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OS MECANISMOS ONLINE DE RESOLUÇÃO DE CONFLITOS (ONLINE DISPUTE RESOLUTION) NO DIREITO BRASILEIRO

ONLINE DISPUTE RESOLUTION MECHANISMS IN BRAZILIAN LAW

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RESUMO

Através desse artigo, pretende-se investigar acerca da possibilidade de utilização de mecanismos consensuais online e a sua aplicabilidade como resposta adequada aos conflitos de interesses, a partir da aplicação da política pública instituída pela Resolução n. 125/2010 do CNJ. Sendo assim, questiona-se: o que são os mecanismos online de resolução de conflitos? Seriam eles uma opção legalmente viável no cenário jurídico brasileiro? Como se daria a sua adequada utilização? Parte-se da hipótese de que é possível a utilização dos meios consensuais online de tratamento de conflitos, pois são instrumentos capazes de facilitar a comunicação entre as partes e encontram respaldo na legislação brasileira. Alinhado ao problema de pesquisa e hipótese, está o objetivo geral, que consiste em investigar o que são os online dispute resolution enquanto mecanismos de acesso à justiça no Brasil diante da aplicação da Resolução n. 125 do CNJ. Em decorrência do objetivo principal foram elaborados os seguintes objetivos específicos: a) descrever a Política Judiciária de tratamento dos conflitos de interesses no Brasil e analisar o princípio fundamental de acesso à justiça; b) explicar o que são os ODR's, analisando a legislação que dá suporte à sua aplicação no direito brasileiro; c) ponderar acerca da implementação dos mecanismos online no Brasil, examinando alguns aspectos relativos às transformações sociais experimentadas a partir da era da informação. Com a finalidade de cumprir com os objetivos propostos, utilizar-se-á o método dedutivo e o método de procedimento monográfico.

Palavras-chave: Internet, Mediação, Online dispute resolution, Políticas públicas.

ABSTRACT

This article aims to investigate the possibility of using online consensus mechanisms and their applicability as an adequate response to conflicts of interest, based on the application of public policy established by Resolution n. 125/2010 of the CNJ. From this contextualization, the question is: what are the online mechanisms for conflict resolution? Would they be a legally viable option in the Brazilian legal scenario? How would it be properly used? It is assumed that it is possible to use online consensual means of conflict handling, as they are tools capable of facilitating communication between the parties and are supported by Brazilian law. In line with the problem of research and hypothesis, is the general objective, which is to investigate what online dispute resolution are as mechanisms for access to justice in Brazil in the face of the application of Resolution no. 125 of the CNJ. As a result of the main objective, the following specific objectives were elaborated: a) to describe the Judicial Policy for the treatment of conflicts of interest in Brazil and to analyze the fundamental principle of access to justice; b) explain what ODR's are, analyzing the legislation that supports their application in Brazilian law; c) consider the implementation of online mechanisms in Brazil, examining some aspects related to the social transformations experienced from the information age. In order to fulfill the proposed objectives, the deductive method and the monographic procedure method will be used.
Keywords: Internet, Mediation, Online dispute resolution, Public policy.

1. INITIAL CONSIDERATIONS

Law is a product of history and culture and is constantly changing. This means that law should be understood as a system, interpreting laws, rules and principles together, considering it systematically. Law ends up being instrumentalized in this ordered system of norms and principles, seeking to guarantee security and social preservation through the regulation of conflicts. Thus, one attempts to protect individual freedom and at the same time the collective interest, aiming at the balance between both.

The various ways of thinking and living together are being worked out in the world of telecommunications and computing. Relations between men throughout history have undergone a number of transformations and are now adapting to an incessant metamorphosis of information technological devices of all kinds. Writing, reading, looking, listening, creating, learning are captured by increasingly advanced computer technology. In this sense, Lévy (1993) warns that no serious reflection on the future of contemporary culture can ignore the enormous incidence of electronic media (especially television) and

informatics[1].

With regards to the context of the Brazilian Judiciary system, it is observed that there is a growing judicialization of controversies, which leads us to believe that fewer people have competence in the management of their conflicts, that is, an inability to deal with their problems[2]. Therefore, the debate on conflict management is extremely relevant; it is a matter of social interest. With the intention of improving the access to justice, the quality of the judicial provision and aiming to reduce the number of lawsuits in Brazil, the following legislative instruments were prepared: Resolution n. 125/2010 of the National Council of Justice[3], the Code of Civil Procedure[4] - Law n. 13.105/2015 and the Mediation Law - Law n. 13.140/2015.

Resolution n. 125/2010 of the CNJ establishes the National Judicial Policy for the proper treatment of conflicts of interest within the Judiciary Power, and public policy is understood as a set of actions (or inactions) taken from conscious State decisions, endowed with coherence that, under the guidance of the State, are developed by itself or by civil society organizations in an attempt to intervene in social reality. The intention is to control, supervise or change a problematic situation that needs to be transformed.

Given this scenario, the research theme covers the possibility of using online consensus mechanisms and their applicability as an appropriate response to conflicts of interest, based on the application of the public policy established by the Resolution n. 125/2010 of the CNJ. From this contextualization, the questions are: what are the online mechanisms for conflict resolution? Would they be a legally viable option in the Brazilian legal scenario? How would they be properly used?

It is assumed that it is possible to use online consensual means of conflict handling, as they are tools capable of facilitating communication between the parties and are supported by Brazilian law. However, in order for its application to be satisfactorily developed from a technical and practical point of view, the legal principles and legislation, as well as the limitations of implementation of the tools and technologies necessary for the adequate provision of this consensual treatment modality, must be considered.

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[1] "Nenhuma reflexão séria sobre o devir da cultura contemporânea pode ignorar a enorme incidência das mídias eletrônicas (sobretudo a televisão) e da informática" (LÈVY, 1993, p. 17).
[2] The following reading is suggested: SPENGLER, F. M.; WRASSE, H. P. A ressignificação do paradigma estatal em tempos de globalização. *Direito, Estado e Sociedade*, Rio de Janeiro, vol. 54, pp. 127 - 146, 2019.
[3] The National Council of Justice (CNJ) is a public institution that aims to improve the work of the Brazilian judicial system, mainly with regard to administrative and procedural control and transparency. Hereafter CNJ.
[4] Code of Civil Procedure is the law that regulates the civil judicial process in Brazil. Hereafter CPC.

In line with the problem of research and hypothesis, the general objective is to investigate what online dispute resolution are while mechanisms for access to justice in Brazil in the face of the application of the Resolution n. 125 of the CNJ. As a result of the main objective, the following specific objectives were elaborated: a) describe the Judiciary Policy for dealing with conflicts of interest in Brazil and analyze the fundamental principle of access to justice; b) explain what ODR's are, analyzing the legislation that supports their application in Brazilian law; c) consider the ways of implementing online mechanisms in Brazil, examining some aspects about the social transformations experienced throughout the information age. Each objective is linked to a section of the article.

In order to fulfill the proposed objectives, the deductive method will be used, starting from general assumptions, such as the possibility of using online mechanisms for handling conflicts in the Brazilian legal system, to achieve specific conclusions about the applicability of this format to manage conflicts in the face of the challenges to its implementation and execution in Brazil. The method of procedure is the monographic, based on books, laws and scientific articles on the subject.

2. JUDICIAL POLICY FOR TREATMENT OF CONFLICTS IN BRAZIL AND ACCESS TO JUSTICE[5]

From the formation of the State and the designation of the Judiciary as the institution in charge of the judicial monopoly, people begin to entrust their conflicts and problems to the State, hoping that it would decide their issues. Over time, there is a growing loss of autonomy by society in the management of its conflicts, because, as the Judiciary has the obligation to decide, instead of operating as a last resort for the citizen, it ends up being sought before other options are exhausted (NALINI, 2015).

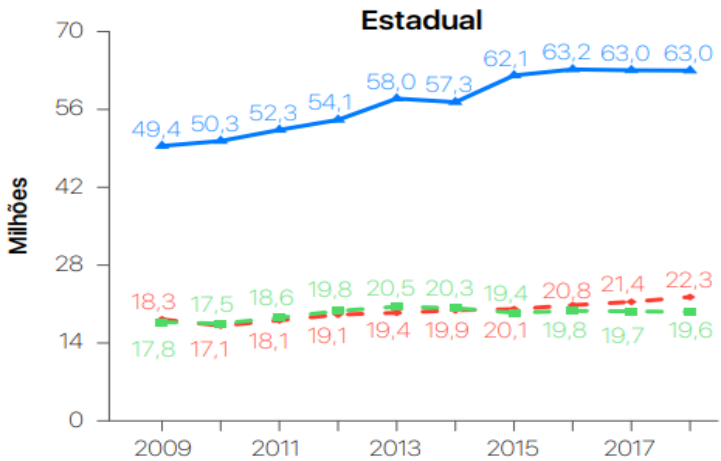
The fifth article, clause XXXV of the Federal Constitution establishes that the law shall not exclude from the Judiciary Power discretion an injury or threat to the law[6], so that any conflict may be prosecuted and judged by the Judiciary. Accordingly, the CPC states that civil proceedings shall be ordered, disciplined and interpreted in accordance with the fundamental values and norms established in the Constitution of the Federative Republic of Brazil, in compliance with the provisions of this Code[7]. It is known that the process begins

[5] Justice is considered the sense of what is just and Justice with capital letter, the Judiciary Power.
[6] Art. 5º, XXXV, Federal Constitution: "a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito".
[7] Art. 1º, CPC: "processo civil será ordenado, disciplinado e interpretado conforme os valores e as normas

with the motivation of the parties and develops by official impulse, except for the exceptions provided by law. It also ratifies the constitutional position by stipulating in the third article that a right or threat to law shall not be excluded from Judicial review[8].

Although the CPC encourages cooperation between the parties and the use of consensual methods of conflict treatment, in practice such use is still very restricted. People identify in the Judiciary, legitimated authority, the idea of order and discipline, placing in it the responsibility to present an answer to their conflicts. There is a transfer of burden and blame, for it is the sentence that will point out right and wrong, the loser and the winner of the case, "resolving" the dispute. The ritual protects and authorizes at the same time, while in self-composition the accountability of the conflicting ones is stimulated in the development of a response that satisfies them (GARAPON, 1997).

For the purpose of illustrating official data of the Brazilian Justice, there follows a graph that contemplates the number of lawsuits filed, the number of cases downloaded and the cases pending judgment (congestion charge) in the State Justice in the Justice Report in Number 2019 (year base 2018). It is noted that the congestion charge is the crucial indicator for finding the accumulation of contentious demands in the country, which measures the percentage of cases that remained pending resolution at the end of the base year, compared to what was processed (sum of pending and downloaded) (CNJ, 2019).



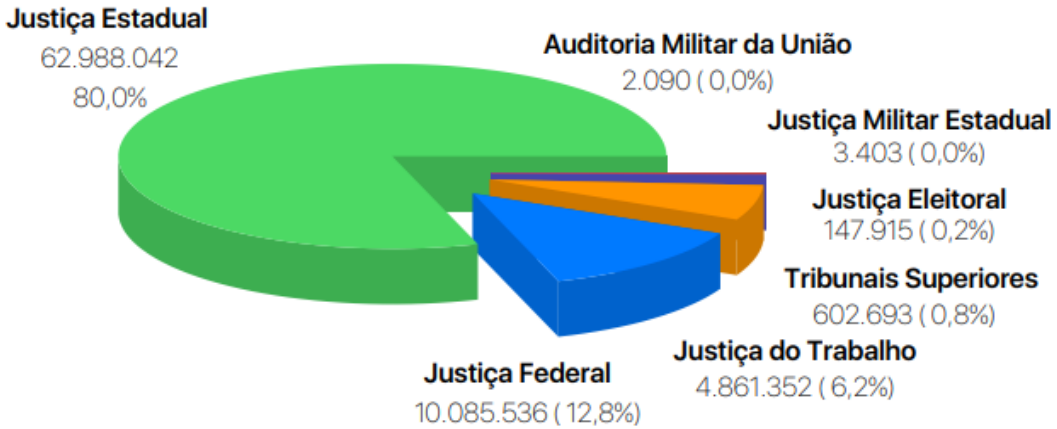
Source: Graph taken from the Justice in Numbers Report 2019 (base year 2018), p. 90. Information available at: <http://www.cnj.jus.br>. Accessed 30 Aug. 2019.

fundamentais estabelecidos na Constituição da República Federativa do Brasil, observando-se as disposições deste Código".

[8] Art. 3º, CPC: "não se excluirá da apreciação jurisdicional ameaça ou lesão a direito".

In general, the rate of congestion in the courts is quite significant and, although executions represent a higher numerical contingent, the rate at the knowledge stage (which is the phase when the judge receives the facts and the legal bases of those involved in the case to gather the necessary information for analysis) is also significant. This shows that the State Justice has very high litigation rates and that the clashes extend over time, since most of them exceed (at least) one year.

Figura 50: Casos pendentes, por ramo de justiça



Source: Graph taken from the Justice in Numbers Report 2019 (base year 2018), p. 84. Information available at: <http://www.cnj.jus.br>. Accessed 30 Aug. 2019.

The indicators serve to clarify the panorama of Brazilian Justice, are a social clipping of the transfer of the burden of management and administration of citizens' conflicts to the Judiciary. Thus, the CNJ instituted, based on strategic guidelines of the Judiciary, the National Judicial Policy for the proper treatment of conflicts of interest, seeking to comply with the right of access to justice, provided for in art. 5, XXXV, of the Federal Constitution Law beyond the formal aspect before the Judicial bodies (due legal process), implies access to a fair legal system, it is essential to stimulate, support and disseminate the systematization and improvement of practices already adopted by the courts, etc.

One of the focuses of public policy is the identification of the type of problem that it seeks to correct and the understanding of models and theories can help the manager in understanding this problem[9]. Thus, the possible outlines of a public policy, which will be

[9] The following reading is suggested: SPENGLER, F. M. The conflictive pluriverse and its reflections on the

developed from the conflicts placed, the trajectory followed and the role of the individuals, groups and institutions that are involved in the decision and that will be affected by it, is oriented.

For Secchi (2014), public policies are expressions of the concrete and symbolic content of political decisions as well as the process of implementation of those decisions. It is a guideline designed to solve a public problem; it is intentionally created as a response to an adverse situation experienced by the community. For Dye (2008) this is all that governments choose to do or not to do, while for Schmidt (2008) it is a broad term that can be explained as the designation of a set of policy actions aimed at addressing social demands. The term “public policy” can be defined as a government program or framework of action and it consists of a set of articulated measures, which purpose is to move the government machine towards the accomplishment of some public order objective or to fulfill a right (SPENGLER, 2019).

Therefore, starting from the problematic scenario faced by the Judiciary system, it is understood that the National Judicial Policy for proper treatment of conflicts of interest, provided for by Resolution n. 125 of the CNJ, is a public policy of social and regulatory nature. It was from this legal framework of November 29, 2010 that other regulations of this nature began to mature and among them is the CPC (originally Bill 166/2010 presented on December 29, 2010) and the legal framework of mediation (Law n. 13.140/2015, derived from Bill 7.169/2014 - text that replaced Bill 517/2011, which was joined as Projects 405 and 434 both of 2013)[10].

Resolution n. 125 of the CNJ establishes mediation as a permanent public policy in the treatment of conflicts and, among the considerations that introduce the text of the Resolution, are issues such as operational efficiency, access to the Justice system and social responsibility, in addition to promoting the fundamental right of access to justice[11], seeking to improve the Judicial provision of the State through mediation, conciliation and other consensual mechanisms, as well as the quantitative reduction of procedural demands. It is important to mention that mediation does not only lend itself to reducing the

agreed state training. *Revista direitos fundamentais & democracia (UniBrasil)*, v. 22, p. 182-209, 2017.

[10] There were previous legislative projects, such as Bill 4.827/1998, coming from a proposal by Mrs Zulaiê Cobra. However, it was from Resolution n. 125 of the CNJ that the theme developed within a more mature context.

[11] The following reading is suggested: SPENGLER, F. M.; BEDIN, G. L. O Direito de acesso à justiça como o mais básico dos direitos humanos no constitucionalismo brasileiro: aspectos históricos e teóricos. *Revista Direitos Fundamentais & Democracia (UniBrasil)*, v. 13, p. 129-144, 2013.

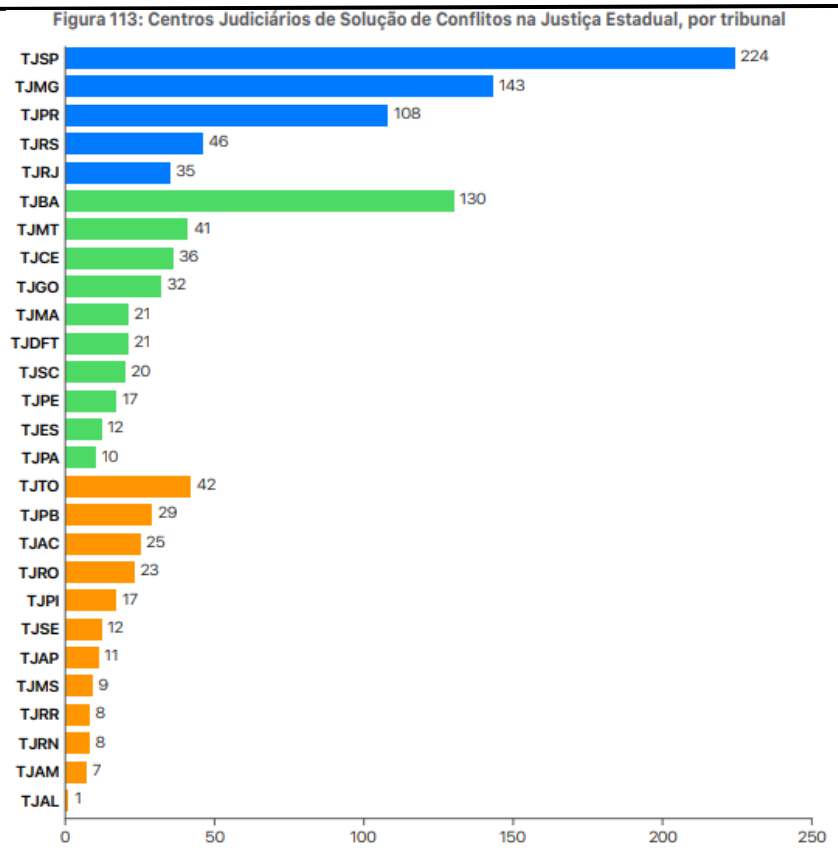
number of cases, but should be thought of as a way of meeting social concerns, qualitatively dealing with the problem/conflict, preventing it and treating it appropriately.

The sole paragraph of the first article of Resolution 125 of the CNJ[12] states that to the Judicial organs, under the terms of art. 334 of the New Code of Civil Procedure combined with art. 27 of the Mediation Law, prior to the decision awarded by judgment, offer other dispute settlement mechanisms, in particular the so-called consensual means, such as mediation and conciliation, as well as providing care and guidance to the citizen.

The idea is that before the beginning of the civil process, as well as at any time during the process, the parties feel free to compromise, to make deals. The Policy encourages the judicialization of self-composing mechanisms for dealing with conflicts without, however, making possible the distribution of adequate financial resources. Although in 2014 it issued Resolution 195[13], the CNJ still finds it difficult to maintain a balanced budget within the Judiciary, as most of the Judicial Centers for Conflict and Citizenship Resolution (CEJUSCs) are supported by a Voluntary team of mediators and conciliators[14], even though CEJUSCs are being implemented in different judicial units, the number is too small to meet the legal demand, which means that it is not feasible to refer all new cases to CEJUSCs as determined in the CPC.

The first degree (instance) of the Judiciary system is structured in 14,877 judicial units and today there are just over a 1,000 Judicial Centers for Conflict and Citizenship Resolution. The point being, that this Centers (CEJUSCs) are a valuable structure for the Legal System, but it is hard work to support the legal demand in Brazil (due to the large number of procedures in place). Follows the graphic that represents the number of CEJUSCs in Brazil, according to the CNJ report:

[12] "Aos órgãos judiciários incumbe, nos termos do art. 334 do Novo Código de Processo Civil combinado com o art. 27 da Lei de Mediação, antes da solução adjudicada mediante sentença, oferecer outros mecanismos de soluções de controvérsias, em especial os chamados meios consensuais, como a mediação e a conciliação, bem assim prestar atendimento e orientação ao cidadão."
[13] This Resolution provides for the distribution of budget in the organs of the judiciary of the first and second degree and other measures.
[14] The he remuneration of professionals is a crucial point for the development of activities, and CNJ Resolution 271/2018 establishes a milestone on the subject, as it addresses and suggests a fee schedule to be regulated by Brazilian Courts.



Source: Graph taken from the Justice in Numbers Report 2019 (base year 2018), p. 143. Information available at: <http://www.cnj.jus.br>. Accessed 20 Sep. 2020.

The judiciary is not (or need not be) an unattainable Power within its organization and space, and there needs to be a more symbiotic relationship with the individual, in which both benefit to a greater or lesser extent. The performance of the Judiciary closest to the citizen and with democratized access is of paramount importance. However, the fundamental right of access to justice must be interpreted as a right that goes beyond access to the Judiciary; it is the right to access what is fair, through an appropriate and timely response.

According to Watanabe (2019, p. 121)[15]:

> access to justice constitutes, in our assessment, much more than the access to the

[15] Acesso à justiça constitui, em nossa avaliação, muito mais acesso à ordem jurídica justa, no sentido de que assiste a todos os jurisdicionados o direito de ser atendido pelo Sistema de Justiça, na acepção ampla que abranja não somente os órgãos do Poder Judiciário preordenados à solução adjudicada dos conflitos de interesses, como também a todos os órgãos, públicos e privados, dedicados à solução adequada dos conflitos de interesses, seja pelo critério da adjudicação da solução por um terceiro, seja pelos mecanismos consensuais, em especial a negociação, a conciliação e a mediação, e significa, ainda, direito de acesso à informação e orientação, não unicamente em relação a um conflito de interesses, como também a problemas jurídicos que estejam impedindo o pleno exercício da cidadania, mesmo que não configurem um conflito de interesses com um terceiro (WATANABE, 2019, p. 121).

> legal system itself, in the sense that people are entitled the right to be served by the Justice System, in the broad sense that encompasses not only the organs of the Judiciary that are adjudicated solution of conflicts of interest, as well as all bodies, public and private, dedicated to the adequate solution of conflicts of interest, either by the criterion of adjudicating the solution by a third party, or by consensual mechanisms, in particular negotiation, conciliation and mediation, and it also means the right of access to information and guidance, not only in relation to a conflict of interest, but also to legal problems that are preventing the full exercise of citizenship, even if they do not constitute a conflict of interest with a third.

Understanding what is meant by access to justice is expressed by a value judgment that refers directly to a fundamental human right. He wants justice (the just) in order to resolve his conflicts of interest based on ethical conduct and the laws of society and the State (HESS, 2004).

Thus, ensuring access to law and justice means ensuring that citizens know their rights, that they do not resign themselves when they are harmed and that they are (or are able to) overcome the costs and the psychological, social and cultural barriers to access their rights and the most appropriate and legitimate means - whether judicial or non-judicial - to settle their dispute (PEDROSO, 2011).

According to Pinho and Stancati (2017):

> The ideal is that we consolidate the mentality that we must first use the extrajudicial means of seeking consensus, then we must resort to voluntary extrajudicial jurisdiction, in the cases provided by law; and finally, the adjudicative means (arbitration and judicial jurisdiction) in which a third party will impose its will that must be fulfilled by the parties in dispute (PINHO; STANCATI, 2017, p. 11).

For Cappelletti and Garth (1988), access to justice can therefore be seen as the fundamental requirement - the most basic of human rights - of a modern and egalitarian legal system that seeks to guarantee, not just to proclaim the right of all. The fifth article of the Federal Constitution provides that the law shall not exclude from the appreciation of the Judiciary an injury or threat to the right, which means that it is not enough to have extremely advanced rules of a material nature, such as, for example, the one in Brazil. In general, the norms foreseen in the Federal Constitution regarding the protection of rights, or the environmental legislation in force, these legal norms have quite advanced content, seeking to transform Brazilian society into a more just and coherent society. However, there is no point in the existence of these rules if there are no mechanisms able to act in case of their violation. This is where access to justice becomes important, because we need instruments

to ensure that[16], in the event of a violation or a simple threat of violation of our rights, we have where to go, we can demand the enforced compliance with the violated rule or the sanction by the non-compliance (SOUZA, 2015).

This is a human right, recognized in the Universal Declaration of Human Rights of 1948, access to justice belongs to liberal states that, like Brazil, have invested in Justice systems and must face their own social, economic and cultural inequalities. However, the volume, complexity and severity of inequalities in Brazil considerably increase the weight of understanding access to justice as the first step towards a democratic society. Such expositions reinforce the concerns about the problem that surrounds the access to justice, encouraging several actors, such as civil society and institutions to think, debate, articulate and implement public policies to meet social demands (REBOUÇAS; CAFÉ, 2016).

The right of access to justice is considered one of the main instruments for the achievement of material equality. If, at an early stage in the development of this movement, the path that was intended to be followed was that of ordinary justice, and thus the expression essentially represented access to the courts, the evolution of the movement led to a loss of centrality of the courts and the broadening of the meaning of access to justice: the resolution of conflicts through impartial, correct and fair institutions, regardless of whether or not there is a place to resort to lawyers or courts (PEDROSO, 2011).

At the beginning of the second decade of the 21st century, the State crisis and the market (especially financial) crisis resulted in liberal public policies to reduce public spending, but did not meet the social and political need for a right to access justice. States and democratic societies need services/means that meet, even partially, their needs to access justice in order to compensate for social inequalities and foster citizenship (PEDROSO, 2011).

> In this context of crisis and social and political necessity, the continuation and development of socio-legal studies on access to law and justice in the area of identifying and overcoming obstacles, effective access and the relationship between this right and the means available in each society with democracy. The constitutional consecration of the new economic and social rights and their parallel

[16] Regarding this subject, it is important to mention that the understanding of the principle of access to Justice, with the requirement of previous extrajudicial request, for example, as a condition for postulation in Court, *presupposes a minimum degree of efficiency in the administrative instance*. One example is the "consumidor.gov.br", that offers a simple space for discussion between companies and consumers. The following reading is suggested: GAJARDONI, Fernando da F. Taking the duty to encourage self-composition seriously: a proposal to revise the access of justice under the Brazilian civil procedural law. Revista Eletrônica de Direito Processual – REDP, Rio de Janeiro, vol. 21, pp. 99-114, 2020.

> expansion with that of the welfare state transformed the right to effective access to justice into a pivotal right, a right whose denial would entail that of all others. Once deprived of mechanisms that enforced their respect, the new social and economic rights would become mere political statements of mystifying content and function (PEDROSO, 2011, p. 173).[17]

The author (2011) also points out that the sociology of the administration of justice has been dealing with social and cultural obstacles to effective access to justice by the most vulnerable social groups, constituting an innovative field of research. Studies show that the distance from citizens to the administration of justice has widened according to the social stratum to which these citizens belong and that this distance has as its causes, not only economic, but also social and cultural factors.

In this sense, technological transformations play a paradigmatic and symbolic role in this context of access to justice, because at the same time they approach, breaking barriers of time and distance; they create other knowledge and skills as well as infrastructure needs - driving away groups of citizens unfamiliar or in lacking access to information technologies. Online mechanisms represent another model of approximation between parties and between them and the Judiciary system.

3. ONLINE DISPUTE RESOLUTION AND BRAZILIAN LEGISLATION

The consumers challenge the economic system and markets, they are the ones who drive the game. They try to construct situations that do not limit their options and choice, often limited by local resources or monopolies of power. Thus consumers - because they are human beings - seek to extend their freedoms: going to shopping centers, preferring democracy, emigrating to freer countries and now migrating to the freest country of all, to the city with markets, and where contact alternatives are greater. Migrates to cyberspace (LÉVY, 1993 and 2001).

The logic behind this consumer reasoning that led to the opening of the “virtual world city” is very coherent and has always driven human behavior toward groupings: to

[17] “Neste quadro de crise e de necessidade social e política assume especial relevância a continuação e desenvolvimento dos estudos sociojurídicos sobre o acesso ao direito e à justiça na área de identificação dos obstáculos e da sua superação, a esse acesso efetivo, e, ainda, da relação entre esse direito e os meios disponíveis, em cada sociedade com a democracia. A consagração constitucional dos novos direitos econômicos e sociais e a sua expansão paralela à do Estado-Providência transformou o direito ao acesso efetivo à justiça num direito charneira, um direito cuja denegação acarretaria a de todos os demais. Uma vez destituído de mecanismos que fizessem impor o seu respeito, os novos direitos sociais e económicos passariam a meras declarações políticas, de conteúdo e função mistificadores” (PEDROSO, 2011, p. 173).

get the best one has to go to the place that makes the best choices possible. Through cyberspace, consumers have a power that they have long sought confusingly. It consumes information, fun, relationships, and everything you imagine possible to order online (LÉVY, 1993 and 2001).

Humans have a huge need to interconnect, which involves a number of factors and feelings, such as choice, freedom, solidarity, interdependence, and conscience. There is only one humanity and the single world market is building fast, taking even its most ardent promoters by surprise, which answers this question of the need for interconnection. In this step, commerce was fueled by the scientific community, which developed its production, transport and communication infrastructures, leading to the early stages of planetarization. Interactive and collective communication through digital networks has helped in the spread and growth of the internet. According to Lévy (2001), little by little, the commerce of ideas will merge with commerce in general until it can no longer be distinguished from it. This development of a global economy that prioritizes knowledge exchange, which is the main factor of conception, production, sale of the main product, leads us to believe that commerce is a trade of more or less objectified ideas.

From the growth of the web, humanity becomes aware of its unity - the author (2001) makes it clear that unity does not mean the absence of inequalities - but that this conscious unity “is born” in various spheres (economic, political, intellectual), quoting as an example the virtual economy, obviously it is not a finished process, but one that is facing these new forms of relationship.

For Pierre Lévy (1999) cyberspace consists of a communication space opened by the worldwide interconnection of computers and computer memories. The author also understands that the definition of cyberspace includes all electronic means of communication. And that this space is the fulcrum of an uninterrupted process of learning and teaching society itself, in which human institutions will intersect and converge on a collective intelligence capable of producing and exploring new forms.

ODR brings conflict resolution to a different sphere of relationship; it is a form of conflict resolution that occurs wholly or partially in cyberspace (KATSH, RIFKIN, GAITENBY, 2000). Cyberspace is an environment that changes and expands as different designs, features and creations of an electronic nature are developed, its representativeness is not known for certain. It is

> […] a human creation where architecture and design are indispensable, where any

> combination of places can be assembled on screen, where larger and more complicated entities continuously replace smaller and simpler “places,” and where, even now, there is some uncertainty about what it really is. [...] As it grows larger, however, we are still challenged to understand how to understand and respond to electronic creations and representations. (KATSH, RIFKIN, GAITENBY, 2000, p. 705-706).

Conscious communication (human language) is what makes the biological specificity of the human species. Because our practice is based on communication, and the internet transforms the way we communicate, our lives are deeply affected by this new communication technology. On the other hand, by using it in many ways, we transform the internet itself. A new sociotechnical pattern emerges from this interaction (CASTELLS, 2003). Social structures in the information age are increasingly organized into networks, constituting a new social morphology. The diffusion of the logic of the networks substantially changes the operation and productive results, the experiences, the connections with the power and with the culture itself. Although social network organization has existed at other times and spaces, the information technology model gives a new form of penetration and expansion into the social structure. For example, using cyberspace as a mechanism for conflict resolution is a way of transforming human interaction.

It is through the use of equipment such as computer, mobile phone, tablet, etc., that interconnect the networks, that the panorama of access to justice is transformed. And, this transformation is linked to the way of entering, communicating, manifesting and the way to sentence disputes. These access changes - usually from the physical to the electronic world - can be found in the Brazilian legal scenario especially after the introduction of the electronic process (SPENGLER, PINHO, 2018).

Advance in online conflict resolution is known not only to develop and refine the electronic process to become increasingly virtualized, but also to develop another procedure for online resolution of conflicts. In this sense, it is considered that network conflict resolution embodies the concept of the virtualization of the Judiciary Power, as it enables the entire procedure to take place virtually and even if in certain situations the parties end up opting to continue the procedure in person (LIMA, FEITOSA, 2016).

However, it is important to emphasize that virtualization cannot be considered simply using information technology tools in traditional courtrooms and forums such as video conferences and computers, or even digitizing processes. Advances in online conflict resolution are not only improving the electronic process so that it develops in an

increasingly virtualized way, but especially in developing a whole new procedure for online conflict resolution (LIMA, FEITOSA, 2016).

The conflict brought to the online environment may or may not have originated in this format, there may be a discussion about a purchase made via the internet or a conflict that, originated in the physical world and people wish to resolve it via online mechanisms. In the online conflict, the role of the third party is another point to consider as it may interfere with the functionality of software and platforms for online dispute resolution. Thus, if we are dealing with some other means of handling conflicts, such as arbitration, mediation, conciliation and negotiation, the intervention of the third party can be graded in accordance with the selected method, giving greater or lesser autonomy to the parties involved.

Regarding the role played by the third party in Brazilian law, it is important to highlight that mediation and conciliation, as classified by Wambier and Talamini (2016), are self-composition species coordinated by a third person, the mediator or conciliator, who acts in order to facilitate communication between conflicting parties. The distinction between these two mechanisms sometimes faces some doctrinal divergences, however, currently the CPC conveys legal concepts of the two modalities of conflict handling.

The mediator acts preferentially in cases in which the parties share a pre-conflict bond, seeking to assist people in reestablishing the communication, so that they can identify for themselves a satisfactory response to the problem, according to article 165, third paragraph of the CPC[18]. While the second paragraph establishes that the conciliator shall act preferentially in cases without prior connection between the parties involved, and may present suggestions and possibilities for resolving the issue, however, the conciliator may not coerce, intimidate or impose any solution. In short, the mediator assumes a facilitative posture, allowing the people themselves to build and work in an appropriate response, while the conciliator has a slightly more active posture and may suggest

[18] Art. 165. Os tribunais criarão centros judiciários de solução consensual de conflitos, responsáveis pela realização de sessões e audiências de conciliação e mediação e pelo desenvolvimento de programas destinados a auxiliar, orientar e estimular a autocomposição. [...] § 3º O mediador, que atuará preferencialmente nos casos em que houver vínculo anterior entre as partes, auxiliará aos interessados a compreender as questões e os interesses em conflito, de modo que eles possam, pelo restabelecimento da comunicação, identificar, por si próprios, soluções consensuais que gerem benefícios mútuos (BRASIL, 2015). Free translation: “The courts will set up consensual dispute settlement judicial centers to conduct conciliation and mediation sessions and hearings and to develop programs to assist, guide and encourage self-composition. [...] § 3º The mediator, who will preferentially act in cases where there is a previous bond between the parties, will help interested parties to understand the issues and interests in conflict, so that they can, by re-establishing communication, identify, themselves, consensual solutions that generate mutual benefits”.

options/alternatives for the solution of the dilemma.

In this sense, besides mediation and conciliation, negotiation is also a self-composing method, being characterized as a conflict resolution mechanism that, as a rule, does not have the presence of a third party, it develops through a direct conversation between the parties. On the other hand, heteronomous methods necessarily requires the imposition of a decision rendered by a third party (judge or arbitrator) in order to put an end to the claim. Heterocomposition is the classification from which the subclassifications of adjudication and arbitration follow.

The third, which is sometimes the facilitator of communication and at other times the decision maker of the dispute, is a well-known figure in the legal and conflict resolution context. From another perspective, Katsh and Rifkin (2001) classify ODR's technology as a "fourth party"[19] since it can interact with the parties involved in the conflict and the impartial third party (when present). Expressing technology as a fourth part draws attention to its decisive role in the current legal framework[20].

> Software, not a human third party, guided the manner in which parties expressed their position, reminded parties to respond in a suitable time frame, and even shaped the tone of exchanges. Negotiations between buyers and sellers began to differ from classical negotiations because of the presence of a technological "fourth party" that mediated exchanges. When such a process is not successful, a human mediator could be requested (KATSH, 2006, https://firstmonday.org).

In Brazil, the legislation is still in a process of development regarding the online procedures, there is a regulation regarding the electronic process - Law n. 11.419/2006 -, which provides the possibility of the process being electronic in civil, criminal and labor cases. In addition, the other means of conflict resolution may be performed electronically according to the foundation of the article 334, §7º of the CPC: the conciliation or mediation hearing may be held electronically, in accordance with the law and article 46 of the Mediation Law: the mediation may be done through the internet or other means of communication that allows the remote transaction, provided that the parties agree. The party domiciled abroad may submit to mediation in accordance with the rules set forth in this Law.[21]

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[19] Also referred to as Information and Communication Technologies (TIC).

[20] It is questioned whether the presential procedure, especially in the case of mediation would not facilitate the possibility of empathy between the parties, reducing prejudices. This finding is extremely relevant, but because it is not the purpose of this research, this argument is only commented for the purpose of knowledge about the debate.

[21] Art. 334, §7º, CPC: "A audiência de conciliação ou de mediação pode realizar-se por meio eletrônico, nos

As authorized by Resolution n. 125 of the CNJ it is possible to create a Digital Mediation and Conciliation System for pre-procedural action of conflicts and, with formal adhesion of each Court or Federal Regional Court, to act in ongoing claims. Note that the Brazilian legal system does not establishes how the ODR model will occur, but encourages and allows it to be used. In this sense, there is doubt about the ways that it would be possible to implement online mechanisms.

4. CHALLENGES AND POSSIBILITIES OF ODR'S IMPLEMENTATION IN BRAZIL

The development of technology removes social activity from localized contexts, and so the possibilities offered by TIC's to a certain degree rearrange the distances between time and space. Given this context, it becomes relevant to create systems through which we can deal with social conflicts, whether they originate in the physical or virtual world.

> Cyberspace is an active place, a creative place and, and for some, a lucrative place. It is not, however, an harmonious place. The more relationships that are formed online and the more transactions that take place, the more disputes are likely to occur. The broadening of the range of online activities, their increasing complexity, and the expanding information processing capabilities of computers linked to the network accelerates the pace of change. This contributes to an environment that is valuable, but not stable, and where, as a result, there is a need for systems that can manage change (KATSH, 2006, https://firstmonday.org).

Rabinovich-Einy and Katsh (2012) explain about the methodology of automatic programs that aim to facilitate conflict resolution. They argue about the complex disputes that occur in the virtual environment and how important it is, in addition to having a third party with dispute resolution skills and expertise, having a sophisticated program or technology to do this. In the automated trading process, the role of third party would be completely replaced by software, hence the need to have a carefully planned and architected system to serve users. The authors mention as an example the successful case of eBay, which has a system with a high positive index.

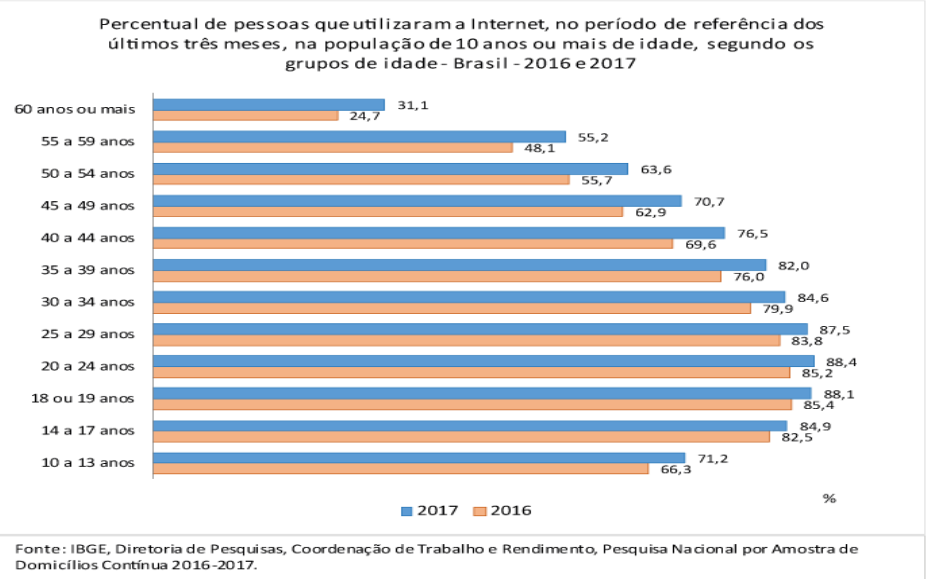
On the other hand, in Brazil, digital inclusion is relatively recent, the National Program for Supporting Digital Inclusion in Communities was established by Decree n. 6.991/2009 and seeks the development of actions of implementation and maintenance of

termos da lei". Art. 46: A mediação poderá ser feita pela internet ou por outro meio de comunicação que permita a transação à distância, desde que as partes estejam de acordo. Parágrafo único. É facultado à parte domiciliada no exterior submeter-se à mediação segundo as regras estabelecidas nesta Lei.

public and community telecenters in the national territory. In 2018, public telecommunications policy was created by Decree n. 9.612/2018, the purpose of which is to encourage and disseminate the use and supply of information and communication technology goods and services.

The Brazilian Institute of Geography and Statistics (IBGE) reported that among the 181.1 million people that are 10 years of age and over in the country, 69.8% accessed the internet at least once in the three months prior to the survey. In absolute numbers there was an increase of 10.2 million people who had access to the internet, the number went from 116.1 million to 126.3 between 2016 and 2017.

The percentage of people who accessed the internet through their mobile phones increased from 94.6% to 97.0% and the proportion that used smart television for this purpose increased from 11.3% to 16.3%. Already the rate of those who used microcomputer to access the internet fell from 63.7% to 56.6%. Sending or receiving text, voice or picture messages through non-email applications was the network access purpose indicated by 95.5% of internet users. Chat by voice or video call was the purpose that presented the largest increase from 2016 (73.3%) to 2017 (83.8%). The survey notes that access to the internet is more difficult due to issues of service unavailability in rural areas than in urban areas. Still, most people access the internet through their private mobile phone. The following graphic reflects the internet access in the respective age groups:



Source: graphic available at: <https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013 news-agency/releases/23445-pnad-continu-tic-2017-internet-enough-three-in-four-of-parents' homes>. Accessed 18 Aug. 2019.

Although the numbers show an increase in the Brazilian population with internet access, the World Bank through the World Development Report 2017: Digital Dividends[22] reported that internet access is crucial but not sufficient. On the subject, Prestes (2019) stated that it is not enough to have access for access to technology. He defends what he describes as digital empowerment, that is, the diffusion of skills that enable users to understand what they can do with emerging technologies. Digital empowerment can lead to business opportunities and economic inclusion.

Wing and Rainey (2012) believe that humanity will survive the so-called “Internet Age” in ways that are not yet possible to predict. On the other hand, Katsh (2012) considers it feasible to anticipate that information processing will be the subject of significant advances, valuing the role of information in conflict prevention and not just in its solution. The "fourth party" would be more than just a "third party" assistant and would play a facilitating role in negotiation and communication. Thus, it is clear that from this perspective, ODR’s are not just media, but software or programs designed to play a relevant role within human relationships.

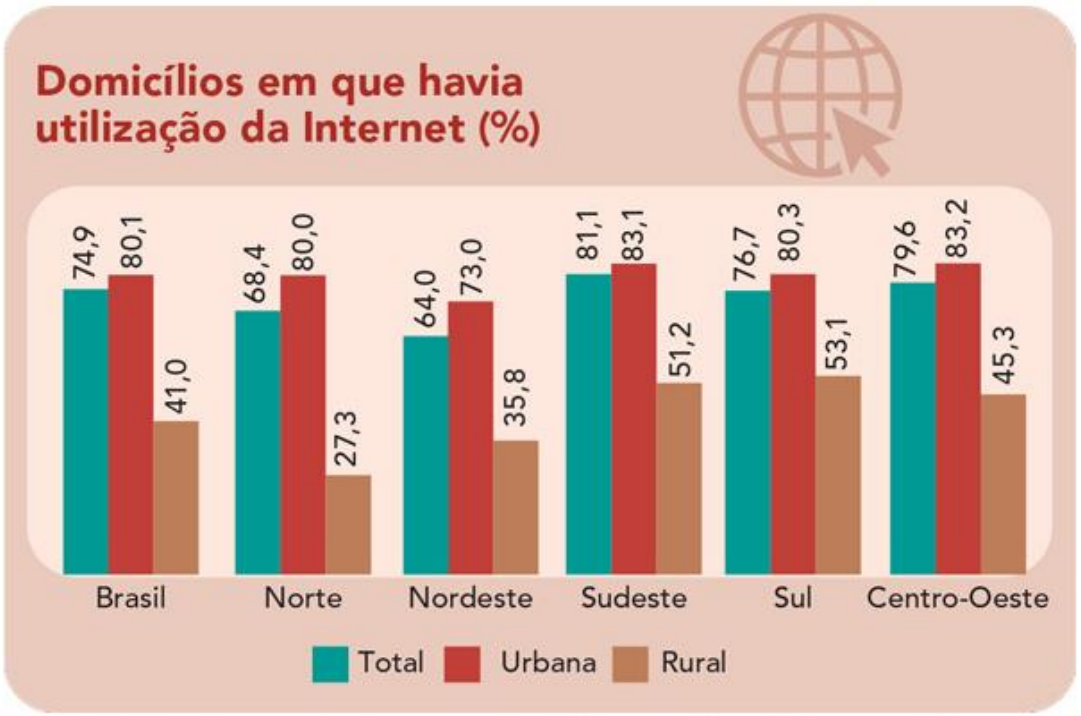
In Brazil there are some initiatives related to electronic conflict resolution, such as the electronic process (Law n. 11.419/2006), in which parties, lawyers and magistrates connect through a platform and all documents related to the procedure are attached in this system. Another feature is the digital mediation promoted by CNJ - Digital Mediation: Justice at a click (Digital Mediation 2.0)[23] (NATIONAL COUNCIL OF JUSTICE, 2016, <www.cnj.jus.br>) - whose legal basis is Resolution n. 125/2010 of the CNJ and the Mediation Law (currently the portal has new schedules suspended). Through this online gate, the parties can register and describe their conflict, creating a communication channel with the other party. Another initiative of the Judiciary Power is the project called “Victor” of the Supreme Court, which uses artificial intelligence to read and sort resources and processes that reach the Court.

This prospect of creating online channels through which people can access justice or the State Jurisdictional system more quickly, without the need for travel and at a lower cost is an option that aims to virtually bring those involved in the conflict closer together, giving them a space for dialogue using a positive language. However, access to justice

[22] “Relatório sobre o Desenvolvimento Mundial de 2017: Dividendos Digitais”.
[23] “Mediação digital: a Justiça a um clique (Mediação Digital 2.0)”.

faces some challenges in the Brazilian context, so that, despite the increasing and widespread use of the internet, not everyone has a technology conscious and appropriate use of the communication network.

According to the IBGE, in 2017, the internet was used in 74.9% of Brazilian households, being widespread in most households in all major regions of the country. Among the main causes of not using the Internet are: a) lack of interest in accessing the internet (34.9%); b) internet access service was expensive (28.7%); and c) no resident knew how to use the internet (22.0%). The following graph illustrates the percentage of internet use in rural and urban areas between the regions of the country, it is clear that the percentages are lower in the north and northeast.



Fonte: IBGE, Diretoria de Pesquisas, Coordenação de Trabalho e Rendimento, Pesquisa Nacional por Amostra de Domicílios Contínua 2017.

Source: graph available at: <https://educa.ibge.gov.br/jovens/materias-especiais/20787-uso-de-internet-televisao-e-celular-no-bras.html>. Accessed on 20 Aug. 2019.

The importance that ODR models can have for the Judiciary Power and Public Policies for access to justice, whether or not connected to State Jurisdiction, is important to improve judicial delivery, access to justice and openness of justice channels of communication and socialization (relationships). However, from the data collected, it is clear that the Brazilian reality is challenging and that the implementation of ODR systems

would face, in addition to physical obstacles and access to the internet, those of a personal nature, appropriate use of tools and means of access to the network, which highlights that the interface of applications and software developed with the objective of access to justice must occur intuitively, facilitating their use.

Lèvy (1999) points out that many collective intelligence processes develop effectively thanks to cyberspace, one of its main effects is to accelerate the pace of technosocial interaction, which makes active participation in cyberculture even more imperative, and at the same time it tends to more radically exclude those who have not entered the cycle of their understanding and appropriation. Due to its participatory, socializing and emancipating aspect, the collective intelligence proposed by cyberculture is one of the best remedies for the exclusionary pace of technical change. In this sense, collective intelligence itself actively works to accelerate this mutation. The author makes an analogy related to the word drug, which in ancient Greek, "pharmakon", gave rise to the word "pharmacie" in French, which means both poison and medicine. New “pharmakon”, the collective intelligence that favors cyberculture is both a poison to those who do not participate in it (and no one can fully participate in it because it is so vast) and a remedy to those who interact with it.

5. FINAL CONSIDERATIONS

Given the panorama of Brazilian Justice, we highlight the relevance of the theme access to justice, which is embodied in a fundamental right of modern society. Public policies, especially those structured from Resolution n. CNJ 125/2010 seeks to meet this social demand illustrated in the graphs of the Justice in Numbers Report. There is a high number of legal demands and a significant delay in their attendance, which demonstrates, in fact, that access to justice is not as effective as expected, since it is not a mere access to Jurisdiction and, yes, to obtain a satisfactory response to social demands and conflicts.

In the midst of this situation, the electronic means of conflict resolution are emerging, bringing an online solution to the problems due to a virtualization movement experienced by human relations. ODR’s are ways of accessing each other through platforms or software designed to establish a communication channel that assists parties in finding answers to their conflict. From this use of cyberspace, we seek alternatives to the problems of relationships coming from within, and outside the network, whether they come from the physical or virtual world.

It is noticed that this movement of virtualization of relations occurs with a greater or lesser intensity around the planet. In Brazil there are still a number of challenges to the implementation of ODR mechanisms, since a large portion of the population has no access or interest in connecting. It is not just a matter of internet access, but access to the proper use of information and communication technologies.

It is noted that Brazilian law encourages the use of these mechanisms, so they are allowed, but does not clarify how this implementation of ODR's can be done, leaving ample scope for creativity. Thus, different ways of acting are glimpsed and some already in place, either through the implementation of the electronic process, digital mediation, the possibility of building partnerships between universities and public institutions and many other possibilities that can be idealized and projected in building a more democratic cyberspace that broadens access to justice. On the other hand, it identifies the need for a serious work of awareness of the use of technologies, in favor of the digital empowerment of society. So that this possibility is a remedy and not a poison in the construction of knowledge and collective intelligence from cyberspace.

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