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Towards a digital legal consciousness?

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Abstract

The justice system is over-stretched and constantly expected to perform beyond its capacity. It is operating with delays, high costs, not providing access to justice for all and, as some argue, with outdated procedures. This reality has forced a shift from slow and tired paper-based, face-to-face procedures to a time, and cost-saving, digital turn. The digitalisation of justice has slowly evolved in different ways in justice systems around the world. This article discusses how this transition to digital justice affects (non) users' perceptions of this system and what motivates their actions. I argue that users of the justice system need different sets of capabilities (legal and digital) to be able to navigate this new justice space. In turn, this highlights the divide between those who can, and those who cannot, access the digital justice system. I build on legal consciousness research, identifying its failure to disentangle conscience from capabilities and propose a framework through which users of a digital justice system can be better understood. I also argue that designers of such systems can use this framework to inform the creation of a better system of digital justice. Finally, I recommend this framework for empirical testing and refining.

Keywords: Access to Justice, Digital Justice, Digitalisation, Digital Culture, Legal Consciousness, Digital Legal Consciousness.

Introduction

How do people make sense of digital justice and what is their relationship with it? In a rapidly growing and constantly developing digital justice space, there is a need to explore (theoretically and empirically) emerging patterns on how people (dis)engage with this space. The purpose of this article is to contribute a framework for this task. To do this, I build on my previous work where I have called these developing patterns *digital legal consciousness* (Creutzfeldt 2018, 2021). I argue below that our digital legal consciousness develops by us combining our attitudes and capabilities towards the law with our attitudes and capabilities towards the digital. In other words, in order to explore how the digital turn of the justice system is being experienced, I bring theories of legal consciousness to digital justice. The starting assumption of digital legal consciousness is that people approach the

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digital justice system with a mixture of expectations they learned and developed through a combination of their (dis)engagement with the *offline* justice system and their (un)ease of everyday engagement with the digital space. Therefore, people approach a digital justice system with two sets of expectations. First, expectations that the justice system will operate as it does in the offline space (as humans we cannot avoid making sense of the activities we are engaged in by drawing on our previous history of activities and learning (Southerland 2014)); and second through their expectations and experiences of the digital space. Most people have more experience with online transactions and interactions than they do with legal settings. In other words, the way in which people are able to engage with the digital justice system depends on both sets of capabilities: legal capabilities and digital capabilities.

Legal and digital capabilities are distinct from each other, not least when we think about non-users of the (online) justice systems. Different types of users (users, 'don't' users and 'can't' users) will have different legal and digital capabilities which results in inequalities emerging from the shift to services online. The way in which we think and feel about the law has an effect on our capability of acting upon it. One of the challenges to this notion is being aware of what a legal problem is. The literature on legal consciousness, which I ground my argument in, omits to make the connection between awareness and capability of access. It is imperative to bridge this gap if we are to have the (theoretical and empirical) tools to adequately assess the implications of the digitalisation trajectory in the future.

Hence, the following questions need to be explored; how does consciousness (sensibility) of how we think and feel about the law relate to our capability of acting upon it? How is our capability to access law connected to our capacity to access the digital justice space? To explore these questions theoretically, I bring together existing literature on legal consciousness and digital culture to start to fill the gap between consciousness (awareness) and capabilities. I develop a taxonomy of attitudes of people who (dis)engage with the online justice system. I then set out a conceptual framework through which to examine experiences of digital justice.

This article is made up of six parts: part one sets the scene of access to justice in the emerging digital justice arena. Part two addresses the design of digital justice systems. Parts three and four draw together existing literature on legal consciousness and legal capabilities (part three) and on digital culture and digital capabilities (part four). Part five conceptualises digital legal consciousness and develops a fresh taxonomy for examining experiences of digital justice; part six offers reflections on the potential value of this taxonomy for assessing the implications of digitalisation.

1. Access to justice in the emerging digital justice space

Digital justice is the space that people have to access when engaging with a court, tribunal or legal advice to resolve their problems online. Perceptions of justice are contingent and multiple. In this article I conceptualise digital justice as a space, as opposed to justice as effect of spatialisation and material dynamics (e.g. digital media), in which the idea of efficiency is bound up with the definition of a working justice system (see below) even though efficiency and needs of users of these systems are often at odds. Many parts of justice systems around the world have gradually been *upgraded* to deliver their services

online. This upgrade comes with a promise of fewer delays, greater efficiency and better access to justice (Susskind 2019). The worldwide *digital turn* of justice systems occurs at different paces and is at different levels of evolution in each country.[1] Despite this, engaging with justice online is a reality that we all have to face, one way or another. These engagements can be fully online (e.g., Civil Resolution Tribunal in Canada,[2] the Traffic penalty tribunal in the UK,[3] application for a divorce in the UK[4]); others offer a combination of online and offline (face-to-face or telephone) access options (e.g., Rechtwijzer[5] in the Netherlands).

These developments have brought with them serious concerns about access to justice, as not all people share the same capabilities to use the digital justice system (Creutzfeldt & Sechi 2021, LEF 2019, JUSTICE 2018). Adding to this concern, the global pandemic in 2020 enforced social distancing and thereby accelerated the remote delivery of justice practically overnight (Lord Chief Justice 2021, European Justice 2020, UNODC 2021, Sourdin *et al* 2020). This meant that people who were used to physically accessing court and tribunal buildings and interacting in person with their lawyers, for example, suddenly could not do so anymore. This has brought to light the inequalities in people's legal and digital capabilities and made access to justice even more of a challenge. For example, Ahmed (2018) argues that 'Internet access is a key battleground in the fight for equality in the digital world (p. 1).' In a recent post, Mwema (2021) asks if digital inequality is a justice issue. She argues that if we understand digital rights as human rights then digital inequality is transformed into an issue of injustice.

> 'Digital inequality affects the economic, cultural and political dimensions of our lives. When viewed through the lens of abnormal justice, unequal distribution of resources and class inequalities count as injustices. Implementing digital rights as a human right through the lens of abnormal justice creates a pathway to hold individuals, big tech and governments accountable for their actions (or lack thereof) on the internet.' (Mwema:1)

Both examples show how deeply rooted the questions of access and justice are in the digital space. Before turning to the questions of access to the online justice systems and inequalities, let us consider a few examples from around the world of emerging online justice spaces in the UK, Canada and Australia.

Modernising the justice system in the United Kingdom: Since 2016, there have been serious efforts to reform the justice system in the UK (HMCTS 2018). Her Majesty's Courts and Tribunal Service (HMCTS) noted in its 2015 annual report that 'the level of service currently received at a court or tribunal is at best inconsistent and, at worse, frustrating…' (p 20). Outdated systems, waste and inefficiency, a lack of digital services, and the poor utilisation

[1] See, Remote Courts Worldwide https://remotecourts.org (accessed 8 December 2021)
[2] Civil Resolution Tribunal https://civilresolutionbc.ca (accessed 8 December 2021)
[3] Traffic Penalty Tribunal for England and Wales https://www.trafficpenaltytribunal.gov.uk (accessed 8 December 2021)
[4] Gov.uk, Apply for divorce https://www.gov.uk/apply-for-divorce (accessed 8 December 2021)
[5] Rechtwijzer https://rechtwijzer.nl (accessed 8 December 2021)

and inadequate facilities of court buildings were all cited as reasons for reform. Further, the report made clear that the courts need to meet the needs of their users and build a system that can stand the test of time. In 2016 an ambitious reform programme was launched in the UK, investing £1bn to bring new technology and modern ways of working to courts and tribunals (HMCTS 2018). The reform includes civil, family and tribunal jurisdictions, aiming to put people at the heart of the reform (HMCTS 2019). Since 2016, different parts of the justice system have been modernised and digitised.[6] This process is fascinating and challenging in itself and research is being conducted on the design of online processes (Tomlinson 2019).

Modernising the justice system in Canada: 'The Civil Resolution Tribunal (CRT) in British Columbia is one of the first examples in the world of on-line dispute resolution being incorporated into a public justice system. The CRT was established under the British Columbia Civil Resolution Tribunal Act 2012 and started in 2016'(Lapper 2020). Lapper further describes that 'the CRT deals with civil small claims (up to $5000), condominium disputes, society and co-operative association disputes and motor vehicle accident claims (up to a maximum of $50,000). There is no court process available for these cases so use of the CRT is mandatory. Additionally, the CRT discourages the use of lawyers (except for motor vehicle claims)' (ibid).

*Modernising the justice system in Australia: '*The Digital Court Program is part of the Government's broader digital transformation agenda (Federal Courts of Australia 2019-20). The Corporate Plan (2020-21) outlines the developments and plans of four court modernisation programs which include the Federal Court of Australia, The National Native Title Tribunal, The Family Court of Australia, the Federal Circuit Court of Australia, the Commonwealth Courts Corporate Services and the Commonwealth Courts Registry Services. Three of these courts (Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia) offer the Commonwealth Courts Portal.[7] The Portal is a secure online system that enables registered litigants and legal practitioners to access information about their cases before these courts and electronically file (eFile) applications and documents; identify documents that have been filed; view future court dates; view outcomes and access sealed orders that have been made. These examples illustrate the difference in the approaches and evolution of online justice throughout the world (Katch & Rabinovich-Einy 2017; Katch 2012). The various online justice spaces that are being created and designed need to be accessible, used and understood by those people they are designed for – and produce just outcomes.

Access to justice is narrowly concerned with problems that are capable of legal definition, as *justiciable problems* (Genn 1999). This notion emphasises that access to justice can be equated to access to legal assistance, legal remedies or law and the legal system. However,

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[6] This included testing video hearings; launching online procedures for specific claims (Online civil money claims went live in March 2018 for claims less than £10,000); tribunal procedures are broken down into: lodging appeals online, track your appeal online, video link hearings, and continuous online hearing (p18,19).

[7] Commonwealth Courts Portal https://www.fedcourt.gov.au/online-services/commonwealth-courts-portal (accessed 8 December 2021)

the system ought to also be characterised by equality so that 'everybody' is 'equally able to protect her legal rights'. As Wrbka et al (2012:2) put it: 'We can thus say that the concept of access to justice embodies the ideal that everybody, regardless of his or her capabilities, should have the chance to enjoy the protection and enforcement of his or her rights by the use of law and the legal system.' Taking a wider approach, Sandefur argues that

> '[T]he access-to-justice crisis is bigger than law and lawyers. It is a crisis of exclusion and inequality. Today, access to justice is restricted: only some people, and only some kinds of justice problems, receive lawful resolution. Access is also systematically unequal: some groups – wealthy people and white people, for example – get more access than other groups, like poor people and racial minorities … justice is about just resolution, not legal services' (Sandefur 2019: 51).

In our recent book we argue for a more holistic approach to access to justice (Creutzfeldt *et al* 2021). We argue that the existing approach to access to justice is too narrow. These narrow approaches equate justice with the concept of 'legal justice', involving access to legal assistance in the form of legal advice and access to resolution in the form of legal institutions. A broader view is necessary to include non-legal advice provision, alternative dispute resolution and other forms of social and community actors being part of delivering access to justice. A holistic vision of access to justice involves recognition of the often-non-legal reality of people's everyday justice problems and the need to take a broad view of the actors and settings that might facilitate access to justice. Further, there is a need for policy and institutional design processes to recognise, involve, and engage those who are excluded from justice (ibid chapter 2).

Many people do not know if they have a *legal* problem or *just* a problem. Literature on how problems transform into disputes (Menkel-Meadow 1985; 1979; Felstiner et al 1980, Curran 1977) and literature on legal needs, based on empirical research, play an important role in this discussion (Pleasence & Balmer 2019). Curran (1974) conducted the first large empirical study in the USA which sought information on popular attitudes towards lawyers and the legal system. The aim was to provide an empirical base to assess the extent to which the needs were met within the existing system of delivering legal advice. Sandefur (2019) distinguishes between legal needs and justice problems that determine which kind of support people seek or need. Sandefur concludes, similarly to Curran, that most people handle their (civil justice) problems on their own or with advice from family and friends (p.51), avoiding the legal system. Felstiner et al (1980) described the emergence and transformation of disputes before they enter the formal legal system. The transformation is from experiences to grievances, grievances become disputes and disputes take different shapes, follow particular dispute processing paths, and lead to new forms of understanding (p.632). This begs the question as to how legal problems are being 'reframed' in an online complaint sphere? Menkel-Meadow (2016) wrote about online dispute resolution (ODR) and alternative dispute resolution (ADR) and its concerns and hopes for greater access to justice. More recently, Smith (2021a) has been writing about the user centred legal design

for access to justice. This approach puts the user at the centre of any reform and design process for online systems, a matter I return to at the end of the article.[8]

The digital justice (Katsh & Rabinovich-Einy 2017) system poses opportunities and challenges to access to justice. The question of access is an even more pressing one during the global COVID-19 pandemic. I write this article while the UK is in its third national lockdown and studies are emerging that show the impact of the closure of the face-to-face justice settings, especially on those who are vulnerable (Law Society 2020). This means that while the digitalisation of courts and tribunals were happening as controlled pilot projects, mostly restricted to certain parts of the justice system (see above), the pandemic forced them to be accessed online practically overnight (The Commonwealth 2020). Access to justice has become a pressing issue as the online system is excluding certain groups. In other words, the pandemic has shown us that online systems are able to function and that people can still access justice. It has also revealed unsurmountable barriers to access (Smith 2021b).

A report by the Legal Education Foundation on digital justice, adopts a definition, based on standards of access to justice required by law, at a minimum need to satisfy: 1. access to the formal legal system; 2. access to an effective hearing; 3. access to a decision in accordance with substantive law; and 4. access to remedy (LEF 2019:17). However, these principles refer more to questions around the fair and effective functioning of court systems than to the broader question of access to justice that I argue for in this article. Whatever the definitions or standards of access to justice are, we need to ensure that they hold true for the offline and online justice space. A crucial part of this debate is about designing digital justice.

2. Designing digital justice systems

There are many different approaches to designing a digital justice system. There is the potential to provide a combination of top-down and bottom-up solutions to access to justice (Albiston & Sandefur 2013). Top-down approaches focus on the design of institutions provided for the remedy of grievances and reducing procedural barriers to access these institutions; bottom-up approaches are more concerned with reducing the barriers that people experience on the ground and have less to do with the design of institutions and more to do with social inequality, and cognitive and cultural barriers. I will discuss here some of the more recent literature on dispute systems design, the approach of a user-centred design for access to justice, and agile methodologies. This lays the groundwork for the framework I propose in section 5.

2.1. Dispute systems design (DSD)

System design is concerned with the institutionalisation of dispute resolution and the creation of mechanisms that: (a) will be used more than once; (b) will potentially be used for a range of different disputes; and (c) may consist of a combination of different processes (McFarlane 2011; Smith & Martinez 2009). Vulnerable and marginalised people

[8] See also agile design by UK government https://www.gov.uk/service-manual/agile-delivery/agile-methodologies (accessed 8 December 2021)

are exposed to particularly acute barriers to accessing justice and face significant challenges at the naming, blaming, and claiming phases of Felstiner et al's conceptualisation of the dispute emergence process. Structural social conditions (race, class, demographic characteristics, etc.), cultural and social norms, individual cognitive processing and practical features of institutional design (such as the availability of advice or the complexity of procedures) add up to significant challenges across justice contexts. Many people are also socially, culturally, and personally predisposed to avoid conflict-seeking and complaining behaviour. The lived reality of consumers' experiences powerfully illustrates the barriers that stand in the way of access to justice. At the same time, these experiences represent the key starting point for thinking about access to justice and how it might be achieved.

DSD is a field of enquiry that involves two aspects: it examines the processes through which dispute systems are designed and evaluated; and it examines the substantive principles and design options available to those designing systems for resolving disputes (Gill et al 2016). DSD has mainly been developed by North American scholars, writing in the context of organisational dispute resolution. There has been recent interest in applying these ideas in the context of European consumer disputes (Gill et al 2017). Gill et al's (2016) DSD model for consumer disputes stresses the importance of access to justice in the goal-setting phase of designing dispute resolution schemes, with decisions made about the goals of the scheme (and trade-offs between goals) influencing a range of design choices around organisational systems and processes. As part of the model's first-order system design choices, accessibility is one of the five key areas that are highlighted for attention by designers (ibid: 447).

2.2. User-centred legal design for access to justice

The concept of legal design and its steady reform and transformation of the justice system begs the question about user-centred approaches. Smith (2021a) argues that legal design has proved that it can unleash enormous energy in building legal reform around the world. The platform Rechtwijzer (Smith 2013) was developed to reduce the burden through innovating the legal process of a divorce itself by reducing the adversarial process and making it easy to follow. The platform was built on the Modria online dispute resolution platform. This was designed for consumer disputes (e-commerce) that are to be resolved quickly, supported by algorithms. Lawyers are integrated into the platform and there are different stages of resolution offered. Another example of user centred legal design is Zorza's (2002) work in California. He creates a new vision of a self-help courthouse, in which a litigant without a lawyer is the norm, protected by the constitution and with the willingness to enforce fairness.

2.3. Agile methodologies

Agile methodologies and design-thinking are used to build digital justice systems (Tomlinson 2019). Agile methodologies are approaches to systems development that are aligned to the values and principles described laid out for software development. Design is a cognitive process, a 'more interpretative, intuitive mind-set that characterised the arts and creative professions (Bason 2010). Applying this concept to systems design, the focus is on: empathy with users, defining the problem, ideating, prototyping, and testing (Rowe

1987). System designers have developed tools to help understand the users and their habits, an agile approach. The agile approach has become popular as a method for developing a digital system that is responsive to its users.

Part of the UK reform programme of the court system includes agile technology. Agile started as an alternative approach to software development and has now spread more widely. The (Manifesto for Agile Software Development (2001) sets out the principles and guidelines. It follows four core values: (1) individuals and interactions over processes and tools; (2) working software over comprehensive documentation; (3) customer collaboration over contract negotiation; and (4) responding to change over following a plan. The agile approach allows for quick response to policy changes and needs of the public while the service is built (gov.uk 2016). The different agile methods put users first, because there is no point in building a system that nobody needs or wants and trying to solve problems that aren't important to users (ibid).

One of the challenges of the agile approach is what it is based on: usually this approach builds on existing policy objectives and legal pathways. Will this then come up to similar challenges as the justice system experiences offline? There is a lot of work to be done and data to be gathered about how these systems work in practise and what users make of them. As we know from experience, it is not enough to have the law and processes available, they have to be understood and used by people they are made for (Creutzfeldt 2021). There are questions about good governance, ethics and performance. Work is emerging on ethics of ODR and digital design (Rainey 2014; Wing 2016). It is early days in the development of these systems, but we need to make sure that they are kept under strict scrutiny while they develop. The most notable shift of the agile approach is the focus on the user, rather on the bureaucrat / civil servant, to design the system / state (Dunlevy & Hood 1994; Pollitt & Geert 2011).

The design of online systems is one of the core elements in building an accessible and user-friendly process. What do the users make of the online system and how do they interact with it? To be able to get a better understanding of what this might look like, I focus on the (non)users of the online justice system and I propose a taxonomy through which to understand the different categories of users which might help think about access to justice, the design of the procedures and the delivery of online justice. I ground my argument in bringing together theories of legal consciousness and digital culture.

3. Legal consciousness and legal capabilities

This part connects the literature on legal consciousness with the notion of legal capabilities. I do this to create a link that is currently missing in the literature, between people's attitudes towards, and experiences, of law, and how this translates into actions and capabilities.

3.1. Legal consciousness

Since the 1970s, legal consciousness research has traced the place of law in everyday life. Originating in the USA (Merry 1990, Ewick & Silbey 1998, Engel 1984) legal consciousness work has also been taken up by scholars in Europe (Cowan 2004, Harding 2006, Hertogh

2004, Halliday & Morgan 2013, Creutzfeldt & Gill 2018) and Asia (Chua & Engel 2019). Legal consciousness is a flexible paradigm with multiple applications (Chua & Engel 2019). In this article, I understand legal consciousness as the way in which individuals conceptualise law and how this impacts their everyday lives. I build on Ewick & Silbey's three patterns that inform the theoretical construction of the taxonomy of (non)users of the digital justice system.

Ewick & Silbey (1998) introduced a model to assess the various ways in which people describe their relationships to the law. This model has become a widely used frame of analysis in many 'legal consciousness' studies (e.g., Engel and Munger 1996; Hertogh 2004; Nielsen 2000; Halliday and Morgan 2013). Ewick & Silbey track the presence of law in society by uncovering stories of legality. Legality is defined by the authors as 'an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings'…. legality operates as both an interpretative framework and a set of resources with which and through which the social world is constricted' (p. 23). They argue that legality is socially constructed, and that legal consciousness operates to construct and change law gradually over time (p.44). Based on in-depth interviews, they describe three types of legal consciousness as cultural schemas: conformity *before the law*; engagement *with the law*; and resistance *against the law* (p.45). These three schemas can be used to explain the ways in which individuals conceptualise law. Of course, these concepts are a theoretical and artificial grouping of phenomena that are naturally more complex and can overlap. However, they can help us to uncover patterns of behaviours. From this bottom-up approach, legal consciousness is concerned with the place of law in everyday life (Harding 2011).

The literature on legal consciousness does not, however, tell us how people use their conceptualisation of law in their everyday lives to translate it into actions. This is a question of capabilities. I argue that we need to think about capabilities as an addition to how we feel about the law to be able to explore empirically the actions that people take.

3.2. Legal capabilities

I take Amartya Sen's (2009) capabilities approach (Menkel-Meadow et al 2020) as a starting point to think about legal capabilities. The basic premise is to put an emphasis what humans need to be able to do to effectively assert choices over their wellbeing. Legal capability is defined as the personal characteristics or competencies necessary for an individual to resolve legal problems (Genn 1999) effectively (Coumarelos et al 2012). In other words, legal capabilities are 'the abilities that a person needs to deal effectively with law-related issues' (Jones 2010).

Our everyday lives can be filled with legal problems; however, most people do not like to think about the law and even see it as something to fear. Also, as mentioned above, it is not always easy to identify if a problem is a legal one (Felstiner 1980). In this situation, ideally, people's capabilities come into play to respond to the issues at hand. Jones (2010)

groups these into four themes: (1) recognise the role of the law in everyday situations[9], (2) know where to find out more and get help[10], (3) communicate effectively and confidently[11], and (4) be an active citizen[12]. These elements create a set of capabilities that enhance people's practical knowledge that can help them deal with common problems of everyday life.

We cannot assume, however, that we all carry these capabilities in the same way. For example, deficiencies in these legal capabilities limit a person's ability to resolve legal problems. McDonald & People (2014) found in a large empirical study in Australia, that a typical response from people about why they did not act in response to legal problems are: 'I didn't know what to do, thought it would be too stressful, and thought it would cost too much'(p 1). Their findings suggest that legal capabilities are patterned by legal problems and demographic characteristics. In other words, some people are more likely to be constrained from acting for certain reasons and for particular types of problems.

Our legal capabilities are a key indicator for the effective use of legal services and our engagement with the law. In a recent study, Corren & Perry-Hazan (2021) found that legal perceptions are intertwined with legal behaviour. Winterstieger (2015:3) found that 'people with low levels of legal capability are more likely not to act, and less likely to sort things out alone. They are less able to successfully solve legal problems, and are twice as likely to experience stress-related ill-health, damage to family relationships and loss of income.' In other words, we can learn how to develop and use our legal capabilities, but we are not all able to do this at the same level, with the same types of resources at our disposal (Fineman 2008). Therefore, those who are less capable need to be supported.

Here, legal consciousness as a theoretical concept comes into play. It was 'developed within law and society in the 1980s and 1990s to study how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action' (Silbey 2005). Research showed that, despite best efforts, the *haves* regularly come out ahead (Galanter 1974; Kritzer & Silbey 2003). In other words, they found that legal institutions reproduce the structured inequalities rather than enhance equal treatment. Law and society research thus produced a significant critique of the justice possible through law (Silbey 2005).

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[9] Awareness of legal aspects of life events / Confidence in the law / Knowledge of details and routes to a solution /Develop the impetus to act

[10] Know where to find more information / Know what services are available and how to use them Have confidence and trust in sources of help / To be self-confident and self-reliant but know when to get help

[11] Understand process and procedures / Identify and avoid risks / Be able to communicate / Plan ahead / Be able to make decisions / Keep track of contacts and correspondence / Manage relationships and negotiate
Be reasonably detached and realistic / Keep calm and manage emotions / Be motivated to act and be persistent

[12] Understand the role of law in society / Engage in critical thinking and participate in debate on law-related issues / Participate in community-based law-related activities

In sum, our legal capabilities determine how well we are equipped to navigate the justice space, and this will have an effect on our legal consciousness, and vice-versa. Put differently, if we possess legal capabilities then we are arguably more at ease with navigating the justice system than someone with low, or lacking, legal capabilities. The *digital turn* of the justice system poses an added challenge to the discussion about personal capabilities and interactions with the law. I posit here that as an addition to legal capabilities we need to possess digital capabilities to navigate the justice system and the law in our everyday lives. Both of these sets of capabilities have an effect on how we (dis)engage with the law and shape our relationship with it. In the next section I make a similar case for the connection between our digital culture and our digital capabilities.

4. Digital culture and digital capabilities

Today, everyday life has an unescapable digital essence. As mentioned above, most transactions we do and interactions we have involve the internet. This means that we are surrounded by a fast- growing digital culture in which we have to find our role.

4.1. Digital culture

Digital culture describes the way in which the internet and technology shapes the way we interact as humans (Gere 2008). Our behaviour and the ways in which we communicate with each other is guided by technology. In other words, our digital culture is the way in which we relate to technology. Digital technology is based on digitised information (large amounts of information can be compressed; stored and transmitted fast and easily which transformed the way in which we learn, communicate and work).

Digital technologies have helped us connect and communicate with family, friends and work effortlessly through text, videos, and pictures. This creates opportunities for connectivity and learning, for example. We can transfer information instantly and across the world and we can access online learning resources and information. Technology cuts away human intermediaries and allows us to access services from the comfort of our home. Most of us are part of several different digital spaces and cultures. Digital technologies can enhance or alter the quality of our lives. We have an on-demand economy for goods and services that we can access immediately and have adapted to the expectation that we need to be able to do this at any time of the day (d'Arnaut 2015). In other words, our habits and cultural needs have adapted accordingly.

4.2. Everyday encounters with digital justice

The movie *I Daniel Blake* by Ken Loach provided an insight into the ways in which access to justice might pose a challenge in the digital system. O'Brien (2018), based on this movie, invited us to deeper reflect upon the relationship between the individual and the state and the re-imagined sense of citizenship. This movie also makes us reflect upon the reality of everyday engagement with the online justice system, the digital divide and literacy. Menkel-Meadow (2020:12) picks up on this and argues that '[I]ssues of the digital "divide" and language literacy remain for the young, elderly, poor, language-challenged and other potential users. It may be that in the future, public libraries, providing access to public computers, will become more central to dispute resolution than courts (see the film *I,*

Daniel Blake for a vivid example; Loach 2016).' This illustrated how important the place from which we access the digital justice arena is for those who are unable to do this with ease.

A consideration here is about the design of digital justice and the use of technology to enhance access to justice. Questions about the design of digital justice in general will be discussed later in this article; here I will discuss the implications for those who are digitally not as able. Brand (2020) wrote about the challenges of balancing the technological revolution and the digital divide. She argues that 'equal access to justice is a promise of universal legal assistance decoupled from the prospect of a digital divide.' The digital divide is between the information 'haves' and 'have-nots' (Hoffman & Thomas 1999). A technically advanced legal system needs to address marginalisation, this is one of the main challenges as it evolves. Further, a vast body of research has shown that those who are digitally excluded, unable to access justice, have a greater propensity to experience legal problems (Toohey 2019; JUSTICE 2018). Importantly, we discuss this topic in the context of not having a choice, the digital revolution with its technology is taking over the justice systems around the world. We have to find ways to design these systems in a manner that allows access for all (Cabral 2012; Denvir 2018).

The legal technological transformation has brought with it the rise of digital justice in the courtroom and tribunal. Video-link technology, online convictions, and access to courts and digital services, are only a few of these developments. Scholars (Donoghue 2017; Rowden 2011, 2013; Mulcahy 2008; Mulcahy & Rowden 2020; Mulcahy et al 2020) have argued that the significance of how access to courts and processes shapes the way in which courts serve as spaces for public participation is not taken into account in the discourse about technology. This argument puts emphasis on the importance of the physical space and ritual that a courthouse provides for the litigants as well as for the public, and for access to justice.

On the other hand, there are groups who may find digital legal spaces *more* accessible on the basis that the provision of accessible physical spaces is widely uneven, depending on where you are in the country (e.g., accessibility issues are actually *supplanted* onto different groups of people in the form of specific challenges brought by moving things online). In a collection of essays in the Harvard Journal of Law and Technology the argument is made for technology to enhance access to justice. Ribadeneyra (2012) argues that the Internet has brought great changes in society and since its beginnings where the digital divide was much more visible and has come a long way to narrow this gap. She argues that in the USA, since the year 2000, access to legal resources and information that is targeted at low-income people has grown significantly. By this she means legal aid websites, self-help centres, public entry points for referrals, for example:

> 'We envision a world in the near future where access to justice means that a potential litigant can easily find legal information about her rights, apply for legal aid electronically, talk to a legal aid attorney over her tablet computer, find and complete the forms she needs to file in court, access the court's e-filing system to file her response and check on the progress of her case, and

> communicate over the Internet with a lawyer in a larger city if her case becomes complicated' (Ribadeneyra: 247).

While these are useful resources, and what was envisaged in the quote above is a reality today, I would argue that this will still not help those people who are digitally excluded, and those who do not know where to source help in the first place. This leads us to think about digital capabilities.

4.3. Digital capabilities

Technology is a part of our everyday lives. Digital transformation is making us work, learn and interact with others in new ways. Digital capabilities are both personal and collective; they belong to you and your learning context (Bartlett-Bragg 2017). They shape how we think about the digital space. We learned how to move some of our everyday behaviours online: we bank online, we shop for food, clothes, and books online. We use our existing experiences and expectations of our bank, our grocery store, or our book store, to learn to make these transactions online, if we choose to. Some of us learned these skills with more intuition and ease than others. Some of us experience the benefits of choosing when to make transactions online and have built it into our daily routines. For example, making a bank transfer does not require the bank to be open, us to get there and to stand in a queue to wait for a bank assistant to help us. We have the choice to do our banking while we wait for our pizza to come out of the oven, for example. This has become routine for those of us who are at ease with navigating their lives in the online sphere. Many people are not able, or comfortable, to use the internet as a gateway for all their transactions. Some are comfortable with a certain aspect to be online but not others.

In the digital world, similar to the real world, there is a divide. This digital divide is the gap between those who can access technology and those who cannot. This is a global issue, but it manifests itself differently nationally. For example, in the UK the main causes of digital divide are: money, location, IT literacy, and Internet access (BBC Bitesize).[13] A study in 2020 found that 9m people struggle to use the internet independently (Lloyds CDI, 2020). A UK charity *The Good Things Foundation* are working to create an inclusive digital nation.[14] They see digital inclusion as a social issue as quoted from their website: 'A lack of digital skills and access can have a huge negative impact on a person's life, leading to poorer health outcomes and a lower life expectancy, increased loneliness and social isolation, less access to jobs and education.' It is most likely that those who are already marginalised or at a disadvantage (education, age, gender, income, disability, e.g.) will experience digital inequality or exclusion.

According to an International Telecommunication Union (2020) report, 3.7 billion people are digitally excluded worldwide. The impact of the digital divide (Cullen 2001) is noticeable and needs attention. While scholarship is divided as to how this divide originates, there is a consensus that socioeconomic conditions that characterise underrepresented minority

[13] BBC Bitesize, The digital divide https://www.bbc.co.uk/bitesize/guides/zkhykqt/revision/5 (accessed 8 December 2021)

[14] Good Things Foundation, Digital Inclusion is a Social Issue https://www.goodthingsfoundation.org/the-digital-divide/ (accessed 8 December 2021)

communities are contributing to the ill effects of the digital divide (Payton 2003, Schoon et al 1999). Warschauer (2004) suggests to rethinking the digital divide and not to measure it in terms of haves and have-nots (for e.g., computer ownership and internet connection) but rather to the intersection of information and communication technology and social inclusion. He takes a broad view, beyond machines and infrastructure, to include the social set-up and surroundings to better understand and explain the digital divide. The pace at which the digital transformation is happening will increase social exclusion of already vulnerable groups. Closing the digital divide and fostering social inclusion can be part of digital inclusion programmes (UN 2021).

> 'Covid-19 is accelerating the pace of digital transformation, in doing so, it is opening the opportunities for advancing social progress and fostering social inclusion, while simultaneously exacerbating the risk of increased inequalities and exclusion of those who are not digitally connected.' (UN:1)

This quote illustrates the double-edged sword of digitalisation. On the one hand, it is aimed at making life easier and everyday transactions more accessible; on the other it requires certain technology as well as the capabilities to access and manoeuvre them. For example, it is perfectly possible to possess high legal capabilities but lack digital capabilities. This poses challenges to those people who know what they expect from the law and the legal process yet are not able to translate this into the digital space. In other words, one needs to be able to confidently navigate the digital space (or get support) to be able to use one's legal capabilities. On the other hand, if people are not able to access the digital space then they are automatically at a disadvantage.

The question remains, how does consciousness (sensibility) of how we think and feel about the digital space relate to our capability of acting upon it. Part of the answer to this will be related to how at ease we are in manoeuvring the digital system (for everyday things). In other words, those who feel comfortable with accessing digital areas will transfer that sense of ease onto the online justice space. Their digital consciousness translates into digital capability. To delve further into this question of how people engage with and make sense of the digital justice system. In the next section, I develop and posit a framework of digital legal consciousness for the purposes of examining peoples' engagement with digital justice.

5. Conceptualising digital legal consciousness

Digital legal consciousness sets itself apart from legal consciousness through the space in which law is experienced and takes place. Digital legal consciousness takes place online whereas legal consciousness has been developed in the mundane face-to-face (offline) space. I argue here that we base our initial engagement and expectations of digital justice on our legal consciousness but then we need additional skills to enter, and act confidently, in the digital space. In the online justice space, we have to negotiate both legal and digital skills and capabilities. The digital space provides opportunities for those who are at ease with operating online, and obstacles for those who are digitally less able than others. In other words, the online justice space, replacing the physical justice space, requires us to learn and to negotiate different skillsets. This means that our digital legal consciousness develops by us combining our attitudes and capabilities towards the law with our attitudes

and capabilities towards the digital. I offer four profiles of people's attitudes to consider when exploring engagement with the digital justice space.

5.1 Four profiles

The four profiles offered below are constructed as ideal-types for the purpose of building a theoretical model to understand peoples' (dis)engagement with the digital justice system. This model needs to be empirically tested and in reality, these types can overlap and do not have the clear-cut distinctions as outlined below. Nevertheless, the four profiles constructed in this model help to start to explore how people engage with digital justice, as a combination of their digital and legal capabilities. As mentioned above, there will be different levels in which each of the capabilities present themselves and thus influence our engagement with and access to the digital justice system.

Table 1: Digital legal consciousness – 4 profiles

		Digital capabilities	
		+	-
Legal capabilities	+	1. Digitally and legally literate / enabled	2. Digitally agnostic / Legally able
	-	3. Digitally assisted / Legally unable	4. Digitally and legally abandoned / excluded

5.1.1 Digitally and legally literate, enabled

People in this category are aware of the law, identify with the law, and chose to do everything online. They are confident to use the justice system online and possess both digital and legal capabilities. A report by the Carnegie Trust UK (2017) explored questions about how people, once digitally engaged, navigate the online world. Digitally literate citizens know how to access technology and are open to use technology to deal with all aspects of their lives.

5.1.2 Digitally agnostic, legally able

People in this category are aware of the law, identify with the law, but choose not to use the internet for justice matters. Although they are able to use the online justice system, they draw a line and believe that justice needs to remain in an offline space. This group of people uses the internet with ease for other transactions as a routine part of their lives. They have legal capabilities and choose not to use their digital capabilities for engaging with the legal system online.

5.1.3 Digitally assisted, legally unable

People in this category are aware of the law, have a low identification with the law and are not able to digitally access the justice system themselves – they need assistance. Typically, this group of people will have regular engagement with the state welfare system and possibly designated advisers to assist them. They are not able to identify that the problems they are facing might be legal ones and where to get help. This group is on the margins of being digitally excluded but if they manage to seek help then they will obtain assistance in legal and digital access. Although these people have low digital capabilities and low legal capabilities, with assistance, they can access the digital justice system.

5.1.4 Digitally and legally abandoned/excluded

People in this category have a limited legal awareness and are not able to access the digital justice system. They have turned their backs to the law, usually due to the lack of assistance or capabilities. This group has lost trust in justice and thinks that it is just not for them. They suffer the most as they do not have access to technology as well as not knowing if their problems are legal problems or where they can go to seek help. These people are digitally excluded, they lack the skills and confidence to use online technology, and usually do not have access to devices or stable internet connections. This is just one layer of social and economic problems that are also related to social exclusion.

These described four profiles provide a starting point to explore digital legal consciousness empirically in the *real* world. The profiles are not as empirically distinct from each other as proposed in the taxonomy, rather this approach offers a theoretical paradigm to grasp the complex and multidimensional understanding of access to digital justice. Legal consciousness is three dimensional and complex, it has helped me to think about how people make sense of law and legality and informed the taxonomy.

This taxonomy of *ideal profiles* can be put to the test to explore how they overlap in reality. We can argue that a person can be, for example, against the law and digitally literate. Further people can be, and feel, alienated from the law (Hertogh 2018, Creutzfeldt & Gill 2018). This opens up the complexity that lies behind the taxonomy and needs to be explored when empirically tested. Further, the relationship between the digital options and the legal options needs to be empirically disentangled. This entails to ask how people self-identify: digitally or legally capable, and also what the administrators and creators or these systems experience them to be. Profiles 1-3 can be empirically captured through surveys, for example, whereas profile 4 needs interviews and participant observations.

6. Conclusion: Exploring digital legal consciousness

This article has argued for a more nuanced investigation of how people understand and engage with the online justice system. It argues that we need to possess, or learn, two sets of capabilities when engaging with the online justice system: legal and digital. These capabilities are part of understanding and distinguishing the digital justice arena from the offline justice arena. In this paper, I have brought the discussion about capabilities to the larger notions of legal consciousness and digital consciousness for the first time. In doing so, I have offered four ideal-type profiles which constitute a fresh framework through which to make a start to theoretically disentangle the complex nature of how people engage with the digital justice space. The taxonomy raises more questions/research agendas that I will set out below.

We can, for example, ask if legal empowerment/disempowerment is more prevalent in one justice system over another; or weaker in one than in the other. Further, we can explore how the taxonomy fits with the typology of a justice system: do people's attitudes and opinions towards digital justice follow a pattern that is unique to a justice system? Also, does the taxonomy apply in the same way to different digital justice systems? Here we can delve deeper into the *type* of dispute: a family dispute, a civil law dispute, a consumer dispute. Moreover, with a focus on those who are vulnerable and marginalised (types 3 /4 in the taxonomy), how do their attitudes towards the digital system differ? This line of inquiry would explore the barriers to accessing (digital) justice that people face. It would connect to the strand within the legal consciousness literature about being *against the law* (Ewick & Silbey 1998); *alienated from the law* (Hertogh 2018) and *turning their back to the law* (Creutzfeldt & Gill 2018).

Further, I suggest two more perspectives to consider for exploring the taxonomy; one in relation to the users and the other in relation to the designers. The taxonomy suggests considering non-users alongside users (e.g. perceptions of access to justice are inherent in how we identify what people perceive law to be). An additional layer could be to distinguish here between the *don't users* and the *can't users*. For example, in this article I focus on the inequalities emerging from the shift to online services on those who cannot access them; future research could add the perceptions of those who *don't need to* access the system. A further element to consider in the taxonomy of people's attitudes towards to online justice system, is to think about designers, implementers and policy makers' expectations of legal systems and justice as a form of legal consciousness. The inclusion of *legal consciousness of creators* of the online systems can be thought of through the lens of capabilities as the convergence of conceptualisation and translation into action, as a frontier in relation to access to justice. Finally, future work could explore the manner in which digitalisation transforms the very nature of legal consciousness itself, so that the nature of justice itself is transformed; access to justice then becomes a fundamentally different quality.

To conclude, this article was about the emerging digital justice space and how best to understand people's attitudes and capabilities concerning it. I argued that to be able to navigate the digital justice arena with confidence, we have to be equipped with both legal and digital capabilities, I call this our digital legal consciousness. To explore this notion, I

brought together legal consciousness theory and digital culture and suggested a theoretical framework through which to better understand those people who use the digital justice system. The framework set out to help to explore the connection between our attitudes and sensibilities towards the law and the capabilities we need to be actively participating in the online space. The framework extends to those groups that are less able or do not use the digital justice system at all. In that sense, it sets the trajectory of future empirical research.[15]

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