ODR and Online Courts in the COVID-19 Pandemic

Is It Correct to Affirm That Courts Are a Mere Service?

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Abstract

Starting from the premise that the pandemic caused by the new coronavirus forced the growth of dispute resolution technologies in Brazil and around the world, this article presents a critique of one of the central arguments for the deployment of online dispute resolution techniques in the courts: that courts are a mere service. It proposes, therefore, the thesis that the term courts, as a synonym of the jurisdictional function, can be understood neither as a public service nor as a mere place but rather as a condition of possibility for fundamental rights, be it in physical or digital environments. In order to guarantee that the execution of procedural acts in digital environments conforms to the democratic constitutional procedure, this article proposes to create a seal of recognition to be granted by the Brazilian Bar Association (OAB) to the platforms that operate according to the due constitutional process. It is also suggested that minimal guidelines be formulated that are capable of offering a reference for the discussions, development, use and integration of online conflict resolution platforms, as well as that institutional protocols be adopted as a means of democratizing the application of technology in law.

Keywords: procedural law, dispute resolution, online dispute resolution, online courts, jurisdiction, online court hearings.

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1 Initial Reflections

Future legal proceduralists may see the year 2020 as a point in history in which the technological turning point in law found fertile ground for expansion and strengthening of the movement of change in the way courts exercise their jurisdictional function. There is no novelty in the ability of technology to change societies by interacting with human beings, generating new behaviours and new solutions to old problems, but it also brings about different problems and conflicts. One has but to think of the increase in the information flow provided by social networks and, on the other hand, of the negative impacts resulting from their usage, such as the growth in political polarization and the mass spread of fake news.[1]

In the field of law, more specifically in procedural law, the application of new technologies has been a subject of debate on the issue of how the legitimation of a judicial decision in highly digitized spaces will happen. If until a few years ago the courts were still worried about the transmission of documents by fax,[2] nowadays efforts to create narrative algorithms capable of building a judicial decision have already started, as well as propositions in regard to allowing the procedural adaptation through the automation of procedural acts and facts, not only as a change from the physical to the virtual environment but also as the creation of new procedural stages with the use of technologies.[3]

All these changes are inserted into the phenomenon called the technological turn in law, which, since the 1990s, has been promoting a symbiosis in which technology and the legal institutes feed each other leading to the dismissal of the merely instrumental perception of the former, to the extent that the graphic revolution that we are experiencing changes the procedural law from the propaedeutics to the shaping of new dispute systems designs.[4] It is not merely a matter of automation of repetitive tasks that were carried out by lawyers, judges and servants in the judicial organs; rather, it is a real transformation of the procedural institutes, which can be reformulated so as to provide more adequate ways to resolve existing conflicts.

1 About this topic, see: *Robôs, redes sociais e política no Brasil [eletronic resource]: estudo sobre interferências ilegítimas no debate público na web, riscos à democracia e processo eleitoral de 2018*. Coordinator Marco Aurélio Ruediger. Rio de Janeiro: FGV, DAPP, 2017. Nunes, Dierle. *A tecnologia no controle das massas em processos decisórios*. Available at: www.conjur.com.br/2019-fev-12/dierle-nunes-tecnologia-controle-massas-processos-decisorios. Nunes, Dierle; Marques, Ana Luiza. *Juristas e tecnologias: uma interação urgente para o bem da democracia*. Available at: www.conjur.com.br/2019-dez-05/opiniao-juristas-tecnologias-uniao-urgente-democracia.

2 See, for example, Joint Ordinance no. 699/PR/2017, by the Law Court of Minas Gerais (TJMG) which, by deciding about the functioning of the protocol service and about the use of data transmission system for the practice of procedural acts in the second instance, predicted the use of fax in its Art. 3.

3 Nunes, Dierle. Virada Tecnológica no Direito Processual (da automação à transformação): seria possível adaptar o procedimento pela tecnologia? In: Nunes, Dierle; et al. (orgs). *Inteligência Artificial e Direito Privado Processual: os impactos da virada tecnológica no direito processual*. Salvador: Juspodivm, 2020. pp. 15-40.

4 Ibid.

In this scenario, online courts would departs from the premise that they fundamentally remain institutions from the 19th and 20th centuries while being functioning in the 21st century. Owing to the backwardness, online courts would be, according to some optimists, the answer to the inefficiency of the legal systems, as they could modernize and simplify the citizen's access, improving the system and consequently reducing the number of lawsuits awaiting judgment.[5]

The term 'online courts' refers to any kind of public service of conflict management and resolution offered by the state and can admit of two concepts: a specific one, related to the resolution of cases by human judges, but not in physical courts; and a broader one, which refers to every initiative of a court to produce more than judicial decisions, such as online conciliations, self-help services, legal orientation for *pro se* litigation through everyday technologies, such as application programs and smartphones.[6]

It is important to point out that for those who welcome this proposal, online court models almost always derive from the need to execute stages of process digitization, automation of part of the proceedings, graduated adoption of online guides for self-representation mixed with online dispute resolution (ODR) techniques, with or without human interference,[7] that is, a new structure for the cognitive phase with a procedural difference attributable to technology.[8]

Besides these stages, the limits and the possibility of adoption of supporting algorithms in decision-making are always discussed.[9] The digitization stages were adopted in Brazil long ago, and are being accelerated by the pandemic with new proposals of automation, a tendency to increase the application of ODR and of artificial intelligence. It is also important to note the growing prominence of the execution of institutional protocols between the judiciary and private and higher education entities for the creation of claim resolution facilities[10] to dimension litigations involving bankruptcy protection,[11] among other possibilities, where a

5 Susskind, Richard. *Online Courts and the Future of Justice*. Oxford: Oxford University Press, 2019.

6 Ibid.

7 Ibid.

8 Nunes, Dierle. Virada tecnológica no direito processual e etapas do emprego da tecnologia no direito processual: seria possível adaptar o procedimento pela tecnologia? In: Nunes, Dierle; Lucon, Paulo Henrique dos Santos; Wolkart, Erik Navarro (Coord.). *Inteligência artificial e Direito Processual: os impactos da virada tecnológica no direito processual*. Salvador: Jus Podivm, 2021, pp. 15-40.

9 Nunes, Dierle; Lucon, Paulo Henrique dos Santos; Wolkart, Erik Navarro (Coord.). *Inteligência artificial e Direito Processual: os impactos da virada tecnológica no direito processual*. Salvador: Jus Podivm, 2020.

10 About Claim resolution facilities, *cf*.: Cabral, Antonio do Passo; Zaneti, Hermes. Entidades de infraestrutura específica para a resolução de conflitos coletivos: as claims resolution facilities e sua aplicabilidade no Brasil. *Revista de Processo*, 287, 2019, pp. 445-483.

11 *Cf*. www.credor.oi.com.br/.

negotiated procedure (Art. 190, CPC) is promoted with the disruptive use of technologies.[12]

The broadest concept of online courts is related to the other form of dispute resolution: ODR,[13] which can be understood as the use of information and communication technologies to help resolve disputes in the virtual environment. This concept was first introduced in the mid-1990s, after the internet began to be used for commercial activities,[14] making the decade a landmark in the promotion of internet access with the increase in interactions in the virtual environment and, consequently, that of conflicts.[15]

The central idea of ODR is the possibility to use a variety of information and communication technologies that range from the simple chat service or videoconferencing to assisted negotiation based on artificial intelligence. That is, it consists not in a specific kind of software but rather in the intentional use of technology to facilitate dispute resolution. Thus, any technological tool that, one way or another, may have a bearing on dispute resolution, in online mode, would constitute an ODR tool.[16]

Application of ODR in the courts is wide ranging, since the use of technological tools can be implemented at any stage of the dispute resolution process, for example, to provide information in accessible language to the parties, to structure negotiations, to suggest solutions and even to help in the enforcement of decisions.[17] Hence, ODR implies not only automation of activities but also a deep

12 *Cf*. the use of procedural conventions in the emblematic leading case of OI S/A's bankruptcy protection: The bankruptcy protection process of one of the country's biggest telecommunications operator, with more than 65,000 creditors from various classes, required the design of a dispute settlement system and the resort to different disciplines through concerted actions and cooperation between the procedural agents so as to enable the regular course of the proceedings. The adaptation of the procedure and the introduction of a digital ecosystem (ODR), based on artificial intelligence and machine learning, under the management of the entity that was specifically instituted for this purpose, allowed thousands of creditors an anticipated resolution and the consequent continuation of the procedure observing the constitutional guarantees reproduced in the fundamental rules of the Civil Procedure Code. Cury, César. Um modelo transdisciplinar de solução de conflitos: direito e tecnologia no processo de recuperação judicial do leading case OI S/A. In: Nunes, Dierle; Lucon, Paulo Henrique dos Santos; Wolkart, Erik Navarro (Coord.). *Inteligência artificial e Direito Processual: os impactos da virada tecnológica no direito processual*. Salvador: Jus Podivm, 2020, pp. 83-104.

13 It is important to note that Richard Susskind considers online courts different from ODR, referring to the former as a public initiative, while placing the latter in the private sphere of action. However, it is not possible to concur with such separation, since both online courts and ODR platforms are related to the use of technology to transform the traditional forms of dispute resolution. Therefore, online courts can also be considered as one of the ways to resolve disputes online and can thus be included among the ODRs; for this reason this article studies both phenomena.

14 The first internet service provider appeared in 1992, the year when the National Science Foundation, which managed the internet at that time, stopped prohibiting its use for commercial purposes. About this, *vide*: Katsh, Ethan. ODR: A Look at History. In: Wahab, Mohamed Abdel; Katsh, Ethan; Rainey, Daniel (eds.). *Online Dispute Resolution: Theory and Practice – A Treatise on Technology and Dispute Resolution*. Netherlands: Eleven International Publishing, 2012.

15 Katsh, Ethan; Rabinovich-Einy, Orna. Technology and Dispute Systems Design: Lessons from the "Sharing Economy". *Dispute Resolution Magazine*, 21(2), 2015, pp. 51-71.

16 Joint Technology Committee. *ODR for Courts*. Version 2.0. Updated and Adopted 29 November 2017.

17 Ibid.

change in dispute dimensioning. Such a change is consistent with the use of technologies to carry out tasks and offer services that would be impossible, or even unimaginable, in the past,[18] thus not limiting itself to the mere online reproduction of alternative dispute resolution (ADR) techniques.

Around the world, various types of dispute have already been submitted to ODR platforms; these include claims of low complexity and value in Franklin, Ohio, in the US;[19] disputes related to traffic offence in Michigan;[20] litigations resulting from lease agreements in British Columbia;[21] appeals against inaccurate tax charges in Ohio;[22] and even low-complexity family disputes, such as the ones that already happen in Michigan on the MiChildSupport and MyLawBC platforms.[23]

2 The Advance of Online Dispute Resolution and of Online Courts Owing to the Pandemic Caused by the New Coronavirus

If this transformation was already a global trend, the new coronavirus pandemic sped it up, forcing the courts to adopt measures to continue the jurisdictional practice despite the restrictions imposed on physical presence by the quarantine orders issued in many countries. Examples of such initiatives are the use of the Cisco Webex software in court hearings in Brazil[24] and in the American states of Colorado, New Hampshire, Oregon, Pennsylvania, Utah and Virginia, as well as the use of the Skype software by the courts of New York and Oregon, the Microsoft Teams software by the courts of Oregon and Wyoming, and the Zoom software by the courts of Michigan, New Jersey and Texas.[25]

In China, the courts have been making full use of information technology in contentious work since the COVID-19 outbreak, analysing almost 550,000 online cases all over the country from February 3 to March 20. In those lawsuits, over 440,000 online payments were made, more than 110,000 online court sessions were held, and more than 200,000 online mediations were conducted.[26] The importance of online measures in accessing jurisdiction is clearly reflected by the fact that the Civil Resolution Tribunal, in British Columbia, has functioned without any significant disruption during the pandemic, because it has been operating remotely since its creation in July 2016.[27]

In Brazil, the state of health emergency brought about by the COVID-19 pandemic led the National Justice Council (CNJ) to implement an 'Emergency Videoconferencing Platform for Procedural Acts', enabling judges to create virtual rooms for holding trials, hearings, meetings, interaction with public and private

18 Susskind, *Online Courts and the Future of Justice*.
19 Cf. https://smallclaims.fcmcclerk.com/home/general-information.
20 Cf. https://courtinnovations.com/MID60.
21 Cf. https://civilresolutionbc.ca.
22 Cf. https://ohio-bta.modria.com.
23 Cf. https://www.mylawbc.com.
24 Cf. https://www.cnj.jus.br/plataforma-videoconferencia-nacional/.
25 Cf. https://remotecourts.org.
26 Cf. http://english.court.gov.cn/2020-03/31/content_37534820.htm.
27 Cf. https://civilresolutionbc.ca Cf. Nunes, Dierle. *Virada Tecnológica. cit*.

attorneys, members of the public prosecutor's office and public defenders, and, if necessary, live oral arguments.[28]

At the Federal Supreme Court, Rule Amendment No. 53/2020 and Resolution No. 669/2020 authorize any procedure, including those of the highest importance such as lawsuits that enable the concentrated control of constitutionality and extraordinary resources with acknowledged general repercussion, to be judged in the virtual assembly.[29] Against this measure, a group consisting of over 100 lawyers sent a letter to the Chief Justice of the Supreme Court, arguing that there would be publicity infringement and restriction on the participation of the lawyers.[30] It is a necessary reflection, since hearings, especially discovery hearings, and arguments by videoconferencing lack the tactility of physical contact owing to 'the multidimensionality and multilayeredness of human perception', given that, as Byung-Chul Han advises about the impacts of technology on human relations, 'digital communication is visually poor communication'.[31]

On the other hand, at the Superior Court of Justice (STJ), Resolution STJ/GP No. 9 of 17 April 2020, allowed in-person, ordinary or extraordinary trial sessions of the Special Court, of its chambers and panels, to be held by videoconferencing,[32] safeguarding the right of any party or the public prosecutor's office to indicate the process to be judged in session without videoconferencing.[33] The videoconferences can be watched live on STJ's channel on YouTube.[34]

Within the sphere of Brazilian legislation, it is worth noting the alteration in Law No. 9.099/95 (Law of the Civil and Criminal Small Claim Courts) implemented by Law No. 13.994/20, published on 27 April 2020. The aforementioned law aimed at enabling remote conciliation in the sphere of the small claim courts, adding to Article 22 of Law No. 9.099/95 the § 2, which considers

> appropriate the remote conciliation conducted by the Court through the use of technological resources available for real-time streaming of sound and image, and the result of the conciliation attempt must be reduced to writing with the relevant Annexes.[35]

28 Cf. https://www.cnj.jus.br/plataforma-emergencial-viabiliza-atos-processuais-por-videoconferencia/.

29 Brazil. Supremo Tribunal Federal. *Resolução 669/2020, de 19 de março de 2020*. Diário do Judiciário Eletrônico, Brasília, 20 March 2020.

30 Cf. https://migalhas.com.br/quentes/324840/grupo-de-mais-de-100-advogados-se-manifesta-contra-plenario-virtual-do-stf.

31 Han, Byung-Chul. *In the Swarm: Digital Prospects*. (E. Butler Trans.) Cambridge, MA: MIT Press, 2017, pp. 21-23.

32 Later, this deadline was extended to 15 June 2020, according to the Normative Ruling STJ/GP 8, available at: https://bdjur.stj.jus.br/jspui/bitstream/2011/142585/IN_8_2020_PRE.pdf.

33 Brazil. Superior Tribunal de Justiça. *Resolução STJ/GP n. 9, de 17 de abril de 2020*. Diário da Justiça Eletrônico do STJ, Brasília, 20 April 2020.

34 The Superior Court of Justice's channel on YouTube is available at: https://www.youtube.com/stjnoticias.

35 Brazil. Law 13.994, of April 24, 2020. Amends Law No. 9.099, of September 26, 1995, to enable remote conciliation in the sphere of the Special Civil Courts. Diário Oficial da União, Brasília, 27 April 2020.

Seemingly, Law No. 13.994/20 also created a kind of contumacy for the refusal to participate in the attempt at remote conciliation, which should be read as prudently as possible, owing to the barriers in accessing digital media and to the difficulties some may have in using electronic devices.[36] It is notable that despite all the technological advances of the last few decades, it is still not possible to affirm that digital citizenship exists in Brazil. Considering the wide range of important aspects of life operating in the digital environment (the pandemic has necessitated the online exercise of rights to education and even to health), it is necessary to guarantee a practicable means of ensuring the full exercise of digital citizenship, which demands teaching the citizens digital literacy or, if needed, guaranteeing the unrestricted exercise of their rights in the physical world. Therefore, the full exercise of individuals' rights in the digital environment must be safeguarded, especially in the advanced stage of growth of the influence of new technologies on society.[37]

Considering again the alteration promoted by Law No. 13.994/20, it could be argued that the initiatives cited do not promote a real transformation of the means of resolving disputes and that thus they cannot be defined as ODR initiatives. However, as seen previously, the terms ODR and online courts admit of a broad meaning, insofar as they refer to the use of any technological tool that, one way or another, may influence online dispute resolutions,[38] such as online conciliations, self-help services and legal advice for *pro se* litigation, through everyday technologies.[39]

It should be noted that although Brazil has no specific law on the installation of ODR platforms and online courts yet, the CNJ edited many resolutions on the use of technologies in courts in 2020, such as Resolution No. 332, about ethics, transparency and governance in the production and use of artificial intelligence in the judiciary branch; Resolution No. 335, which created the digital platform of the Brazilian judiciary branch (PDPJ-Br), aiming at integrating and consolidating all the electronic systems of the Brazilian judiciary in a unified environment; Resolution No. 345, which designed a 100% digital court; Resolution No. 349, which created the intelligence centre of the judiciary branch (CIPJ) and the intelligence centres network of the judiciary branch; and, finally, Resolution No. 358 of the CNJ, of 2 December 2020, which regulated the creation of technological solutions for dispute resolution by the judiciary branch through conciliation and mediation.

Accordingly, the crisis emphasized the importance of technological tools for the continuity of jurisdictional practice in terms of physical distancing and

36 Law No. 13.994/20 also amended Art. 23 of the Law of the Special Courts, thenceforth providing that if the defendant does not appear in court or refuses to take part in the attempt at remote conciliation, the professional judge will deliver sentence.

37 Marques, Francisco Paulo Jamil Almeida. *Cidadania Digital: A Internet Como Ferramenta Social*. Paper presented at NP10 – Núcleo de Pesquisa Economia Política e Políticas Públicas de Comunicação. XXV Congresso Anual em Ciência da Comunicação, Salvador/BA. 4 and 5 September 2002.

38 Joint Technology Committee, *ODR for Courts*.

39 Susskind, *Online Courts and the Future of Justice*.

accelerated the movement of digitization of the judiciary,[40] indicating that technology may contribute to an increase in the courts' productivity.[41] However, the increase in numbers cannot be confused with the improvement in the application of law, which makes clear the preoccupation about discourses that link the (rhetorical) efficiency to the simple quantitative improvement of the courts, neglecting the fact that the qualitative improvement is what guarantees the legitimacy of judicial decisions.

For this reason, the courts will need to find answers to a complex equation: safeguarding access to justice in online environments (e-access), maintaining it and seeking genuine efficiency, and observing the democratic model of procedure instituted in Brazil by the Constitution of 1988.[42] It is important to remember Neil Postman's warning that "for every advantage a new technology offers, there is always a corresponding disadvantage" and that in every situation "[t]he disadvantage may exceed in importance the advantage, or the advantage may well be worth the cost".[43]

It must be considered that, as long as online courts work well, their use may be (and probably will be) extended to include litigations that involve much higher values.[44] ODR will probably be how most day-to-day problems will be solved, with increasingly present algorithmic approaches. The rhythm of this change will be determined largely by the speed at which the lessons learned from ODR projects so far are consolidated, as well as by conducting new research to understand the efficiency and the ethics of ODR.

Thus, it is necessary to seriously address the implications of technology for procedural law and its premises focusing on its possible impact on fundamental rights such as those to property, liberty, security and access to justice. This is sought to be done in the next section.

3 Can the Courts Be Seen as a Service?

As the application of technology becomes widespread, arguments in favour of the use of online courts instead of traditional ones proliferate. Currently, the argument that courts would be a service and not a place is gaining strength, and, as such, the

40 By addressing the procedural changes caused by the pandemic in the courts of England and Wales, the report *The Civil Justice and Covid-19* pointed out as "likely that what has been done now will form the basis of lessons to be learnt for the more permanent changes that will flow from those made now in response to the crisis, and will shape the ongoing and longstanding digitising programme. […] What is certain, however, is that the current pandemic will have a profound and undoubtedly enduring effect on the future evolution of the English and Welsh civil justice system." See: Krans, Bart; et al. *The Civil Justice and Covid-19*. Septentrio Reports 5. Arctic University of Norway.

41 Cf. https://www.cnj.jus.br/judiciario-mineiro-realiza-quase-1-milhao-de-atos-processuais/.

42 For a general analysis: Nunes, Dierle. *Processo Jurisdicional Democrático*. Curitiba: Juruá, 2008. Nunes, Dierle; Bahia, Alexandre. *Processo, Jurisdição e processualismo democrático na américa latina: alguns apontamentos*. *RBPE*, BH, n. 101, pp. 61-96. July/December 2010.

43 Postman, Neil. *Five Things We Need to Know About Technological Change*, 1998. p. 1

44 Susskind, *Online Courts and the Future of Justice*.

parties would not need to meet in a physical environment when resolving their disputes.[45]

It would suffice, therefore, to offer the 'service' and reduce its stages, regardless of the environment used. It can be observed that, in the models with the best results such as that of the Canadian Civil Resolution Tribunal, the same tier model of levels is almost always adopted, and that

> [the] first helps users to explore possible resolutions to their lawsuit. The second would be a platform for online negotiation. And on the third, a case manager would try to mediate online or by telephone and, if they failed, on the fourth, a judge would get involved in the lawsuit – online, by telephone, or videoconferencing – and protract a binding decision.[46]

However, the premise that the court is a simple service, even though appealing and oft-repeated in Brazil without any reflection, is incorrect. First of all, it is necessary to note that its artificer, Richard Susskind, does not explain the basis for his theory in the work in which it is presented within the XaaS (everything as a service) view. By failing to investigate the premises of his assertion, Susskind ignores principles fundamental to the study of procedural law, such as jurisdiction and procedure, in their conformity to the democratic Constitution.

Even though the foundations are not so clear, it is possible to understand Susskind's reasoning. In the introduction to the book *Online Courts and the Future of Justice*, the author claims that "[i]t might be more accurate to speak of 'online court services' or 'online court processes,' but the term 'online courts' has somehow stuck as a brand".[47] That is, the terms 'court service', 'court processes' and 'courts'

45 Ibid.

46 Nunes, Dierle. *Virada Tecnológica no Direito Processual (da automação à transformação)*. 2020, p. 32. In the project conceived by Susskind to be implemented in the English system, the stages, inspired by Modria and CRT, would be as follows: "We suggested that this should be a three-tier court service for the resolution of low-value civil disputes. The first tier would provide what we called 'online evaluation'. This would help users with problems to categorize and classify their grievances, to understand their rights and obligations, and be guided on the options and remedies available to them. […] this tier would help with 'dispute avoidance'. On the second tier would be 'online facilitation', as we named it. Here, human facilitators would bring disputes to speedy, sensible conclusions without the involvement of judges. Communicating largely across the internet, these facilitators would review papers and statements and help parties by mediating and negotiating. Where necessary, they would also use telephone conferencing facilities. A key role of the facilitator would be to prevent disputes from escalating, failing which to direct cases to online judges or normal judges, as appropriate. In addition, and in the spirit of much historical ODR work, there would be some automated negotiation tools. This tier would provide 'dispute containment'. The third tier would involve judges, working online rather than in courtrooms. They would be fully fledged members of the judiciary who would decide suitable cases or parts of cases, based on papers submitted to them electronically. This would form part of a structured process of online pleading and require users to submit their evidence and arguments across the internet. Again, this would be supported by telephone conferencing and, in the future, by video links. At any stage, though, online judges could decide to refer cases to traditional hearings. This third tier would provide 'dispute resolution.'" Susskind, *Online Courts and the Future of Justice*, pp. 100-101.

47 Susskind, *Online Courts and the Future of Justice*, p. 5.

are treated as synonyms in the work, and the option to use the term 'courts' is due simply to its widespread use. This is a technical impropriety since the terms 'court service' and 'process' cannot be confused in the current stage of the procedural science.

In another passage of his work, the author states that the term 'online courts' is used in two senses, a specific and a more general one, but that "[b]oth refer to some kind of public, state-provided dispute management and resolution service".[48] It is thus evident that the resolution of disputes by the state is treated by Susskind as a simple service. Hence, by referencing online courts, Susskind is actually referring to jurisdiction in its classical definition given by Chiovenda, according to whom jurisdiction would be the performance of the concrete will of the law in relation to the parties, meaning that the judge would only reveal the legislative intention and apply it to the concrete case.[49]

Therefore, by referring to courts, Susskind is referring to an outdated perception of jurisdiction itself and, consequently, jurisdiction would be a public service provided with the objective of resolving disputes that are submitted to it. This argument is not new, but it is welcomed by modern legal proceduralism, which considers jurisdiction as one of the three functions of the state. Together with the executive and the legislative functions, jurisdiction deals with multiple types of litigation and fulfils functions that guarantee fundamental rights, at times with a counter-majoritarian character.[50]

Thus, it must be pointed out that such terminology (online courts or digital justice) offers a clear reductionism of analysis of the procedural system, which must be undertaken within a multidimensional and macrostructural approach that we call democratic constitutional proceduralism.[51]

In view of this, it is not possible to reduce jurisdiction to a mere service or place and the process to its instrument. The process is a guarantee of power control that offers condition of participation in the implementation of rights and limit in the action of those affected by the decisions, and the jurisdictional activity is a democratic locus for safeguarding correction and legitimacy, which, in a community of principles, improves democracy.

Moreover, every time we consider the use of technology for the implementation of extended online courts, as Susskind maintains, we cannot neglect the need to verify whether the online paths, from beginning to end, would be adequate for all the litigations, in view of the specificities of every litigation and what they affect. And although the author defends the beginning of the implementation for less complex litigations, which is repeatedly done, there is an argument in favour of the expansion to a widespread use.

The argument that jurisdiction is a service represents, for that reason, an inadequate simplification of the institute and neglects the development of the role

48 Ibid., p. 6.

49 Chiovenda, Giuseppe. *Instituições de direito processual civil*. Vol. II. São Paulo: Saraiva, 1969. p. 37.

50 Nunes, Dierle; Bahia, Alexandre; Pedron, Flávio. *Teoria Geral do Processo*. Salvador: Editora JusPodivm, 2020.

51 Nunes, Dierle. *Processo jurisdicional democrático*.

that jurisdiction has assumed since the second post-war period. Therefore, even though those who consider jurisdiction as a service have the laudable objective of seeking expanded access to justice, they may incur the risk of infringing fundamental rights by neglecting the role of the process in safeguarding such rights.

Thus, the term courts, meaning jurisdiction, can be used as a synonym of neither public service nor any place, in its geographical aspect, but rather as a locus for safeguarding fundamental rights. Hence, not all of the actions of a procedure can be carried out exclusively online and, even if it is possible in many cases, all the rights resulting from the due constitutional process must be guaranteed, even in the technological sphere, so as to control the algorithmic powers in the search for fairness, transparency and accountability.

Undeniably, the argument in favour of online courts has among its goals the legitimate purpose of resolving the lack of access to justice. However, there is no proof that simply enabling online access is a solution to the problems of the procedural system, especially in a country like Brazil, which still faces vast social inequality and lack of access to technology. See, for example, that Susskind had already suggested that access to justice would increase when the laws became available on the internet.[52] In Brazil, however, even though all the laws can be accessed through the legislation portal, fully available on the internet,[53] this initiative does not seem to have brought any qualitative or quantitative improvement to the Brazilian justice system.

4 Problems in Conducting Hearings in Online Courts

In order to clarify the argument that the online exercise of jurisdiction alone does not offer guarantees of improvement in the procedural system, it must be considered that every procedural act has peculiarities that must be examined before its unrestricted virtualization is proposed.

In fact, some acts can and must be performed by means of electronic tools. For instance, an improvement can be observed in the drastic reduction in the use of letters rogatory, owing to the virtual practice made possible by these acts.

Similarly, the creation of algorithmic platforms has already been suggested, aiming at speeding up enforcement proceedings such as the development of a program to offer standard calculation memory and a unified judicial auctions platform.[54] Projects have also been planned, such as ELIS, at the Court of Justice of Pernambuco, in order to automate the activities identified as bottlenecks for actions of tax foreclosure submitted to the Electronic Judicial Process platform (PJe). In the project, artificial intelligence is used in the initial sorting of the processes, classifying them according to the following aspects: inconsistencies

52 Susskind, *Online Courts and the Future of Justice*, p. 107.

53 Cf. www4.planalto.gov.br/legislacao/.

54 Nunes, Dierle; Andrade, Tatiana Costa de. Execução e Tecnologia: novas perspectivas. In: Nunes, Dierle; et al. (orgs). *Inteligência Artificial e Direito Processual: os impactos da virada tecnológica no direito processual*. Salvador: Juspodivm, 2020.

among the data of the documents contained in the initial petition, in the overdue liabilities certificate, and in the electronic judicial system, diverse competence and lapse.[55]

Other procedural acts, however, will only admit online practice if ways are contrived to guarantee the implementation of the due constitutional process in digital media. Among the various problems related to the implementation of online procedural acts, those related to the implementation of remote hearings stand out nowadays, such as instructions carried out by videoconferencing, testimonies taken by audio recording, and oral arguments recorded and sent to the magistrates. For this reason it is imperative that institutional protocols be implemented involving the OAB and, at least, the courts where premises are fixed, based on objective good faith and on cooperation (co-participation), for the adequate holding of video hearings, also bringing a preventive role of future discussions of curtailment of the right of defence and nullities.[56] The institutional protocols resulting from the normative authorization for agreement of procedural conventions in Article 190 of the Civil Procedure Code are accords reached between the courts and the professional bargaining units that, for being concluded on behalf of a category or group, bind all of its members.[57]

Furthermore, it is necessary to identify how the delivery of asynchronous oral arguments through videos recorded by the lawyers and sent to the arbitrators may impair the high effectiveness of the principle of the right to influence the construction of the judicial decision in the construction of the judicial decision. Although the oral argument by video is said to be able to provide a bigger influence power, since it is possible to design the systems in a way that prevents opinion editing until the magistrates watch the whole video, we do not consider it to be the best solution.

Despite the lack of empirical demonstration, for the lack of comparative data (at least momentarily), there seems to be a loss of the multidimensionality of the body and of the persuasion power through synchronous in-person oral arguments in relation to those delivered by videoconferencing. But as this movement seems to be here to stay, especially in the higher courts, lawyers need to adapt to the hyper-orality (orality via hyperlink) by prototyping new ways to present information, e.g. through projections of infographics so as to keep the influence in decision-making.

It is also valid to register that the holding of hearings by remote means may cause damage to the full defence because it interferes with the contact between the

55 Cf. https://www.cnj.jus.br/cnj-usara-automacao-e-inteligencia-artificial-para-destravar-execucao-fiscal/.

56 Analysing the conclusion of institutional protocols for the use of artificial intelligence mechanisms in court processes: Faria, Guilherme Henrique Lage; Pedron, Flávio. Inteligência artificial, diretrizes éticas de utilização e negociação processual: Um diálogo essencial para o direito brasileiro. In: Nunes, Dierle; et al. (Coord.). *Inteligência Artificial e Direito Processual*. 2020. Specifically about the conclusion of institutional protocols running upon the aspects to be observed in online hearings, cf. Nunes, Dierle; Faria, Guilherme Henrique Lage; Pedron, Flávio. *Hiperoralidade em tempos de Covid-19*. Available at: https://www.conjur.com.br/2020-jun-16/nunes-faria-pedron-hiperoralidade-tempos-covid-19.

57 Cabral, Antônio do Passo. *Convenções Processuais*. Salvador: Juspodivm, 2016. p. 84.

lawyer and the witnesses examined and the contact between the parties and the magistrate that will judge them. Once again, Byung-Chul Han's warning that "the digital medium is taking us farther and farther away from the other"[58] prompts reflection on the limits of communication by videoconferencing. Considering the premise that "the verbal component of communication is very slight" compared with the nonverbal forms "such as gestures, facial expressions, and body language",[59] it is clear that the examination of witnesses by videoconferencing will be, in many cases, insufficient for the lawyers to be able to make the best use of the hearings and produce the proofs necessary for success in a lawsuit.

It should be noted that the Brazilian Civil Procedure Code of 2015 aimed at bringing the lawyer closer to the witness examined during the discovery hearing by providing, in Article 459, that the examination should be conducted directly, with no intervention by the judge. Thus, the use of videoconferencing tools may promote an unjustified distancing, preventing the lawyer from exploiting the witness's nonverbal communication during the testimony.

Another problem resulting from conducting hearings by videoconferencing lies in the reduction in the parties' and the judge's control in the production of proof, allowing the strategic performance of the lawyers. It is perfectly possible that, in the face of an unfavourable piece of information given by a witness, the very lawyer who listed it may close the connection on the pretext of having an occasional technical failure. The scenario is even worse when one considers that the lawyer may not enter the virtual hearing room again but instead waits for a new scheduling to get better prepared.

Unfortunately, it is also quite possible that the witnesses heard be instructed in another space, separated from the arbitrator and from the opposing party's lawyer. The possibility that the instruction will happen without the judge's control would induce a form of presentation of testimonial evidence that would depend much more on the lawyers' liability, as what happens in the American procedural system. However, as there is no such tradition in the Brazilian judicial system, and no legislation to deal with this topic, the regulation is more frequently left up to the courts of justice.

58 Han, *In the Swarm: Digital Prospects*, p. 24.
59 Ibid., p. 21.

This new reality demands the creation – as we have already affirmed[60] and now insist – of, at least, an interinstitutional protocol (Art. 190, CPC) determining which aspects must be observed by the parties and the judge for conducting of hearings through videoconferencing, mainly establishing control forms based on the objective good faith. In order to guarantee the participation of all of those affected and considering the need for a quick answer, since online procedural acts are already piling up, the protocol should preferably be developed jointly by the CNJ and the OAB, representing the application of cooperation in the strategic management plan. Only thus will it be possible to visualize a minimally democratic application of videoconference hearings, avoiding no-right zones during the pandemic.

5 Guidelines to Be Observed in the Implementation of Online Platforms for Dispute Resolution

As discussed in Section 3 of this article, the legal treatment of dispute resolution technologies in Brazil has been done mainly by the CNJ and by the courts of justice themselves. While specific legislation for this new phenomenon has not been promulgated, which would involve the effective participation of all of those affected, what is of relevance is guidelines that can provide a reference for the discussions, the development, the use and the integration of ODR platforms, in line with the democratic constitutional process and its corollaries, that is, in harmony with the due constitutional process.[61]

60 In defending the need for institutional protocols to regulate the conduct of procedural acts on digital media, we proposed, together with Flávio Pedron and Guilherme Lage, that "among the basic policies (without prejudice to others to be adopted), we believe it is essential to establish that: 1) the hearings can only take place in case of agreement between the parties, anticipating procedural acts that can be conducted if there is no hearing; 2) in case of connection problems, the act must be suspended; 3) the judiciary must make places available for the parties and witnesses to participate in the hearings (respecting the health protective measures); 4) in the event that there is testimony by both parties, one of them (who does not belong to a high risk group) must appear in court to bear testimony so as to make sure that the first one does not hear the testimony of the second; 5) the list of witnesses must be accompanied by photo identification; 6) the witnesses that do not belong to the high risk group will appear in court to be examined in separate rooms; 7) the parties and witnesses that are in the high risk group will be heard in their residences, being required an endeavor to ensure that there is no influence or interference by third parties, and the judge may request that the environment be showed for inspection; 8) before the testimony, the witness will show their official photo identification; 9) the testimonies must be recorded, as well as the whole discovery hearing and judgment; 10) oral arguments through synchronous or asynchronous hyper-orality must compulsorily be watched by the arbitrators, and the computer system must be programmed so that it will only allow the votes to be cast after the complete hearing of the presentations; 11) mechanisms and timetables must be made available so that the parties can meet with magistrates of any grade, via real-time videoconferencing, to deliver provisory judicial protections and briefs; 12) if there is provision to the contrary in procedural legal business, it must prevail." Cf. Nunes, Dierle; Faria, Guilherme Henrique Lage; Pedron, Flávio. *Hiperoralidade em tempos de Covid-19*. Available at: https://www.conjur.com.br/2020-jun-16/nunes-faria-pedron-hiperoralidade-tempos-covid-19. Accessed 15 March 2021.

61 Nunes, Bahia, and Pedron, Flávio. *Teoria Geral do Processo*.

Although many guidelines have been considered in national and international doctrines,[62] we do not address them comprehensively here, but only identify those that would be essential at this time of adaptation forced by the pandemic, specifically the guidelines of accessibility, confidentiality, equality, impartiality, informed participation and transparency.

According to the *accessibility guideline*, the project and the implementation of ODR platforms must not only provide its use for a larger number of people but also consider the reality of existing cultural and social differences, as well as enable the differential access to resources and experiences in accord with the particularities of those involved. That is, the ODR systems and processes must effectively facilitate, rather than limit, the parties' participation in the dispute resolution mechanisms.

Arguments in favour of accessibility are not merely rhetorical, since data from the Brazilian Institute of Geography and Statistics (IBGE) relating to 2018 indicate that 79.1% of Brazilian homes have internet access, a number that, although high, demonstrates that one out of five homes are not connected yet. Another important factor that must be taken into consideration is related to the influence of income on internet access, since it was found that, the average real income per capita of Brazil's households that had an internet connection (R$ 1,769.00) was much higher than that of those that did not (R$ 940.00).[63]

The internet access rate was also low for people over 60 years old (less than 40% use the internet) and for people who lack formal education (less than 15% have internet access), according to data from IBGE's National Household Sample Survey (2018).[64] As can be perceived, this data demonstrates that the mere establishment of online courts is insufficient to guarantee access to justice, as there are structural problems that hinder the citizen's full access.

Another guideline that must be observed by the courts in their initiatives to exercise jurisdiction online is *confidentiality*. This means that the development and implementation of ODR systems, including the professionals involved, must maintain confidentiality according to all legal obligations. Confidentiality is of special relevance to the fields of conciliation and mediation, whose practices in remote form have already been authorized in Brazil by Law No. 13.994/20, as noted previously.

In Brazil, confidentiality is one of the principles that inform conciliation and mediation, according to Article 166 of the Civil Procedure Code and extends to all the pieces of information produced in the course of the proceedings, the tenor of which cannot be used for a purpose that is different from that predicted by parties'

62 The *National Center for Technology & Dispute Resolution*, founded in 1998 by Law professors Ethan Katsh and Janet Rifkin from Massachusetts University, systematized the ethical principles that should be observed in order to guarantee higher quality, effectiveness and objective of the dispute resolution procedures with the use of technological tools. Available at: http://odr.info/ethics-and-odr/#_ftn1.

63 Instituto Brasileiro de Geografia e Estatística. *Pesquisa Nacional de Amostras por Domicílio Contínua – PNAD*. 2018. Available at: ftp://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_continua/Anual/Acesso_Internet_Televisao_e_Posse_Telefone_Movel_2018/Analise_dos_resultados_TIC_2018.pdf.

64 Ibid.

expressed resolution, in terms of § 1 of the aforementioned article. Therefore, the ODR systems must be built in such a way as to prevent information presented by the parties to reach plea bargaining from being shared at a later stage of the judgment.

The necessity of safeguarding the confidentiality of the information produced by the parties for attempting plea bargaining calls attention to another guideline that must be observed by the ODR platform developers: the *security guideline*. According to this guideline, efforts must be made to ensure that the data and the communication between the parties and other entities linked to the ODR platforms be protected against breach and leakage. Something remarkable, in this respect, is that the courts have used commercial software to hold hearings and videoconferences, and that it is not possible to know how liability will be conferred in the event of data breach.[65] The advent of big data and its co-optation for profit making makes it necessary to adopt as many precautions as possible to safeguard personal data from improper use, as the use of technological tools helps to strengthen the omnipresent surveillance state.[66]

A reflection is in order here: ODRs become more efficient the larger the data that accrues from previous negotiations (which helps in the enhancement of the best approaches to optimize the performance). Without the use of data from negotiations, the training of algorithms at any of the levels pointed out in item 3 would be impracticable. However, as much as the data from previous negotiations is anonymized, its use will end up being continuously required, putting the treatment of and ethical respect for the use of data on the agenda.

Just as importantly, the *equality guideline* must also be observed, representing as it does the obligation to design and implement ODR platforms without prejudicing or privileging the interests of individuals or groups, including those based on algorithms. To ensure that these platforms treat all participants equally, their projects must allow silenced or marginalized voices to be heard and guarantee that privileges and disadvantages will not be replicated (or even amplified) in the virtual environment. In Italy, as part of the procedural changes resulting from the COVID-19 pandemic, virtual hearings were authorized to be conducted only when equality of arms between the parties was guaranteed.[67]

Walking together with equality is the *impartiality guideline*, according to which the ODR processes must be designed and implemented with a commitment to reducing algorithmic bias in the formation of dispute resolutions. This includes considering the conditions that could structure privilege patterns in procedures and better results for regular litigants. When the ODR platforms used belong to or are controlled by one of the parties involved, it is not difficult to verify the

65 In Italy, the Ministry of Justice issued a technical recommendation that the programs used for virtual hearings be Skype for Business and Teams, keeping in mind that both programs must use infrastructure and data centres restricted to the Ministry of Justice. About this, see: Krans, Bart; et al. *The Civil Justice and Covid-19*. Septentrio Reports 5. Arctic University of Norway, p. 33.

66 About the current surveillance capitalism, see: Zuboff, Shoshana. Big Other: Surveillance Capitalism and the Prospects of an Information Civilazation. *Journal of Information Technology*, 30, 2015, pp. 75-89.

67 Krans, Bart; et al. *The Civil Justice and Covid-19*. Septentrio Reports 5. Arctic University of Norway.

possibility of breaches of impartiality. First of all, there is a clear conflict of interest, since the platform is built by the very party that will be subjected to it, making it possible for the system to be built with the objective of bringing competitive benefits to this party.[68]

Even though the platform developer is imbued with sincere intentions of achieving positive results for the other party, it is necessary to remember that human rationality is a myth that has been debunked at least since the 1970s, by Amos Tversky and Daniel Kahneman's studies about behavioural psychology.[69] Therefore, there are no reasons to believe that the ODR platform developer will be free from their bias, which may lead them, albeit unconsciously, to create mechanisms that offer positions of advantage[70] or bring suboptimal solutions to the opposite party.[71] It is necessary to remember that today a major part of the ODR platforms are developed and implemented by the very interested party, who makes use of their economic and informational privilege to expand their advantages.[72]

See, for example, the possibility of creating mediation platforms incubated in the very law firms that represent the products or services supplier and the insertion of mediation commitment clauses in adhesion contracts. This means that if the consumer has any problem with the product or service purchased, the dispute resolution will be mediated by the very law firm that represents the interests of the one that caused the damage. Although Law No. 13.140/15[73] does not explicitly bar the insertions of this type of commitment clause into adhesion contracts, there is a clear breach of duty by ODR platforms.

It is also interesting to note that the OAB, through the Federal Council's National Coordination of Supervision of the Legal Professional Activity, has been facing the predatory behaviour of start-ups that offer legal services, on the

68 Colin Rule empirically demonstrates that, as the use of these dispute resolution systems may bring measurable benefits to the companies. See: Rule, Colin. Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution. *University of Arkansas at Little Rock Law Review*, 34, 2012, p. 767.

69 Kahneman, Daniel. *Rápido e devagar: duas formas de pensar*. Rio de Janeiro: Objetiva, 2012.

70 Although this topic will be more carefully examined by the authors in other texts, it must be registered here that decision-making in digital environments creates the risk of using the digital platform's architecture to skew the parties, who can be influenced according to the display of information on their computer or smartphone screen. Cf. Sela, Ayelet. e-Nudging Justice: The Role of Digital Choice Architecture in Online Courts. *Journal of Dispute Resolution*, 2019. p. 136. Available at: https://scholarship.law.missouri.edu/jdr/vol2019/iss2/9136. Accessed 24 November 2020.

71 For a better understanding of cognitive bias, see: Nunes, Dierle; Lud, Natanael; Pedron, Flávio. *Desconfiando da (im)parcialidade dos sujeitos processuais: um estudo sobre os vieses cognitivos, a mitigação de seus efeitos e o debiasing*. Salvador: Juspodivm, 2018.

72 Cf. Nunes, Dierle; et al. *Teoria Geral do Processo*. Salvador: Podivm, 2020. pp. 118-122.

73 Brazil. Law. 11.340, of June 26, 2016. Rules on the mediation between individuals as a form of solution of controversies and on plea bargaining of disputes in the sphere of public administration; changes Law No. 9.469, of July 10, 1997, and Decree No. 70.235, of March 6, 1972; and revokes § 2 of Art. 6 of Law Lei No. 9.469, of July 10 1997. Diário Oficial da União, Brasília, 29 June 2015.

argument that such services would be illegal, seeking to avoid disloyal completion and damages to lawyering.[74]

In order to guarantee transparency and prevent the ODR initiatives from being used as a market niche, violating neutrality, it is vital that, in addition to the written observance of the norms contained in Law No. 13.140/15, a seal of recognition be created and granted by the OAB to the platforms that work in accordance with the due constitutional process.

All of these possible problems resulting from the thoughtless use of ODR platforms emphasize the importance of ensuring full transparency and the informed participation of users in relation to the risks involved. The *transparency* and *informed participation guidelines* have considerable importance in ODR platforms, since the use of technological tools may cover the parties' interests through omission of their real identity, hinder the action of those who have more difficulty in understanding the workings of the technological mechanisms, and create the risk of leakage and improper use of data.[75]

In view of such dangers, every possible effort must be made to ensure the transparency of the real purposes and existing risks, including the forma of the dispute resolution procedures; the identities, affiliations, obligations and conflicts and interest of the parties, entities and systems; and the policies and data security systems, confidentiality and privacy involved.[76] Besides preventing the risks, participation of the users must be preceded by complete information, leaving it up to the courts to guarantee that the parties know how the online proceedings will work before starting, who manages the procedure and who will have access to the data and, if applicable, make the algorithms that impact on the decisions available for analysis.[77]

Therefore, in order to ensure that the ODR platforms and online courts are effectively transparent, they have to guarantee the explicit disclosure of all information about the risks and benefits of the proceedings to the participants, providing, whenever possible, the voluntary acceptance by the users of the risks resulting from their participation.

6 Final Considerations

Legal analyses about the global trend towards a technological turn in law, which has been forcefully accelerated by the new coronavirus pandemic, should not adopt an excessively optimistic attitude that purely and simply believes in the use of technological tools to correct distortions of the legal system such as the barriers to

74 In the exercise of this supervision, the coordination, until 14 March 2020, had already sent more than 90 notices to start-ups involved in this kind of activity in various economic sectors. Cf. www.oab.org.br/noticia/58145/oab-age-para-enfrentar-atuacao-predatoria-de-startups-que-oferecem-servicos-juridicos-de-maneira-ilegal.

75 Quek Anderson, Dorcas. Ethical Concerns in Court-connected Online Dispute Resolution. *International Journal of Online Dispute Resolution* (Research Collection School of Law), 5(1-2), 2019, pp. 20-38.

76 Joint Technology Committee. *ODR for Courts*. Version 2.0. Updated and Adopted 29 November 2017.

77 Some ODR legal systems offer public search about decisions previously made. Cf. www.housing.gov.bc.ca/rtb/search.html.

the access to justice and the lack of legitimacy of legal decisions. These analyses, however, must avoid empty discourses of repudiation of the use of technology to implement qualitative improvements in the system, avoiding what Richard Susskind calls 'irrational rejectionism', which is the visceral and "dogmatic dismissal of a technology with which a critic has no personal or direct experience".[78]

The technological turning point in law is an unrestrainable phenomenon that may produce great results but that may also serve only to produce quantitative efficiencies for the Brazilian procedural system, which has been immersed, since the 1990s, in a neoliberal context. Thus, in order to enable the technologies implemented at this time of adaptation forced by the new coronavirus pandemic to improve the quality and legitimacy of legal decisions, those responsible for the development of ODR platforms and online courts must observe the guidelines of accessibility, confidentiality, equality, impartiality, transparency and informed participation as new tenets of the due constitutional process post technological turning point.

As to the various practical problems related to the conduct of online procedural acts such as instructions carried out via videoconferencing, testimonies taken by audio recording, asynchronous oral arguments recorded and sent to the magistrates, it is necessary to understand how the exercise of these acts may impair the high effectiveness of the principles of full defence and of the contradictory as the parties' influence power in the construction of the decisions.

In order to avoid no-right zones in online proceedings, an institutional protocol must be urgently created that identifies which technical aspects must be observed and establishes ways to control the parties' and the lawyers' actions. This protocol, whose possibility of creation follows from Article 190 of CPC, must be jointly developed, in the strategic management plan, preferably by the National Council of Justice and by the OAB, in order to guarantee the participation of all of those affected.

The ODR platforms, in turn, must operate in a transparent and neutral way, and its use as a market niche is not normatively adequate. Thus, it is imperative that a seal of recognition be created and granted by the OAB to those platforms that operate in compliance with the due constitutional process, besides the strict observance of the norms in Law No. 13.140/15.

All of these problems reinforce the hypothesis that one cannot acquiesce with an alleged reduction of the debate about online courts – whether they are services or places – as Richard Susskind does. This is because such a simplification dismisses the role of the procedure as a guarantee and of the courts as institutions of implementation of the due constitutional process. To be online does not allow non-compliance with the legal system, much less the reduction of the jurisdictional activity to a mere service.

78 Susskind, *Online Courts and the Future of Justice*, p. 3.