialisation entails the risk of tunnel vision. In this regard, the rise of international business courts in Europe and beyond that focus on access to justice for international commercial disputes is a fascinating phenomenon. It emerges not only from the desire to increase expertise within courts but also because the establishment of these courts is triggered by economic and competitive motives. In addition, as is explicated in some countries, these courts are also intended to provide an alternative to international commercial arbitration and to counter the vanishing trial. However, the experience in Europe so far seems to indicate that the impact of these new courts on the international litigation market is limited.

The Covid-19 crisis that emerged in 2020 has also served as a catalyst in the move towards digitalisation of court procedures, with courts forced to offer their services almost exclusively online under the influence of widespread lockdowns. Courts in

many countries have adapted to the crisis and embraced technology. Online hearings and digital documents suddenly became the norm and, perhaps, will become the new normal. Above all, this situation shows that digital technology is a need rather than a luxury. With this in mind, courts should take advantage of the situation and push themselves to make more use of AI and digital technologies. The health crisis, however, may result in long-term economic instability and legal disputes regarding safety, with many people facing financial difficulties and uncertainty. As a result, the traditional hurdles obstructing access to justice are suddenly very high.

While it is difficult to measure the extent to which each of the four trends—digitalisation, privatisation, self-representation, and specialisation—in civil procedure contribute to improving access to justice, it is clear that they are intertwined and strengthen each other. Digitalisation and the rise of artificial intelligence have evidently not only found their way to courts but have also changed the face of ADR, as indicated by the many providers that have moved online. Several ADR entities, are now using AI-powered tools to assist and guide users during the dispute resolution process. This trend is expected to expand in the foreseeable future.[33] In fact, private online dispute resolution (ODR) often proves more advanced and more flexible in integrating technology than do public courts and bodies. Digitalisation also supports self-represented litigants, as online sources and access to procedures can facilitate the journey to courts and to other dispute resolution mechanisms. Technology and online information play an important role in improving the interface between court and out-of-court dispute resolution. At the pan-European level, the e-justice portal and the ODR platform—despite certain flaws—have played an important role in improving access to information, in connecting some of the dots, and in simplifying access to out-of-court and court procedures.[34] Lastly, ADR mechanisms have made clear that customised and low-threshold justice is essential, and court specialisation enables tailoring procedures to the needs of specific litigants and disputes. International commercial courts as they have been established are better geared to the needs of commercial parties in high-value international disputes, among others, by enabling litigation in English and adopting features of commercial arbitration as the 'alternative'—though in fact often the main method of dispute resolution—and they are better equipped technologically.

Over the past two decades, civil justice at the European level has developed rapidly, and the contours of a genuine European civil justice system are visible. European legislation, for instance in the area of ADR, has influenced law and practice in the Member States, but to a certain extent developments at the national and pan-European level take place in parallel. Plagued in part by the financial crisis, by Brexit, and by various political and economic controversies and challenges, the speed at which the European civil justice system is evolving has slowed down.

[33]Biard (2019b) Justice en ligne ou Far Www.est? La difficile régulation des plateformes en ligne de règlement extrajudiciaire des litiges.

[34]Hoevenaars and Kramer (2020). Van Gelder and Biard (2018).

Emphasis is placed on instruments that support economic development as well as on the proper implementation and evaluation of existing instruments, judicial training, and the exchange of best practices.[35] The most noteworthy developments over the past few years have been the EU 'New Deal for Consumers' (in particular the Directive on representative action for the protection of the collective interests of consumers),[36] the further development of the ODR platform as announced by the European Commission in September 2019,[37] and a strong policy emphasis on digitalisation and the modernisation of civil justice cooperation.[38] Improvements regarding the European e-justice portal—which are somewhat helpful for self-represented litigants—increase access to information. However, considering the limits of technological interconnectivity and the decentralisation of e-justice, a more revolutionary digitalisation of justice at the European level is not to be expected. As regards court specialisation, it is important to note that the court organisation and national judicial infrastructure are not within the EU competence. The struggles to found a single European Patent Court signify how complicated it is to establish a specialised court at the pan-European level. Interestingly, in the context of a study on building commercial competence by the European Parliament also at the pan-European level, the idea of setting up a European commercial court has been launched.[39] However, it seems unlikely that this will be followed up in the near future.[40]

An overarching issue in the context of access to justice that has not been addressed specifically so far is that of the financing of the justice system as a whole, and of individual or collective litigation or other forms of dispute resolution in particular. Costs and funding are crucial to access to justice, and increased digitalisation in the justice context, the advancement of ADR schemes, increased self-representation, and the desire of court specialisation are to a great extent triggered by the need to increase efficiency and to reduce costs. Two important developments in this are the shift from public to private funding (in particular third-party funding and crowdfunding) and the reform of cost rules (including fee-shifting, proportionality rules, and cost sanctions). While these developments are promising in terms of bridging the access to justice gap, they also pose challenges,

[35]Hess and Kramer (2017).

[36]Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.

[37]EU Commission (2019a) Implementation Report on the European Framework for Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR).

[38]For instance, the modernisation of the EU Service and Evidence Regulations to better reflect digital means of serving documents and taking of evidence.

[39]See Rühl (2018). Evas (2018). Criticised by Themeli et al. (2018).

[40]Response European Commission to European Parliament resolution of 13 December 2018 with recommendations to the Commission on expedited settlement of commercial disputes (2018/2079 (INL)), at https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-expedited-settlement-of-commercial-disputes (last visited 8 July 2020).

are surrounded by legal uncertainty, and measures to reduce or redistribute the collective and individual costs of litigation have so far not always been effective. A new project, financed by the Dutch Research Council under its Vici scheme[41], which commenced in late 2020, will add another layer to the ERC research project from which the present book results. Joint efforts and the cross-fertilisation of research in these areas will enable a comprehensive mapping and analysis of recent developments and new frontiers, and will provide new pathways to civil justice in Europe.

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[41] Vici project 'Affordable access to justice: towards sustainable cost and funding mechanisms for civil litigation in Europe', financed by the Dutch Research Council (NWO), Erasmus School of Law (PI Xandra Kramer), 2020–2025.

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Part I
Digitalisation and AI

Chapter 2
The Human Control Over Autonomous Robotic Systems: What Ethical and Legal Lessons for Judicial Uses of AI?

Daniele Amoroso and Guglielmo Tamburrini

Abstract This contribution provides an overview of normative problems posed by increasingly autonomous robotic systems, with the goal of drawing significant lessons for the use of AI technologies in judicial proceedings, especially focusing on the shared control relationship between the human decision-maker (i.e. the judge) and the software system. The exemplary case studies that we zoom in concern two ethically and legally sensitive application domains for robotics: autonomous weapons systems and increasingly autonomous surgical robots. The first case study is expedient to delve into the normative acceptability issue concerning autonomous decision-making and action by robots. The second case study is used to investigate the human responsibility issue in human-robot shared control regimes. The convergent implications of both case studies for the analysis of ethical and legal issues raised by judicial applications of AI enable one to highlight the need for and core contents of a genuinely *meaningful* human control to be exerted on the operational autonomy, if any, of AI systems in judicial proceedings.

2.1 Introduction

Recent advances in robotics and artificial intelligence (AI) have paved the way to robots autonomously performing a wide variety of tasks[1] that may significantly affect individual and collective interests, which are worthy of protection from both ethical and legal perspectives. Exemplary cases are the application of lethal force by

[1]A robotic system may be counted as "autonomous" at given tasks if, once activated, it is able to carry out those tasks without further human intervention.

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