Université de Montréal

Cyberjustice in Brazil – the use of technology to enhance access to justice and procedural celerity

by

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Résumé

Dans une société mondialisée, où les relations sont intégrées à une vitesse différente avec l'utilisation des technologies de l'information et des communications, l'accès à la justice gagne de nouveaux concepts, mais elle est encore confrontée à de vieux obstacles. La crise mondiale de l'accès à la justice dans le système judiciaire provoque des débats concernant l'égalité en vertu de la loi, la capacité des individus, la connaissance des droits, l'aide juridique, les coûts et les délais. Les deux derniers ont été les facteurs les plus importants du mécontentement des individus avec le système judiciaire. La présente étude a pour objet d'analyser l'incidence de l'utilisation de la technologie dans l'appareil judiciaire, avec l'accent sur la réalité brésilienne, la voie législative et des expériences antérieures dans le développement de logiciels de cyberjustice. La mise en œuvre de ces instruments innovants exige des investissements et de la planification, avec une attention particulière sur l'incidence qu'ils peuvent avoir sur les routines traditionnelles des tribunaux. De nouveaux défis sont sur la voie de ce processus de transformation et doivent être traités avec professionnalisme afin d'éviter l'échec de projets de qualité. En outre, si la technologie peut faire partie des différents aspects de notre quotidien et l'utilisation de modes alternatifs de résolution des conflits en ligne sont considérés comme un succès, pourquoi serait-il difficile de faire ce changement dans la prestation de la justice par le système judiciaire? Des solutions technologiques adoptées dans d'autres pays ne sont pas facilement transférables à un environnement culturel différent, mais il y a toujours la possibilité d'apprendre des expériences des autres et d'éviter de mauvaises voies qui pourraient compromettre la définition globale de l'accès à la justice.

Mots-clés : accès à la justice, tribunaux, mondialisation, coûts, délai, technologies de l'information, cyberjustice, Brésil, unification, interopérabilité.

Abstract

In a globalized society, where relationships are built at a different speed with the use of information and communication technology, access to justice incorporates new concepts, but still faces old obstacles. The worldwide crisis in access to justice through the judicial system provokes debates regarding equality under the law, party capability, knowledge of rights, legal aid, costs, and delays. That being said, the latter two have long been the most important factors of dissatisfaction of individuals with the Judiciary. This study aims to analyse the impact of the use of technology, by the legal system, with focus on the Brazilian reality, sharing the legislative path and previous experiences in the development of cyberjustice software. The implementation of such innovative instruments demands investments and planning, with special attention to the impact they can have on cultural and traditional court routines. New challenges are in the way of this transformation process and have to be dealt with professionally to avoid the failure of good projects. In addition, if technology can be part of different aspects of our daily routines and the use of online alternative methods of dispute resolution are considered a success, why would it be difficult to make this shift in the delivery of justice through the Judiciary? Technological solutions adopted in other countries are not easily transferred to a different cultural environment, but there is always the possibility of learning from others' experiences to avoid wrong paths that could compromise the global definition of access to justice.

Keywords: access to justice, courts, globalization, costs, delay, information technology, cyberjustice, Brazil, unification, interoperability.

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Acronyms and Abbreviations

AC-JUS : Autoridade Certificadora da Justiça

AC-OAB : Autoridade Certificadora da Ordem dos Advogados do Brasil

ADR : Alternative Dispute Resolution

AGA : Agravo Regimental no Agravo de Instrumento

AgRg: Agravo Regimental

AgRgREsp : Agravo Regimental em Recurso Especial

AJUFE : Associação dos Juízes Federais do Brasil

CA: Constitutional Amendment

CA: Certificate Authority

CANJLT: Canadian Journal of Law and Technology

CBA: Canadian Bar Association

CD: Compact Disc

C.de D. : Cahier de droit

CENAG : Centro de Estudos e Apoio à Gestão Organizacional

CEO: Chief Executive Officer

CJEU: Court of Justice of the European Union

CJF : Conselho da Justiça Federal

CLP : Comissão de Legislação Participativa

CNJ : Conselho Nacional de Justiça

CNR : Consiglio Nazionale delle Ricerche

CPI : Cahiers de Propriété Intellectuelle

CRDP : Centre de recherche en droit public

DIGES : Diretoria Geral

DJ : Diário da Justiça

ECHR: European Convention of Human Right

ECtHR: European Court of Humans Rights

EDAGA : Embargos de Declaração no Agravo Regimental do Agravo de Instrumento

EDcl: Embargos de Declaração

Fordham Int'l LJ: Fordham International Law Journal

Fordham Urb LJ: Fordham Urban Law Journal

GA: General Assembly

IACHR: Inter-American Court of Human Rights

IBDP: Instituto Brasileiro de Direito Processual

IBGE : Instituto Brasileiro de Geografia e Estatistica

ICC: International Chamber of Commerce

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICJ: International Court of Justice

ICP-Brasil : Infraestrutura de Chaves Públicas do Brasil

ICT : Information and Communication Technology

ITI : Instituto Nacional de Tecnologia da Informação

JADA : Journal Africain du droit des affaires

JEF: Juizado Especial Federal

LL.M.: Master of Laws

Loy LA L Rev: Loyola of Los Angeles Law Review

MS: Mandado de Segurança

NCJ L & Tech: North Carolina Journal of Law & Technology

NGO: Non-governmental Organization

ODR: Online Dispute Resolution

PKI: Public Key Infrastructures

PL : Projeto de Lei

PNAD : Pesquisa Nacional por Amostra de Domicilios

PRESI : Presidência

REDP : Revista Eletronica de Direito Processual

REsp : Recurso Especial

RJ: Rio de Janeiro

RN: Rio Grande do Norte

RS: Rio Grande do Sul

STF : Supremo Tribunal Federal

STJ : Superior Tribunal de Justica

TRF1 : Tribunal Regional Federal da 1ª Região

TRF4 : Tribunal Regional Federal da 4ª Região

UCLA L. Rev.: University of California Law Review

UFMG: Universidade Federal de Minas Gerais

UFRG : Universidade Federal do Rio Grande do Sul

UN: United Nations

UNDP: United Nations Development Programme

UNESP: Universidade Estadual Paulista

UNGAOR: United Nations General Assembly Official Records

Windsor Rev. Legal & Soc. Issues: Windsor Review of Legal and Social Issues

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Introduction

When bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle.

Edmund Burke[1]

An ineffective justice system is the perfect environment for the denial of rights and a great incentive for illegalities to prosper. When expressions like "go find your rights in courts" are used to threaten good people, there are signs that evil is triumphing and honest people are doing nothing. However, we see many good judges dedicating their lives to the hard mission of delivering fair justice, going beyond their legal duty, creatively facing diverse obstacles, and keeping the ideal of equal justice under law. And then we question ourselves: what should good men be doing differently in order to achieve their purposes?

Back in 1996 and 1997, the Internal Affairs of the 1st Regional Federal Court in Brazil felt the necessity to have standardized and precise details about the stage of processes in the courts of its fourteen sections for the purpose of both controlling the judicial activity, and providing society with updated information about delays in the delivery of justice. The analyses of the needs of procedural reforms, the creation of more courts, and the investments in infrastructure also depended on the statistics to be provided. These necessities led to the creation of a committee that was responsible for the modernization and the unification of information and technologies in the fourteen units of the federal justice of the first region. Being a Federal Judge Substitute in section of Goiás, in the initial stages of our career, but with previous experience as a lawyer and a court clerk, we were invited to participate in this project. Initially, there was some resistance, but we gained the collaboration of the users not

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[1] According to Quote Investigator, there are similar quotations, but this one is attributed to Edmund Burke, the Irish statesman and philosopher, who "wrote about the need for good men to associate to oppose the cabals of bad men", in 1770, online: Quote investigator <http://quoteinvestigator.com/2010/12/04/good-men-do/>.

by telling them it was an order from Internal Affairs, but by sitting with stakeholders, and explaining that these new procedures would help them manage the files better and reduce the time for developing certain activities, would provide the Internal Affairs and the society with the correct information about their work, and would also ease their relationship with lawyers and litigants. Many judges and court staff had ideas of how to improve the modernization and some courts had even developed their own modular systems to manage certain procedures, which were incorporated to the unified solutions. Still, modernization is never final, and in 2012, as a Federal Judge Assistant of the Internal Affairs, and having participated for many years in diverse committees for the standardization of procedures, development and implementation of new technologies, we were still worried about how to deal with population mistrust of the Judiciary.

In this context, this study is not a pre-paid ticket with a previous known destination. It did not follow a pre-conceived plan that we had already structured. It is the result of the immersion in another culture combined with a theoretical review after almost thirty years of practice, including eighteen years of experience as a federal judge, which seemed to be the perfect opportunity to seek a broader understanding of what is happening with the justice we deliver.

Judges are usually working overtime, taking work home, invading their family time with legal literature, substituting their leisure time for itinerant courts in distant communities, studying new and complex subjects, re-learning forgotten concepts, and involved in managing the demand, but still the news worldwide expose citizens' dissatisfaction with the Judiciary. That being said, considering the Brazilian Judiciary, how can we understand the paradox of having a population that does not trust the judicial system and, at the same time, courts that are

overloaded with more than one hundred million cases to be examined by less than seventeen thousand judges?[2]

Judges have been taking personal responsibility for not achieving the results expected by the citizens, and try to become the CEOs of courts, a task that demands more than legal experience, legal knowledge or legal reforms. More involved in management programs, after writing missions, visions and strategic plans for the future, participating in meetings for establishing goals for the Judiciary, we found it necessary to search for more information with the purpose of increasing the chances of success in this challenge.

The Cyberjustice Laboratory, "part of the evolving research that has been underway at the Centre de recherche en droit public (CRDP)"[3] at the Université de Montréal, "where justice processes are modelled and re-imagined",[4] inspired our main question: How does the use of technology in Brazilian courts affect the principle of access to justice?

Our final conclusion may differ from some similar approaches about cyberjustice in Brazil, because our starting point is the theory of access to justice. We intend to add to the traditional analysis of access to justice, the ideas of ADR and ODR, and the impacts of the social, commercial, economic, and cultural relations in a globalized society. Understanding the access to justice crisis is our pre-requisite to the analysis of the effects of introducing information technology in courts. The idea is not only to follow the path of ICT into the judicial context, but to withdraw from previous experiences the necessary knowledge to face the challenge of reducing costs and delivering justice in a reasonable time without limiting accessibility.

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[2] José Roberto Nalini, "Único prêmio para o bom juiz é propiciado pela consciência própria" *Consultor Jurídico* (2 March 2015), online: <http://www.conjur.com.br/2015-mar-02/renato-nalini-premio-bom-juiz-propria-consciencia>.

[3] Cyberjustice Laboratory, *History*, online: < http://www.cyberjustice.ca/en/history/>.

[4] Cyberjustice Laboratory, *The Laboratory*, online: <http://www.cyberjustice.ca/en/the-laboratory/>.

In addition, the access to literature in English, French, Portuguese and Spanish allows us to search for the point of view of more authors, reflecting the understanding of the crisis and the obstacles of access to justice through diverse cultural lenses. Finding that the problem is globalized and that the investments in solutions is part of an international concern, we assumed that a better understanding of Brazilian legislation and e-justice experiences can contribute to future decisions involving information technology projects for courts.

We expect that the use of technology can reduce the time and costs of procedures in courts not only by automating existing activities, but by leading to a re-thinking process of how things are done in the judicial resolution of conflicts. Many other advantages can derive from the processing power of computers and the implementation of e-courts. The upcoming obstacles will instigate political decisions and investments in new solutions. This is a path to regain the general public's confidence in the Judiciary, which still does not mean an immediate reduction of caseload, considering a probable and consequent increase in the number of new claims.

In order to understand the aspects that led to a deficient preservation of rights and delivery of justice, we chose to re-examine the principle of access to justice and how its concepts are defined in the Brazilian legal order and reality, considering the need to investigate how high rates of inequalities can influence individuals' capacity to recognize legally enforceable rights and file a claim.

The definition of access to justice goes from the positive perspective of citizens of the existence of a system by which individuals can search for the preservation or restoration of their rights that is present in international treaties and conventions, and reproduced in democratic constitutions, to the negative perspective of the barriers that must be overcome to its effectiveness (section I A). [5]

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[5] Mauro Cappelletti & Bryant Garth, eds, *Access to Justice: A World Survey*, vol 1, book 1 (Milan: A. Giuffrè, 1978) at 6-10.

What happened to access to justice? We could not confirm when in history the justice system was considered effective according to social needs,[6] but repeatedly, many authors mention there is a worldwide crisis in access to justice.[7] And in this crisis, factors like "the growth in self-represented litigants, the inaccessibility of justice for citizens living in areas remote from courts and lawyers […], the physical inaccessibility of courts services and courtrooms, escalating costs, and significant delays contribute to growing citizen disaffection with the legal system".[8]

In 1978, as a result of the Florence Access-to-Justice Project, a "world survey [with] twenty-three national reports on the costs of justice and the national approaches to access problem",[9] Cappelletti and Garth used the "wave" metaphor to define the three basic

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[6] "Déjà, en 1413, en France, on se désolait de l'interminable longuer des causes portées en justice. L'archevêque de Reins se plaignait auprès du roi Charles VII 'd'une justice trop coûteuse, trop longue et embrouillée'. En 1667, Louis XIV émettait une ordonnance pour une justice plus rapide en Nouvelle-France". The delays in justice systems since 1413 were registered by Pierre-Claude Lafond, *L'accèss a La justice Civile au Québec. Portrait general* (Québec: Éditions Yvon Blais, 2012) at 63 (references omitted); also Cléa Iavarone-Turcote, *La résolution en ligne des conflits de consommation à l'aune de l'accès à la justice* (LL.M. Mémoire, Université de Montréal, 2013) at 1 [unpublished] mentions that, according to Sylvio Normand, in "De la difficulté de rendre une justice rapide et peu coûteuse : une perspective historique (1840-1965)" (1999) 40 C. de D. 13 at 14-15, since the middle of the nineteenth century, the citizens in Quebec complain of the delays and high costs of the judicial system.

[7] Refering to some authors like Cappelletti and Garth and Pierre-Claude Lafond, Cléa Iavarone-Turcotte says that: "On connaît bien l'accès à la justice comme problème juridique et social. Ceux qui se sont penchés plus attentivement sur cette question savent qu'elle s'inscrit dans un mouvement mondial amorcé aux États-Unis au début des années 1960, lequel se situe dans le contexte plus général de l'État-providence". *Supra* note 6 at 12. Also see in Lafond, *supra* note 6 at 26-32, under "perception du système judiciaire", that, according to the research presented, affirms that citizens do not mistrust the judges and the courts, but the system of administration of justice.

[8] Jane Bailley & Jacquelyn Burkell, "Implementing Technology in the Justice Sector: A Canadian Perspective" (2013) 11 CANJLT 253 at 1 (references omitted).

[9] "The Florence Access-to Justice Project, funded both by the Ford Foundation and the Italian National Research Council (CNR), began to gather materials and to study these problems in the fall of 1973.[…] The four Volumes, beginning with this one, that are being published in The Florence Project series follow closely the Project's methodology. As indicated by its title, A World Survey, the present Volume, in two Books, contains twenty-three national reports on the costs of justice and the national approaches to access problem. The reports, [...] come from Western Europe (8), Eastern Europe (3) and U.S.S.R., Latin America (4), Australia, Canada, China, Indonesia, Israel, Japan and the United States. (Other countries, it should be noted, particularly India and some African ones, are treated in subsequent Volumes in one aspect or another.)" Cappelletti & Garth, *supra* note 5 at ix – x.

approaches of the access to justice movement,[10] and these elements are fundamental for the comprehension of all mentioned factors that, although not new, have to be frequently revisited as checking points for the analyzes and reforms of judicial systems.

But simply increasing access isn't sufficient. As Deborah Rhode questioned "Access for Whom? For What? How Much? And Who Should Decide?"[11] The search for answers to these questions also leads us to the obstacles that need to be surpassed, so that equality under the law and fair justice can become a reality.

Nevertheless, before addressing the major obstacles frequently associated with public access to justice in traditional courts, it is important to examine the role of Alternative Dispute Resolution methods (ADR), which are included by many authors in the broad concept of access to justice,[12] as an option for citizens who would consider them easier and cheaper ways to solve disputes out of courts.

Then, the process of investigation meets a reshaped definition of access to justice by a globalized view, which transforms traditional concepts of time and social relations into those developed in a new environment known as the cyberworld. Here, we should consider that time runs faster in computerized relations, once communication spreads information, shortens

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[10] Cappelletti & Garth, *supra* note 5 at 21. For the movements of access to justice also see Lafond, *supra* note 6 at 20-23.

[11] Debora L. Rhode, *Access to Justice* (New York, Oxford: Oxford University Press, 2004) at 5 [Rhode, *Access*].

[12] About alternatives for settling out of courts included in the concept of access to justice see Cappelletti & Garth, *supra* note 5 at 59-66; Lafond, *supra* note 6 at 14-18, 262-268.

distances, and keeps people connected twenty four hours a day.[13] This leads to the urgency of conferring a more rapid pace to judicial response regarding violation of rights.[14]

Within this context, the use of technology in courts appears as a possible solution for surpassing the existing obstacles that restrain access to justice. The globalized society affirms that there is no option to maintain the judicial system outside the technology revolution. At the same time, this new frontier of access to justice adds "new territories of complex and problematic claims […] to the agenda at an ever-increasing pace", asking for a review about how access to justice may remain compromised if individuals' competence does not proportionally progress.[15]

If the "solution to the 'problem' depends on how the problem is defined and what policy goals one wishes to reach",[16] undoubtedly, the delay of procedures and the costs must be considered as main objective obstacles to be overcome,[17] and information technology offers itself as a solution provider (section I B).

Subsequently to these definitions of access to justice and the investigation of the obstacles that compromise the guarantee that this principle represents to democratic societies, we will concentrate on analyzing the development of systems for courts with focus on the Brazilian experience (section II A).

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[13] Literature about globalization frequently mentions the new dimensions of time. As an example, "There is compelling evidence to suggest that time is moving faster in absolute terms […]." Asserts Eric Sheppard,"The Spaces and Times of Globalization: Place, Scale, Networks, and Positionality" (2002) 78:3 Economic Geography 307 at 325. About new concepts of time as a consequence of electronic globalization, also see Lucchien Karsten, *Globalization and Time* (London, New York: Routledge, 2012).

[14] "A crisis of time or the lack of it" is object of analysis of Marcio Carvalho Faria, "A duração razoável dos feitos: uma tentantiva de sistematização na busca de soluções à crise do processo" (2010) VI Revista Eletrônica de Direito Processual (REDP) 475 at 475-476.

[15] Marc Galenter, "Access to Justice in a World of Expanding Social Capability" (2009) 37: I Fordham Urb LJ 113 at 127.

[16] Lawrence M. Friedman, "Access to Justice: Some Historical Comments" (2009) 37: I Fordham Urban Law Journal 3 at 15.

[17] Lafond, *supra* note 6 at 49.

We will present brief summaries of federal laws that have been regulating the use of electronic means in court procedures, complementing with some court precedents and regulations that will give us a notion of what are the political decisions regarding this subject.[18] In this matter, the role of the National Council of Justice is very special, for its standardizing regulations and for the development a cyberjustice project that carries what some authors define as the three fundamental features of any online dispute resolution system: convenience, trust, and expertise.[19]

However, as the laws do not detail the process of development, and do not consider the risks of stakeholders' rejection of the projects, the second part of our thesis will also be dedicated to share experiences and take a special look into some obstacles that could limit accessibility or lead to the failure of initiatives. To this end, the exploratory research project conducted by Prof. Jane Bailey and Jacquelyn Burkell,[20] as well as the best practices compiled by Prof. Karim Benyekhlef and Prof. Nicolas Vermeys,[21] based on their experience as Director and Associate Director of the Cyberjustice Laboratory of the Université de Montréal, will add a comparative approach to the experiences in e-justice. Some of these recommendations are even more important in large countries, like Brazil, where systems are implemented to attend communities that hold different social needs and have diverse levels of infrastructure. The pilot projects installed in real courts, without all the prudence that pertains to an experience in

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[18] Since Brazil follows a civil law legal system, the legislation has an important role in the procedural reforms, and in the use of technology in courts, as we can see from Alexandre Atheniense, *Comentários à Lei 11.419/06 e As Práticas Processuais por meio Eletrônico nos Tribunais Brasileiro* (Curitiba: Juruá Editora, 2010) at 29-68; Tarcisio Teixeira, *Curso de direito e processo eletrônico* (São Paulo: Editora Saraiva. 2014) at 405-420; José Carlos de Araujo Almeida Filho, *Processo Eletrônico e Teoria Geral do Processo* (Rio de Janeiro: Ed. Forense. 2015) at 69-75.

[19] Jagruti Chauhan, "Online Dispute Resolution Systems: exploring e-commerce and e-securities." (2003) 15 Windsor Rev. Legal & Soc. Issues 99 at 100.

[20] Bailley & Burkell, *supra* note 8.

[21] Karim Benyekhlef & Nicolas Vermeys, "Best Practices in the Field of Cyberjustice" in Carlos Gregorio, ed., *Seminar on Recent Trends and Good Practices in the Application of Electronic Technology to Judicial Processes* (*E-Justice*) (Mexico City: Rapport produit pour l'Organisation des États Américains, 2011) [Benyekhlef & Vermeys, "Best Practices"].

a cyberjustice laboratory, should be preceded by some better planning. In sharing experiences, it is important to consider eventual critiques as suggestions for a better approach in the future.

In the last part of our arguments (section II B), we will give special attention to the dilemma regarding public access to information, the secure storage of processes, the use of digital certificates, the interoperability of systems, and the difficulties that involve unification of ICT solutions that had for many years parallel development in many courts, sometimes with similar applicability but no compatibility. These are elements of our concern when associated to how they may constitute a risk to the accessibility of justice.

In summary, all components will be analyzed for the purpose of discovering if the electronic process is a good way of making justice accessible and efficient.[22] If we can already start selling old shelves, where files used to be stored in courts, and reduce courts' archives is a decision that does not only involve costs, but the pace of the proposed transformation which includes adequate legislation, cultural changes of stakeholders, compatible budget and political will.[23] However, we must always remind ourselves that the failure of the justice system is good only for those who can profit from injustice.[24]

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[22]Renato Luís Benucci. *A Tecnologia Aplicada ao Processo Judicial (*Campinas, São Paulo: Millennium Editora, 2006) at 58. Accessible and efficient justice is a concept that cannot be simplified to "fast justice" and judges cannot be converted in machines to deliver rapid decisions. About the concerns with due process of law and quality of decisions see Teixeira, *supra* note 18 at 446-447; Faria, *supra* note 14 at 483-484; Juliana Borba, "Apesar de CNJ focar em estatística, juízes se preocupam com qualidade de decisões" *Consultor Jurídico* (22 March 2015), online:< http://www.conjur.com.br/2015-mar-22/entrevista-jayme-oliveira-presidente-apamagis>.

[23] Teixeira, *supra* note 18 at 448-450.

[24] Livia Scocuglia, "Morosidade da Justiça só serve a quem não tem razão, diz Renato Nalini" *Consultor Jurídico* (24 November 2014), online: <http://www.conjur.com.br/2014-nov-24/morosidade-serve-quem-nao-razao-renato-nalini?imprimir=1>.

I. Access to justice: moving towards a globalized concept

The first part of this thesis is dedicated to exploring meanings of access to justice, and how it gained importance within societies that recognize rights and aim at social justice. Some historical aspects will be presented, but only enough to understand the current social context where the existing structures responsible for providing the balance of rights appear to be insufficient, and the search for reasons indicates objective and subjective barriers,[25] but do not present solutions that can be easily implemented or that could be reached without exclusion of part of the population.

Having finished our graduation studies in 1984, before the Brazilian Constitution of 1988 and many modifications that it brought to traditional concepts previously learned, we have had to follow the evolution of definitions that derive from the new theories and from the practice of law inside and outside courts. However, we could understand that in the social field it is not possible to entirely anticipate the consequences of law reforms, either regarding rights or procedures.

As a member (for nearly 20 years) of a Judiciary[26] that struggles to deliver fair justice, we have been actively participating in the process of modernization of the judicial system, particularly in terms of utilizing information technology as a means of accelerating court procedures.[27] The question of how automating courts can affect effective access to justice is

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[25] Iavarone-Turcote, *supra* note 6 at 24-36.

[26] Since November 1995.

[27] Appointed President of the Permanent Commission to standardize the Study of Information Technology Platform in Federal Courts by the Federal Council of Justice, and Chairman of the Technical Commission of Judiciary Certifying Authority - AC-JUS - May 2006 / August 2007 (1104 Act PRESI TRF1 - 1193, 04/19/2006, 04/24/2006 and DJ CJF Ordinance no. 042, 04/24/2006); assigned by the Council of Federal Courts as member of the Committee of Procedures Systems and Records for the Federal Justice (Ordinance CJF n. 119 05/11/2011) and by the 1st Regional Federal Court as member of the Special Committee on Standard Procedures Records (Ordinance/PRESI 600-298, from 05/11/2006 to 04/17/2008); of the Management Committee of e-JUS (Ordinance/PRESI 600-291, from 12/24/2007 to 04/17/2008); of the Committee for the Implementation of Tax Enforcement Virtual Procedures (PRESI 600-329 from 06/05/2006 to 04/17/2008); and of the Commission for the creation of the manual of virtual small claims system (Ordinance/PRESI 600-574 of 10/27/2005 to

one that is still evolving, and that must take into consideration two major elements of accessibility: time and cost.[28]

Considering the element of time, there is no doubt that a contemporary definition of access to justice also needs to deal with the effects of globalization, including the use of information technology, which is presented as an undeniable path to bring celerity to the procedures in courts. But, digital accessibility raises new challenges that have to be confronted, with focus on subjective barriers related to the possibility of exclusion of vulnerable populations and those who have incipient or no access to computers.

This part of our study presents the certainty that objective barriers to access to justice, like cost and delay of procedures, territorial and time limited access of judicial services, as well as the formalism and complexity of justice delivered by courts,[29] are also faced by nations that have different legal, political, and economic levels of development. These problems are brought to a globalized arena in the pursuit of justice as a broad democratic ideal, as we can extract, for instance, from the Florence Access-to-Justice Project[30] and from the United

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04/17/2008); designated Head of goals for the Judiciary for the years 2010, 2011, and 2012, for the 1st Regional Federal Court (Ordinance/PRESI/CENAG-282, 07/21/2010; Ordinance/PRESI/CENAG-165, 06/04/2011; and Ordinance/PRESI/CENAG-266, 07/20/2012), Coordinator of the Regional Committee of Procedures Records for 1st Regional Federal Court (Ordinance/PRESI/CENAG-199, 02/05/2011); and member of the Committee on Security of the Federal Courts - CJF Ordinance 09, 31/08/2011.

[28] These elements are part of studies on access to justice, such as Cappelletti & Garth, *supra* note 5; Fernando de Castro Fontainha, *Acesso à Justiça: Da Contribuição de Mauro Cappelletti à Realidade Brasileira* (Rio de Janeiro: Lumen Juris Editora, 2009); Iavarone-Turcote, *supra* note 6; Leilson Mascarenhas Santos, *Processo Eletrônico e Acesso à Justiça* (Rio de Janeiro: Lumen Juris, 2014); Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Canadian Forum on Civil Justice, October 2013), online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>; Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004); Bailley & Burkell, *supra* note 8; Karim Benyekhlef, Emmanuelle Amar & Valentin Callipel, "ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries" (2015) 6 The World Bank Legal Review 325; Benyekhlef & Vermeys, "Best Practices", *supra* note 21; Lafond, *supra* note 6; Faria, *supra* note 14.

[29] About objective and subjective barriers see Iavarone-Turcote, *supra* note 6 at 24-25; Lafond, *supra* note 6 at 49-86.

[30] The Florence Access-to Justice Project is a four-year comparative research, with reports from Western Europe (8), Eastern Europe (3) and U.S.S.R., Latin America (4), Australia, Canada, China, Indonesia, Israel, Japan, the

Nations Development Programme (UNDP) with focus on "Access to Justice and Rule of Law".[31]

In addition, although not separately labeled, the subjective obstacles[32] will also be brought into this context, since equality can only be associated to fair justice if minimum conditions including the knowledge of rights and the possibility to obtain these rights become concrete.

The main idea is to expose points of view that can lead to in depth thinking about a less formal and more substantive access to justice, starting by the difficulties in defining what should be encompassed in its political and legal concept.

A. Access to Justice Definitions

On the search for a definition of access to justice that would be flexible, but still connected with the solution given by the states when rights are breached, we arrived at the assertive of Dory Reiling that "in the access to justice discourse, access is not a clearly defined concept, and neither is justice".[33] However, the expression "access to justice" has an undeniable symbolic importance, both politically and legally, that leads to the always current

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United States, and other countries, particularly India and some African ones. Cappelletti & Garth, *supra* note 9 at ix-x.

[31] "The poor and marginalized are too often denied the ability to seek remedies in a fair justice system. UNDP promotes effective, responsive, accessible and fair justice systems as a pillar of democratic governance. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Rule of law is the foundation for both justice and security […] According to the United Nations Secretary-General (A/59/2005), 'The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability.'" United Nations Development Project, *Access to Justice and Rule of Law*, online: <http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.html>.

[32] Iavarone-Turcote, *supra* note 6 at 31.

[33] Dory Reiling, *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden: Leiden University Press, 2009) at 161.

worries about how to increase its power, since "one can hardly imagine anyone who would speak out against accessible justice or who would advocate justice that is inaccessible".[34]

Whenever there is a need to bring up a debate about what access to justice should represent, it is frequently connected to the incapacity of the legal order to efficiently provide the administration of law and how reforms on the systems can solve the problems of inequality. In order to understand the paradox of this expression that carries a positive meaning, related to the guarantee of rights and, at the same time, a negative feeling of an unjust society, Prof. Lawrence Friedman remembers that the problem can be as big as the goal one intends to reach, since empowering the citizens to have the opportunity to claim their rights should not become an incentive to worthless litigation.[35]

To define this goal some scholars present series of questions to be answered, and that lead to debates about access to justice in and out of courts in democratic societies. Also, by understanding how the access-to-justice movement is incorporated in national and international scenes, we will be able to examine the effects of the use of technology in courts.

1. Access to justice and access to judicial systems

Access to justice could be associated with a series of legal expressions. Due process of law, right to a hearing, legal order, equal justice under law, right to access a justice system, resolution of conflicts, alternative resolution of conflicts, social, legal and substantive justice, and many others are all expressions customarily used when discussing the recognition and preservation of the rights of all individuals in a society. There is no opposition to the positive subliminal messages they carry.

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[34] Austin Sarat, Book Review of *Access to Justice: A World Survey, vol 1, book 1* by Mauro Cappelletti & Bryant Garth, eds, (1981) 94: 8 Harvard Law Review 1911 at 1911.

[35] Lawrence Friedman, *supra* note 16 at 8-9, 15.

As stated earlier, Debora L. Rhode, in her book "Access to Justice", worried about how the aspiration of "equal justice under law" has become difficult to reach, poses the questions: "Access for Whom? For What? How Much? And Who Should Decide?" [36]

Admitting the same difficulty of crafting a definition of access to justice, Cappelletti and Garth focused on a traditional reference to the access to judicial systems or through judicial systems, by which anyone could pursue the protection of the state in order to obtain the preservation of potentially violated rights and, consequently, fair justice.[37] The central idea is the effective access, which includes individual and socially fair results. Their studies also included the search for answers to questions like "What is justice?" "Justice for whom?" And, analyzing the real world in a multidisciplinary view, they led the search for solutions in the access-to-justice movement of contemporary societies that share the ideal of effective justice.

In order to contextualize the timeframe in which their report was produced, Cappelletti and Garth provided a historical analysis of how the concept of access to justice transformed over time. They began with the late eighteenth and nineteenth centuries, when the concept was derived from the liberal "bourgeois" notion that access to justice was a natural right that required no affirmative state action for its existence because individuals were free to utilize existing economic, legal and political institutions to vindicate their rights without any special help of the state. As for those individuals who could not understand their legal rights and/or afford the cost of vindicating them, this was considered to be a natural consequence of a system of formal justice prevailing in a laissez-faire society.[38]

The growth of societies in size and complexity, resulting in a change of the recognition of human rights as part of the collective concerns, has made many governments include in

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[36] Rhode, *Access*, *supra* note 11 at 5.

[37] Cappelletti & Garth, *supra* note 5 at vii, 6.

[38] *Ibid* at 6-7.

their constitutions individual and social rights that would sound "meaningless without mechanisms for their effective vindication".[39]

Effective access to justice, as a guarantee of respect and protection to all rights, gains special attention in international context, when related to the protection of human rights. Whenever a right is violated, the availability of judicial remedies has fundamental importance for the aggrieved person, since in egalitarian legal systems there is no meaning in proclaiming rights that cannot be exercised.

a) Access to justice through the Judiciary

Known as a milestone document for the development of human rights, the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in December of 1948, established in its article 8 that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[40] Similar disposition is in article 14 of the International Covenant on Civil and Political Rights (ICCPR)[41] and in the right to a fair trial according to article 6 of the European Convention of Human Rights (ECHR).[42]

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[39] *Ibid* at 7-8.

[40] *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) at 71.

[41] "Article 14 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No 16, UN Doc A/6316, (1966), 999 UNTS 171 at 176, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) 16 December 1966; entry into force on 23 March 1976, in accordance with Article 49.

[42] "Article 6 Right to a fair trial 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent

This principle, which represents an accomplishment as a democratic opening of the state to the protection of all rights, is deeply inserted in the Brazilian Federal Constitution of 1988, which guarantees that "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power" (Article 5, XXXV), and further ensures that all individuals have the right to petition the Government in defense of their rights or against illegal acts or abuse of power without being required to pay any fees when doing so (Article 5, XXIV).[43]

We should here consider that these major legal instruments do not aim solely at a basic access to courts. The justice system has to be able to guarantee a fair legal order and to achieve substantial justice. A day in court or a filed case do not represent, by themselves, the protection of rights, if individuals have to face a system that is inoperative and cannot provide adequate and equal treatment to all. It is essential that the claims be presented to judgement, trespassing the barriers that keep parties in unbalanced conditions. Effective justice can only be obtained if there are minimum guarantees of means and results, because these guarantees, in addition to directly affecting the rights of the parties involved in a legal dispute, will also establish confidence, within the broader society, that anyone has access to the judicial system, thus resulting in a fair legal order, which validates or reproves values, and indicates the path to the construction of democracies.[44]

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and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, 213 UNTS 221 at 228, ETS 5.

[43] Constitution of the Federative Republic of Brazil: constitutional text of October 5, 1988, with the alterations introduced by Constitutional amendments no. 1/1992 through 64/2010 and by Revision Constitutional Amendments no. 1/1994 through 6/1994. 3. ed. Brasília : Chamber of Deputies, Documentation and information Center, 2010. 435 p. – (Série textos básicos ; n. 57).

[44] Rodrigo Murad do Prado, "O acesso à justiça no Brasil e suas implicações no atual processo de controle abstrato de constitucionalidade" (January 2014), online: DireitoNet <http://www.direitonet.com.br/artigos/exibir/8290/O-acesso-a-justica-no-Brasil-e-suas-implicacoes-no-atual-processo-de-controle-abstrato-de-constitucionalidade>.

Back to Cappelletti's project, we find the concern with the existing barriers to achieve the desired equilibrium between rights and remedies, expressed in other series of questions:

> "What is the role of the courts in dispute processing, and what should it be? When are lawyers useful in dispute processing and when are they necessary? What is the appropriate role in modern society of 'informal' procedures aimed at conciliation or mediation, such as those typical of so-called primitive societies? What are costs, in terms of fairness and accuracy, of such informal procedures?"[45]

The study of what Cappelletti labeled as the three major waves of reform in the access-to-justice movement is an essential part of any research about access to justice. The first wave was related to legal services for the poor, and represented the search for solutions regarding access to justice surpassing the barriers of costs and legal illiteracy. The second wave of reform represents "the movement to give representation to 'diffuse', collective interests through such mechanisms as class actions, public interest lawyers, and granting of standing to sue to consumer and environmental groups".[46] The last wave, known as the "access-to-justice approach", absorbs the other ones by proposing a more general reform of procedures and review of institutions of the judicial systems, to make it possible for everyone to vindicate violated rights.[47]

Although Brazil has not been included in the Florence Access-to-Justice Project, where there was just one mention to the Popular Action (Law n. 4.717/65)[48] when referring to the

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[45] Cappelletti & Garth, *supra* note 5 at ix.

[46] *Ibid* at x.

[47] *Ibid* at xi.

[48] *Ibid* at 41, n 109: "[…] *add* Brazil, which allows citizen actions to challenge conduct of the public administration or publicly-financed institutions which causes damage (either property, economic, aesthetic, artistic, or historic damage) to the public welfare. Law of June 29, 1965, n. 4717, 1976 Codigo de Processo Civil 473"; Fontainha, *supra* note 28 at 80.

protection of diffuse rights, Fernando de Castro Fontainha has dedicated his work on access to justice to Cappelletti's contribution to the Brazilian reality.[49]

It is relevant to quote that besides the Brazilian Federal Law n. 4.717/65, other federal statutes preceding the Federal Constitution of 1988 may be referred to as part of the constant access to justice worries, for instance, Federal Law n. 1.533 of December 31 of 1951, regulating the *writ of mandamus,* and Federal Law n. 7.347 of July 24 of 1985, regulating the public civil action.[50]

The Brazilian Constitution was acclaimed in Cappelletti's studies regarding the modern constitutionalism and the role of the judicial power in contemporary society, for its leading advancements in the transformation of modern liberal-democratic states.[51] Some articles of the Brazilian Constitution that were mentioned are of special relevance to access to justice, among which we should give emphasis to the collective *writ of mandamus* that can be proposed by political parties or associations (Article 5, LXX, b);[52] the popular action which has also begun to protect, besides rights of strictly public nature, diffuse and collective rights, like the

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[49] Fontainha, *supra* note 28 at 79-81.

[50] Carlos Alberto Alvaro de Oliveira, "Mauro Cappelletti And The Brazilian Procedural Law" (2002) Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul. Edição Especial em Homenagem a Cooperação entre a Universidade do Texas - Austin e a UFRGS, Universidade Federal do Rio Grande do Sul 381 at 383.

[51] Original text: "La Costituzione brasiliana del 1988 ha introdotto un sistema estremamente elaborato di controlli giurisdizionali, che vanno dall' azione di incostituzionalità, all' incidente d' incostituzionalità (con disapplicazione della norma incostituzionale nel caso concreto), al *mandado de segurança* individuale e collettivo, *all'habeas corpus* e *habeas data* ecc. La lettura e lo studio della vostra Costituzione sono stati per me affascinanti; ed e lecito sperare che l' "ipertrofia" tradizionale del potere esecutivo sia resa impossibile in futuro, anche se una cosa che non dobbiamo mai dimenticare e che le leggi, e le costituzioni stesse, hanno poco valore senza quella che già i Romani chiamarono la *constans voluntas* - gli sforzi, i sacrifici, il coraggio di coloro che le debbono applicare. La vostra Costituzione si inserisce pertanto, anzi per molti aspetti si mette all' avanguardia, di una grande tendenza evolutiva contemporanea, un'evoluzione che, a mio avviso, ha cambiato profondamente la 'forma di governo' dei Paesi liberal-democratici moderni." Mauro Cappelletti, "Costituzionalismo Moderno e Ruolo Del Potere Giudiziario Nelle Società Contemporanee" (1992) 17: 68 Revista de processo/Instituto Brasileiro de Direito Processual (IBDP) 68 Revista dos Tribunais 47 at 48.

[52] "Article 5 (…) LXX – a collective *writ of mandamus* may be filed by: a) a political party represented in the National Congress; b) a union, a professional association or an association legally constituted and in operation for at least one year, to defend the interests of its members or associates." Constitution of the Federative Republic of Brazil, *supra* note 43.

environment, and historic and cultural patrimony (Article 5, LXXXIII);[53] the right to health included as a social right (Articles 6 and 196-200); the possibility of defense of social and inalienable interests by the Public Prosecution, as an institution (Article 127), as well as its competence for the protection of public and social property, the environment and other diffuse and collective interests through a public civil suit (Article 129, III);[54] the existence of consumer[55] and environmental protection among the general principles guiding the economic order (Article 170, V and VI), and the mechanisms to ensure effectiveness to the right of an ecologically balanced environment (Article 225 and its first paragraph). Another point of special interest was the Brazilian Public Prosecution,[56] as defined in the Constitution,[57] with the characteristic of being essential to the administration of justice and having the power to defend diffuse interests.[58]

Nevertheless, in Cappelletti's analysis of the Brazilian judicial system, he also regrets that the political and social reality does not match the legal order. This represents the same concern expressed by Prof. Rhode about the gap between aspirations and achievements of a

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[53] "Article 5 (…) LXXIII – any citizen is a legitimate party to file a people's legal action with a view to nullifying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment, and to the historic and cultural heritage, and the author shall, save in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat." *Ibid*.

[54] "Article 129. The following are institutional functions of the Public Prosecution: (CA No. 45, 2004) (…) III – to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests." *Ibid*.

[55] Brazilian Federal Law n. 8.078, 11 September 1990, establishes the Consumer Defense Code.

[56] *Ministério Público*.

[57] "Article 127. The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests. (CA No. 19, 1998; CA No. 45, 2004)." Constitution of the Federative Republic of Brazil, *supra* note 43.

[58] Fontainha, *supra* note 28 at 81-83.

fair justice, while asserting that "'equal justice under law' is a principle widely embraced and routinely violated".[59]

According to its constitution, the Federative Republic of Brazil is a legal democracy founded on citizenship, dignity of human beings and the social values of labor and free enterprise,[60] with focus on fundamental objectives of eradication of poverty and substandard living conditions, reduction of social and regional inequalities, in order to build a free and fair society with prevalence of social solidarity, and to promote the well-being of all, without any kind of discrimination.[61] And, not to mention, the constitutional Article 5th [62] registers an exhaustive list of fundamental rights that all citizens are equally entitled to.

In addition, the state has been theoretically and legally planned to guarantee to all citizens social rights such as education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to vulnerable individuals.[63] However, as Fontainha emphasizes, the recognition of rights has to go far beyond the legal order, and access to justice, which is a right itself, also has to be the guarantee for other rights. While justice is kept as a privilege for the elites, and those socially excluded can rarely find protection from the state to have their rights recognized, fair justice will not be achieved.[64]

Just to clarify the difference from theoretical barriers of access to justice to the real ones, it is necessary to mention that economic inequality is a very serious issue in Brazil, presenting alarming numbers related to poverty. Brazil has a population of over 200 million

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[59] Deborah L. Rhode, "Whatever Happened to Access to Justice" (2009) 42 Loy LA L Rev 869 at 870 [Rhode, "Whatever Happened"].

[60] Constitution of the Federative Republic of Brazil, *supra* note 43 at Article 1, II-IV.

[61] *Ibid* at Article 3, I, III-IV.

[62] "Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004)." *Ibid*.

[63] *Ibid* at Article 6.

[64] Fontainha, *supra* note 28 at 34, 81-85.

people[65] and a GINI index[66] of 52.7 (2012),[67] considering that 0 is total equality and 100 corresponds to total inequality. Even though we may find some debates about the real data provided by Brazilian governmental statistics agencies to the GINI index,[68] when we size this social problem, it becomes easier to understand its effects on access to justice. Even if perfect equality can be considered utopian, and the eradication of differences between parties can never be really achieved,[69] the existence of some minimum preconditions is essential to enhance the capacity of people to exercise their freedom and rights.[70]

And this is the point where we find, in Cappelletti's ideas, the convalescence of the model that excludes, and the enthusiasm of words like "materialization of rights", "instrumentality", "material equality", "judicialization" and, last but not least, "access to justice", englobing all previous concepts.[71]

But then, what is justice without effectiveness? Having the "identification of barriers" as the first step to the search for effective access, Cappelletti and Garth cite article 6,

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[65] The 2013 data was obtained from the World Bank website, online: <http://data.worldbank.org/country/brazil>.

[66] "GINI index (World Bank estimate) - Gini index measures the extent to which the distribution of income or consumption expenditure among individuals or households within an economy deviates from a perfectly equal distribution. A Lorenz curve plots the cumulative percentages of total income received against the cumulative number of recipients, starting with the poorest individual or household. The Gini index measures the area between the Lorenz curve and a hypothetical line of absolute equality, expressed as a percentage of the maximum area under the line. Thus a Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality." Online: <http://data.worldbank.org/indicator/SI.POV.GINI/countries/1W-BR?display=graph>.

[67] The 2012 data was obtained from the World Bank website, online: <http://data.worldbank.org/indicator/SI.POV.GINI/countries/1W-BR?display=graph>.

[68] According to the Instituto Brasileiro de Geografia e Estatistica (IBGE), there was a mistake in the numbers of the PNAD (Pesquisa Nacional por Amostra de Domicilios) related to the population of metropolitan regions that influenced the GINI index and may have altered the results. The indicators have been revised. Economia Emprego, *Novos dados da Pnad reafirmam trajectoria de queda das desigualdades*, online: <http://www.brasil.gov.br/economia-e-emprego/2014/09/novos-dados-da-pnad-reafirmam-trajetoria-de-queda-das-desigualdades>.

[69] Cappelletti & Garth, *supra* note 5 at 11.

[70] Amartya Sen, "Equality of What?" (The Tanner Lecture on Human Values, delivered at Stanford University. 22 May 1979), online :< http://tannerlectures.utah.edu/_documents/a-to-z/s/sen80.pdf >.

[71] Fontainha, *supra* note 28 at xxiii-xxv.

paragraph I, of the European Convention for Protection of Human Rights and Fundamental Freedom, which recognizes that "justice that is not available within a 'reasonable time' is, for many people, inaccessible justice". When he refers to a delay of two or three years that litigants who seek judicial remedies have to bear in order to obtain an enforceable decision, and converts this time in financial consequences, he asserts that the result is "great pressure on the economically weak to abandon their claims or settle for much less than that to which they are entitled".[72]

In Brazil, when we consider that a great number of lawsuits could depend upon a final decision of the Supreme Court,[73] once the Brazilian Federal Constitution opens in its 250 articles[74] many possibilities for a constitutional judicial review, this time-cost effect is highly increased, and it results in citizens distrusting the Judiciary due to justice being significantly delayed.

b) ADR as evidence of a failed access to justice policy

Which alternatives were provided to individuals as solution for the failure of courts regarding timely delivery of justice? This is where the limits of regular court reforms were pointed out by Cappelletti and Garth, devising the use of alternative methods as a review of the concept that adjudication would be solely the effective way of resolution of conflicts. The traditional and complex procedures allied to high costs and deficiency in capability of accessing courts are incentives to pursue justice in mediation, arbitration and other parallel dispute resolution system.[75]

Although we consider that alternative dispute resolution (ADR) methods, yielded in the 1970s, can offer procedures that are less expensive, faster and simpler than traditional

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[72] Cappelletti & Garth, *supra* note 5 at 10-14.

[73] Directly, when there is a judicial review pending of result; or indirectly, when waiting in lower courts for decisions about constitutionality of laws or regulations in previous cases.

[74] Besides the 97 articles of the Temporary Constitutional Provisions Act.

[75] Cappelletti & Garth, *supra* note 5 at 59.

litigation,[76] the existence of an access to justice out of court systems through negotiation, mediation, arbitration should not derive of failure of the judiciary in providing a public service to stop injustices and restore rights. "There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system."[77]

According to the World Development Report of 2002, "in developing countries where judicial systems are ineffective, alternative dispute resolution (ADR) mechanisms can substitute for ineffective formal legal procedures". The report affirms that, as courts become more efficient, proportionately, formal systems are more accessed and more precedents are created. As a consequence, regarding subjects where judgements are predictable, more people search for ADR settlements. This leads to the conclusion that alternative dispute resolution methods "generally work better when the courts are efficient".[78]

However, the famous adage in the legal culture of settlements that "a bad agreement is better than a good lawsuit"[79] is far from a concept of true justice. It portrays an access to justice challenge that shall be confronted in the interest of all. It is admissible, in a postmodern society, that individuals make their choices regarding their motivations and interests. Still, lack of confidence in the judicial system should not be the reason for choosing other means of dispute resolution, or for being conformed to possible but not fair justice.

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[76] Shirin Sinnar, *Access to Justice Movement – Topic Brief*, online: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0, contentMDK:20756347~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>.

[77] United States Institute of Peace, *Necessary Condition: Access to Justice*, online: <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice>.

[78] The World Bank, *World Development Report 2002: Building Institutions for Markets* (New York: Oxford University Press, 2002) at 126-127.

[79] Special Dictionary/World Proverbs, *23 Proverbs about Lawsuit*, online: <http://www.special-dictionary.com/proverbs/keywords/lawsuit/>.

No doubt that conciliation can be more adequate to mend relationships between parties, to explore the real questions underlying disputes, to bring back peace to family and social relations, but Cappelletti and Garth have called the attention to a wrong path where conciliation is mainly a way to reduce court congestion and to solve court failures, leaving behind the search for truly fair results.[80]

Analysing numbers that represent the effects of the use of ADR in caseload of courts in Brazil, it is intriguing that, according to the statistics provided by the National Council of the Justice[81] in 2014, based on data from 2013, there is an increasing amount of new cases every year. In 2013, 95.14 million cases were being processed in Brazilian courts,[82] from which 70% corresponded to cases remaining from previous years (66.8 million) and 30% of new cases (28.6 million). It is important to mention that 16.429 judges were in charge of the solution of these lawsuits. The numbers will have to speak for themselves, since it is not an easy task to identify the social movement that denies the utility of reaching courts for the solution of problems and, at the same time, reaches for state protection regarding justice. We could certainly affirm that the valid existence of alternative dispute resolution of conflicts neither invalidates traditional justice, nor justifies less governmental investment in its structure, but recommends the reevaluation of the procedures to enable the necessities of democratic societies.

In recent years, the concept of access to justice disassociated from access to courts or judiciary efficacy aims at a substantive justice "shifting emphasis from guaranteeing the availability of lawyers or court procedures to producing social outcomes that are more fair and

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[80] Cappelletti & Garth, *supra* note 5 at 64.

[81] The National Council of Justice was created by the Constitutional Amendment n. 45/2004, and has its composition and competence defined in Article 103-B.

[82] Data is derived from all Brazilian Judiciary Courts, excluding the Federal Supreme Federal Court (STF). Information obtained by the National Council of Justice corresponds to numbers provided by the Superior Court of Justice, the Federal Regional Courts, the Labour Courts, the Electoral Courts, the Military Courts, and the Courts of the states, of the Federal District, and of the territories.

equitable".[83] It is expected that a justice system should be able to resolve legal problems in ways that are as "timely, efficient, effective, proportional and just as possible" by preventing legal issues, through alternative dispute resolution services, and if necessary, through formal litigation procedures.[84]

Some questions still remain unanswered: Does this approach withdraw from the state the liability of being the source of law and equality, investing in reforms of its structures? Does it create a shared responsibility with the private sector and even international organizations?

2. A globalized view

Globalization has a direct effect on most people's lives, from the way consumers have easier access to international products, to modifications implemented in the relation between nations and that of state and law, since it carries elements beyond the feeling of being a citizen of the world.

An increased process of integration of national economies into an international realm, composed by concepts like trade of goods and services, financial flow, economic growth, markets, and others related to the dynamics involving the development of societies, impacts the so called rule of law and the concepts of justice.

Before globalization, it was predominant in legal debates that "the state presents the ultimate point of reference for both domestic and international law".[85] The major actors would be the states, and nationalism would prevail. A state-centered legal platform would determine individual and collective rights established by laws, regulations, norms, ethical standards, customs, and precedents.

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[83] Sinnar, *supra* note 52.

[84] *Access to Civil and Family Justice*, *supra* note 28 at 2.

[85] Ralf Michaels, "Globalization and Law: Law beyond the State" in Reza Banakar & Max Travers, eds, *Law and Social Theory* (Oxford: Hart Publishing, 2013) at 5.

Globalization brought some rethinking in the division of roles, in both internal and international legal provisions. The incorporation of new actors like multinational enterprises and non-governmental organizations (NGOs) substantially contributed to the transformation of the states, taking into consideration their activities which simultaneously embrace diverse legal systems and territories. The pluralism of structures demanded the production of new law theories to accommodate unprecedented economic situations, with the participation of private actors. [86] This new reality has undoubtedly had an effect on access to justice, which had its focus on state provided solutions for conflicts due to relations within its territories.

a) Globalization impact on the definition of access to justice

A new sovereignty is the result of the relocation of a traditional centered model position of the state, affecting former concepts of territory, legal order and justice.

The phenomenon called denationalization reveals the shift of some state-owned responsibilities to supranational institutions, formed on economic principles, which deal directly with national organizations.[87] However, as considered by Saskia Sassen,[88] national and global are not in opposition, and the public instances cannot be excluded from global governance.

Multinational corporations embrace governmental roles as problem solvers, such as those associated to health, insurance, environmental protection, first response to natural

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[86] Jean-Bernard Auby, *La globalisation, le droit et l'État*, 2nd ed (Paris: LGDJ, 2010).

[87] "We find more and more delegation of lawmaking powers to supranational institutions […]", Michaels, *supra* note 85 at 12.

[88] Saskia Sassen, "Qui gouverne la mondialisation?" (2007) 180 Sciences Humaines 10 at 48.

disasters and others.[89] They demonstrate being more competitive, once "they are quicker and more agile than their national counterparts"[90] and government agencies.

Globalization goes beyond territorial limits. Although territorial integrity is one of the basic characteristics of a state, globalization made national borders less central and effective. Technology advancements in communication reduced the importance of geographical distances, implemented qualitative changes in social interaction and made possible global production chains. International corporations regulate trans-border trades and provide stability to business.[91]

It is essential to insert the national legal systems in the global legal pluralism,[92] which comprises hard law, with state binding force, and contracts, rules of conduct, sector regulations,[93] or other norms with practical effects created by private actors.

In the access to justice perspective, an increased participation of international courts, such as the International Criminal Court (ICC), the Inter-American Court of Human Rights (IACHR), the European Court of Humans Rights (ECtHR), the Court of Justice of the European Union (CJEU), and the International Court of Justice (ICJ) in dispute resolution seems to be the recognition of conflicts that surpass national borders, single state legal provisions and traditional judicial resolutions. In addition, just like contracts produced in

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[89] Michael Barbaro, "Wal-Mart: The New Washington" *The New York Times* (3 February 2008) at 3, online : <http://www.nytimes.com/2008/02/03/weekinreview/03barb.html?_r=0>.

[90] For example, the I. Global Inc. offers its multinational services under the following description: "The iGlobal Group was formed in 1995, by a team comprising of emerging technopreneurs and business evangelists with a vision to take Information Technology anywhere, anyplace. We have global operations with direct presence in the US, Canada, Australia, Singapore, Malaysia, and primarily in many parts of India acting as an Off-shore Development Centers." iGlobal Inc, online:< http://www.iglobalinc.com/home/iglobal-inc/>.

[91] Michaels, *supra* note 85 at 9-10.

[92] F. G. Snyder, "Governing Globalization" in M. Likosky, ed, *Transnational Legal Processes. Globalization and Power Disparities* (London: Lexis Nexis, 2002) at 71-74.

[93] Like *lex mercatoria*.

lawyers' offices creatively regulate transnational business, the solution for many claims will be found in international negotiation, mediation or arbitration outside the courts of justice.[94]

However, it is not possible to consider that globalization presents the same results in countries like Canada and the United States when compared with Ethiopia, Kenya or even developing nations like Brazil.[95] As an external factor, globalization is shaped by different nations through their national laws and with respect to diversity of cultures. We would prefer to stand for the idea that "market-led governance does not indicate a decline in state power, but in many cases its expansion and reorganization".[96] Legal systems should not abandon collective and public responsibilities or respect for human values, to favor profitable markets and maximize profit. Economic efficiency has to cope with political values like justice, equality, liberty, security and order. Contemporary societies face difficulties that are not easily solved by internationalization of solutions.[97]

Still, there are many questions to be answered. Is there a new justice to be accessed? Does the idea of globalization present solutions or challenges to the previous format? How can justice be delivered without territorial boundaries or time limitations? Who takes control of the outcomes?

Precise answers cannot be provided, since it is not an easy task to evaluate if the inevitable changes are on the whole progressive or if they can be flawed, because:

> "[…] the globalization system, unlike the Cold War system, is not static, but a dynamic ongoing process: globalization involves the inexorable integration of markets, nation-states, and

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[94] Like the International Court of Arbitration, which is part of the International Chamber of Commerce (ICC).

[95] Michaels, *supra* note 85 at 7.

[96] Joshua Barkan, "Law and the Geographic Analysis of Economic Globalization" (2011) 35 Progress in Human Geography 589 at 590.

[97] Monique Chemillier-Gendreau, "Peut-on faire face au capitalisme?" in Monique Chemellier-Gendreault & Yann Moulier Boutang, eds, *Le Droit dans la Mondialisation: Collection Actuel Marx Confrontation, Série Droit* (Paris: PUF, 2001) at 17.

> technologies to a degree never witnessed before – in a way that is enabling individuals, corporations, and nation-states to reach around the world farther, faster, deeper, and cheaper than ever before, and in a way that is also producing a powerful backlash from those brutalized or left behind by this new system."[98]

Although the developments that will result from social and cultural changes brought by globalization may be considered unpredictable,[99] it is definitely important to embark access-to-justice in the world where territory can be anywhere including cyberspace, time is not limited by office hours, costs gain new parameters with the use of telecommunication technologies,[100] and all these aspects give a new speed to social and commercial relations, generating conflicts that have to be solved using updated perspectives, built with ideas of integration in a world united by a wide web.

Automation, computerization, miniaturization, microchips, digitization, satellite communications, fiber optics, internet, clouds and so on, transformed the circulation of information[101] and the knowledge of rights modifies what is expected as justice.

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[98] Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization*, 2nd Ed (New York: Anchor Books, 2000) at 9.

[99] Jon Mandle, "Globalization and Justice" (2000) 570 Annals of the American Academy of Political and Social Science - Dimensions of Globalization at 126.

[100] "(…) today's era of globalization is built around falling telecommunications costs – thanks to microchips, satellites, fiber optics and the Internet. These new technologies are able to weave the world together even tighter. These technologies mean that developing countries don't just have to trade their raw materials to the West and get finished products in return; they mean that developing countries can become big-time producers as well. These technologies also allow companies to locate different parts of their production, research and marketing in different countries, but still tie them together through computers and teleconferencing as though they were in one place. Also, thanks to the combination of computers and cheap telecommunications, people can now offer and trade services globally – from medical advice to software writing to data processing – that could never really be traded before. And An why not? According to *The Economist*, a three-minute call (in 1996 dollars) between New York and London cost $300 in 1930. Today it is almost free through the Internet." Thomas Friedman, *supra* note 98 at xviii.

[101] "Globalization has its own defining technologies: computerization, miniaturization, digitization, satellite communications, fiber optics and the Internet, which reinforce its defining perspective of integration.(…)While the defining measurement of the Cold War was weight – particularly the throw weight of missiles – the defining measurement of the globalization is speed – speed of commerce, travel, communication and innovation.(…) In globalization the most frequently asked question is: 'To what extent are you connected to everyone?'(…) In globalization the second most frequently asked question is: 'How fast is your modem?' The defining document of

The information society and a globalized era are part of an undeniable reality in development. However, it is up to each nation, even if submitted to general rules in a perspective of integration to the global context, to find its own way by adapting, complementing or developing solutions that are adequate to its internal policies.[102]

We must take into consideration that, although globalization may increase social and cultural modifications, there is no predictable homogenization of cultures. If it appears to be easy to implement a concept of justice within a specific society, for sure, in an age of globalization, different concepts of good will be shared and interaction shall occur despite of the diversity of ends pursued by each individual or group.[103]

Considering that "social institutions are sustained, transformed, or abolished by actions and attitudes of people collectively",[104] there is a social responsibility of all actors that participate in the process of adapting traditional concepts of justice to new circumstances. Globalization gives access to justice a chance of spreading information, reducing costs and incorporating new elements.[105]

b) How globalization has affected the access to justice for vulnerable populations

When state and non-state actors assume the commitment to supervise real and potential breakdowns of the rule of law, remedies must be fair and sensitive to the needs of all, and special attention shall be given to obstacles encountered by vulnerable populations in

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the Cold War system was 'The Treaty'. The defining document of the globalization system is 'The Deal'." *Ibid* at 9-10.

[102] Jose de Oliveria Ascensão, "Sociedade da Informacao e mundo globalizado" (2002) 22 Revista Brasileira de Direito Comparado 180 at 180-182.

[103] Mandle, *supra* note 99 at 127-130.

[104] *Ibid* at 128.

[105] "A crucial element of cultures is how they adapt to new circumstances. To deny a culture the ability to incorporate new elements and reinterpret old elements in response to new pressures and opportunities is to deny it 'what many would regard as its most fascinating feature: its ability to generate a history." *Ibid* at 136.

understanding and asserting their legal rights, never forgetting that "a commitment to equal justice is central to the legitimacy of democratic processes".[106]

Many studies have been done by the World Bank involving various developing countries regarding low-income population, with special concern to access to justice, access to legal information and legal literacy, adequacy of legal representation[107] and protection of human rights.

It is axiomatic that some social problems could be solved through education, and that ignorance keeps many individuals away from the existing mechanisms of preservation of their rights.[108] A right that cannot be identified as violated will not be restored. While some basic injuries regarding family and criminal matters could be easily part of the knowledge of legal rights even for those that received less formal education, new complex rights raised by an expanding legal universe, e.g., environment, e-commerce, consumers, health, economic laws[109] will demand more complex legal knowledge, and consequently, investments regarding proper legal advice.

Legal nescience leads to illegalities, abuse of power and unconscious injustices. It is not expected, however, that legal literacy will lead to reduction of conflicts. In a first moment, alerting and empowering people of their rights can result in increasing lawsuits and complicate caseload management.[110]

Justiciable events can be explained as happenings and circumstances that raise legal issues but that people may fail to name or identify as an injury and with respect to which they

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[106] Rhode, *Access*, *supra* note 11 at 4.

[107] Michael Dowdle, et al, "The Effect of Globalization on Domestic Legal Services" (2000) 24 Fordham Int'l LJ 277 at 282.

[108] Fontainha, *supra* note 28 at 52.

[109] Galenter, *supra* note 15 at 117-118, 123.

[110] Santos, *supra* note 28 at 36-37.

may not expect any compensation. A subset of these problems is considered grievances, and corresponds to events or circumstances that people recognize as injurious and they are able to determine the agent responsible for the injury.[111]

Both Marc Galenter[112] and Lawrence Friedman[113] mention the dispute pyramid perspective in their analysis of the access concerns, and identify a portion of disputes that are inhibited by the fact that the individuals might fail to recognize the injury or to attribute it to another party. Many incidents are not pursued as legal claims because of ignorance, intimidation caused by the complexity of laws and procedures, or costs barriers.

A report published in October 2013, by the Action Committee on Access to Justice in Civil and Family Matters in Canada, establishes as important elements for an accessible justice system:

> • "public awareness of rights, entitlements, obligations and responsibilities;
>
> • public awareness of ways to avoid or prevent legal problems;
>
> • ability to participate effectively in negotiations to achieve a just outcome;
>
> • ability to effectively utilize non-court and court dispute resolution procedures".[114]

Unfortunately, there are different degrees of vulnerability and poverty around the world, especially when considering developing countries. Populations that still have to

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[111] Rebecca L. Sandefur, "Access to Civil Justice and Race, Class, and Gender Inequality" (2008) 34 Ann Rev Sociol 339 at 341-342.

[112] "The central intellectual construct of the dispute perspective was the dispute pyramid – the notion that any sector of the legal world can be envisioned as a pyramid in which a base of troubles or injuries underlies a layer of perceived injuries, which leads in turn to successively smaller layers of grievances (injuries for which some human actor is viewed as responsible), claims, and disputes." Galenter, *supra* note 15 at 117.

[113] Lawrence Friedman, *supra* note 16 at 7.

[114] *Access to Civil and Family Justice*, *supra* note 28 at 2.

struggle with illiteracy and starvation face more difficulties to fight hunger for justice or to understand about their rights through educational programs about legal systems. And this is where the principle of equality before the law needs to meet the concept of equality of access to the law, making it fundamental for the law to be equally and impartially accessible.[115]

When addressing these difficulties, the World Bank related the complexity, the scope and the number of legal rules as barriers encountered by vulnerable people that are rarely literate in legal matters, and noted that such rules are frequently beyond the capacity of many laypeople to comprehend.[116]

In situations where there is lack of legal knowledge, it is not recommended to leave the party with complete control over the resolution of the justiciable problem. This gap has to be adequately overcome with legal advice and assistance to avoid the negative impacts of unresolved disputes.

It is part of the transparency of governments to have websites where citizens can consult laws, search for answers about some legal common doubts or find paths to solve issues. Nevertheless, even those who live actively online may find it difficult to discover useful information, because of specific and incomprehensible vocabulary that causes legal language barriers.

An example of governmental program to enhance access to justice through providing easy information can be seen through a visit to the website of the Brazilian Ministry of Justice,[117] where statistics and other information about courts, manuals on human rights,

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[115] Sir Jack I. H. Jacob, "Access to Justice in England" in Cappelletti & Garth, *supra* note 5 at 420-421.

[116] The World Bank, *Law and Justice Institutions: Legal Information and Public Awareness*, online: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0, contentMDK:20760741~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>.

[117] Ministério da Justiça, *Acesso à Justiça*, online: <http://ww.acessoajustica.gov.br/>.

women and worker rights, and so on, can be found, along with instructions about procedures and how to ask for help.

The Brazilian National Council of Justice, part of the judiciary branch, also has a webpage on access to justice,[118] providing information about conciliation and mediation, small claims courts, legal aid, with special emphasis on centers for conciliation installed in courts as a part of a policy of finding the appropriate solution for conflicts of diverse nature.

It is certain, however, that legal education is not the only frontier to be surpassed when the access to justice concept has to deal with new types of conflicts that either result of multinational issues or correspond to commercial or personal internet based relationships, exceeding territorial limits and person to person contacts.

Democratization of information also means that people cannot be isolated from understanding life beyond borders. Technology has been creating bridges and providing many opportunities to those who were once kept hidden from progress behind walls of lack of communication.[119]

It seems to be utopian to imagine that we could resolve all conflicts, in all circumstances, achieving social peace to everyone's satisfaction,[120] but we must update the concepts of justice to augment the possibilities of obtaining fair justice, to extend opportunities to vulnerable populations, and to facilitate the access to all citizens.[121]

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[118] Conselho Nacional de Justiça, *Acesso à Justiça*, online: <http: www.cnj.jus.br/programas-de-a-a-z/acesso-a-justica>.

[119] Thomas Friedman, *supra* note 98 at 67-70.

[120] *Ibid* at 137.

[121] "Although economic development, facilitated by globalization, has reduced poverty more rapidly in the past century than at any other time in human history, many millions of people are forced to live in extreme poverty, which prevents them from participating in a meaningful way in any cultural practices [...] As globalization ties the world more closely together, we must ensure that the institutions that form the background to our interactions are just. Only then will people have a fair opportunity to shape their own lives and history." *Ibid*.

In this regard, the traditional access to justice concepts had to be expanded in order to encompass globalized actors, growth of human knowledge, and elevated expectations generated by social and cultural fast dynamics.[122] It is important that access to justice programs consider legal and political investments in all instruments available to understand and remove the barriers to achieve effective protection of rights, including the new legal universe.

c) The use of technology for solution of conflicts in globalized societies

Online systems for the resolution of conflicts seem to be appropriate instruments to deal with these new social demands. The definition of ODR, however, commonly presents an inverse duality of the traditional concept of access to justice. First, a conventional and straight definition relates online dispute resolution (ODR) exclusively to the origins of alternative dispute resolution (ADR), considering that there is just a basic migration to the internet world.[123] Second, a wider view of online justice encompasses mechanisms of ADR, systems adopted in courts and even new ideas that raise from the virtual environment.[124]

In 2004, Thomas Shultz, in a review on the literature about ODR, pointed out a variety of types of procedures that were included in the field, such as blind bidding, automated negotiation, automated settlement systems, assisted negotiation, mediation, online consumer advocacy and complaint, complaint assistance, software-based or automated mediation,

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[122] Galenter, *supra* note 15 at 122-125.

[123] The United Nations Commission on International Trade Law, which is responsible for "modernization and harmonization of rules on international business", carries working groups to debate arbitration, conciliation and online dispute resolution rules for cross-border electronic commerce transactions. Even though ODR is mentioned as "a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology", the term is used only to refer to out of court procedures. United Nations Commission on International Trade Law, *Online Dispute Resolution: On-line Resources*, online: <http://www.uncitral.org/uncitral/publications/online_resources_ODR.html>.

[124] Iavarone-Turcote, *supra* note 6 at 4-8; Karim Benyekhlef & Nicolas Vermeys, "ODR and the Courts" in Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online Dispute Resolution: Theory and Practice* (London: Eleven International Publishing, 2012) at 307-308, 322 [Benyekhlef & Vermeys, "ODR and the Courts"].

facilitative mediation, conciliation, consumer schemes, consumer complaint boards, ombudsmen, med-arb for consumers, jury proceedings, arbitration, non-binding evaluation, non-binding arbitration, automated arbitration, mock trials, and credit-card charge backs,[125] many that could be related to consumers relations or e-commerce, but not limited to these situations.

Although ADR movements appeared as an alternative to difficulties faced by state provided justice, "ODR is a reaction to the constraints of the offline world, not strictly to courts".[126] A digital access to justice is not an opposition to justice in courts. It is the adaptation of the mechanisms of justice to a new environment where some obstacles can be overcome and justice can be more efficient and accessible.[127] Certainly, as in all cultural changes, it is inevitable to abandon or transform some older forms, what will present new controversies. Some people will easily embrace new procedures, while others will stick to familiar routines,[128] but that will not be enough to hold back the expanding frontiers.

Our challenge in this research is not to rescue the history of access justice as a way to justify the barriers that are faced today. We will follow the paths of access to justice in this globalized scene, understand the goals that can be reached with the contribution of information technology to the production of enforceable decisions by automating processes[129] and try to subsidize with elements that help envisage justice neither as a privilege of elites,[130] nor as a deposit of unnecessary disputes that would be better off forgotten.[131]

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[125] Thomas Schultz, "Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust" (2004) 6: 1 NCJ L & Tech 71 at 73.

[126] Gabrielle Kaufmann-Kholer & Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (London: Kluwer Law International, 2004) at 7.

[127] Benyekhlef & Vermeys, "ODR and the Courts", *supra* note 124 at 317.

[128] Mandle, *supra* note 99 at 136.

[129] Reiling, *supra* note 33 at 190-191.

[130] Fontainha, *supra* note 28 at xxiv.

[131] Lawrence Friedman, *supra* note 16 at 7.

B. Major challenges to be faced

It is not our intention to provide miraculous solutions to the dissatisfaction with the judicial systems, or to convince that we will finally achieve a society with no unresolved claims. Understanding the challenges of access to justice and situating them in the globalized world may help the equalization of indispensable arms to deliver effective justice. Neither the judiciary system, nor the alternative dispute resolution structures, can become solution providers with no compromise related to the fairness of the outcomes or the social impacts of their performances.

Although access to justice and judicial efficiency are distinct concepts,[132] there are no benefits in providing access to courts if the judicial system can't provide the expected results regarding the protection of rights. Thus, these two ideas must remain connected in the same challenge that justice shouldn't cost much, neither take too long.

Unfortunately, a crisis in the access to justice guarantee is observed in both developed and developing countries. Addressing this issue in 1997, Judge Robert Sweet[133] asked a fundamental question: "What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law?" At that time, his answer was to expand constitutional right to counsel in civil matters, once lawyers are essential to the function of an effective justice system.[134]

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[132] Lafond defines an efficient justice system : "[…] il s'agit d'un système : - qui mène à des résultats justes; - par un traitement équitable; - à un cout abordable, proportionnel aux enjeux; - dans des délais raisonnables; - adapté aux besoins des parties; - compréhensible par les utilisateurs; - qui offre une prévisibilité des résultats; - dans un système où règnent l'efficacité, la bonne organisation et le financement adéquat; et que tient compte autant des intérêts collectifs". Lafond, *supra* note 6 at 19-20.

[133] Robert W. Sweet, "Civil 'Gideon' and Justice in the Trial Court (The Rabbi's Beard)" (1997) 42 The Record 915, 924.

[134] Justice Earl Johnson, Jr. "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies" (2000) 24: 6 Fordham Int'l LJ S83.

In March 2010, the United States established the Access to Justice Initiative with the mission to help the criminal and civil judicial systems deliver fair and accessible outcomes to all, regardless of status or financial conditions. Three principles guide its actions: promoting accessibility, ensuring fairness, and increasing efficiency. The first two focus on equality, based on understanding and exercising rights and overcoming economic or other disadvantages. The third one aims at the effective delivery of justice, by avoiding waste of time and money.[135]

The crisis situation has also been recurrently approached in Canada,[136] where Chief Justice Beverly McLachlin of the Supreme Court of Canada recognized an "increasingly failing in our responsibility to provide a justice system that [is] accessible, responsive and citizen-focused".[137] The problem involves, in brief words, high cost of litigation, delays in case processing and decisions, geographical inaccessibility of courts, deficiency in legal aid assistance, and a consequent raise on self-represented litigants.

Two bold reports were released last year heavy with worries, but envisioning comprehensive reforms that could make justice systems simpler, more coherent and focused on public needs.

The report "Reaching Equal Justice: An Invitation to Envision and Act" was released by the Canadian Bar Association's Access to Justice Committee at the 2013 CBA Legal Conference in Saskatoon. In its invitation, the CBA Access to Justice Committee emphasizes that "our understanding of the prevalence of legal problems and the severe and disruptive

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[135] Access to Justice, *The Access to Justice Initiative*, online: U.S. Department of Justice <http://justice.gov/atj/>.

[136] "Le juge en chef de la Cour supérieure, l'honorable François Rolland, a un jour écrit : 'La pensée populaire est imprégnée du cliché voulant que tout recours à la justice soit un rendez-vous avec l'éternité'. L'honorable Antonio Lamer, jadis de la Cour suprême, avait à sa façon qualifié les délais de 'sida de la justice'." Lafond, *supra* note 6 at 63.

[137] Nikki Gershbain, "Law students can help solve Canada's access-to-justice crisis", *Grand Prairie Legal Guidance* (9 December 2013), online: <http://www.gplg.ca/news/article.511943>.

impact of unresolved legal problems has grown exponentially over the past two decades",[138] but not much has been done to transform knowledge into action. This report frames thirty one concrete measurable targets to be achieved between 2020 and 2030, necessary to restore the connection of people to a justice system that shows concern to diverse legal needs, provides timely and personalized assistance, and is committed to fair outcomes.[139]

The other report, "A Roadmap for change", published by the Action Committee on Access to Justice in Civil and Family Matters in October 2013, presents three main areas to be reformed until 2019: innovation goals, institutional and structural goals, and research and funding goals. It is considered by Justice McLachlin a plan of actions that should be achieved in order to improve access to civil justice across Canada.[140]

In Brazil, the dissatisfaction of the population with access to justice is so centered on the backlog and congestion of undecided cases, that other elements of inaccessibility, such as geographical distances and deficiency in legal aid, are considered to be less consequential.

Searching for solutions, many procedural reforms were made to reduce the number of appeals, to concentrate the solution of cases involving similar matters, and to temporarily anticipate the decisions. Also, the ideal of justice was so hard to be achieved with the recurrent delay on the resolution of the cases in all levels of the Judiciary that the Federal Constitution was amended in 2004, by the Amendment n. 45, which added to article 5 that "LXXVIII – a reasonable length of proceedings and the means to guarantee their expeditious consideration are ensured to everyone, both in the judicial and administrative spheres".[141] Changes in procedures involved the inclusion of conciliation as a first step after filing a petition in order to

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[138] The Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act- Report of the CBA Access to Justice Committee* (2013), online: <http://www.cba.org/cba/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf>.

[139] *Reaching Equal Justice*, *supra* note 138 at 151.

[140] *Access to Civil and Family Justice*, *supra* note 28.

[141] Constitution of the Federative Republic of Brazil, *supra* note 43.

accelerate judicial decisions, and also to review cases sent to courts of appeals that are related to new precedents of Superior or Supreme Courts.

The Brazilian National Council of Justice has been holding annual meetings to determine national goals for the Judiciary, with the objective to align the constitutional rights of all Brazilians, and to give special attention to the reasonable length of proceedings in courts. However, neither law reforms, nor creative modifications in procedures, or strategic targets have been sufficient to effectively solve the delay on processing a great number of lawsuits and regain confidence in the judicial system.

It seems unanimous that advancements on access to an efficient justice agenda depends on popular understanding of law, protection of collective rights, proportional costs, availability of legal aid delivery systems, efficient management of courts, reasonable delay of procedures, equitable treatment of parties, and last but not least, fair results.[142]

Addressing the existing barriers for an equal access, the United States Institute of Peace emphasizes that "justice systems that are remote, unaffordable, slow, or incomprehensible to the public effectively deny legal protection".[143] Unfortunately, this denial represents the lack of access to justice in most nations that needs to be redressed in its quality and quantity facets.

Over decades, access to justice has gone through waves of theoretical analyses, always centered in detecting problems and craft solutions. Considering that obstacles, like high cost of litigation and delays in case processing, seem to be very difficult to surpass and can affect the development of many nations, all efforts must be directed to drop the rhetoric mask from the

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[142] Lafond, *supra* note 6 at 10-19.

[143] United States Institute of Peace, *supra* note 77 at section 7.8.4.

discourse of access to justice and transform into reality the effective restoration of violated rights.[144]

Civilised societies must enforce equality and avoid the perpetuation of second-class justice or second-class access to justice. An effective access to justice requires fast answers from a Judiciary that needs to adapt to the new sort of disputes that appear in the globalized era.[145] It is not sufficient to confirm the existence of delays in procedures. It is essential to understand their causes and search for solutions.

1. Delays in Procedures

a) General consensus

Back in 1975, the Supreme Court of Texas, in the United States, warned that the delays in judicial decisions do not only affect the litigants, but the administration of justice itself. The consequences are not limited to the postponed or unfeasible restoration of the injury. Courts backlogs increase, costs for the parties are considerably augmented, and judges, facing fundamental impediments to the full determination of the facts and comprehension of proofs, just provide the possible decisions that may not correspond to fair justice.[146]

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[144] Jose Renato Nalini, "Novas Perspectivas no Acesso à Justiça", online: <http://daleth.cjf.jus.br/revista/numero3/artigo08.htm>; Rhode, "Whatever Happened", *supra* note 59 at 870.

[145] Jacob, *supra* note 115 at 421; Ana Carolina Fonseca Martinez Perez & Roberto Brocanelli Corona, "O processo eletrônico como efetivação do direito fundamental de acesso à justiça" (2010) A 14: 19 Revista Estudos Jurídicos *UNESP* 269, at 276.

[146] "Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressuring judges to take short cuts, interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganization and insolubility. But even these are not the worst of what delay does. The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination. If the facts are not fully and accurately determined, then the wisest judge cannot distinguish between merit and demerit. If we do not get the facts right, there is little chance for the judgment to be right." *Southern Pacific Transportation Company v. Gussie F. Stoot*, 530 S.W.2d 930 (Tex.1975).

According to Bielsa and Graña,[147] the longer it takes for a claim to achieve its final decision, the harder it is to repair injustice, since a remedy cannot be considered just if a reasonable amount of time has passed with no resolution of a conflict.

In 1921, in a graduation speech delivered to law students at the "Faculdade de Direito de São Paulo", which became known as "Oração aos Moços", Rui Barbosa[148] asserted that delayed justice is not justice at all, but rather qualifies as injustice, since it breaches the written rights of litigants, and causes damage to their property, integrity and liberty.[149]

The concept of delay brings in itself the perception of waste of time. Our contemporary world is a place where time seems to be running in a faster speed, where everything is urgent, and where people share the feeling of always being late for their personal and professional lives. Despite the increasing human longevity, our societies face an everyday pressure of lack of time, trying to expand the fragment of time called "present moment" to extend situations that were already part of the past and to anticipate a future that still does not exist.[150]

In this scene, in which celerity is associated to triumph, it is not easy to imagine a world of peace and tranquility. The fast food era associated with online and instant information are elements of a fast life, and, since the legal order cannot be out of this time machine, there is pressure for fast justice.

This shift to a globalized social dynamics, brought by a revolutionary advance in technology, also amplified and generalized conflicts, and the legal order and its machinery to

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[147] Rafael A. Bielsa & Eduardo R. Graña, "El tiempo y el proceso", online: <http://www.argenjus.org.ar/argenjus/articulos/granabielsa.pdf>.

[148] For his distinguished participation in the 2nd Hague Conference, he earned the nickname "Eagle of the Hague".

[149] Rui Barbosa, *Oração aos Moços*, 5ª edição popular anotada por Adriano da Gama Kury (Rio de Janeiro: Edições Casa de Rui Barbosa, 1999) at 40.

[150] Mauro Ivandro Dal Pra Slongo, "O Processo Eletrônico Frente aos Princípios da Celeridade Processual e do Acesso à Justiça" *Universo Jurídico* (maio 2009), online: <http://uj.novaprolink.com.br/doutrina/6248/O_Processo_Eletronico_Frente_aos_Principios_da_Celeridade_Processual_e_do_Acesso_a_Justica>.

provide justice are struggling to follow the pace of societies dissociated from geographic limits, living in updated virtual spaces where things happen without barriers of time.[151]

In this social background, the element time is closely related to the fundamental guarantee of access to justice, which comprehends providing effective judicial provision. There is an international normative framework establishing that courts shall handle everyone's case "without undue delay or within a reasonable time". These words are present in the International Covenant on Civil and Political Rights (ICCPR) (Article 14),[152] the African Charter on Human and People's Rights (Article 7), the American Convention on Human Rights (Article 8) and the European Convention on Human Rights (ECHR) (Article 6). Signatory countries face the obstacles to implement this standard, not only as normative rules[153] or in their strategic plans for the Judiciary, but as effective guarantees that "timely justice is not just an abstract right".[154]

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[151] Slongo, *supra* note 150 at section 1.2.

[152] "Article 141. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay." International Covenant on Civil and Political Rights, *supra* note 17.

[153] The Constitution of the Federative Republic of Brazil was amended in 2004 by Amendment n. 45, which added to Article 5 that "LXXVIII – a reasonable length of proceedings and the means to guarantee their expeditious consideration are ensured to everyone, both in the judicial and administrative spheres." Constitution of the Federative Republic of Brazil, *supra* note 43.

[154] Reiling, *supra* note 33 at 83.

In this context, the principle of reasonable duration of proceedings is intrinsically correlated to the preservation of rights. Moreover, access to justice is substantially attached to a concept of efficiency associated with celerity, and the systems must be improved in order to reduce the duration of the long path that citizens encounter to recover their rights.

In relation to time of proceedings, it is important to consider Cappelletti's reference regarding time in courts, and the fact that in many countries, sometimes litigants have to wait "over two or three years for an enforceable judicial decision".[155] From our experience as a member of the Brazilian Judiciary, we have seen conciliations taking place in one month, and preliminary dismissal of cases in less than a week, however, if a case is taken to all levels of appeal allowed by the Brazilian rules of procedures, time becomes impossible to measure.[156]

Backlogs, congestion, complexity of cases, lengthy procedures and lack of structure can be identified as common causes for the problem, which is aggravated by uncontrolled demand, limited and inflexible resources, and some cultural, economic and political factors.[157]

Backlogs, characterized by an overwhelming number of unresolved lawsuits, have been considered an administration problem that could be solved with some organization and methods. If this is an aspect that can be identified as part of the discredit of the judicial system, the explosion of litigation derived from laws, which enlarged the doors of legal systems, allied

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[155] Cappelletti & Garth, *supra* note 5 at 14.

[156] As an example, the decision held in the Ordinary Action n. 94.00.01300-0, filed on January 28, 1994 in the Federal Court in Brasilia, still awaits for enforcement procedures, since the dispute was object of all possible appeals of the defendant that uses the delay of the Judiciary to postpone its obligations. Fontainha mentions some statistics from the State Courts in Rio de Janeiro and arrives to the conclusion that if a case does not face appeals to the Superior Court of Justice or the Supreme Court, and no incidents occur in the enforcement stage, it could take fifty months to be final. Fontainha, *supra* note 28 at 90-91.

[157] Reiling, *supra* note 33 at 102; about the crisis in the Brazilian Judiciary see Fernando da Fonseca Gajardoni, *Técnicas de aceleração do processo* (São Paulo: Lemos & Cruz, 2003) at15-16.

to the lack of structure and tools to help implement more efficient routines, should be considered as part of the problem to be administrated.[158]

Movements derived from massive social changes empowered women, students, minorities, disadvantaged people and many others that did not have their civil rights acknowledged before. Other empowered plaintiffs, positioned as victims, started to question liability of public and private services, as if there is an invitation for litigation. Citizens find in labor unions, law firms, and environment protection organizations, besides all types of associations and pressure groups, the encouragement to transform any dissatisfaction into a claim. The result is known by all: a slow and inefficient system.[159]

b) The Brazilian experience

The theoretical situation questioned by Lawrence Friedman is now brought up by real statistics in the Brazilian society. Asking about how much access to justice societies really want, he comes up with the following suggestion:

> "Let us try to imagine a world in which everyone who had any claim whatsoever could get a hearing, had inexpensive and convenient access to counsel, and presumably could get his claim resolved in his favor. Would this be a good society?"[160]

The President of the Court of Appeals of Sao Paulo, Brazil, Judge José Renato Nalini, in a seminar for a group of business leaders, emphasized that the Brazilian judiciary has the mission of stimulating conciliations as indispensable means to stabilize and reduce the caseload in Brazilian courts. Statistics show more than one hundred million cases in a country with a population of approximately two hundred and two million people, and considering that each claims has the minimum of two parties involved in the conflict, there is one lawsuit for

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[158] Lawrence Friedman, *supra* note 16 at 5-6.

[159] *Ibid* at 6-9.

[160] *Ibid* at 7.

each Brazilian.[161] Is the Brazilian society the most litigious in the planet or is there an excessive access to justice?

Back to Lawrence Friedman, the answer would be that millions of disputes or potential disputes should not evolve into formal claims or complaints, either because they are not worth the time and costs that it would waste, or because they do not need to get resolved. Situations, such as the inconvenience of loud music played in the neighbor's house, demonstrate the kind of annoyance that should be forgotten on the following day, instead of turning into a suit. And this shall not be taken as criticism against the access to justice movement.[162] Understanding the explosion of litigation can help find the way to administrate the backlogs and avoid the burden of responsibility for the delays, which is frequently deposited on the shoulders of the members of the Judiciary.

In Brazilian Courts, the National Council of Justice,[163] which has the Standing Committee on Access to Justice and Citizenship,[164] has set, since 2009, as goal number 2 for the Judiciary to identify the oldest lawsuits and take concrete steps to present a solution to these claims, avoiding congestion and delay in procedures. Many sporadic blitzing of backlogged cases have been adopted in order to face the challenge and ensure the constitutional right to reasonable duration of proceedings. There is statistic control of the results[165] and a lot of pressure to achieve the target. It is relevant to mention that these goals

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[161] "Judicialização Excessiva", *Consultor Jurídico* (24 March 2015), online: <http://www.conjur.com.br/2015-mar-24/nalini-quantide-processos-prejudica-imagem-brasil>.

[162] Lawrence Friedman, *supra* note 16 at 7.

[163] The National Council of Justice was created in 2004 by the 4th amendment to the Constitution of the Federative Republic of Brazil, which introduced Article 103-B, and was installed on June 14, 2005.

[164] The Council is responsible for the adoption of measures regarding democratization of access, enforcement of court decisions, social inclusion and development, rights awareness and citizen values. Conselho Nacional de Justiça, *Comissão Permanente de Acesso à Justiça e Cidadania*, online: <http://www.cnj.jus.br/sobre-o-cnj/comissao-de-acesso-a-justica-e-a-cidadania>.

[165] According to a report from Feb 8, 2013, provided by the National Council of Justice, the goal number 2/2009 was 79.88% achieved. Conselho Nacional de Justiça, *Documentos,* online: <http://www.cnj.jus.br/gestao-e-planejamento/metas/metas-de-nivelamento-2009/meta-2/documentos>.

are always result of national debates with representatives from all branches of the Brazilian Judiciary, what reveals total awareness of the problem and the will to modify the situation, offering society a true access to justice.

In 2009, Brazilian courts of law attempted to clear the backlog of cases by deciding all those cases that were filed before December 31st, 2005. Although that did not mean that more recent cases would not be decided at that time, it was important to concentrate efforts to manage the delays. In 2010, the date was changed to include all cases filed before December 31st, 2006, and the courts were able to dispose of 74.16% of these old cases.[166] In 2013, it was decided that some special civil and criminal cases regarding injuries to public property and public administration which were filed before December 31st, 2011 should have their judgements prioritized by the courts.

The current goal, number 2/2015, determines distinct commencement date limits for the different levels and specialized branches of the Judiciary, December 31st, 2010, being the oldest parameter.[167] We have to admit that these goals are very shy in relation to the reasonable duration of proceedings, since they refer to a first judgement that sometimes represents a small step in the long path to the final enforcement, but they represent some management efforts to control the delay in procedures.

Moreover, to fight the congestion, since 2010, the first goal has been to decide an amount of cases at least equal to the number of new cases filed in the year of reference and part of the stock, so that it can be possible to maintain control of the pace of litigation.

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[166] Based on a report from July 25, 2013, provided by the National Council of Justice, Conselho Nacional de Justiça. *Meta 2/2010*, online: <http://www.cnj.jus.br/files/conteudo/arquivo/2015/02/7c1a33f63db5582f7ae35afc9c4de131.pdf>.

[167] Applied for first instance courts of the Federal Justice. Conselho Nacional de Justiça, *Metas Nacionais para 2015*, online: <www.cnj.br/images/gestaoplanejamentocnj/2015/Metas_Nacionais_aprovadas_no_VIII_Encontro.pdf>.

However, during the last decades, societies have faced significantly transformation on how people interact. The information society, with the development of new technologies, is highly influenced by the digital revolution that considerably impacts social relations[168] and, as a consequence, expands the realm of injustices.

Congestion here represents a massive production of injustice that has been enlarged by the growth of knowledge, such as new scientific and technological discoveries, in a world where individuals contend increasingly. According to Galenter, "people are capable of identifying or inventing new problems as quickly as the old ones are solved".[169] So, it is quite impossible to find a formula to maintain the equation of justice and injustice in a sustainable balance, which could be timely administrated by courts and would not inhibit access to justice.

It is seen in some countries that alternative methods have been used by ordinary people to resolve their problems out of courts, reducing costs and congestion. Nevertheless, as mentioned earlier, the statistics of Brazilian Courts show that, despite all the efforts to reduce backlogs, to encourage conciliation and mediation, the search for judicial resolution is higher than the current capacity of courts to provide the public service. The goal of deciding more cases during the year than the new claims filed is usually not achieved by most branches of the judicial system.

Since 2006, the National Council of Justice has determined the implementation of conciliation and mediation programs in Brazilian courts, at a pre-trial stage, for undecided cases or for those that have appeals pending. These initiatives comprehend training professionals and involving the legal community in the idea that conciliation inside or outside

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[168] Cristiano Becher Isaia & Adriano Farias Puerari, "O Processo Judicial Eletrônico e as Tradiçõoes (Inautênticas) Processuais" (2012) 1: 1 Revista de Direitos Emergentes na Sociedade 121.

[169] Galenter, *supra* note 15 at 123-125.

courts can be a faster and cheaper way of achieving social peace, strengthening judges' performance in other cases that really demand judicial intervention.[170]

Nevertheless, in order to reduce the congestion in courts, the Brazilian Legislative and Executive branches also have to assume their social-political responsibilities. The Legislative is responsible both, for the delay in adapting the legal order to social needs, and for the inflation of laws that affects the knowledge of rights and individuals' capacity to identify illegalities. The Executive should be promoting administrative justice, instead of leading citizens to file unnecessary judicial claims, regarding situations that could be resolved in administrative procedures.[171]

In relation to the previously mentioned element of complexity of issues and its effects in the delay in providing justice, the creation of small claims courts represented the opening of access to justice to those that cannot afford lawyers or have claims that, for the economic value they carry, do not justify complex procedures. A simple, modest justice, away from the hassle of formal procedures and their costs, and enhancing the possibilities of conciliation, certainly represents a key to the doors of the judicial systems. However, although we might recognize that this model is appropriate for the demands it embraces, this cheaper justice also opened the opportunity for companies to pursue debts and to solve many consumers' cases, augmenting the number of new claims.[172] The impact in the access to justice ideal is undeniable, but this creation does not represent a reduction of time processing for the other lawsuits, since, because of costs barriers, most small claims were not the object of judicial decisions.

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[170] Conselho Nacional de Justiça, *Conciliar bom para todos melhor para você*, online: <http://www.cnj.jus.br/programas-e-acoes/conciliacao-mediacao/movimento-conciliacao-mediacao/historico-conciliacao>.

[171] Slongo, *supra* note 150 at section 1.2.1.

[172] Lawrence Friedman, *supra* note 16 at 5.

Another important aspect of the delay in new complex issues disputes is that it is common to find professionals arguing over which new legal theory should prevail. These disputes will consume more time to reach settlement in courts, because this will also demand profound study of the cases by the judges, especially when constructing new precedents with high social impacts.

The length of procedures has equally been object of concern, generating procedural reforms in many countries, for example the ones involving small claims courts[173] and collective actions. From our experience, all procedural reforms require adaptation to the new rules by legal professionals, demanding time to achieve the expected positive results. In relation to class actions, which in theory correspond to a faster way to bring justice to a wider group of citizens that share the same legal situation, we frequently face considerable delay due to some difficulties in the enforcement procedures, especially if they represent financial gains.

Research made by the Brazilian Supreme Court identified that around 70% of the time of proceedings are consumed by bureaucratic activities, what removes the causes for most of the delays from the decision making process to the administration of proceedings.[174]

Aspects associated to lack of structure and investments in the judicial machinery certainly contribute to the time of proceedings, as the number of courts, judges and staff, as well as deficiencies in infrastructure directly influence the capacity of dispute resolution.[175]

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[173] Cappelletti & Garth, *supra* note 5 at 69-73, mentions the movement to "reduce costs to the state and to the parties, resolving disputes involving relatively small amounts of money.(…) Recognizing that important reform activity is taking place in numerous places, we shall discuss briefly the exemplary recent reforms in certain areas of Australia (especially small claims tribunals in New South Wales, Queensland, Victoria, and Western Australia, 1973-1976), in England (the county court system for the arbitration of small claims, 1973), in Sweden (small claims procedure, 1973), and in the United States (especially the New York small claims courts, 1972). Some characteristics of these reforms, as well as some features of important Canadian experiments (1974), may serve to illustrate the activity that is now occurring".

[174] Santos, *supra* note 28 at 20.

[175] Fontainha, *supra* note 28 at 93.

This element is also accounted in the cost barrier, contributing to the inhibition of a wider access to justice.

The World Bank Report of 2002, on Building Institutions for Markets, presented a special chapter about the Judicial System (Chapter 6), where the following remedies to improve court performance were appointed: simplification of procedural rules, alternative dispute resolution (ADR), summary proceedings, small claims courts, specialization of judges and early intervention in individual cases. It was also shown that increased publicity and transparency, together with planning methods and goals, production of statistics, and case management, can help speed the heavy judicial machinery. Doubtlessly, if implemented with the use of information and communication technology (ICT), these suggested solutions produce better results in reducing processing time.[176]

The old adage that "justice delayed is justice denied"[177] reveals that, for centuries, justice around the world has encountered the obstacle of delay in its administration. This principle has been raised as the basis to the right for a speedy trial. The legal order cannot stay behind or away from the transforming phenomena that derive from the use of technology, and access to justice programs have to rescue the social responsibility of pacifying conflicts, in efficient and reliable manners.

2. Costs and values

Costs of litigation have been one of the major aspects present in most debates about access to justice. Expensive fees and lawyers, impossibility of states to guarantee legal assistance to the poor, absence of budget for hiring more judges or installing new courts, amounts of money invested in reforms and projects, and so on. Worldwide, "we tolerate a

[176] Reiling, *supra* note 33 at 103-106.

[177] Attributed to British Prime Minister William Stewart Gladstone.

system in which money often matters more than merit, and equal protection principles are routinely subverted in practice".[178]

What is the price of justice? Shouldn't access to justice be paid for? How can the ideal concept of a priceless justice deal with factors like capital and running costs, litigation costs, legal professional costs and social costs?[179]

Capital costs refers to providing adequate structure and maintenance of the machinery that promotes justice, so that all citizens will be able to make the option to settle their disputes addressing state or non-state justice systems, acting in belief that results can be obtained on a fair and equitable basis, because recourse to justice is always available.[180] The public system has to be effectively and efficiently available, without regard to the amount involved or nature of the dispute. The taxpayers' money has to be administrated in order to keep the judicial machinery compatible with the needs of the population.

Running costs comprise the amount estimated to administrate the courts, such as salaries of judges and court staff, and provisions for legal aid, but it has to take into consideration the court fees and other contributions that are deductible from the gross costs. Running and capital costs could be aggregated and classified as public investment in providing justice.[181]

Litigation costs involves court fees, legal professionals, experts and eventual liability for opponent's costs, besides small amounts related to transportation, providing documentation and so on. The problem these costs cause to access to justice, especially to small and modest

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[178] Rhode, *Access*, *supra* note 11 at 4.

[179] See classification presented by Jacob, *supra* note 115 at 436.

[180] *Ibid* at 421.

[181] *Ibid* at 437-438.

claims, and lower-income people, are aggravated by the uncertainty of how much they will represent until the complete resolution of the dispute.[182]

It is not always predictable who is going to win the judicial dispute. In countries like Brazil, where the rule is "costs follow the event", the loser will have his costs highly increased by the obligation of reimbursing the opponent's expenses. Also, costs may increase depending in how long the proceedings will last and how many steps will be taken until the final decision, considering possible appeals and eventual enforcement of the judgement.[183]

According to Cappelletti and Garth, the personal legal competence that must be achieved before vindicating through the judicial system involves, besides overcoming the barriers of education, background and social status, the financial resources necessary to file a legal claim.[184] The financial capability becomes even more powerful if the complexity of the case demands the help of professionals with more ability to investigate, to present evidences and to develop the arguments.

Jacob appropriately remarks that the term "access to justice" is usually improperly used to concentrate the interests of plaintiffs and complainants in vindicating their legal rights, without consideration of defendants that are made party of legal processes and have no other choice besides defending themselves or submitting to the claim. Defendants that are vulnerable and in a position of disadvantage, even regarding small and modest claims, must be granted with fair treatment and proper protection. Jacob also reminds that the concept of justice must go beyond the commencement of proceedings and achieve as well the enforcement of judgements, when finally justice is effectively delivered.[185]

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[182] *Ibid* at 432-441.

[183] *Ibid* at 424-441.

[184] Cappelletti & Garth, *supra* note 5 at 15.

[185] Jacob, *supra* note 115 at 423-425.

Addressing the matter of "equal justice under law", Debora Rhode asserts that this is "one of America's most proudly proclaimed and widely violated legal principles", since millions of Americans lack any access to justice, for "four fifths of civil legal needs of the poor, and two- to three-fifths of needs of middle-income individuals, remain unmet". The cause for this deficiency is attributed to the reduced budgets regarding government legal aid and criminal defense, what leads the most low-income litigants to have barely no assistance of counsel.[186]

Confronting the same issue, Justice Earl Jonhson, Jr mentions the brilliant philosophers Jean-Jacques Rousseau, Thomas Hobbes,[187] and John Locke,[188] who explained that a government's right to govern did not descend from God, but from the consent of the governed. Based in the social contract that embraces promises related to justice, peace and a better life, he calls governments' responsibilities regarding the equality before the law, as a principle that should guarantee all citizens of different economic classes the right to stand equal in any public forum for resolving conflicts. If societies allow the inequality in the administration of justice, the members of the disfavored class can argue the breach of the social contract. The right to counsel is, then, part of the basic precept of equality before the law and a guarantee of

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[186] Rhode, "Whatever Happened", *supra* note 59 at 869-870.

[187] "The safety of the People requireth further, from him or them that have the Sovereign Power, that *Justice be equally administered to all degrees of People;* that is, that as well the rich and mighty, as *poor and obscure persons, may be righted of the injuries done them;* so as the great may have no greater hope of impunity, when they do violence, dishonour, or any injury to the meaner sort, than when one of these does the like to one of them; For in this consisteth Equity; to which, as *being a precept of the law of nature, a sovereign is* (…) *subject."* Thomas Hobbes, *Leviathan* (New York: Penguin Books, 1968) at 184 (*emphasis added*); mentioned by Johnson, *supra* note 134 at 160 n. 8.

[188] "Political power, is that power which every man having in the state of nature has given up into the hands of the society […] with this express or tacit trust, that it shall be employed for their good (…) *and to punish the breach of the law of Nature in others* [...] And this power has its original only from *compact and agreement, and the mutual consent of those who make up the community*." John Locke, Two Treatises of Government (New York: William Benton, 1952) at 65 (*emphasis added*); mention by Johnson, *supra* note 134 at 160 n.7.

a fair trial for those who, because of disfavored social conditions, are not granted with the financial capacity or legal knowledge indispensable to vindicate their rights.[189]

Back in the 1980s, Brazilian law school professors emphasized that the provision in the code of civil procedures which permitted a lawyer to self-represent in courts should be interpreted cautiously, because knowledge of the law was not the only aspect to be considered. It was explained that litigants have blinding emotions and a third person (another lawyer) could be in a better position to analyse the situation and bring the claim before a judge.

Has this lesson been forgotten? Have people changed and can they better deal with their own problems without emotion? Is the citizen of the 20th century empowered enough for the defense of his own rights? Or is self-representation a remedy for both high cost of lawyers and deficiency of legal aid?

Many reforms minimize the need for lawyers in cases of low complexity, and simple procedures are frequently created to help ordinary people reinforce new rights and settle disputes, but in complex cases or anytime a litigant does not comprehend the legal order enough to stand for his rights, professional assistance and representation need to be provided. Legal advice is much more than a mere representation in courts, it is part of the process of empowering ordinary people in the knowledge of their rights, what can be of great importance to prevent, negotiate, conciliate or take an action to repair a grievance.[190]

Justice Earl Johnson, Jr mentions that the Swiss Supreme Court was the first European court to recognize that, for the poor, equality before the law in civil right courts has to be associated with the guarantee of professional legal advice.[191]

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[189] "Equality before the law and the social contract: when will the United States finally guarantee its people the equality before the law the social contract demands?" Johnson, *supra* note 134 at 159-162.

[190] Cappelletti & Garth, *supra* note 5 at 108.

[191] Johnson, *supra* note 134 at 162-163.

Apparently with the objective of promoting, at the same time, equality and accessibility by reducing costs, different steps have been taken in some countries, like Sweden and England, to actively discourage attorney representation. The possibility of obtaining an attorney is seen as a potentially decisive advantage. In Australia, most jurisdictions do not allow representation by attorneys. The idea of giving parties equal opportunities in courts is certainly welcome, but this controversial measure does not assure balance in access to justice for poor and inarticulate individuals who must litigate against more sophisticated and powerful opponents[192] or with repeat-player litigants.[193]

Why is there a need for legal aid? The answer provided in the developed USA, by Ohio Legal Assistance Foundation, makes it clear that low-income people would not access courts without assistance, and legal aid helps them resolve urgent legal problems that can change everyday lives. "While legal problems do not discriminate by income, those in poverty are disproportionately and adversely affected" by their financial incapacity to bear the costs. Lower-income individuals feel excluded of legal systems that they can neither understand nor afford, what makes them believe that the justice system will not promote the resolution of their conflicts.[194] Legal aid is essential to avoid keeping financially vulnerable groups in legal vulnerability.[195]

It is important to mention that many middle-income individuals also suffer from lack of representation, and they try to self-represent not because they are confident in their knowledge to navigate the justice systems, but because of their ineligibility for legal aid and financial inability to afford a lawyer.[196] Other solution that we frequently see in Brazilian civil procedures, when litigants do not have money to invest in their claims, is the legal service

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[192] Cappelletti & Garth, *supra* note 5 at 69-74.

[193] *Ibid* at 17.

[194] Ohio Legal Assistance Foundation, *Ohio's Legal Aid Delivery System FAQ*, online: <http://www.olaf.org/ohio-legal-aid/faq/>.

[195] Rhode, *Access*, *supra* note 11 at 4.

[196] Jacob, *supra* note 115 at 442-443.

contract of risk, allowing the lawyer to receive part of the amount the plaintiff will obtain, if he wins the dispute.

What to say about the practice of charging clients reasonable monthly amounts for the legal services? Considering possible delays, at the end of the case, the cost of the procedure can represent even more than the value of the right pursued.[197] The costs necessary to have a successful day in court can make formal rights too expensive to be enforced and "even those who win in court can lose in life".[198]

The right for legal assistance is a fair treatment that should be ensured as part of the access to justice programs, especially for those incapable of understanding the complexity of legal systems. Nevertheless, in increasingly "do-it-yourself" societies, there must be greater efforts to educate litigants about the value of legal advice in the outcome of a dispute.

For ordinary people, cost is a significant factor for not seeking legal assistance. This restrictive element includes not only the monetary amount spent on transactions during proceedings. The valuable and productive time spent dealing with the procedure in transportation, contacting professionals, collecting information, waiting and attending hearings and so on, loss of opportunities due to possible lengthiness of lawsuits, together with emotions, stress, anxiety, depression or deterioration in relationships, are incalculable social costs that can result from a lawsuit.[199]

Unresolved legal problems affect people's lives, and, when related to debt, housing, and social services, the denial of a right can lead to social exclusion and dependency on

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[197] "In too many cases, windfall recoveries for lawyers far exceed a reasonable return, or the incentive necessary to bring socially useful lawsuits." Rhode, *Access*, *supra* note 11 at 35.

[198] *Ibid* at 6.

[199] "An important result of the inaccessibility of legal services and the fact that many people do nothing to address their legal problems is that a proportion of legal problems that could be resolved relatively easily at an earlier stage escalate and shift to ones that require expensive legal services and court time down the road", *Access to Civil and Family Justice*, *supra* note 28 at 10; Jacob, *supra* note 115 at 435-442.

government assistance.[200] Despite of that, it is not so common to talk about values that are enhanced in a society that makes more financial investments in access to justice.[201]

It is interesting to mention Cappelletti and Garth's vision about a relation between the importance of certain types of claims and the allocation of resources, besides the fact that the nature of the issues will indicate if they are suitable for speedy or lengthy deliberations. There are not fast solutions for all kinds of conflicts. The values involved, like the animosity of parties, the complexity of the legal rights, and even the duration of the relationships, may interfere in the cost and the delay of a dispute. So, when comparing or criticizing methods and costs of conflict resolution, it is important to take in account the diversity of elements present in each legal claim.[202]

Considering that administration of justice involves exchange of information and organizational activities, technology can be used to reduce time, costs, and geographical barriers, and also can help improve quality and enhance access to justice.[203] E-justice embracing websites, e-filing, automation of case management systems, videoconferencing, court-run online dispute resolutions and other means of adapting the traditional justice to the needs of all individuals, are instruments of our globalized technological advanced society to modernize the judicial system and help minimize the injustice of insufficient and ineffective solutions for rights breached.

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[200] *Access to Civil and Family Justice*, *supra* note 28 at part 1.

[201] Rhode, *Access*, *supra* note 11 at 35.

[202] Cappelletti & Garth, *supra* note 5 at 52-53.

[203] Agusti Cerrillo i Martinez & Pere Fabra i Abat, *E-justice: Using Information Communication Technologies in the Court System* (Hershey, Pennsylvania: IGI, 2009).

II. Developing systems for Courts

Based on our Brazilian experience, there is no way to opt out of the technological revolution without the risk of paying a high price of being left behind of this globalized world, or compromising the chances of addressing some of the access to justice major obstacles. For the purpose of our analysis, it is not our objective to compare the use of technology in Brazilian courts with other countries, but we will examine some technological experiences in the judicial system and how they impact the access to justice.

It has been a long time since man could imagine himself having the right to be away from technology and still lead a good life. It is undeniable that the technological revolution got incorporated to most people's life and changed the way we do and think diverse aspects of our routines.

Addressing the future of the delivery of justice in Canada, the Canadian Bar Association presented a report in 2014 emphasizing the necessity to provide quicker, simpler and cheaper legal services, compatible with the globalized world, changed by the use of technology.[204]

As reminded by Prof. Nicolas Vermeys, cyberjustice is not the miracle pill to deliver instant justice free of cost, but the high costs and undesired delays of judicial solutions can be positively affected by the use of technology.[205] The implementation of new procedures in

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[204] "Globalization and the rapid increase in the use of technology have created growing calls for the liberalization of markets, and profoundly changed how we interact with each other. As more knowledge and information becomes readily available, there is a desire to break down barriers between countries, regions, and industries. Similarly, as other professions deliver quicker, cheaper, and simpler services, Canadians will demand the same of their legal services". CBA Legal Futures Initiative. *Futures: Transforming the Delivery of legal services in Canada*. Canadian Bar Association August 2014. Ottawa, at 25, online: <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>.

[205] Nicolas Vermeys, "La cyberjustice et l'espace Ohada : des outils virtuels pour une avancée réelle" in *L'arbitre, l'avocat et les entreprises face au droit des affaires de l'OHADA Actes Forum OHADA CANADA*

courts is complex and followed by a series of advances and retreats, taking in special consideration people's aversion to computers, especially when it brings the idea of having to relearn known procedures and readapt to new concepts.

Machines brought revolution to our lives, causing dependency in many different aspects. Some examples are systems related to banking,[206] transportation and communication, health diagnosis and search for cure, information and education, leisure and development of sports techniques, personal and commercial relations, and solution of conflicts in all different areas.

In the digital era, one is not allowed to think about development of a country or democratization of rights without considering the new configuration of social relations. And, in courts, the due process of law faces its major challenge by taking this moment to review traditional formats and, with this transformation, improve access and delivery of justice. The shift has to be progressive, but should not be restrained to procedural renovations, or else an important opportunity for renovation of concepts will be missed.

In the presentation of the book about cyberjustice, "Processo Eletrônico e Teoria Geral do Processo Eletrônico", Delton Meirelles emphasizes that the reconfiguration of social relations demands the reshaping of procedural laws. It is not just a matter of converting steps of bureaucratic procedures or even the digitization of papers and documents. It is important to resist the temptation of keeping the old procedures in new format.[207]

Numéro spécial 2013 Journal Africain du droit des affaires (JADA) section 11, online :< http://www.vermeys.com/publications/la-cyberjustice-et-lespace-ohada-des-outils-virtuels-pour-une-avancee-reelle/> [Vermeys, "Ohada"].

[206] "Why do you think banks have become electronic?' The Honourable Justice Thomas Granger of the Superior Court of Justice, Ontario, asks matter-of-factly. 'Banks have realized that you save money doing it. The government does the same thing." Luigi Benetton, "Guide to Courtroom Technology in Canada" CBA Practice Link (September 2009), online: <http://www.cba.org/cba/practicelink/solosmall_technology/courts.aspx>.

[207] Almeida Filho, *supra* note 18 at 11.

The first computers in courts substituted typewriters, but the activity, although faster, was almost the same: typing and printing. Then, other software brought internal control of activities, as means of organizing mechanical works. As a next step, public view terminals helped with publicity, making information easily available to litigants and their lawyers. All these changes involved adaptation to new procedures. Still, not much was being done to improve results and construct a different access to the Judiciary.

Internet does not only connect computers, but it really revolutionizes interaction between people. In the judicial system, it allows widespread distribution of legal and judicial information, better connects the justice system with remote communities, and reduces costs.

It is very common for courts to have their own websites, which provide access to basic information about services, judges, processes including databases of decisions, statistics, and related legislation. Anyone participating in the design of these websites knows the great amount of decisions taken regarding quality of information, who can access it, and how difficult it is to maintain them updated according to users' needs.

E-mails are constantly used as means of communication, and some notification systems count on this tool to deliver information to litigants and lawyers.[208] Written petitions, images and audio documents are easily sent to courts or directly included in electronic case files. However, these apparently simple electronic actions demand intense debate over reliability, confidentiality and security, because protecting private information is harder in cyberspace.

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[208] Emails are part of information to be provided when registering into court systems. Although they are not used to send the detailed information of notifications or to initiate a term for any procedure, emails are sent to remind the litigant or the lawyer that there is some notification pending. Even if you are not a lawyer or a litigant in an specific lawsuit, it is possible to track cases and receive information about each procedural stage by registering in the "push" system of many courts (STF push, STJ push, TRF push and so on). Teixeira, *supra* note 18 at 417; "Art. 5º [...] § 4º Em caráter informativo, poderá ser efetivada remessa de correspondência eletrônica, comunicando o envio da intimação e a abertura automática do prazo processual nos termos do § 3º deste artigo, aos que manifestarem interesse por esse serviço." Brazilian Federal Law n. 11.419/06.

The attachment of pictures, audio and video files in electronic cases can provide a wider and better comprehension of the facts and can help on decision making process. Still, adjustments done in these digital information could lead to a distortion of reality, and, consequently, to an unfair trial.

In the short term, it is expected that courthouses' electronic systems, integrated with teleconferencing, videoconferencing, internet-based conferencing, case management, hearings, motions, applications, and judicial dispute resolution proceedings, will be widely available, enhancing access to justice.

Technology is seen as one of the solutions for the problems the Judiciary is facing, but there is no machine doing man's work of thinking. There are humans evaluating the necessities of society and searching for a way to restore confidence in the judicial system.

In Brazil, judges are always assigned to be members of boards, committees and other groups involved in creation and implementation of new technologies for courts.[209] We take a very active role in these processes, and besides managing our own cases, we are always concerned about how to deliver justice better and faster.

Regarding the Canadian perspective in implementing technology in the judicial sector, Prof. Jane Bailley and Prof. Jacquelyn Burkell emphasize the importance of the participation of various levels of the Judiciary to guarantee the comprehension of judicial needs. However, they point out the difficulty to design and implement a complex system that involves independent levels of courts and other stakeholders such as lawyers, governments and the general public. They also recommend focus on smaller initiatives parallel to an overall technology implementation plan.[210]

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[209] Our experience in the development and use of technology in courts was described in *supra* note 27. Besides, we always volunteered to participate in the procedures to detail the requirements of systems and to test them in our courts.

[210] Bailley & Burkell, *supra* note 8 at 22.

The idea of sharing the evolution of the Brazilian legislation and some major experiences in the adoption of e-justice in courts is to bring into consideration advancements and retreats, and to contribute to the improvement of access to justice. Besides, computerizing courts does not only involve buying new computers and printers. The projects for implementing information technology imply training people, reevaluating managing procedures and planning the relation between software, hardware and "peopleware", in order to achieve the expected results.[211]

We cannot underestimate the costs and the unexpected incidents that may occur during the process of computerizing the judicial system, neither overvalue the achievements.[212] Financial and legal obstacles cannot be ignored, but the resistance caused by psychological and cultural barriers also have to be properly addressed for the success of any initiative.[213]

Even though cultural and social aspects influence the needs of different societies, we are positive that, in the globalized scene, many similarities can be found in this shift from paper based files to e-processes, and different countries can aggregate some new values to the journey of cyberjustice, in a safe and secure virtual environment.

A. How technology changes access to justice

The investigation of how the use of technology promotes access to justice and innovates in judicial systems is our major concern. Prof. Almeida Junior considers the idea of electronic procedures as part of the three waves of access to justice, being of special importance to enlarge the doors of justice, to provide adequate solution to issues related to the

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[211] Atheniense, *supra* note 18 at 27.

[212] Vermeys, "Ohada", *supra* note 205 at section 87.

[213] Karim Benyekhlef, "La résolution en ligne des différends de consommation : un récit autour (et un exemple) du droit postmoderne", in Pierre-Claude Lafond (dir.), *L'accès des consommateurs à la justice, Montréal*, Éditions Yvon Blais, 2010, 89-117 at 108.

information technology society and to equip the courts with mechanisms to deal with the augmentation on the number of claims.[214]

Brazilian Federal Law 10.259/01 is an example of the three approaches brought together. By determining the implementation of Federal Small Claims Courts, it allowed the plaintiffs to file claims up to sixty times the monthly minimum wage without the assistance of lawyers. Many litigants, however, did not have enough knowledge to understand the legal order and the appeals could only be presented by lawyers. These federal courts had to manage the problem. The staff was trained to help and give information, some standard forms to be used in these cases were created, and partnerships with university law clinics and local governments were established to grant the necessary legal aid, which is part of the first wave of access to justice.

Small claims courts specialized in federal low value and simple disputes, some even concentrating only on social security cases, are a reflex of the second wave. And, finally, the legal command to use technology to manage these procedures, in order to make it faster, cheaper and easier to access, even from distant communities, is part of the third wave of access to justice.[215]

In order to deal with judicial incapacity to deliver justice within a reasonable period of time, some jurists would appoint an increase in the number of judges as a solution. From the perspective of economists, a possible alternative would be the reduction in the number of claims, since it could bring back the economic equilibrium between supply and demand.[216]

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[214] Almeida Filho, *supra* note 18 at 60-64.

[215] Our knowledge is part of our experience as Federal Judge of the 25th Federal Small Claims Court in Brasilia (2006-2010) and Assistant Judge of the Coordination of Federal Small Claims Courts of the First Region (2008-2010).

[216] Vermeys, "Ohada", *supra* note 205 at sections 20-21, explains: “Comme nous l’avons souligné ci-dessus, la solution privilégiée par les juristes afin de répondre à la incapacité du système judiciaire de traiter les dossiers à l’intérieur de délais raisonnables est l’ajout de juges. Toutefois, les économistes souligneront qu’il existe une seconde possibilité: diminuer le nombre de dossiers. En effet, l’approche économique nous enseigne que, afin d’établir un équilibre entre l’offre et la demande, il suffit d’agir sur l’un de ces deux éléments. (…) Toutefois, vu

However, if we also take into consideration an intended reduction of costs and the maintenance of access to justice, a different solution has to be encountered. And this is the contribution that can be made by successful practices of "computerization of judicial processes and the networking of stakeholders in the legal world".[217]

The technological revolution has made its moves into courts, just like into most people's lives, to bring comfort, to reduce mechanical activities, to rationalize the time spent in different tasks, to manage files, and to organize work. No other recent technological advancement has caused such as great impact as the internet cultural, economic, and social revolution.

In this "Global Village", as foreseen in the 1960s by Canadian communication and media theorist Marshall McLuhan, we can instantly search and distribute information, access and provide services, buy, sell, communicate with someone in any part of the planet through messages, listening to their voices, seeing images, and lead a completely virtual life. We are surrounded by the impacts of technology, even if not sitting in front of a computer.[218]

There are new concepts of time and distance in an internet based society. And it is undeniable that the celerity which citizens could expect from the Judiciary has been increased in an environment where research, communication and decisions can be provided within a click, saving time and costs.

The two reports previously mentioned about the crisis in access to justice, released in 2013 by the Canadian Bar Association[219] and the Action Committee on Access to

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le contexte économique mondial actuel, il est plus facilement concevable de réduire le nombre de dossiers nécessitant l'intervention d'un juge que d'augmenter substantiellement le nombre de magistrats. 21. Il importe de souligner que réduire la demande n'implique pas de réduire l'accès à la justice. […]Il existe différentes façons, notamment par le biais de la cyberjustice, d'incorporer un système de résolution des litiges assisté dans le processus judiciaire actuel, tout en maintenant l'intégrité de ce dernier."

[217] Benyekhlef, Amar & Callipel, *supra* note 28 at 327.

[218] Marcelo Mesquita Silva, *Processo Judicial Eletrônico Nacional* (Campinas: Millenium Editora. 2012) at 12.

[219] *Reaching Equal Justice*, *supra* note 138.

Justice in Civil and Family Matters,[220] reveal the necessity to use inclusive technology solutions to provide direct access to justice services. Technology has been used as a mechanism to not only increase physical accessibility of courts, provide information, connect communities to courtrooms, and use instruments like videoconferencing, but also to reduce costs with staff and transportation.

In Brazil, according to F/Radar, a survey conducted by FNazca Datafolha,[221] there were more than 93 million internet users by April 2014, corresponding to 57% of the Brazilian population over the age of 12. Also, 24% of non-users revealed the intention of accessing internet within a year.[222] These numbers lead to the certainty that the use of internet is irreversibly expanding, and its utilities and advancements must be extended to the administration of justice in Brazil and in other countries.[223]

Although some people still face difficulties in including computer technology into their daily lives, there is no doubt the use of technology for professional purposes has the objective not only to substitute typewriters, but to put more efficiency in the management of time and to facilitate access to justice.

The attempt to overcome the barriers to access to justice created by the immensurable costs to reach fair justice and delays that compromises the effective restoration of rights, together with the new technologies, propel the Judiciary into the digital era.[224] While worries regarding unsophisticated users are appointed as an important challenge for implementing

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[220] *Access to Civil and Family Justice*, *supra* note 28.

[221] The survey F/Radar is conducted since 2007. In its 14th edition there were more than 2.6 thousand interviews in 144 municipalities. Its error margin is more or less 2 points percentage, with level of trust of 95%. The results are based on information of the Census 2010 and estimates 2013 from the Instituto Brasileiro de Geografia e Estatística, the Brazilian Census Bureau, online: <http://www.fnazca.com.br/index.php/2014/12/16/fradar-14ª-edicao/>. Mesquita Silva, *supra* note 218 at 12, presents information from April 2011 when registered 81,3 million internet users.

[222] Survey available online:<http://www.fnazca.com.br/wp-content/uploads/2014/12/fradar-14_publica-site.pdf>.

[223] Mesquita Silva, *supra* note 218 at 12.

[224] Almeida Filho, *supra* note 18 at 20-21.

innovations in courts' systems,[225] online alternative dispute resolution outside tribunals are being considered important tools to achieve justice.

Technology can greatly improve the processing time of cases, speeding up notifications, and many administrative procedures. The use of electronic notification, videoconferencing, and e-filing decreases the impact of physical distance of courts from some communities, what affects the final costs of a case. Internet also contributes to accelerate decisions, either because it facilitates the search for precedents and legal information, or because some tools help the management of similar cases. Reduction of the costs and the length of trials can be achieved, even with the use of modular tools that automate simple tasks.[226]

Nevertheless, we must be ready to face new challenges. First, the evolution of systems depends on funding that is constantly not compatible with the planned goals. Second, the co-existence of diverse judicial systems, using different technologies, is a recurrent complaint of public attorneys and private lawyers.[227] Confidentiality, security and unavailability of systems, and the exclusion of part of the population that does not access computers, are frequently part of the debates.

Even if distances, costs and time are reduced, each new step of ICT solutions into the judicial systems demands the appropriate modification of the legal order and the evaluation of the risk of diminishing access to justice.

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[225] Marcos Mairton da Silva, *Tecnologia da Informação e Processo Eletrônico na Justiça Brasileira: considerações sobre um dos principais instrumentos da informatização do Poder Judiciário brasileiro* (Fortaleza: Fundação Getulio Vargas, 2008) at 17-19.

[226] Teixeira, *supra* note 18 at 444-445, lists sixteen advantages of the implementation of e-processes.

[227] Luiz Claudio Allemand, "Processo Eletrônico não pode ser bom apenas para seus idealizadores" *Consultor Juridico* (23 October 2014), online:< http://www.conjur.com.br/2014-out-23/luiz-allemand-pje-nao-bom-apenas-idealizadores>.

1. The path of information technology in Courts in Brazil

The Brazilian Ministry of Justice José Eduardo Cardoso asserted, in the foreword of the first edition of Almeida's work on electronic procedures, that despite the difficulties faced by legal professionals, generally more conservative, to accept reforms, to change, to innovate, to take risks, to dare, to destroy and reconstruct, the adoption of technology in the delivery of justice is essential to meet social needs and overcome the existing obstacles in the judicial system.[228]

He emphasized that, in the 21st century, it is inadmissible that while our children learn and play with tablets and notebooks, our cases keep being processed in paper files sewed following ancient patterns. While banking transactions are made with a click of a button on secure online systems, petitions are still paper delivered in courthouses and formally stamped following traditional rituals. While all legislation can be carried in a pen drive and accessed on computers aboard airplanes, case files are difficult to transport because they usually consist of hundreds or thousands of pages, many being to simply register procedural formalities, which are totally empty of juridical content.[229] The shift from traditional judicial practices, however, requests some changes in the legal order.

The legislative determination of aiming the advancement of technology in courts is essential to encourage the investment and the development of new systems. Without this legal incentive, it is difficult to offer cyberjustice solutions that can be trusted and used by all stakeholders. Indeed, it is recommended that the legislation must be compatible with technology reality, using proper terms to avoid issues regarding conflicting interpretations.[230]

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[228] Almeida Filho, *supra* note18 at 39-40.

[229] *Ibid* at p 39-40.

[230] Vermeys, "Ohada", *supra* note 205 at sections 90-97. Special emphasis should be given to section 91, with the original text in French: "En effet, sans volonté législative visant à faciliter l'accès à technologie, notamment par le biais d'une régulation '*visant à encourager les opérateurs à investir dans les zones peu ou non rentables*'

Even though the Brazilian current legal reference to the implementation of electronic procedures in courts is the Federal Law n. 11.419/2006, that carries in its preamble the mission to regulate the use of electronic media in judicial proceedings, including communication of acts and transmission of documents, the Brazilian legal order already had some previous legislation that stimulated the use of technology.

a) Federal Law n. 8.245, of October 18th, 1991 – Landlord-Tenant Law

Federal Law 8.245/91, known as "Landlord-Tenant Law", was officially the first to authorize the use of electronic means in the practice of a procedural acts, allowing, if previously stated in the contract, the notification of natural and juridical persons by facsimile.[231] Many Brazilian scholars do not mention it because there are no registers or precedents related to its use.[232]

Still, Courts were already feeling the first influences of information technology with the use of electronic tools by judges and court staff, searching for improving performance in their activities. Private computers, printers, text processing, electronic spreadsheet software, and legal data (laws and precedents) stored in CDs were frequently employed in achieving better results at work.[233]

With the goal of organizing the judicial services, the second step was the development of systems to manage the case-flow from filing to closure, and also across judicial systems and courts. This helped classify the lawsuits, identify cases that were ready for decision and

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et le développement de nouvelles solutions technologiques, il demeurera difficile pour les développeurs d'offrir des solutions de cyberjustice et, surtout, pour les justiciables, de les utiliser."

[231] "Art. 58 [...] IV - desde que autorizado no contrato, a citação, intimação ou notificação far - se - á mediante correspondência com aviso de recebimento, ou, tratando - se de pessoa jurídica ou firma individual, também mediante telex ou *fac-símile* , ou, ainda, sendo necessário, pelas demais formas previstas no Código de Processo Civil;" Brazilian Federal Law n. 8.245/91.

[232] Almeida Filho, *supra* note 18 at 10-11.

[233] *Ibid* at 26.

provide the general public the correct information of the status of the procedure. These systems led to others responsible for the automation of the publication of decisions. The courts had to include in their budgets provisions for the acquisition of machines, terminals, printers and software.[234] It was also an investment in the transparency demanded by the new information society.

b) Federal Law n. 9.800, of May 26th, 1999 – Facsimile Law

Federal Law 9.800/99, known as "Facsimile Law", was considered the first legal authorization for the use of electronic means in the transmission of petitions and paper based documents. Alexandre Atheniense, as a specialist in internet law and ICT, considers this law to be the inception of the digitization procedures in Brazil, and it could have represented a great advancement for the use of technology in courts, since according to its article 1,[235] it allowed the transmission of data by facsimile or any other similar systems.[236] However, the validity of these documents was conditioned to the delivery of the original in court five days after the transmission, when no specific time frame has been established by the judge, or else, five days after the last day of the time frame previously assigned.

This first legal initiative presented a lack of knowledge about the issue, which resulted in multiple understandings of what could be considered "other similar systems". Some courts considered e-mails as other similar systems and regulated the transmission of electronic messages. Prof. Tarcisio Teixeira refers to the precedent of the Superior Court of Justice REsp

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[234] Atheniense, *supra* note 18 at 26.

[235] "Art. 1º É permitida às partes a utilização de sistema de transmissão de dados e imagens tipo fac-símile ou outro similar, para a prática de atos processuais que dependam de petição escrita." Brazilian Federal Law 9.800/99.

[236] Atheniense, *supra* note 18 at 47; Edilberto Barbosa Clemantino. *Processo judicial eletrônico: o uso da via eletrônica na comunicação de atos e tramitação de documentos processuais sob o enfoque histórico e principiológico, em conformidade com a Lei 11.419, de 19.12.2006* (Curitiba: Juruá, 2008) at 73.

n. 916.506[237] to affirm that it has been pacified that e-mails do not correspond to a technology similar to facsimile.[238]

Atheniense points out some of the vulnerabilities of the adoption of e-mails without digital certification. The first would be the fact that the originals, which were afterwards delivered in courts, most of the time did not confer the exact authenticity of the sent message, since they were not the same document, but only similar ones. Unless the petition would be attached as a scanned and signed document, we could not certify the identity of both.[239] Sometimes, technologies offering similar services do not necessarily have similar features in all aspects, and this can compromise the expected result.

Since it was not mandatory the use of public keys to sign documents, the sender could not be certain that the content would arrive at the destination without risks of modification and the receiver would not have the guarantee of its origin. Nevertheless, in 1999, the knowledge regarding the use of public keys was still not disseminated and the regulation concerning digital certification and the integrity of electronic documents would only be provided by Provisional Measure n 2.200/2001.[240]

Prof. Petronio Calmon considers that courts should adopt technology neutrality, which means that the law does not limit the use of similar technology if the equivalent results can be

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[237] "PROCESSO CIVIL. AGRAVO REGIMENTAL. INTEMPESTIVIDADE. INTERPOSIÇÃO VIA CORREIO ELETRÔNICO (E-MAIL). IMPOSSIBILIDADE. 1. O correio eletrônico (e-mail) não pode ser considerado similar ao fac-símile para efeito de aplicação do artigo 1º da Lei nº 9.800/99, que estabelece ser permitido às partes a utilização de sistema de transmissão de dados e imagens para a prática de atos processuais que dependam de petição escrita. 2. A Resolução nº 2, de 24 de abril de 2007, que disciplina o recebimento de petição eletrônica no âmbito do Superior Tribunal de Justiça, somente se aplica "nos processos de competência originária do Presidente, no Habeas Corpus e nos Recursos em Habeas Corpus" (art. 1º). 3. Agravo regimental não conhecido." STJ, AgRg nos EDcl no REsp Nº 916.506/RN (2006/0274270-1), 6ª Turma, DJ 24/09/2007 p 389, Relator Ministro Paulo Gallotti.

[238] Teixeira, *supra* note 18 at 407.

[239] Atheniense, *supra* note 18 at 47-48.

[240] Atheniense, *supra* note 18 at 48.

obtained by the use of more modern equipment.[241] As an example, the Superior Labour Court edited the "Instrução Normativa" n. 28, of June 2nd, 2005, implementing the e-doc system to allow litigants, lawyers and experts to send electronically their petitions to labour courts, using digitally certified signatures. In labour courts, the users were exempted from the obligation of delivering the originals.[242]

This was the object of many judicial controversies[243] in all levels and branches, especially because some courts had internal regulations allowing and then revoking the e-mails and similar text messages systems. The 1st Regional Federal Court enacted the Portaria/DIGES/PRESI 820, of November 12th, 2001,[244] introducing the e-Proc as a system to receive electronic petitions and documents related to cases already in progress. On February

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[241] Petrônio CALMON, *Comentários à lei de informatização do processo judicial: Lei n. 11.419, de 19 de dezembro de 2006 (*Rio de Janeiro: Ed. Forense, 2008) at 47.

[242] "Instrução Normativa n. 28/2005. Art. 1º Instituir o Sistema Integrado de Protocolização e Fluxo de Documentos Eletrônicos, denominado e–DOC, no âmbito da Justiça do Trabalho, que permite às partes, advogados e peritos utilizar a Internet para a prática de atos processuais dependentes de petição escrita [... Art. 3º O envio da petição por intermédio do e-DOC dispensa a apresentação posterior dos originais ou de fotocópias autenticadas. Art. 4º O acesso ao e-DOC depende da utilização, pelo usuário, da sua identidade digital, a ser adquirida perante qualquer Autoridade Certificadora credenciada pela ICP-Brasil, e de seu prévio cadastramento perante os órgãos da Justiça do Trabalho." Tribunal Superior do Trabalho, online: <http://ext02.tst.gov.br/pls/no01/no_noticias.Exibe_Noticia?p_cod_noticia=5400&p_cod_area_noticia=ASCS>, accessed on April 19, 2015.

[243] The Brazilian Court of Justice presented for many years different precedents, such as the following one, where e-mails were considered similar to facsimile, according to Federal Law n. 9800/99. "PROCESSUAL CIVIL. INTERPOSIÇÃO DE AGRAVO REGIMENTAL POR MEIO DE CORREIO ELETRÔNICO (E-MAIL). APLICAÇÃO DA LEI 9.800/99. NECESSIDADE APRESENTAÇÃO ORIGINAL.1. O correio eletrônico (e-mail) é sistema de transmissão de dados e imagens similar ao fac-símile, motivo pelo qual permitida a sua utilização, para a apresentação de petição escrita, na forma da Lei 9.800/99. Precedentes da Corte: AGA 545.299/RS, 1ª T., Rel. Min. Francisco Falcão, DJ 14/06/2004; EDAGA 389.941/SP, 1ª T., Rel. Min. Humberto Gomes de Barros, DJ 16/06/2003; AGA 574.451/SC, 5ª T., Rel.Min. Gilson Dipp, DJ 06/09/2004.2. A Lei 9.800/99 prevê a transmissão de dados para a prática de atos processuais por meio de fac-símile ou outro similar, impondo a apresentação dos originais até cinco dias da data do término do prazo para a prática do ato processual, ficando aquele que se utiliza do sistema de transmissão de dados responsável pela entrega do material transmitido ao órgão judiciário.3. Hipótese em que o agravo regimental foi interposto por meio do correio eletrônico sem a posterior apresentação do original.4. Agravo regimental não conhecido." STJ, AgRgREsp Nº 660.369/RS (2004/0065877-6), 1ª Turma, DJ 28/3/2005 p 215, Relator Ministro Luiz Fux.

[244] Tribunal Regional Federal da 1ª. Região, online: <http://www.trf1.jus.br/dspace/bitstream/handle/123/16345/PORT_820_2001.pdf?sequence=1>.

8th, 2002, it was modified by the Portaria/DIGES/PRESI 100,[245] withdrawing the obligation of handling the originals in courts, unless specifically demanded by the judges. A few months later, the Portaria PRESI n. 258, of May 16th, 2002,[246] made it mandatory to follow the same procedure as prescribed for petitions and documents sent by facsimile, which meant to restore the obligation of presenting the originals in five days.

Unfortunately, these divergences in procedures and in opinion of the courts harmed the principle of access to justice, resulting in the denial of the appreciation of appeals and lawsuits based on procedural formalities that were not established uniformly. Contributing to this difficulty faced by litigants, the article 5 of Federal Law n. 9.800/99 released the courts from the obligation of having the appropriate infrastructure to receive the documents.[247]

c) Federal Law n. 10.259, of July 12th, 2001 – Law of Federal Small Claims Courts

Almost two years after the edition of the "Law of Facsimile", the next legislative step was the Federal Law n. 10.259/2001, which had as main object the creation of federal small claims criminal and civil courts.[248]

At that time, computers were widely used in many courts, but besides serving as a new machine for typing and accelerating the edition of decisions, it was still limited to giving information about the courts regarding their jurisdiction, addresses, judges, and other information to promote transparency of case processing steps and to reduce geographical distances.

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[245] Tribunal Regional Federal da 1ª. Região , online: <http://www.trf1.jus.br/dspace/bitstream/handle/123/19501/PORT_100_2002_DIGES.pdf?sequence=1>.

[246] Tribunal Regional Federal da 1ª. Região, online: <http://www.trf1.jus.br/dspace/bitstream/handle/123/19422/PORT_258_2002.pdf?sequence=1>.

[247] "Art. 5º O disposto nesta Lei não obriga a que os órgãos judiciários disponham de equipamentos para recepção". Brazilian Federal Law n. 9.800/99.

[248] *Juizados Especiais Federais Cíveis e Criminais no âmbito da Justiça Federal*.

This law accelerated the implementation of cyberjustice in Federal Courts. Three of its articles represented the opening of federal justice to the use of new technologies.[249]

The first was its article 8, paragraph 2.[250] It permitted the courts to install e-filing programs and services to notify the litigants electronically. Differently from what imposed the Federal Law 9.800/99, litigants were now released from the obligation of providing the originals of the petitions or documents.[251]

The second was its article 14, paragraph 3.[252] It stipulates that the sessions of federal small claims standardization courts that included the participation of judges residing in different cities shall be carried out by videoconferencing. As an example, in October, 2005 the Federal Small Claims Court of Appeals of Santa Cantarina inaugurated its videoconferencing systems, allowing judges sitting in different cities to participate in the same judgement.[253]

The third was article 24.[254] It conferred the Council of Federal Justice and the Schools for Magistrates of the Regional Federal Courts of Appeal the responsibility for developing case management systems for the Federal Small Claims Courts and for promoting courses for judges and court staff.

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[249] Atheniense, *supra* note 18 at 49.

[250] "Art. 8 [...] § 2º Os tribunais poderão organizar serviço de intimação das partes e de recepção de petições por meio eletrônico." Brazilian Federal Law n. 10.259/2001.

[251] Atheniense, *supra* note 18 at 49.

[252]"Art. 14 [...] § 3º A reunião de juízes domiciliados em cidades diversas será feita pela via eletrônica." Brazilian Federal Law n. 10.259/2001.

[253] Atheniense, *supra* note 18 at 30.

[254] "Art. 24. O Centro de Estudos Judiciários do Conselho da Justiça Federal e as Escolas de Magistratura dos Tribunais Regionais Federais criarão programas de informática necessários para subsidiar a instrução das causas submetidas aos Juizados e promoverão cursos de aperfeiçoamento destinados aos seus magistrados e servidores." Brazilian Federal Law n. 10.259/2001.

In a short period of time, electronic management systems for small claims were developed by different courts. Litigants and lawyers could easily register in federal courts' websites to obtain a pin code to access the systems. Although no misusage is known, the procedure did not assure the identity of the users, since no identification documents or in-person confirmation were needed.

d) Federal Law n. 10.358, of December 27th, 2001

Federal Law n. 10.358, passed by the Legislative branch in December 2001, would solve that problem. The paragraph introduced in article 154 of the Code of Civil Procedure would grant the courts the right to establish rules for the practice of procedural acts and notification of litigants in these new systems. Under its jurisdiction, each court should observe the requirements of authenticity and security.[255]

However, Provisional Measure 2.200, of June 28th, 2001,[256] had already created the Brazilian Public Key Infrastructure (ICP- Brasil) to guarantee the authenticity, integrity and juridical validity of electronic documents. The President Fernando Henrique Cardoso used his veto to block the new paragraph of article 154, afraid that the courts would create their own system of digital certification, compromising the adoption of a standard and safer national system.[257]

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[255] Atheniense, *supra* note 18 at 50.

[256] The Provisional Measure n. 2.200/2001 was substituted by the Provisional Measure n. 2.200-1, 27 July 2001, that was replaced by the Provisional Measure n. 2.200-2, 24 August 2001. This last version is still valid.

[257] Atheniense, *supra* note 18 at 50-51; Wesley Roberto de Paula, *O processo justo eletrônico* (LL.M: UFMG, 2014) at 54.

e) Federal Law n. 11.280, of February 16th, 2006

In 2006, as part of a cycle of procedural reforms approved to respond to the need for a faster delivery of justice,[258] Federal Law n. 11.280/2006 added a new paragraph to article 154 of the Code of Civil Procedure.[259] The new version added the need to observe the requirements of authenticity, integrity, juridical validity and interoperability of ICP-Brasil. This made compulsory for all the courts to use the same technological pattern adopted by ICP-Brasil. Other details about the use of digital signatures will be presented when approaching the use of digital certificates.

Since 2003, the first all-electronic procedures were implemented in Brazilian Federal Small Claims Courts. In June 2003, the 1st Federal Region launched the first version of the "JEF virtual", developed in three months,[260] which is still being updated and used in many courts. The first version of the "eproc", of the 4th Federal Region, was also installed in 2003, and approximately three million claims were filed using this system.[261] The novelty these systems represented caused expected resistance, but the legality of the new technology found support in courts.[262]

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[258] Many Brazilian laws were considered as the third cycle of reforms. See Jamil Zamur Filho, *Processo Judicial Eletrônico: Alcance e Efetividade sob a Égide da Lei n. 11.419, de 19.12.2006* (LL.M, Faculdade de Direito da Universidade de São Paulo, 2012) at 55, online: <http://www.teses.usp.br/teses/disponiveis/2/2137/tde-02052012-105409/es.php>.

[259] "Art. 154. [...] Parágrafo único. Os tribunais, no âmbito da respectiva jurisdição, poderão disciplinar a prática e a comunicação oficial dos atos processuais por meios eletrônicos, atendidos os requisitos de autenticidade, integridade, validade jurídica e interoperabilidade da Infra-Estrutura de Chaves Públicas Brasileira - ICP - Brasil." Brazilian Code of Civil Procedure.

[260] The system "JEF virtual" is a software for all electronic process in small claims in 1st Region Federal Courts. See "Juizado Virtual admite todos procedimentos processuais pela Web" *Consultor Juridico* (10 June 2003), online: < http://www.conjur.com.br/2003-jun-10/juizado_virtual_recebe_acao_julga_internet>.

[261] The electronic process called "eproc" was developed by the ICT personnel of the 4th Regional Federal Court, and initially was used for small claims, but it has been upgraded to be used for all types of procedures. See Sergio Renato Tejada Garcia. "Pje necessita de gestão mais transparente e democrática" *Consultor Jurídico* (11 October 2013), online: <http://www.conjur.com.br/2013-out-11/sergio-tejada-pje-necessita-gestao-transparente-democratica>.

[262] A lawyer filed a petition to question the obligation of the use of the eProc, since it could represent a limitation in access to justice, specially to those who did not have access to computers, but the judicial decision confirmed

f) Federal Law n. 11.419, of December 19th, 2006 - Law of the Computerization of the Judicial Process

In August of 2001, the Association of the Federal Judges of Brazil (AJUFE) sent a suggestion regarding the digitization of all Brazilian Courts with some changes in the Code of Civil Procedure to the Committee of Participative Legislation (CLP) of the Brazilian National Congress. This initiative became the Project of Law (PL) n. 5.828/01. Nobody denied the need of expanding the use of technology in courts, but legal and political debates postponed its approval.[263]

With a delay of more than five years, Federal Law n. 11.419/2006 was enacted with twenty two articles, modifying the Code of Civil Procedure and regulating four major elements of the electronic process: transmission of documents, notifications, digital

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the legality of article 2, of the Resolution TRF4 13, March 11, 2004, which established that "A partir da implantação do processo eletrônico somente será permitido o ajuizamento de causas pelo sistema eletrônico.", prohibiting new paper based files in those Courts. The decision of the 4th Federal Regional Court of Appeals considered that the system would improve the delivery of justice and the courts provide the necessary infrastructure to guarantee access to all citizens and their lawyers. The summary of the decision is: "MANDADO DE SEGURANÇA. ATO PRESIDENTE TRF4. OBRIGAÇÃO DE UTILIZAÇÃO DO PROCESSO ELETRÔNICO (*E-PROC*) NOS JUIZADOS ESPECIAIS FEDERAIS.1.A instituição do processo eletrônico é decorrência da necessidade de agilização da tramitação dos processos nos Juizados Especiais Federais, representando a iniciativa o resultado de um enorme esforço institucional do Tribunal Regional da 4a Região e das três Seções Judiciárias do sul para que não se inviabilize a prestação jurisdicional à população, diante da avalanche de ações que recai sobre a Justiça Federal, particularmente nos Juizados Especiais Federais.2. O sistema em implantação é consentâneo com os critérios gerais da oralidade, simplicidade, informalidade, economia processual e celeridade que devem orientar os Juizados Especiais, previstos no art. 2º da Lei 9.099/95, e que são aplicáveis aos Juizados Especiais Federais, conforme disposto no art. 1º da Lei 10.259/2001.3. A sistemática implantada assegura o acesso aos equipamentos e aos meios eletrônicos às partes e aos procuradores que deles não disponham (Resolução nº 13/2004, da Presidência do TRF/4ª Região, art. 2º, §§ 1º e 2º), de forma que, a princípio, ninguém tem o acesso à Justiça ou o exercício da profissão impedido em decorrência do processo eletrônico. Segurança denegada." TRF4, Mandado de Segurança Nº 2004.04.01.036333-0/RS, Corte Especial, DJ 19/10/2005 p 829-834, Relator Desembargador Federal João Surreaux Chagas; Some authors also questioned the mandatory use of technology in courts, as we can see in Luiz Rodrigues Wambier, Teresa Arruda Wambier & José Miguel Garcia Medina, *Breves Comentários à nova sistemática processual civil* vol 3 (São Paulo: RT, 2007) at 292.

[263] Atheniense, *supra* note 18 at 30-40.

certification and all-electronic based process.[264] This law established basic rules to be observed in electronic procedures in all branches and levels of the Judiciary, and standardized the use of information technology, with the purpose of reducing costs and improving the delivery of justice.[265]

This law, which consolidated some procedural rules and unified some requisites for new systems, was certainly an incentive for the development of multiple electronic systems for courts. By validating previous practices, its article 19[266] emphasized the principle of "pas de nullité sans grief",[267] which can be considered an authorization for the use of technology advancements beyond the limits of law by using technology neutrality.

Many courts launched their own judicial systems, and, just as an statistics reference, the Federal Courts of the 4th Region, which comprehends the south states of Santa Catarina, Parana and Rio Grande do Sul, has more than three thousand and two hundred million electronic cases in the system called e-proc.[268]

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[264] José Sebastião Oliveira & Arlete Aparecida Chavenco, "O Processo Eletrônico e a efetividade dos Direitos Fundamentais no Contexto do Acesso à Justiça" (2012) 2 Revista Jurídica 29 at 308-325, online: <http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/525>.

[265] Atheniense, *supra* note 18 at 25.

[266] "Art. 19. Ficam convalidados os atos processuais praticados por meio eletrônico até a data de publicação desta Lei, desde que tenham atingido sua finalidade e não tenha havido prejuízo para as partes." Brazilian Federal Law n.11.419/2006.

[267] The principle is frequently mentioned in courts, as we can see from the following precedent:

"PROCESSUAL CIVIL. EMBARGOS DECLARATÓRIOS. REINÍCIO DO PRAZO RECURSAL. SENTENÇA SUCINTA. FALTA DE PREJUÍZO. NULIDADE INEXISTENTE.[...] Por regra geral do Código de Processo Civil não se dá valor à nulidade, se dela não resultou prejuízo para as partes, pois aceito, sem restrições, o velho princípio: 'pas de nullitté sans grief'. Por isso, para que se declare a nulidade, é necessário que a parte demonstre o prejuízo que ela lhe causa.[...]". STJ, REsp Nº 14.473/RJ (91/0018359-8), 4ª Turma, DJ 03/03/1997 p. 4654, Relator Ministro Cesar Asfor Rocha.

[268] Information from the website of the 4th Regional Brazilian Federal Court, accessed on 12 April 2015, online :< http://www2.trf4.jus.br/trf4/controlador.php?acao=principal>.

g) Federal Law n. 13.105, of March 16th, 2015 – New Code of Civil Procedure

Brazil's latest legislative step on the path of bringing technology to courts is the new Code of Civil Procedure. Approved by the Senate in December 2014 and sanctioned by President Dilma Roussef in March 2015, it will come into force on March 17th, 2016. It dedicates a special section, from article 193 to article 199, to the electronic civil procedural acts,[269] besides some references to different procedures regarding signatures, petitions, notifications, appeals and others, when the cases are processed in electronic systems. It reflects the Brazilian reality in courts, where paper based files co-exist with technological advancements.

Article 194 establishes that the automation systems will respect the publicity of the acts and the guarantee of access and participation of litigants and their lawyers. The rules of the nationally unified infrastructure of public keys and the ICT principles that guide technology

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[269] "Seção II - Da Prática Eletrônica de Atos Processuais. Art. 193. Os atos processuais podem ser total ou parcialmente digitais, de forma a permitir que sejam produzidos, comunicados, armazenados e validados por meio eletrônico, na forma da lei.Parágrafo único. O disposto nesta Seção aplica-se, no que for cabível, à prática de atos notariais e de registro. Art. 194. Os sistemas de automação processual respeitarão a publicidade dos atos, o acesso e a participação das partes e de seus procuradores, inclusive nas audiências e sessões de julgamento, observadas as garantias da disponibilidade, independência da plataforma computacional, acessibilidade e interoperabilidade dos sistemas, serviços, dados e informações que o Poder Judiciário administre no exercício de suas funções. Art. 195. O registro de ato processual eletrônico deverá ser feito em padrões abertos, que atenderão aos requisitos de autenticidade, integridade, temporalidade, não repúdio, conservação e, nos casos que tramitem em segredo de justiça, confidencialidade, observada a infraestrutura de chaves públicas unificada nacionalmente, nos termos da lei. Art. 196. Compete ao Conselho Nacional de Justiça e, supletivamente, aos tribunais, regulamentar a prática e a comunicação oficial de atos processuais por meio eletrônico e velar pela compatibilidade dos sistemas, disciplinando a incorporação progressiva de novos avanços tecnológicos e editando, para esse fim, os atos que forem necessários, respeitadas as normas fundamentais deste Código. Art. 197. Os tribunais divulgarão as informações constantes de seu sistema de automação em página própria na rede mundial de computadores, gozando a divulgação de presunção de veracidade e confiabilidade. Parágrafo único. Nos casos de problema técnico do sistema e de erro ou omissão do auxiliar da justiça responsável pelo registro dos andamentos, poderá ser configurada a justa causa prevista no art. 223, caput e § 1º. Art. 198. As unidades do Poder Judiciário deverão manter gratuitamente, à disposição dos interessados, equipamentos necessários à prática de atos processuais e à consulta e ao acesso ao sistema e aos documentos dele constantes. Parágrafo único. Será admitida a prática de atos por meio não eletrônico no local onde não estiverem disponibilizados os equipamentos previstos no caput. Art. 199. As unidades do Poder Judiciário assegurarão às pessoas com deficiência acessibilidade aos seus sítios na rede mundial de computadores, ao meio eletrônico de prática de atos judiciais, à comunicação eletrônica dos atos processuais e à assinatura eletrônica." Brazilian Federal Law n. 13.105/2015. New Code of Civil Procedure.

security and confidentiality were included as a requisite for registering judicial acts in electronic systems.

Some observers would expect that the new code would present forward-looking ideas for future implementation and more standardization regarding the use of technology, or else, they suggested that electronic procedures could have been left as subject of special legislation, such as the Federal Law n. 11.419/2006.[270]

We consider reasonable the choice of not promoting great advancements, but presenting general principles and making it compatible with the Brazilian judicial reality. By leaving to the National Council of Justice and courts the responsibility to regulate some practices, the legislator makes it clear the concern that involves the necessary adjustments to what was mentioned, in the article 196, as progressive incorporation of new technologies. Besides, the digitization of the Judiciary does not involve only civil lawsuits, and debates regarding future technologies could represent an indefinite delay of the project's approval.

Following the disposition of article 19 of Federal Law n. 11.419/2006, and conscious that many systems have been implemented and disputes have been solved, the legislator adopted in article 1053 the instrumentality principle[271] to validate previous acts that have not met the requirements now determined, but achieved the expected results without loss to the litigants.[272] There is no doubt that one must be aware of the risks involving security of

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[270] These criticisms are presented by Mesquita Silva, *supra* note 218 at 151-152, 164; Zamur Filho, *supra* note 258 at 58-71; Augusto Tavares Rosa Marcacini, *Processo e tecnologia. Garantias processuais, efetividade e a informatização processual* (São Paulo, Edição Autor, 2013) at 61; Ana Amelia Menna Barreto, **"**O novo CPC e o processo judicial eletrônico" *Consultor Jurídico* (22 December 2014), online: <http://www.conjur.com.br/2014-dez-22/ana-amelia-cpc-processo-judicial-eletronico>.

[271] It is considered the same as "pas de nullité sans grief", that corresponds to "no nullity without injury" to the parties. See in Almeida Filho, *supra* note 18, at section X.2, 11-12, the point of view of Candido Rangel Dinamarco that, following Liebman, finds in article 154 of current Code of Civil Procedures (article 188 of the New Code of Civil Procedures) the legal provision that attributes more importance to the result than to formalities. On the contrary, the point of view sustained by Jose Carlos Barbosa Moreira, who considers it of great risk to try to solve the congestion of courts with the abandonment of formalities.

[272] "Art. 1.053. Os atos processuais praticados por meio eletrônico até a transição definitiva para certificação digital ficam convalidados, ainda que não tenham observado os requisitos mínimos estabelecidos por este

information in technological platforms, but who would declare that paper based files were risk free instruments?

Although it seemed to be solely an authorization to the adoption of cyberjustice by courts, in a short period of time, this path has become mandatory. It is not just a matter of modernization of the Judiciary. It is a solution to deal with the incapacity of absorbing the increasing social demand for justice, which causes excessive and harmful delay in the resolution of disputes.[273]

Electronic justice in Brazil, as in most countries, is still an unaccomplished mission, but the computerized process and other modular systems that have been developed for the Judiciary as means to reduce court caseloads and facilitate access to justice, is a reality in fast development and expansion.

2. Experiences to be shared

In 2013, Bailley and Burkell, after collecting information from people involved in technology implementation across Canada and at different levels of the Judiciary, arrived at the identification of the following key factors that contribute to the success or failure of any initiative to introduce or update systems:

Código, desde que tenham atingido sua finalidade e não tenha havido prejuízo à defesa de qualquer das partes." Brazilian Federal Law n. 13.105/2015. New Code of Civil Procedure.

Almeida Filho, *supra* note 18, at section XIII.3, 12-15, lists other articles of the current Code of Civil Procedures (Federal Law n. 5.869/73) with similar rules, such as "Art. 154. Os atos e termos processuais não dependem de forma determinada senão quando a lei expressamente a exigir, reputando-se válidos os que, realizados de outro modo, Ihe preencham a finalidade essencial".[...] and "Art. 243. Quando a lei prescrever determinada forma, sob pena de nulidade, a decretação desta não pode ser requerida pela parte que Ihe deu causa". In addition, the article 563 of the Brazilian Code of Criminal Procedure (*Decreto-lei* n. 3.689, October 1941) carries similar provision, asserting that "Nenhum ato será declarado nulo, se da nulidade não resultar prejuízo para a acusação ou para a defesa". In Labour Courts, the equivalent command is inserted in article 794 of the CLT, establishing that "Nos processos sujeitos à apreciação da Justiça do Trabalho só haverá nulidade quando resultar dos atos inquinados manifesto prejuízo às partes litigantes".

[273] Atheniense, *supra* note 18 at 25.

> "First, *involve the judiciary at all levels of technology planning and implementation*.(…)
> Second (and related to the first), *ensure recognition of and respect for judicial independence*.(…)
> Third, *develop an overall plan for technology implementation*.(…)
> Fourth, *policy and technology development should progress hand in hand- one without the other tends to lead to problems*.(…)
> Fifth, *recognize and address standardization issues*.(…)
> Sixth, *start small and go for the 'quick win'*.(…)
> Seventh, *consult early, consult widely, and consult often*.(…)
> Eight, *learn from the mistakes and success of others*.(…)
> Ninth*, never assume that technology is a simple substitute for existing mechanisms or processes."*[274]

These factors represent aspects related to system design, engineering and development, together with psychological and political power issues. These last ones, which include users' characteristics and practices as well as organizational structures and interactions, can endanger any great technology project.[275]

Even though we agree with Bailley and Burkell that "early consideration of the implementation process along with system design appears to be preferable to an approach in which implementation occurs first, so that resistance issues are left to be dealt with afterward",[276] the Brazilian experience, especially in the first systems developed for federal small claims courts, did not follow this pattern. Pushed by legislation changes and budgets, political decisions were taken and our courts became our cyberjustice labs.

This is far from the ideal conditions of transposition to cyberjustice, but maybe if we would have waited for ideal conditions and followed the process of identification, review, analysis of current practices, testing,[277] and training, we would never have implemented the

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[274] Bailley & Burkell, *supra* note 8 at 19-21.

[275] Bailley & Burkell, *supra* note 8 at 2.

[276] *Ibid*.

[277] According to Bailey and Burkell, "the literature suggests that staged development and implementation of technological change may be important to success, with implementation of a new process ideally preceded by

systems, for lack of political and financial opportunities. It's current, in development groups, that we work targeting the best, but we start with what is possible, and the systems keep being matured and adapted to the needs of the users.

As an example, the federal small claims system (JEF virtual) implemented in June of 2003 in the 1st Region Courts was ready to be launched after three months of development. In May 2003, one tort claim was used as a pilot test and in less than a month it was possible to have its judgement. The complete file was available in the website for consultation of the parties.[278]

The consequences that adopting technology in courts can represent for part of the population that does not have access to computers or are not computer literate, either because of individual rejection of the modern instruments or financial vulnerability, is a constant concern. However, the same law (n. 10.259/2001), which determined the implementation of Federal Small Claims, carried the legal authorization for the development of the first all-electronic process. It included the idea of empowering the low-income population of their rights, with special attention to social security claims, and the use of technology to deal with the expected explosion of litigation and the constitutional principle of the reasonable duration of the process.

The solution to the contradictory situation, where the digital access to justice was being offered to socially vulnerable individuals, was in the will of the Judiciary to involve judges, court staff, and legal community in the goal of delivering justice. Although only Federal Law 11.419/2006 has established the obligation of courts to have equipment for the use of litigants and lawyers,[279] the federal courts already had this provision in their own regulations[280] and

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steps such as: process identification, review and analysis of the current process, and new process design and testing." *Ibid*.

[278] *Consultor Juridico*, supra note 260.

[279] "Art. 10.[...] § 3º Os órgãos do Poder Judiciário deverão manter equipamentos de digitalização e de acesso à rede mundial de computadores à disposição dos interessados para distribuição de peças processuais." Brazilian Federal Law n. 11.419/2006

with the help of local bar associations and faculties of law, it was provided all the necessary legal or technological assistance to guarantee access to justice to those that are legally and digitally vulnerable.

In 2004, when questioned about the legality of the exclusive use of the "eproc" to file claims in the Brazilian federal small claims courts of the 4th Region, the judges were confident in supporting the initiative, compatible with the informality, simplicity and celerity that must be applied to these procedures. A report of the Coordination of Federal Small Claims of the 4th Region revealed a substantial reduction of time from filing to sentencing.[281] They were conscious that the new system would result in reviewing procedures and traditional routines, and emphasized that judges, staff, lawyers and the general public would adapt and benefit from a more efficient way of delivering justice.[282]

Since "many have wondered if IT could succeed where legislation has failed",[283] we could affirm that this experience in federal small claims in Brazil proves that legislation, technology and man's determination have to work together to overcome the obstacles and promote access to justice.

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[280] An example is the Resolution n. 13, 11 March 2004, of the 4th Federal Regional Court of Appeals, that established in its article 2 the installation of a self-service room, with necessary equipment to access the system and also the possibility of counting on the help of a court staff to take down the claim in electronic forms. Original text: "Art. 2º. A partir da implantação do processo eletrônico somente será permitido o ajuizamento de causas pelo sistema eletrônico. Parágrafo primeiro: Em cada Subseção Judiciária será instalada uma sala de auto-atendimento, com acesso a sistema de escaneamento e computador ligado à rede mundial para uso dos advogados e procuradores dos órgãos públicos e consulta pelas partes. Parágrafo segundo: Se a parte comparecer pessoalmente, o seu pedido poderá ser reduzido a termo eletronicamente por servidor do Juizado Especial Federal." Tribunal Regional Federal da 4ª Região, online :< http://www.jfrs.jus.br/atos_normativos/trf/2004_13_POA_DF.pdf>.

[281] In his vote, Federal Judge Nylson Paim de Abreu mentioned that statistics revealed the average time from filing to sentence of 719.87 days in ordinary civil courts, 206.62 days in paper based small claims courts, 104.33 days in small claims courts using both paper and electronic processes, and 47.67 days in all-electronic small claims courts. MS 2004.04.01.036333-0/RS, TRF4, *supra* note 262.

[282] Vote of Federal Judge João Surreaux Chagas in MS 2004.04.01.036333-0/RS, TRF4, *supra* note 262.

[283] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 at 1.

In the situation described, we could apprehend that the four socio-economic factors connected to digital inequality - availability of infrastructure, human capacity to use technology, financial capacity, and adequacy of services to real needs - were taken care of.[284] We understand that the Judiciary should provide solutions that help solve these problems or remove these conditions as requisites to access the judicial system.

The participation of stakeholders is mentioned in many studies as essential to the success of systems developed for courts. Bailley and Burkell identified that involving judges is a way of recognizing judicial independence and obtaining legitimacy to technology. "Judicial leadership in the process of technology implementation was identified as critical for the success of technology."[285] In Brazil, management and development committees responsible for ICT projects are presided by judges, and the National Council of Justice has a permanent committee for ICT and infrastructure that is composed of five of its members.

In fact, most Brazilian courts have their own ICT staff, which facilitates the integration of the members of development committees that are usually multidisciplinary. Even when it is inevitable to rely on external collaboration, an insider is the leader of the project. Judges have learned more about technology, and the ICT staff has learned about the judicial procedures. The investment in technology is considered so important that the 4th Regional Federal Court has more than one hundred people in its ICT sector, and this results in a system called "eproc", totally integrated with their needs and constantly updated. The ICT internal infrastructure is considered essential to maintain the existing open source systems and promote innovations. Initial experiences with proprietary and closed source software programs were expensive considering the number of users and the acquisition and renovation of licenses. In addition, these computer programs were not flexible regarding the requests of changes by stakeholders, causing more resistance in the implementation.

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[284] Prof. Nicolas Vermeys mentions these groups of factors related to "la fracture numérique" in *supra* note 205 at sections 58-59.

[285] Bailley & Burkell, *supra* note 8 at 6.

We find it interesting when reality meets theory, especially when it has not happened before. Karim Benyekhlef and Nicolas Vermeys listed the best practices in the field of cyberjustice development to avoid the failure of a project. These practices are:

> "• Be aware of the impacts of technological changes on human behaviour;
> • Be aware of the impacts of technological changes on legal rituals and practices;
> • Identify the true impacts of technological changes on processes;
> • Use an incremental or modular approach to technological change;
> • Be aware of the possible implications of outsourcing;
> • Identify possible compatibility issues with existing technology and practices;
> • Identify factual needs, not theoretical wants;
> • Use a collaborative approach;
> • Identify all costs, not simply acquisition costs;
> • Don't just reproduce: Innovate."[286]

We identify that even in a more intuitive manner than as part of a planning strategy, these practices were always being considered in the ICT projects adopted in Brazilian Courts. For some political or cultural reasons, maybe some steps were consciously disregarded or the risks were assumed as inevitable in the transformation process. The Brazilian legislation path and the existing investment limitation led us to start with modular systems. First there were systems to give information about the status of the case. Then, case track users could follow online their cases of interest and even could be notified of any change in a process they were tracking. Other modular system made possible the automation of publication of decisions. Also, content of precedents were available for online access to general public, unless there was any specific reason for restrictions.[287]

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[286] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 at 2-3.

[287] Almeida Filho, *supra* note 18 at 179-180.

In the 1st Regional Federal Court, many modular systems were developed to bring innovation to the management of caseloads and to daily practices. Considering that we still cannot envisage the civil and criminal courts totally free from paper files, either because of the backlogs or because some of our first instance courts are in areas where internet access is still not good enough for the traffic of information, we have to work with modular systems that reduce costs and time in some traditional routines. The idea is that these modular softwares interact with the electronic processes and bring celerity to the paper cases' procedures, using the same blueprint. Examples of these systems are a dedicated text editor that can use forms and capture details of each process to help on the elaboration of decisions (TRF1-doc), automation of the storage of decisions that allows future consultation using specific parameters (e-CVD), statistic bulletins to measure performance, electronic filing of petitions and documents without having to deliver the originals in courts (e-Proc), management bulletins that help identify cases that have not been timely examined and those that have similar issues, and notification online (e-mandado) .

Of course, this approach would be perfect if solutions were all "compatible and complementary in order to avoid overlapping issues".[288] The problem that we usually face in the modular development is the incompatibility, because technologies evolve and some prefer to use a new tool for new developments. We have systems in Java, PHP, FORMS, visual basics and ASP, and users have to log in and out to do their jobs.

When we took part in a developing committee in the 1st Regional Federal Court, we would always tell the technology staff that they should never loose time adding tools that the user would not understand, because they would not use them, and it would represent just a waste of time. The main idea is that "If cyberjustice solutions simply add another step to already complex procedures, they do not serve their main purpose, which is to save time and money".[289] Judges have been complaining about systems that, with the argument of security of

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[288] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 section 4 at 7.

[289] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 section 3 at 6.

information, transfer bureaucratic activities to their routines, stealing time from the decision-making process.

To quote Bailley and Burkell, their research dedicates a specific section to "legacy practices" and how they conflict with new technologies.[290] The enthusiasts of novelties will welcome anything that will change their routines. The traditionalists will find a thousand motives to declare the failure of the innovation. And the issue of having old practices in parallel to new ones is the possibility of comparison. Instinctively, our option, as said, was to adopt modular systems to change the routines of the paper cases, trying to introduce a real shift of parameter.

Some courts, however, have the budget and the administrative autonomy to make a more definitive movement into technology. In numbers that can represent how intense is the use of technology in Superior Court of Justice, between the months of January through March of 2009, more than 236.000 cases were transformed into digital files.[291] In December of 2012, the Superior Court of Justice reached one million electronic files received since the implementation of its e-STJ in 2009.[292]

Brazilian courts have been through an expansion of diverse initiatives, including the electronic process in the Brazilian Supreme Court [293] and the Superior Court of Justice.[294] The National Council of Justice, listening to the needs of internal and external stakeholders, decided to concentrate the costs and to standardize not only rules, but the electronic processes

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[290] Bailley & Burkell, *supra* note 8 at 18 .

[291] Aírton José Ruschel , João Batista Lazzari & Aires José Rover. "O Processo Eletrônico na Justiça do Brasil" 39 JAIIO - SID 2010 at 2135, online: <http://www.egov.ufsc.br/portal/sites/default/files/o_processo_eletronica_na_justica_do_brasil.pdf>.

[292] *Relatório de Gestão do Exercício de 2012* (Brasília: Superior Tribunal de Justiça March 2013) at 30, online: <http://www.stj.jus.br/portal_stj/arquivos/Relatorio_de_Gestao_de%202012_STJ_versao_entregue_TCU.pdf>.

[293] Resolution n. 344, 31 May 2007, Brazilian Federal Supreme Court.

[294] Resolution n. 1, 6 February 2009, Brazilian Superior Court of Justice.

into the PJe.[295] Since it is not the first attempt of unifying systems, there is some mistrust in the judicial community, but the pilot projects are already being implemented and let's hope the goal for 2018 will be achieved, encompassing other systems and bringing innovations.

B. Obstacles to overcome

We know it may sound repetitive after all we have said in this thesis, but the adoption of ICT solutions in courts is the correct and irreversible path to enhance access to a timely and equal justice. The expansion of the use of the internet accelerates the possibilities of using technology, opening courts to all citizens twenty four hours a day, seven days a week, and integrating distant communities.

That being said, developing systems in this era demands the ability of constructing the present, keeping an eye on the past and the other on the future. Legacy practices, legal rituals, symbols and traditions have to be understood and not simply abolished, or else, psychological, political, social and cultures barriers will lead to the failure of innovations.[296]

Sometimes the problem is not in the technology used itself, but in the use we make of it. Societies could be divided in digital literate and digital illiterate, including in this last group those who are not computer literate or don't have access to computers and broadband networks. This could certainly deep the obstacles faced by access to justice even worse.[297] However, our mentioned experience with the Brazilian federal small claims courts shows that those vulnerabilities can be managed with human support and adequate planning of courts' infrastructure, bringing celerity, reducing costs and providing simple procedures for simple claims. The illiteracy problem, being digital or not, is part of the inequality problem, which fair justice can help diminish.

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[295] Resolution n. 185, 18 December 2013, Brazilian National Council of Justice.

[296] See Benyekhlef, Amar & Callipel, *supra* note 28 at 319-320, about the failure of past cyberjustice initiatives.

[297] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 at 3.

The goal in computerizing the judicial system is to increase the efficacy of the judicial process, providing solutions that can accelerate the procedures. If any e-justice solution adds more steps or brings more complexity to the routines in courts, either to inside users or to the general public, its mission is compromised.[298] So, even if it is to guarantee the security of the systems and of the information, simplicity has to be on top of the list of requisites in all initiatives. We would always recommend: "the fewer number of clicks, the better".

Since predictions of the future can be crafted by factors including knowledge, planning, and a bit of luck to guarantee that the pre-established conditions won't change, we consider that even projects that were shut down should not be identified as failures. They are part of the path. They are seeds and not all will necessarily grow in the same direction. In the globalized society, many ideas blossom at the same time. Some will be developed faster, others will be absorbed by the new technologies or will become incompatible with future regulations. We learn from all previous experiences, because in the end, they are the support for decisions regarding the next step. Even if cyberjustice is not able to eliminate all existing obstacles to access justice, doubtlessly, it can help restore the trust in judicial systems, leaving behind the barriers caused by high costs and delays.[299]

1. Confidentiality and Authenticity of information

The use of technology carries many hopes and fears. Hopes that all solutions will be easily provided solving old problems, and fears of what obstacles we will have to face in order to adapt to a new condition. Many studies focus in important security issues such as virus, hackers, adulteration of contents, and other factors that may comprise the use of technology in any environment. However, we decided to focus our concern in some obstacles to the use of ICT in judicial processes such as access to information, digital signature, and storage of documents, which can affect the access to justice principle.

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[298] Vermeys, "Ohada", *supra* note 205 at section 88-89.

[299] Perez & Corona, *supra* note 145 at 279.

a) Access to information

Who could access the documents of an electronic case was an early concern of the first Brazilian e-process system. Following the rule that processes are public, unless determined by the judge or if its subject requires secrecy, many technology solutions would allow the public consultation of all pages of the digital processes. Then, the debates about the privacy and internet publicity led to restrictions established by the courts in internal regulation.

Article 11, paragraph 6 of Brazilian Federal Law n. 11.419/06 restricted access to digitalized "documents" to the parties, their lawyers, and the public prosecutors. The first doubt that appeared was if this restriction would be applied to petitions and decisions. The other was the incompatibility with article 40 of the Code of Civil Procedures and article 7, XIII of Federal Law n. 8.906/94[300] that guaranteed to all lawyers the right to examine in courts, any process.[301]

In 2010, the National Council of Justice[302] and the Brazilian Supreme Court[303] approved internal regulations allowing online access of petitions and documents of electronic processes only to parties, lawyers, and public prosecutors. In the Superior Court of Justice, the access to the files of the e-STJ follows the determination of the laws and is only allowed with the use of digital certificates.[304]

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[300] Brazilian Federal Law n. 8.906, 4 July 1994, is known as the Statute of Lawyers and of the Bar Association.

[301] Atheniense, *supra* note 18 at 220-225.

[302] Resolution CNJ n. 121, 5 October 2010, Conselho Nacional de Justica.

[303]. Although article 16 of Resolution STF n. 427, 20 April 2010, allows free access to anyone registered in the e-STF, in STF's website there is a reference to the Resolution CNJ 121/2010, limiting access to parties, lawyers and public prosecutors. Original text: "Art. 16. A consulta à íntegra dos autos de processos eletrônicos poderá ser realizada por qualquer pessoa credenciada no e-STF, sem prejuízo do atendimento pela Secretaria Judiciária. § 1° É livre a consulta, no sítio do Tribunal, às certidões e aos atos decisórios proferidos por esta Corte em processos eletrônicos. § 2º Todas as consultas realizadas no e-STF ficarão registradas no sistema e, se necessário, poderão ser atestadas pela Secretaria de Tecnologia da Informação." Supremo Tribunal Federal .

[304] "Art. 20. É livre a consulta pública aos processos eletrônicos pela rede mundial de computadores, mediante o uso de certificação digital, nos termos da legislação em vigor, sem prejuízo do atendimento presencial no Tribunal. § 1º O disposto no caput deste artigo não se aplica aos processos e procedimentos de investigação

Regarding the PJe, the National Council of Justice has established clear rules to the access to information in articles 27 and 28 of Resolution n. 185/2013,[305] which correspond to the result of the debates inside and outside courts related to the difference between public access to paper base in courts and the public access to internet. The files can be consulted by the parties, all lawyers, public prosecutors and judges, but it is cogent the identification of the user in the courts' systems for online access. Besides, all litigants can require the confidentiality of a document, a petition or of the case.

The solution to what should be public online seems to have become standardized. The common complains that remain unsolved in many courts is when access is wanted in person, since there is the obligation to register who had access and most courts do not have a computer on the counter. The access in rooms equipped with computers for the access of general public usually helps, but the problem remains for those that do not have the digital certification or are not registered in the systems. Wouldn't this configure a limit to access to justice?

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criminal sob publicidade restrita nem aos que estejam correndo em segredo de justiça. § 2º A consulta aos processos criminais após o trânsito em julgado da decisão absolutória, da extinção da punibilidade ou do cumprimento da pena será permitida apenas pelo número atual ou pelo anterior, inclusive em outro juízo ou outras instâncias". Resolution STJ n.14, 6 June 2013, Superior Tribunal de Justiça.

[305] "Art. 27. A consulta ao inteiro teor dos documentos juntados ao PJe somente estará disponível pela rede mundial de computadores, nos termos da Lei nº 11.419, de 19 de dezembro de 2006, e da Resolução CNJ nº 121, de 5 de outubro de 2010, para as respectivas partes processuais, advogados em geral, Ministério Público e para os magistrados, sem prejuízo da possibilidade de visualização nas Secretarias dos Órgãos Julgadores, à exceção daqueles que tramitarem em sigilo ou segredo de justiça.
§ 1º Para a consulta de que trata o *caput* deste artigo será exigido o credenciamento no sistema, dispensado na hipótese de consulta realizada nas secretarias dos órgãos julgadores.
§ 2º Os sítios eletrônicos do PJe dos Conselhos e dos Tribunais deverão ser acessíveis somente por meio de conexão segura HTTPS, e os servidores de rede deverão possuir certificados digitais Equipamento Servidor da ICP-Brasil adequados para essa finalidade.
Art. 28. Na propositura da ação, o autor poderá requerer segredo de justiça para os autos processuais ou sigilo para um ou mais documentos ou arquivos do processo, através de indicação em campo próprio.
§ 1º Em toda e qualquer petição poderá ser requerido sigilo para esta ou para documento ou arquivo a ela vinculado. § 2º Requerido o segredo de justiça ou sigilo de documento ou arquivo, este permanecerá sigiloso até que o magistrado da causa decida em sentido contrário, de ofício ou a requerimento da parte contrária.
§ 3º O Tribunal poderá configurar o sistema de modo que processos de determinadas classes, assuntos ou por outros critérios sejam considerados em segredo de justiça automaticamente." online : < http://www2.trtsp.jus.br/geral/tribunal2/Trib_Sup/STF/CNJ/Res_185_13.html>.

b) Digital signature and digital certificates

This will lead us to the next issue: digital signature and digital certification. In this matter, the decision of the Court of Appeals of Quebec in *Bolduc c. Montréal (Ville de)*[306] demonstrates how something as simple as a signature can be so important to demand a judicial definition. Article 2827 of the Civil Code of Quebec says that "a signature is the affixing by a person, to a writing, of his name or a mark distinctive to him which he regularly uses to signify his intention". The decision, regarding the electronic signature, emphasized that it is important to understand the spirit of the law and to abandon the traditional formalism. The signature functions to identify the individual and to confirm his consent.[307]

That being said, many stakeholders missed the visualization of real signatures in the first decisions and some systems even associated an image to make them feel more comfortable with the shift from paper to electronic media. Some occurrences of people asking for the original of electronic signed documents were part of this process of identification of the digital signature in a document.

We have seen that the controversy over authenticity of documents sent by email, based on the "Facsimile Law", has harmed the guarantee of access to justice. Federal Law n. 11.419/06, in its article 1, paragraph 2, established the notion of electronic signature as that based on a digital certificate issued by a certified authority and by in person registration on the judicial systems, in order to assure confidentiality, identification, and authenticity. [308]

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[306] *Bolduc c. Montréal (Ville de)*, 2011 CanLII 1827 (QCCA), online: <http://canlii.ca/t/fnbp5>.

[307] Nicolas Vermeys, "Pentacles et Pentiums : Cinq décisions ayant marqué le droit des technologies de l'information en 2009 ", (2010) 22 *CPI* 421 at 436-439.

[308] "Art. 1o [...] § 2o Para o disposto nesta Lei, considera-se: [...] III - assinatura eletrônica as seguintes formas de identificação inequívoca do signatário:a) assinatura digital baseada em certificado digital emitido por Autoridade Certificadora credenciada, na forma de lei específica;b) mediante cadastro de usuário no Poder Judiciário, conforme disciplinado pelos órgãos respectivos." Brazilian Federal Law n.11.419/06; José Eduardo Carreira Alvim & Silvério Nery Cabral Junior. *Processo judicial eletrônico: comentários à Lei 11.419/06* (Curitiba: Juruá, 2008) at 20-23; Teixeira, *supra* note 18 at 423-424.

Although the spirit of the law was to guarantee authenticity and security to information, and, at the same time, not limit accessibility, some courts' systems only permit access to electronic lawsuits for those who have the digital certificate.[309]

Through Provisional Measure n. 2.200, of June 28th, 2001,[310] the Brazilian government launched the Brazilian Public Key Infrastructure – PKI Brazil,[311] and adopted a legal model which observes principles of authenticity, integrity, confidentiality, and legal validity for the certification of electronic documents, equipment, technology applications and transactions.[312]

The National Institute of Information Technology (ITI) is the Brazilian federal agency of the Executive branch, with the aim of giving support the Brazilian Public Key Infrastructure – PKI Brazil, holding the status of first certificate authority of the chain – CA root. It also has the important goal of promoting digital inclusion,[313] accredit, supervise, and audit the other participants in the chain.

ITI has accredited the AC-JUS – a first level Certificate Authority for the Judiciary, created in December 2004.[314] Usually, digital signatures produced by certificates mentioned above are legally equivalent to handwritten signature of individuals, but the certificates Cert-

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[309] A digital certificate, when issued to identify someone in the virtual world, connects or correlates a person with a cryptographic key pair. Its objective is to guarantee the identification of the user, in order to provide security and validity of electronic documents and its contents. For more detailed information see Atheniense, *supra* note 18 at 113-114; Mesquita Silva, *supra* note 218 at 22-73; Mairton da Silva, *supra* note 225 at 62.

[310] Re-edited as Provisional Measure 2200-02, 24 August 2001.

[311] Brazilian Public Key Infrastructure - ICP – Brasil

[312] Authenticity ensures that the author is the person named in the certificate used in the signature. Integrity means that the document was not modified after release. Confidentiality avoids that unauthorized people access contents of messages or documents. Legal validity, associated with non-repudiation in crypto-technical meaning, establishes that the sender cannot refute authorship, after signing, once the information in verifiable by any third party and with high assurance can be confirmed to be genuine. See Adrian Mccullagh & William Caelli, "Non-repudiation in the digital environment" (2000) 5:8 Peer Reviewed Journal on the Internet, online: <http://pear.accc.uic.edu/ojs/index.php/fm/article/view/778/687>; Vincent Gautrais, *Preuve Technologique* (Canada : Lexis Nexis, 2013).

[313] Instituto Nacional de Tecnologia da Informação, online: <http://www.iti.gov.br/institucional/quem-somos>.

[314] Resolution STJ/CJF nº 001, 20 December 2004, Autoridade Certificadora online: <http://www.acjus.jus.br/legislacao/resolucoes>.

jus carry some other particular characteristics like the identification of the public servants – their position, id number and where they work, which is a digital functional identity that stamps the responsibility of the public agent in the production of the electronic document. Other details also involve Cert-jus for equipment and applications to guarantee the security of systems and information.

The National Institute of Information Technology – ITI informed that in 2011 and 2012 over two million digital certificates were issued per year in the pattern of the Brazilian Public Key Infrastructure – PKI-Brazil and each day new applications increase the use of this technology by individuals.[315]

The participation of the Bar in the updating process of professionals is essential to help lawyers to overcome many obstacles they sometimes face in the use of new tools. As an example, the Bar of Rio de Janeiro, the second largest in Brazil, has been providing courses (in person and online based ones) on digital certification and electronic process. Besides, projects like 'Get Digital' caravan, which visited sixty subsections, was responsible to provide information to lawyers about the requirement of digital certification to access new technological Judicial systems, and facilitated the acquisition of digital certificates, providing, as well, explanations to technical questions.[316]

As President of the Technical Committee of AC-JUS, in the years of 2006/2007, we could experience the security procedures involving the expedition of digital certificates and the maintenance of the information in safe rooms with very strict access. However, the growth in the demand, with a parallel raise in the number of Registration Authorities and the multiplication of applications that require these certificates, calls for the risk involving fraud

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[315] "ICP-Brasil emite mais de 2 milhões de certificados em 2012" (2012) 2:7 Revista Digital INTI 7, online: <http://www.iti.gov.br/images/publicacoes/revista-digital/revista_digital_2_2012.pdf >.

[316] "Projeto Caravana Fique Digital" (2012) 2:7 Revista Digital INTI at 11-13, online: <http://www.iti.gov.br/images/publicacoes/revista-digital/revista_digital_2_2012.pdf >.

during the primary identification[317] to be taken seriously, in order to prevent the efficiency and confidence of the tool to be questioned.

The use of biometry in the identification of the individual, combined with the signing process, instead of token or cards with chips and pin codes, could be the next step to increase the assurance of ownership of the certificate, since it uses a key that can't be borrowed or taken from a person, minimizing the possibility of issuing a certificate for people who are not who they claim to be.[318]

There are many ICT solutions to guarantee security of information and identification of users, but the use of digital certification is still not a common tool for the average individual, because of the absence of knowledge of its uses and the costs. The challenge is to find the perfect equation regarding accessibility and security.

c) Storage of information

On the topic of storage of information, the barriers are related to the original documents, to the size of files, to backups, to discard criteria and to future access to files. The article 12, paragraph 1, of Federal Law 11.419/06[319] makes it clear there is no need to have an extra copy of the files, since the electronic processes are protected by security systems and properly stored in means to preserve the integrity of the information. Today this may sound strange, but not long ago it was common to keep copies of paper based processes or some of the documents for security reasons. Also, when the first e-processes systems where launched, a copy of digitalized petitions and documents was maintained, in case of inconsistency of the

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[317] The primary identification corresponds to the presentation of physical documents.

[318] About definition and the use of biometry to identify individuals see Julie M. Gauthier, *Le droit de la biométrie au Québec : sécurité et vie privée* (LL.M. Mémoire, Université de Montréal, 2014) [unpublished].

[319] "Art. 12.[...] § 1º Os autos dos processos eletrônicos deverão ser protegidos por meio de sistemas de segurança de acesso e armazenados em meio que garanta a preservação e integridade dos dados, sendo dispensada a formação de autos suplementares". Brazilian Federal Law 11.419/06.

data stored or unavailability of the system. In courts, it was a routine to confirm the correct digitalization of each page of petitions and documents, to assure that the dossier was complete.

For security reasons, Brazilian courts use backup storage in a different server and have some safe rooms to duplicate the information. Cloud storage also has been analyzed as a possibility, but it still did not give stakeholders the confidence to be considered a security method for the storage of this type of information. The management and the discard of stored documents should also be a concern, considering that in the future some files could not be accessed by new technologies and important information could be lost.

About the size of files admitted in e-processes, there are three obstacles to overcome: capacity of secure storage, resistance of stakeholders to read long petitions or documents in computers, and the risk of have some e-processes with paper based documents kept in courts. Until we figure out an appropriate solution, litigants are trying to adequate their petitions and documents to the limits allowed by internal regulations and some courts are keeping the possibility of having paper procedures for these situations.

While computerizing courts, if we do not take into consideration these and other issues that may compromise access to justice, critics and traditionalists will celebrate the failure of the projects.[320]

2. Unification of systems and interoperability

Among what has been identified as the principles of the electronic process, Atheniense mentions the principle of uniformity, referring to the indispensable compatibility of systems in order to permit the transmission of information between different courts. Based on this principle any data inserted in a judicial system could be stored and shared without risk of distortion.[321]

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[320] Almeida Filho, *supra* note 18 at 174.

[321] Atheniense, *supra* note 18 at 98.

In order to understand the dimension of this principle and why it can become an obstacle to be surpassed, it is important to take into consideration the structure of the Judicial Branch and the administrative autonomy of courts. A more autonomous and divided judicial system, with different specializations and levels, certainly leads to a greater difficulty in developing solutions that will embrace all stakeholders needs.

The macro organizational structure of the Brazilian Judiciary System is established on article 92 of the Brazilian Constitution:

> I – the Supreme Federal Court;
>
> I-A – the National Council of Justice;
>
> II – the Superior Court of Justice;
>
> III – the Federal Regional Courts and the Federal Judges;
>
> IV – the Labour Courts and Judges;
>
> V – the Electoral Courts and Judges;
>
> VI – the Military Courts and Judges;
>
> VII – the Courts and Judges of the states, of the Federal District and of the territories;"[322]

Besides the Superior Court of Justice, there are three other superior courts: the Superior Labour Court (Article 111, I), the Superior Electoral Court (Article 118, I) and the Superior Military Court (Article 118, I). The federal justice system has five Federal Regiona Courts (of appeals) responsible for all twenty six states and one federal district, and twenty seven federal judiciary sections.[323] The labor justice system has twenty four Regional Labour Courts (of appeals), the electoral justice system has twenty seven Regional Electoral Courts (of appeals)

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[322] Constitution of the Federative Republic of Brazil, *supra* note 43 Article 92.

[323] First instance for each state of the federation and the Federal District.

and each of the twenty six states of the federation and the Federal District has a Court of Justice.

The result of this wide organizational structure combined with the autonomy of the Courts was decentralized planning, development of different ICT solutions, and establishment of internal regulation. Even though the procedural law is the same in all federative units, internal organization of courts, infrastructure, budgets, and internal regulations interfere in the degree of digitization of each court.[324]

We must reinforce that many modular systems started being implemented in the 1990s and the federal small claims e-processes were already reality before the creation of the National Council. In the federal justice system, the Federal Council of Justice had already invested in sharing experiences among the Federal Regional Courts. There were some previous efforts for unifying requirements, and some requisites were considered mandatory, like the unified classification of actions, subject and procedures' records, the use of open source codification and statistics parameters.

In 2004, there was a national federal project named e-Jud, with the mission of integrating the database of the systems of the five regional courts, by converting into only one system.[325] This idea, and the documentation produced was later on encompassed by the project of the National Council of Justice, known as PJe.[326] After the creation of the National Council of Justice, installed in 2005, there have been efforts in avoiding duplication of costs and

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[324] Andre Andrade & Luis Antonio Joia. "Organizational Structure and ICT Strategies in the Brazilian Justice". ICEGOV '10. Proceedings of the 4th International Conference on Theory and Practice of Electronic Governance. New York,.2010. at 103-108, online:< http://dl.acm.org/citation.cfm?id=1930345>.

[325] Some information about this project can be obtained in the website of the 4th Federal Regional Court at < http://www2.trf4.jus.br/trf4/controlador.php?acao=noticia_visualizar&id_noticia=4017>.

[326] Detailed information about the PJe, including requirements, guide for different users, documentation and evolution of the project can be accessed in the website of the National Council of Justice, online:< http://www.cnj.jus.br/wikipje/index.php/P%C3%A1gina_principal>; and in websites of all courts that have already implemented this electronic process system.

introducing standardized solutions and regulations, but the autonomous development of systems by the courts was authorized by Federal Law n 11.419/2006, in its article 8.[327]

Although more than twenty five different systems co-exist in Brazilian courts, the National Council of Justice took the responsibility to level federal and state courts, of different specializations, to same digital standards and it is trying to work on solutions that can be evenly applied in this continental country. Through the Resolution n.185, approved in December of 2013, it was established the adoption of the PJe as the only electronic process for all Brazilian courts by 2018.[328] Still, all courts should have had it installed in at least 10% of its units by December 2014. This system already has three versions: one that was prior developed for the 5th Federal Region Court, one for Labour Courts, and one national version being installed in all other courts.

Considering that, for example, in the 1st Federal Region Courts, where there is an electronic process system for small claims (JEF virtual- developed in visual basic), another for tax courts (PJD-EF in ASP), one for civil courts (e-Jur in JAVA), they have just started a pilot project of the PJe (also in JAVA) in civil courts of the Federal District judicial section. These systems do not intercommunicate, and judges, staff, lawyers and the general public are expected to learn how to work in all of them. Judges who work in federal civil courts in the Federal District have, in their daily routine, to manage paper files and the cases that are being processed in two different systems. We know that each software has its advantages, but for sure there is no benefit in having this complex group of systems for the same purpose. In this

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[327] "Art. 8º Os órgãos do Poder Judiciário poderão desenvolver sistemas eletrônicos de processamento de ações judiciais por meio de autos total ou parcialmente digitais, utilizando, preferencialmente, a rede mundial de computadores e acesso por meio de redes internas e externas." Brazilian Federal Law 11.419/2006; also see Teixeira, *supra* note 18 at 436-437, about possible incompatibility of art. 44 of the Resolution CNJ 185/2013 and the article 8 of the Federal Law 11.419/06.

[328] "Art. 34. As Presidências dos Tribunais devem constituir Comitê Gestor e adotar as providências necessárias à implantação do PJe, conforme plano e cronograma a serem previamente aprovados pela Presidência do CNJ, ouvido o Comitê Gestor Nacional [...] § 3º O cronograma deve relacionar os órgãos julgadores de 1º e 2º Graus em que o PJe será gradualmente implantado, a contar do ano de 2014, de modo a atingir 100% (cem por cento) nos anos de 2016, 2017 ou 2018, a depender do porte do Tribunal no relatório Justiça em Números (pequeno, médio ou grande porte, respectivamente)." Resolution CNJ 185/2013; Teixeira, *supra* note 18 at 436-437.

case, there is no doubt that unifying is the proper solution for management of caseloads in courts.

The unification of systems will probably help alleviate another major complain of private and public lawyers who protest that, since 2007, the defense of rights involves knowledge of regulation of the Supreme Court, of the Superior Court of Justice, of twenty seven State Courts of Justice, of five Federal Regional Courts, besides Labour and Military Courts. They say that the new Code of Civil Procedures lost an opportunity to unify the sparse regulations.[329]

Federal Law 13.105/2015 left the competence to complement the regulation of procedures in electronic media to the National Council of Justice and to the courts, but reinforced the obligation to promote the compatibility of systems.[330]

In this path, the word interoperability had already been introduced in the list of concerns of the Judiciary since 2006, when the National Council of Justice created the group of interoperability with the mission to gather all information about technology solutions applied to the administration of justice.[331]

In 2013, the National Council of Justice together with the National Council of the Public Prosecution focused on the process of exchanging information with institutions essential to justice system, and edited the Resolution CNJ/CNMP n. 3, of April 16th, 2013, introducing the National Model of Interoperability, which is already part of the current version of the PJe.[332] The Lawyers Digital Office is being developed with the support of the Brazilian

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[329] Barreto, *supra* note 270.

[330] Barreto, *supra* note 270.

[331] Resolution CNJ n. 12, 14 February 2006, Conselho Nacional de Justiça.

[332] Débora Zampier, "CNJ apresenta funcionalidades do Escritório Digital a advogados" *Agências CNJ de Notícias* (2 March 2015), online: < http://www.cnj.jus.br/noticias/cnj/77267-cnj-apresenta-funcionalidades-do-escritorio-digital-a-advogados>.

Bar Association (OAB) as part of this interoperability concept. One of its functionalities is to facilitate notifications and access to information of different courts without it being necessary to sign in all systems.[333]

Either by unifying systems or using interoperability tools, it is important to keep systems compatible among themselves and following principles that guarantee access to justice. If technology "will dictate what we can or cannot do"[334] and establish limits in size of documents, number of characters, and rules of accessibility, we have to be watchful in order to avoid any trace of violation of rights, being them procedural or substantive rights. If code is the law, stakeholders must give special attention to the rules and values that will be in the blueprint of systems,[335] so that we don't allow coders to breach our fundamental principles or our already pre-determined regulations.

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[333] *Ibid*.

[334] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 at 4.

[335] Lawrence Lessig, "Code Is Law. On Liberty in Cyberspace" (2000) Harvard Magazine, online:< http://harvardmagazine.com/2000/01/code-is-law-html>.

Conclusion

> ***The real power of technology is not that it can make old processes work better but that it enables organizations to break old rules and create new ways of working.***
>
> ***Michael Hammer and James Champy***

The study of the access to justice principle has taken us from narrow to wide definitions, presenting new alternatives to the traditional judicial methods of resolution of conflicts, and introducing technological social relations in a globalized era. The obstacles to deliver fair justice are not new, but the available instruments to surpass them are. We can and we should be in control of how to adapt the Judiciary to new demands with the use of ICT and its consequences, because we are already experiencing this new reality.

The path of life is not straight. Curves and incidents add experience and knowledge to all trajectories. Innovations bring fear of unfamiliar situations and motivation to go on, pushing people out of their comfort zone of traditional routines. We are not always ready for these changes, but either we adapt or we are left behind.

We agree with Prof. Ethan Katsh, who defines this social transformation as displacement: some human activities may become obsolete because of a rearrangement of roles in society. Changes are made not only on the mechanisms of how to do things, but also in rethinking objectives as new social codes appear. It is not a simple technological investment in courts, but the use of technology to update old concepts and to optimize access to justice.[336]

E-judges are not what we expect at our stage of technological evolution, but judges, court personnel, lawyers and citizens interacting with technology to make a worthy transition into information society, accelerating the delivery of justice, and consequently, enhancing

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[336] M. Ethan Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995) at 12-13; Benucci, *supra* note 22 at 59.

efficiency in justice systems[337]. It should be simpler, easier and more secure than how it was before.

In "Best Practices in the Field of Cyberjustice", Vermeys and Benyekhlef narrate the situation described by a judge that "would often receive three versions of the same document from lawyers: an email version, a faxed version, and the 'original copy' which was usually received through the mail days later". This contra-productive situation, which caused a waste of time in rereading and refiling documents, resulted from the absence of a legislation to guarantee that just one of the means would be sufficient and efficient to produce the expected results.[338]

The circumstances above in Quebec courts do not differ from the ones in the Brazilian judiciary derived from the "Law of Facsimile", both caused by the absence of adequate legislation or stable precedents about what is or is not considered valid when using technology in courts.

The ideal situation would be laws allowing for technology, detailing the use of solutions, and then, the development process would properly take place.[339] However, this is not real in a globalized and computerized world, when different ideas blossom in a speed that no legislative process can follow. The Brazilian path taken by legislators is an experience to be shared: using technological neutrality[340] and the principle of "pas de nullité sans grief", the

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[337] Dínio de Santis Garcia, *Introdução a informática jurídica* (São Paulo: J. Bushatsky, 1976) at 134.

[338] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 at 5-6.

[339] Benyekhlef & Vermeys, "Best Practices", *supra* note 21 at 6.

[340] "Technology is neutral means that 'guns don't kill people, people do', or that a knife can be used to 'cook, kill, or cure.' For controlling widespread easy accessibility a proper regulation is needed where technology will be neutral in the fields of broadcasting, voice over IP, universal service, spectrum allocation, net neutrality, information, communications and telecommunications. In 'Framework for Global Electronic Commerce' of July 1997, the US Government stated, 'rules should be technology-neutral (i.e., the rules should neither require nor assume a particular technology) and forward looking (i.e., the rules should not hinder the use or development of technologies in the future)'(…) According to the text of the 1999 Communications Review, technological neutrality means that 'legislation should define the objectives to be achieved, and should neither impose, nor

Brazilian Federal Law 11.419/06 and the New Code of Civil Procedures left technology choices and regulation details for the National Council of Justice and courts.

Brazil did not integrate the field of research of the Florence Access-to-Justice Project, but that does not mean that the waves of access mentioned by Cappelletti and Garth[341] did not reach its judicial system. Legal aid concerns, inclusion of class actions, defense of public and collective interests, and implementation of small claims courts as well as reforms of procedures to enhance access to justice are components of the Brazilian legal order history and democratic development.

The public legal defense for the judicial guidance of low-income individuals and the participation of lawyers in the delivery of justice are part of Brazilian constitutional provisions.[342] Although there have been investments in increasing the availability of legal information and empowering the citizens with the knowledge of their rights, self-representation is still not accepted in most levels of courts and types of action, because it represents an imbalance in legal capability of litigants to promote the defense of their rights and consequent disequilibrium of the balance of justice, especially in a society with disturbing rates of inequality.[343]

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discriminate in favor of, the use of a particular type of technology to achieve those objectives'." Rajab Ali, "Technological Neutrality" (2009) 14: 2 Lex Electronica, at 6-8.

[341] Cappelletti & Garth, *supra* note 5 at 21.

[342] "Article 133. The lawyer is indispensable to the administration of justice and is inviolable for his acts or manifestations in the exercise of his profession, within the limits of the law; Article 134. The Public Legal Defense is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV." Constitution of the Federative Republic of Brazil, *supra* note 43.

[343] See previously mentioned World Bank GINI INDEX, *supra* note 66. Also see education index in the Human Development Reports of the United Nations Development Programme, where the data calculated using mean years of schooling and expected years of schooling, on November 15, 2013 indicates Norways with the highest score of 0.91, the United States with 0.89, Canada with 0.85 and Brazil with 0.661 (less than what these other countries had in 1980). Data can be accessed online: United Nations Development Programme <http://hdr.undp.org/en/content/education-index>.

Some countries, where educational disparities are not as severe, have adopted self-representation in their plan for promoting general accessibility, reducing the costs by cutting the dispenses of hiring an attorney and simplifying procedures, but the party that has the legal representation gains a "potentially decisive advantage".[344] And even the prohibition of representation by attorneys, like in the example of Australia, is not a proper solution, since vulnerable individuals are generally less articulate than their opponents, government representatives, businessmen, and other "repeat players" litigants.[345]

In Brazil, the experience regarding self-representation in small claims demands that judges assume a different role to facilitate party equality. "It is now generally accepted that the use of a more active judge can be an aid, not a hindrance, to a basically adversarial system of justice, since even in essentially two-party litigation it maximizes the chance that the result will be fair, and not merely reflect inequalities between parties."[346] Court personnel and university legal advice clinics have also provided a special help in equalizing parties, by drawing up pleadings, filling out complaints, aiding in the definition of proofs to be presented, tracking the cases, and explaining the procedures.[347]

That being said, the same solution that is provided to include vulnerable individuals who have difficulty in understanding or addressing their rights can be used to solve the problem of digital vulnerability. The Brazilian Bar Association has been called to the process of computerization of courts and included in planning strategies of implementation of e-courts, especially those that demand the use of digital certificates.

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[344] Cappelletti & Garth, *supra* note 5, at 74.

[345] *Ibid* at 74-75.

[346] *Ibid* at 56. Also see in page 76 a reference to judicial activism as part of modern reforms to facilitate party equality.

[347] A description of the experience in federal small claims courts in São Paulo was presented in 2009 by Fontainha, *supra* note 28, at 120-128. The Brazilian experience matches with examples of small claims courts in Vancouver and New York City given by Cappelletti & Garth, *supra* note 5 at 77-78.

We cannot say that the use of digital certification in Brazil is a part of the routine of common citizens, and that there is no technological exclusion when systems employ the digital certificate as the only tool to file and consult a process online. However, regarding the lawyers, since the Bar Association is a certification authority (AC-OAB), it provides all the information to facilitate the comprehension of what a digital signature represents to the profession. The acquisition of the digital certificate and the professional identity card are almost simultaneous.[348] Besides that, many training opportunities in person or online are frequently available.

For those who are comfortable in the digital era, there is no doubt cyberjustice is a great door for access to justice. For the lawyers, the Bar is trying to diminish the barriers. For the general public, considering the socio-economic-cultural reality of the country, the technological innovations still demand some temporary alternatives and complementary procedures, while adjustments to avoid harm to the access to justice principle are still being made.

The suggestion made by the Canadian Bar Association that "technological innovations preserve traditional access for people challenged by technology"[349] represents the idea of maintaining old practices simultaneously with the new ones introduced by technology. In the Brazilian experience, modular technological solutions were introduced to speed-up paper files and gain users' confidence, parallel to the planned and gradual implementation of new cybercourts. The co-existence of many systems of access is not a desired situation, because it can compromise the celerity and reduction of costs.

Standardization of systems requirements and the core regulation also represent better access to justice. All good practices should be condensed in a unique tool, because the use of

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[348] Information about the procedures adopted by the Brazilian Bar Association can be obtained online: < http://www.acoab.com.br/pdf/AF_317_folder_OAB_A5_baixa_final.pdf>.

[349] *Reaching Equal Justice, supra* note 138 at 81.

only one technology gives more comfort, speeds actions, and reinforces transparency of information. Using this approach, the Brazilian National Council of Justice has already made a plan to be followed by all courts that includes unifying systems and interoperability of information.

Barriers to implement modifications in court routines should serve as orientation for new paths to be followed. For example, in large countries like Brazil, some infrastructure obstacles might appear in vulnerable communities, internet connections may fail to provide access, but the necessities will guide the investments on public services.

If online alternative dispute resolution systems have been praised for the benefit they bring as fast and efficient methods of resolution of complaints, we should also give the same chance for the Judiciary to present the online processes as a solution provider, with pre-trials and conciliation, carrying the advantage of credibility and enforcement that is proper of a public justice.

In order to make sure that the celerity and costs are factors being appropriately considered in the adoption of cyberjustice, we can look at the example of the Federal Justice of the 4th Region that implemented the e-Proc in 2003 in federal small claims courts, and since 2010 in all instances and subjects, reducing the time of the procedures by 60%. In the last five years, more than three million processes have been electronically filed, and no more paper filing is admitted for new actions in the federal justice of the south region. Besides the reduction of time, costs with paper and processing have considerably decreased, and the digitization allowed an estimated economy of more than R$77 million.[350]

Technology modifies the management of courts and the access of justice, with benefits in terms of procedural celerity and expanding the possibilities for litigants that were

[350] Information from the website of the 4th Regional Federal Court. "Eproc: processo judicial eletrônico da 4ª Região imprime velocidade à Operação Lava Jato" (6 March 2015), online: < http://www2.trf4.jus.br/trf4/controlador.php?acao=noticia_visualizar&id_noticia=10815>.

previously excluded by the costs of judicial cases, the physical distance of courts in large countries like Brazil, or by the fear of facing a long term dispute.

In conclusion, we believe that the use of technology in the Brazilian Judiciary is an efficient approach to upgrade accessibility to justice, overcoming existing obstacles, and bringing courts closer to all citizens in the preservation of their rights. It enhances democratic principles and it is part of the constitutional guarantee that judicial provisions shall be handled within a reasonable time.

These last fifteen years represented a great advancement for cyberjustice in Brazil with no possible nor desired regression. Adjustments are part of any transformation process. New generations, which are born in the globalized and technological era, will have more difficulty in understanding how we used a typewriter and added stamped paper petitions to huge and heavy files, than we will have to adapt ourselves to new routines that represent quality, celerity, transparency, efficacy and accessibility to the administration of justice.

For the future, in benefit of a globalized society, the next stage will be the interoperability between judicial systems of different nations and the signature of some international treaties to regulate basic requirements to all systems. In this context, the constant advancements of technology will certainly present new solutions and great challenges.

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