

# The Brazilian Law System and Some Reflections on the Use of Technology

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## Abstract

*This contribution has emerged in response to the provocations of the editor, Daniel Rainey, about the interest in knowing the status and use of technology by the Brazilian judicial system. It is based on the premise that the COVID-19 pandemic accelerated the adoption of technological tools, even in complex legal systems such as that in Brazil. There is still much to be built on it, and there are many opportunities for adopting online solutions as a means of accessing justice.*

**Keywords:** Brazilian, ODR, democracy, citizenship, judicial system, digital inclusion.

## 1 Introduction

Brazil has had a long-standing culture of litigation. Its citizens see the judiciary as the solution to all controversies, which are conditioned to the judicial process. This creates the possibility of referring causes of low complexity to the decision of the state in high instances.

Legal education in universities still recommends that the direction of litigation, procedural arrangements and the training of lawyers be focused on the culture of conflict. This has resulted in a lack of habit creation for envisioning the benefit of using other forms of problem solutions.

The Constitution of the Federative Republic of Brazil of 1988, termed the Principiological Constitution, establishes the democratic state of law and prescribes as a fundamental guarantee, in Article 5, item XXXV, the principle of access to justice and also the Consumer Protection Code. It has expanded the rights guarantee perception, so this ingrained culture has associated it with the filing of legal actions.

According to data from the National Council of Justice – CNJ, Brazil recorded about 75 million lawsuits pending trial in 2021, in which there are around 18 million new cases per year. However, with this plethora of lawsuits, the jurisdictional exercise does not always generate a sense of justice, by either outsourcing the

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decision to the third party, the judge, or by the delay in solving them, generally perceived as inefficient and unfair.

From 2006, there was a movement of the judiciary's summit, captured by the National Council of Justice. It had the support of the legislative body to create public policies that have modified this belligerent culture, encouraging many different forms of consensual solutions and having the use of technology<sup>1</sup> as the 'cherry on the cake'.

This expansion allows the right to access justice without being restricted to the judiciary. It led to the use of numerous and efficient out-of-court initiatives for conflict prevention and resolution, such as mediation, arbitration and dispute board resolution.

As Minister Emmanoel Pereira of the Superior Court of Justice pointed out in the article Panoramic View of Access to Justice in Brazil,

... by 'access to justice' we can both apprehend the analysis of the various ways of achieving a response from the judiciary, as well as the idea of realizing the social expectation of equitable distribution of rights, as a way to guarantee, both to the individual and to the collectivity, the means of obtaining what is right.<sup>2</sup>

## 2 The Technology Adoption Accelerator

In 2020, the perception of access to justice was globally impacted by the pandemic. The reduction of social contact, such as the need to close the court doors, owing to the fast spread of the COVID-19 virus, has given rise to new conflicts and has modified the work routines of many people. This scenario has led to a race for adopting and implementing a virtual service for citizens.

The declaration of a state of public calamity, as a consequence of the COVID-19 pandemic, resulted in fears of increasing judicialization in cases related to public health and the current complex problems already in court. It has affected the articulation between various organs engaged in the search for protocols of action and joint solutions, whenever possible. A quick migration from face-to-face to the online universe has occurred, owing to the need to retain access to communication, even though distancing matters existed.

We were forced to rethink our habits and beliefs, to overcome our limits, strengthen our bonds, and work cooperatively not only in institutions but also individually within society.

Brazil's experience has been no different; its judiciary faced the serious challenge of embracing and accepting new technologies owing to the crisis triggered by the pandemic. This has required rapid and effective responses in the virtual environment, adopting technologies already experienced by the digital society with legal certainty.

1 Resolution CNJ 125/2010, Mediation Law and the Code of Civil Procedure 2015.

2 <https://www.cnj.jus.br/>.

According to a survey carried out by the *Global Access to Justice Project* in<sup>3</sup> more than 50 nations, 72% of legal assistance systems in different countries have adopted measures to mitigate the impact of COVID-19, using the option of working remotely, and 47% of temporary suspension of face-to-face care in 53% of countries.

Several movements began in Brazil approaching *as legal techs*, private companies of law and technology, owing to the know-how, to support the judiciary during the pandemic.

Actions such as '*Justice will not stop*' allowed private platforms through partnership with the courts to offer a technological tool<sup>4</sup> for online conflict solutions, as well as structure, support and training of professionals for distance action.

In this context, companies also had to improve their digital systems to adapt the available tools to the exponential increase in judicial service. An example of this was the use of the WhatsApp application by citizens' defence agencies, such as the Public Defender's Office, which, in connection with the judiciary, enabled access to justice.<sup>5</sup>

The Zoom video conferencing platform, being used for hearings and trial sessions within the scope of labour justice, is an example of tools that are being used. Although it is useful and necessary, there has been too many adjustments to identify the<sup>6, 7</sup> *correct design of the online dispute solution*. This design is integrated with internal procedural management systems and public access.

Regarding labour justice, a record number of hearings have been revealed by the CNJ to have been held, with 4,871 virtual rooms and an increase in the productivity of that court. At the end of the first semester of 2020 there was an increase of 2% in the number of cases judged and an increase of 12% in the volume of judgments in session, compared with the case during 2019.<sup>8</sup>

The numbers are impressive:

(...) according to the Monthly Productivity Module Panel, during the period of COVID-19 (<https://www.cnj.jus.br/pesquisas-judiciarias/paineis-cnj/>), the Judiciary delivered 40.5 million judgments and judgments, and 59.5 million

- 3 The full study is available on the Global Access website to Justice Project: Paterson, Alan. Barlow, Anna. Garth, Bryant. Alves Cleber. Edwards Diogo. Johnson, Earl. Silva Franklyn Roger Alves. Azevedo, Julius. Economides, Kim. Biggelaar, Peter. Impacts of COVID-19 on Justice Systems. Global Access to Justice Project, 2020. Available at <http://globalaccesstojustice.com/impacts-of-covid-19/> (accessed 10 May 2021), Apud, Azevedo, Julio by Camargo and Giovanni Ravagnani *In fashion WhatsApp and digital inclusion: an outlet for the Public Defender's Office*, <https://www.conjur.com.br/2021-mai-11/tribuna-defensoria-whatsapp-inclusao-digital-saida-defensorias-publicas#author>, 5 November 2021.
- 4 <https://www.mediacaonline.com/poder-publico>. The platform offered its videoconferencing, notification of the parties with a guarantee of blockchain, automatic scheduling, drafts and terms electronic signature and analytical dashboards.
- 5 <https://www.conjur.com.br/2021-mai-11/tribuna-defensoria-whatsapp-inclusao-digital-saida-defensorias-publicas>.
- 6 <https://legalcloud.com.br/tst-trts-alteram-plataforma-videoconferencia/>.
- 7 <https://www.tjam.jus.br>.
- 8 <https://agenciabrasil.ebc.com.br/justica/noticia>.

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court decisions, which demonstrates a rapid and substantial response to this period of health emergency.<sup>9</sup>

It is worth noting that public and cyber policy within the judiciary was gradually being implemented. Since 2009, this investment has been made into the virtual migration of physical processes, and in 2020 the index of electronic processes among the total number of new cases distributed was 97.86%, according to the statistical yearbook of the CNJ, 'Justice in Numbers 2021'.

In a recent decision, on 3 January 2022, the CNJ approved Resolution CNJ 420/2021, which restricts the existence of physical processes, with scope for expediting the conversion and acceptance, in the Brazilian courts, of cases in the electronic format, thereby accelerating digital transformation of the justice system.

In fact, the overarching goal of technological development is to overcome existing barriers and to open possibilities for the democratization of the most diverse state services, such as the judicial ones.

### 3 The Brazilian Challenge in the Use of Technology and the Application of ODR

The democratization of judicial services, its access and the linear development of technologies represent an arduous task owing to the complexity of the distribution of skills in a country with continental extensions.

The judiciary organizational structure is decentralised regarding its functional and administrative issues. It is categorised by two competences: the territorial and the conflict matters (jurisdiction for the cause of asking or parties involved). Therefore, as a consequence of the Brazilian territorial extensions, their cultural and financial diversities have generated different technological renewals in State and Federal Courts.

This can be illustrated by Law 11.419, of 19 December, which 2006 officialized the computerization and regulation of electronic judicial proceedings (PJe), with the aim of ensuring the effective delivery of judicial provision and access to justice.

The organ with a strategic action in pursuing this balance, the National Council of Justice (CNJ), by the actions of the judicial units, adhered to the objectives of the United Nations Global Agenda 2030 on Human Rights. These objectives are focused on peace, justice and effective institutions. They are aligned with actions from the perspective of human rights, universal values inalienable of each person in the process of permanent construction. Respect for human dignity is the great challenge and lies in the adequacy of public policies.<sup>10</sup>

9 <https://www.cnj.jus.br>.

10 Poverty Eradication, Zero Hunger and Sustainable Agriculture, Health and Well-Being, Quality Education, Gender Equality, Drinking Water and Sanitation, Clean and Affordable Energy, Decent Work and Economic Growth, Industry, Innovation and Infrastructure, Relationship of Inequalities, Sustainable Cities and Communities, Sustainable Consumption and Production, Action Against Change Global Climate Life, Life in Water, Terrestrial Life, Peace, Justice and Effective Institutions, Partners and Means of Implementation.

In the words of President Humberto Martins,<sup>11</sup>

(...) We are all under a commandment of higher order: that of social pacification always with the gaze to the human being who is at the tip and that will ultimately be achieved by our actions. Thus, we need to be increasingly united in faith and hope and prepared to disseminate ethical and moral values through effective institutional action in the judiciary. And that is exactly what the Permanent Commission for Democratization and Improvement of Judicial Services of the CNJ proposes with this event. And the Superior Court of Justice, as the Citizenship Court, is aligned with this proposal and committed to seeking actions that can improve Brazilian democracy.

After all, what is and what represents the CNJ in the Brazilian judicial system?

The CNJ is a public institution that aims to improve the Brazilian judicial system, especially in regard to administrative and procedural control and transparency. Its mission is<sup>12</sup> to promote the development of the judiciary for the benefit of society, through judicial policies and control of administrative and financial activities. It was created by Constitutional Amendment No. 45 of 2004 and established on 14 June 2005, pursuant to Article 103-B of the Federal Constitution, with its head office in the capital, Brasília (Federal District), and operations throughout the national territory.

It centralizes the sharing of information from the various courts, allowing the crossing of data and the construction of strategies aimed at solving disputes efficiently. The transparency of the actions has given legitimacy to the initiatives, and the technology has helped substantially in this process.

It should be noted that the CNJ, despite an always conservative and formalist vision, demonstrated a great capacity to modernize the Brazilian judicial system. It has reformulated policies of the judicial organization, imparting greater effectiveness to the judicial provision and functioning as a strategic manager in the solutions adopted in the pandemic.

This reality confers greater credibility on the judicial system in regard to its parties and lawyers. They are the ones who, in *hearings and online sessions*, provide oral support in real time, that is, simultaneously with the judgement of the cases, to make the procedure more effective.

The technological transformation experienced by the judiciary, with the implementation in the Justice 4.0 Program by the CNJ, attests to the need to recognize as a fundamental right the inclusion of the citizen in digital revolutions.

11 Colloquium Access to Justice – Dialogue, Diversity Developed of the Permanent Commission for Democratization and Improvement of Judicial Services of the CNJ *In fashion* Democratizing Access to Justice 2022.

12 <https://www.cnj.jus.br/sobre-o-cnj/quem-somos>.

It covers the rights to information, citizenship and freedom of opinion and expression.<sup>13</sup>

However, this digital progress achieved by the implementation of the electronic judicial process requires communication interoperability and accessibility. In addition, there is a need for other resources to facilitate communication and access to justice, under penalty of digital inclusion becoming exclusion.

The change, sophistication and modernization of digital procedural systems can never ignore the state of social inequality that Brazilians still, unfortunately, live in.

What is a concern, and should be the goal of public authorities, is, in addition to access to justice, the democratization of digital inclusion. This means the integration of those individuals on the margins of technological expansion, who, for this reason, are excluded from the judicial services.

The democratization of access to justice must overcome the socioeconomic, cultural, structural and legal barriers that hinder the full exercise of citizenship.

According to the 2018 National Continuous Household Sample Survey (Pnad Continuous – ICT), which was published by the Brazilian Institute of Geography and Statistics (IBGE), one in five Brazilian households does not have *internet access*.

Using this statistic, the important contingent of ‘digital excluded’ cannot be disregarded. According to this survey, almost 46 million people, or about 25% of the entire Brazilian population aged 10 years or older, did not use an internet connection when the survey was conducted.

In this regard, the criticism of Yuri Costa and Jean Nunes in the article *Legal Elitism and Democratizing Access to Justice* is notable:<sup>14</sup>

The existence of the different boundaries discussed in this essay imprints a certain ironic tone in the affirmation of free access to jurisdiction, discursively preached in the Brazilian jurisprudence. It is necessary to overcome the elitism that marks the training of professionals who work in the legal field. More than that, there is a need to redefine the legal culture that predominates in our country. The gaze of justice must hang down, not as a sign of the decrease in its importance, but so that it can, without obstacles, observe who needs it most.

It is not about nowadays or due to the pandemic, that the Brazilian state formulates several actions to modernize the structure of public power. There is a need to implement projects that ensure the population’s access both to new digital means and to justice.

However, it is perceived that the attempts to provide full access to justice, through technological initiatives, still run into the greatest difficulty of the public power to cope with digital exclusion. The reality of the country is translated into

13 <https://www.cnj.jus.br/tecnologia-da-informacao-e-comunicacao/justica-4-0/> (Innovation and Effectiveness in The Realization of Justice developed among the CNJ. The United Nations Development Programme-UNDP and the Council of Federal Justice, with the support of the Superior Electoral Court-TSE, Superior Court of Justice-STJ and the Superior Council of Labor Justice (CSJT).

14 *Collective Work: Democratizing Access to Justice*. 2022. <https://www.cnj.jus.br/wp-content/uploads/2022/02/democratizando-acesso-justica-2022-v2-01022022>, pp. 37/44.

the high indicators of poverty, illiteracy and the price of connection, as limiting factors.<sup>15</sup>

The expansion of access to justice in Brazil, through digital platforms, is an axiom to be respected.

Thus, it is also the determination of digital inclusion, as a means of making democratic technology accessible to Brazilian citizens with transformative and effective potential for social inclusion, which must overcome all adversities.

The term 'online dispute resolution' (ODR), as Daniel Rainey explains, had never been used before the advent of<sup>16</sup> *e-commerce* in the mid-1990s. The e-Bay has been a notable example of ODR development, crossing the plethora of disputes, with the limited universe of things that can be solved by developing algorithms and artificial intelligence to deal with disputes. Thus, ODR may be functionally defined as *the intelligent application of information and communication technology for alternative dispute resolution*.

Whether through public or private initiative, the structuring of the diversity of designs for the resolution of conflicts through ODR has been delaying its capacity to scale and serve diverse audiences. It has also facilitated interaction without displacement and bureaucracy, besides the cost of direct and indirect efficient resources.

Recently, the CNJ has approved Resolution No. 332/2020, which enables the implementation of Artificial Intelligence (AI) mechanisms in the judicial sphere. Its objective is to promote the well-being of those involved in the jurisdiction and its equitable provision, in order to create a model of technical cooperation between public and private institutions, as well as civil society, for the collaborative development of Artificial Intelligence models, ratifying the premise of more democratic access to justice.<sup>17</sup>

One of the observable problems of the ODR may be the asymmetry of information between the parties, as Joaquim Muniz points out among companies and consumers, because

(...) Frequent litigants will be able to get a better view of the whole to estimate how much the consumer would accept in a deal while it would negotiate in the dark; at that point, expert lawyer assistance would be beneficial in achieving a balance. In addition, public agencies and private consumer protection entities should invest in big data and campaign for the public informing about judicial positions related to sensitive matters, to standardize knowledge.

The use of extrajudicial means of dispute resolution *or online mediation services is an expanding reality* in Brazil, having also been driven by the increase in the number of providers of electronic sales platforms, virtual dispute resolution channels, all favourable to non-judicialization.

15 [https://cetic.br/media/analises/tic\\_domicilios\\_2020\\_coletiva\\_imprensa](https://cetic.br/media/analises/tic_domicilios_2020_coletiva_imprensa).

16 Free translation of the Notes for the Certification Program ODR Practitioner (2019).

17 Resolution 332/2020: <https://atos.cnj.jus.br/atos/detalhar/3429>.

#### 4 Technological Innovations of the CNJ

Among the technological innovations proposed by the Brazilian judicial system, judgement is 100% digital. It consists in simplifying access to justice, which was put into practice in the increasing implementation of solutions in the units. This way, those who have a case running in the court will be able to follow their process through the computer or mobile phone without having to attend any forum. As previously mentioned, the Public Policy for The Governance and Management of Electronic Judicial Process (PJe) of 2006 was the start. The most recently outstanding ones follow:

- a *Digital Platform of the Brazilian Judiciary (PDPJ-Br)*. This was created by Resolution CNJ No. 335 of 2020, its main scope being to encourage collaborative development among courts. Therefore, it preserves the public systems in production, consolidating the policy pragmatically for the management and expansion of the electronic judicial process – PJe.

It also aims to transform it into a multiservice system that allows courts to make adjustments according to their needs and ensures that, at the same time, it unifies pending procedures in the country. It was designed to reduce the<sup>18</sup> distance between the local systems adopted by the various courts, where the demands are being processed in a more linear way in Brazil.

- b *Virtual counter*<sup>19</sup> ensures the services are given by the courts' secretariats through videoconferencing. Thus, lawyers are spared from commuting to different forums, as the location within judicial units is no longer a hindrance. Throughout the second semester of 2021, the team that works with the Justice 4.0 program made nine visits to courts in all regions of the country to exchange experiences and make commitments to the expansion of the program's solutions.
- c *Justice Centers 4.0*. It was created by Resolution No. 385 of 6 April 2021, having the same remote working format, in a total digital way. It imparts greater agility and effectiveness to justice. They serve all clients who seek justice, looking for solutions to specific disputes, without forcing them to attend a hearing in a courtroom. In addition, the model of service of the judiciary promises to qualify the demands in the first degree courts, which are now overloaded.

The solution would reach the units located in the countryside, where specialized courts are rare and a single judge is responsible for lawsuits involving different fields, such as family, recovery, bankruptcy, crime, health and business.

- d The *Digital Office* is a software developed by the CNJ in partnership with the Federal Council of the OAB. It enables lawyers to access the different procedural systems of Brazilian courts. Through it, the lawyer will have a single door of access to the judiciary.

18 <https://www.cnj.jus.br/tecnologia-da-informacao-e-comunicacao/plataforma-digital-do-poder-judiciario-brasileiro-pdpj-br/>.

19 <https://atos.cnj.jus.br/atos/detalhar/3742>.



The software works as a ‘translator’ that makes connections with different systems developed by the courts and presents the required information on a single page. It is easily navigable and operable. In the Digital Office, it is possible to consult proceedings in progress, submit petitions, file new demands, control deadlines and share lawsuits with other lawyers in a single environment, regardless of the court in which the case is processed.

Indeed, such initiatives have strengthened society’s trust in a present and strong judiciary, which is committed to the tireless mission of offering fair and appropriate solutions for conflict resolutions. It happens regardless of the need to reinvent itself in the use of the technological means available.

## 5 Final Considerations

The important impetus given by the judiciary summit, which was captured by the NCJ, set the need for a cultural change of Brazilian citizens, to get adapted to the use of consensual solutions of controversies and technology.

The quick migration of the ‘face-to-face’ to the ‘online’ universe owing to the need to keep up with the communication has generated new habits. It has also given space for rethinking old beliefs, in order to overcome limits, through creativity and cooperation between institutions and society.

The new technologies have made rapid and effective responses, especially in the virtual environment. It has fulfilled the Brazilian citizens’ expectation regarding the access of a quick, efficient and reliable service from the state.

Having a diverse drawings structure in the field of conflict resolution, which is enabled by the ODR system, it demonstrates the ability to scale and serve a variety of clients. It also shows easy interaction without the need to move to different locations, with less bureaucracy and efficient cost in terms of direct or indirect resources.

Indisputably, the current scenario is favourable to developing diverse forms of technology-mediated communication, as evidenced by the tools used to access justice and the alternative means of conflict resolution. The need still remains, however, to minimize the impacts of social inequalities so that the result achieved becomes more widely accessible to Brazilian society as a whole.