

# The Influence of New Technologies in the Realization of the Fundamental Right of Access to Justice in Brazil

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**Keywords—** *fundamental right, access to justice, new technologies.*

**Abstract—** *In spite of having already conquered their space in society, the new information and communication instruments remain a novelty for Law and its institutions, which to a large extent still use traditional means. Thus, the incorporation of technological tools by the legal universe constitutes an urgent need for modernity, reflecting on the promotion of access to justice. The main objective of this article is to analyze the influence of new technologies in the realization of the fundamental right of access to justice, since the Law must accompany the development of the society in which it is inserted. Therefore, the work will be based on doctrinal studies, through research in bibliographic and information sources. Finally, the chapters will address, respectively, access to justice as a fundamental right, advancing to the relationship between law and new technologies and ending with an analysis of the influence of new technologies in the realization of the fundamental right of access to justice.*

## I. INTRODUCTION

Human rights, which are responsible for ensuring that individuals respect their dignity, are accompanied by a constant need for recognition and effectiveness before their recipients. For Rojas, these rights refer to the “guarantee of the dignity of the human being through certain minimum rights that are recognized to individuals only by their condition as human beings”. For that, “the original idea of individual rights is reinforced and becomes a special category of subjective rights, with protection not only national, but international”.

In domestic law, the Federal Constitution of 1988 accepted Human Rights in its article 5, welcoming them under the name of Fundamental Rights. Thus, it can be said that fundamental rights and human rights represent norms of the same content, differing mainly due to the

legal plan in which they were confirmed, since both terminologies refer to fundamental rights and guarantees for every human being.

Among the rights listed in the aforementioned provision, there is the fundamental right of access to justice, as provided for in article 5, item XXXV: “the law will not exclude injury or threat to law from the Judiciary's assessment”. This guarantee has sparked several doctrinal debates regarding the meaning of access to justice or its effectiveness in the legal-social sphere.

In this context, the technologies made available in the information age play an important role in affirming individual rights and guarantees, in particular in providing justice that qualitatively serves all sectors of a society, because, in addition to making the legal system more efficient, technological tools allow it to be made available

to social strata removed from the centers of power, both socioeconomically and geographically.

The primary objective of this article is to analyze the influence of the new technologies developed and their contribution to the provision of a more accessible and more efficient justice to individuals, considering that the Law must accompany the development of the society in which it is inserted.

To achieve this purpose, the work will be based on doctrinal studies, through research in bibliographic and information sources, using deductive and comparative methods. In turn, the chapters will address, respectively, access to justice as a fundamental right, advancing to the relationship between Law and new technologies and ending with an analysis of the influence of new technologies in the realization of the fundamental right of access to justice.

## II. ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT

In view of the need to ensure that individuals have the minimum conditions to safeguard their dignity before the State and their peers, the Law has been showing significant progress since the emergence of the first fundamental guarantees to modernity. In this context, history shows that, in terms of human rights, the guarantees to be recognized should not be considered finite and their discovery process requires constant search.

Although there is no unified understanding of the origin of human rights, many authors claim that their ground zero is positioned in the events that occurred after the French Revolution and, later, after the end of the Second World War, considering that these are moments historical events related to great changes, conflicts and tragedies, with great philosophical movements being triggered in favor of the recognition of fundamental rights and guarantees.

As an example of a fundamental right, the right of access to justice has historically been one of the most relevant, although often a superficial understanding of its concept has had a negative impact on the level of its effectiveness, in the face of the legal abstraction that surrounds the expression "access to justice". Notwithstanding this, its application is of great importance, since it provides for the recognition of other rights.

Its emergence is linked to the moment when the State claimed for itself the authority to resolve the conflicts of society, ending up becoming directly responsible for the application of justice and social peace desired by those

who act on it. Thus, in a society in which litigation is common and natural, it is reasonable to have rules to discipline the most diverse disputes involving its individuals and even the State itself.

Since then, access to justice has become an essentially instrumental right, since it is related to the way the State will try to reestablish social harmony, since, in the words of Cappelletti and Garth, "the ownership of rights is stripped of senses in the absence of mechanisms for its effective claim".

Thus, while human rights in general ensure guarantees inherent to human beings, the right of access to justice provides individuals with a legitimate means of fighting for such guarantees. In short, it can be said that the right of access to justice functions as a "gateway" for the affirmation of other fundamental rights.

It must be said that the understanding of access to justice has evolved considerably if compared to the conception that had its origin, when its concept was limited to the purely formal aspect. According to the list by the author Vinícius Gonçalves,

*[...] at first, with the appearance of the Liberal State at the end of the 18th century and the beginning of the 19th century, the right to access to judicial protection essentially meant the formal right of the aggravated individual to propose or contest an action. Thus, in that period, access to justice was nothing more than a mere formal right, the State having the simple function of making it positive in the ordering, as it remained inert in the face of the inequalities observed at the empirical level.*

In other words, the right of access to justice was considered a natural right, a prerequisite for every individual, a fact that exempted the State from the obligation to enforce it. Due to this positioning, the fact is that only a small portion of society was really able to access the judiciary, with the percentage of those who received a concrete answer even less.

The concept of access to justice, in turn, is difficult to define. From the perspective of international law, Article 8, 1, of the Inter-American Convention on Human Rights provides that:

*Everyone has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or court, previously established by law, in the investigation of any criminal charge against him, or to determine his rights, rights or obligations of a civil, labor, tax or any nature.*

Therefore, access to justice must necessarily meet objective formal requirements before reaching the potential to offer a qualitatively fair and equitable decision, without favoring some over others. And, in this way, it will fulfill its function as a mechanism that allows the search for recognition of other rights, making the use of violence or any other form of private revenge unnecessary.

At the national level, the right of access to justice is contained in the Political Charter of 1988, both in item XXXV and in LXXIV of its article 5, which list respectively that “the law will not exclude injury or threat to the right from the Judiciary's assessment” and that “the State will provide full and free legal assistance to those who prove insufficient resources”. This time, the Constitution also guarantees the right to those who supposedly would not be able to exercise it.

The 1988 Constitution also contains, in its 1st article, the foundations of the Federative Republic, namely: sovereignty, citizenship, political pluralism, the social values of work and free enterprise and the dignity of the human person. The latter, in turn, functions as a principle whose essence is present in the other provisions of the Brazilian legal system. Dignity is, therefore, taken as a reference for norms, from those that refer to the constitution of the Democratic Rule of Law to those that deal with the protection of individuals through fundamental rights and guarantees.

The dignity of the human person, according to a constitutional approach, includes the awareness that every individual is a dignified being simply because of his condition as a human being, and because he has the prerogative to fight and enjoy the rights inherent to this condition, the example of the right of access to justice.

Critically speaking about his moral theory, Kant maintained that due to his dignity "man exists with an end in himself, and cannot be a means for the arbitrary use of this or that will". Based on this, among the principles contained in the legal system that have the purpose of enforcing this right, there are the publicity of judicial acts, the obligation as to the reasoning of decisions, due legal process, contradictory and broad defense, among others.

It cannot be overlooked that access to justice has an instrumental function as regards the enforcement of other rights, and that therefore it is not limited to access to the judiciary. The sense of justice, in turn, forks as explained by the words of the author Kazuo Watanabe:

*The issue of access to justice cannot be studied within the narrow limits of access to existing judicial bodies. It is not just a matter of enabling*

*access to Justice, as a state institution, but of enabling access to the just legal order.*

In this context, if the objective of fundamental rights is to ensure the dignity of the human person, the provision of qualitative justice through a just legal order reinforces this guarantee, since access to justice is intrinsically related to the concept of fundamental right, and must be taken into account when analyzing the applicability and effectiveness of the other rules of the Brazilian legal system.

In summary, it should be noted that, even when dealing with an abstract theme in matters of constitutional law, the concern surrounding the right of access to justice has already been established as a parameter in the formulation and application of several legal norms, especially for the purpose to ensure the fulfillment of this fundamental right in the most comprehensive way possible, as the lack of access to justice is confused with the impossibility of realizing justice itself.

### III. THE RELATIONSHIP BETWEEN LAW AND NEW TECHNOLOGIES

With the technological development of the last decades, societies in general have witnessed a significant change in their lifestyle. In this context, as a phenomenon not only inherent in civilization, but dependent on it, the Law perceives the effects of these transformations, both in relation to the process of creating legal norms and in terms of the way in which they are applied. On the topic, Manuel Castells states that:

*Our world has been in the process of structural transformation for two decades. It is a multidimensional process, but it is associated with the emergence of a new technological paradigm, based on communication and information technologies, which began to take shape in the 1960s and which spread unevenly throughout the world. Society shapes technology according to the needs, values and interests of the people who use the technologies. In addition, communication and information technologies are particularly sensitive to the effects of the social uses of the technology itself.*

Regarding the history of the relationship between law and new technologies, Boaventura Santos (2005, p. 82-109) points out that two aspects can be observed that communicate as parts of a whole and, although distinct, require a joint analysis for your understanding. They are: “the impact of new communication and information technologies on the management of courts and access to information, on the one hand, and the impact of social

communication on the relationship between courts and society, on the other”.

Thus, from the incorporation by the jurisdictional environment of the new computing tools, most of the procedural systems are currently interconnected by information networks, through which data processing and process monitoring are carried out. This reality has already proved successful in the sense of enabling an improvement in the efficiency and quality of judicial proceedings and, therefore, of the jurisdictional activity as a whole.

When investigating the aspect of legal computerization, it is observed that technological modernity has been reaching the Superior Courts, as well as the National Council of Justice and the Regional Courts. In these bodies, resources can already be filed and their respective processes monitored by means of electronic programs. In addition, the digitization of processes provides for a faster processing of procedures, while allowing the reduction of expenses on paper and mail. These changes make the Brazilian legal system less bureaucratic and Justice, in turn, more viable.

In addition to this instrumental aspect, technological devices have become a material object of legal norms with regard to the regularization of their use, with a view to eliminating gaps in the ordering involving situations that were previously not possible, so that there was no need for legal provision.

With regard to technologies with a wide social reach, Wolkmer (2002, p. 9-32) suggests that, “in the face of the continuous and progressive evolution of information technology, it is essential to define legislation that will regulate, control and protect providers and users of electronic mass media”. As an example, we can mention the Marco Civil da Internet, sanctioned in 2014, whose rules govern the use of the world wide web in national territory.

Through a historical analysis, it can be seen that the search for guarantees consists of a continuous process of effecting the legal rules by their addressees, especially those with a fundamental right character. It is only fair, therefore, that a constant verification of the system of rules and principles be carried out with a view to incorporating mechanisms that assist and improve the exercise of these guarantees.

In this context, it can be said that the mass propagation of instruments from the digital age are of paramount importance for those who seek to recognize and enforce their rights. Through the need to increase the flow of information and communication, the internet and the devices that surround it are able to provide better visibility

and even reinforce the capacity of marginalized sectors of society to protect their rights and defend their interests.

When discussing the potential for interference from new technologies on groups and individuals in a society, it is concluded that “today digital networks are social institutions, integrated into contemporary day-to-day life”. In view of this, “when a citizen does not have access to Information and Communication Technologies, it is not a matter of him simply not having access to a technology, but to a social institution, resulting, therefore, in social exclusion”.

Although information and communication technologies have spread rapidly on a global scale, in Brazil there are still many who do not have a minimum of digital access, as a technological advance does not automatically reflect in the inclusion of new communication spaces, as in the hard-hitting democratic structures. conquered historically. This advance, at least in the field of human rights, must be synchronized with social achievements. But the fact is that many are excluded from the modernization process, either due to the lack of economic and financial conditions or the simple geographical distance from the centers of power.

With the current need for connection and exchange of information, the concern around these excluded populations has been the subject of studies and research about the possibility of including digital access itself in the list of human rights. Thus, it can be said that the eventual framing of access to new technologies as a fundamental guarantee would ratify the role of law as a regulator and mediator of the relations between technology and society.

For Wolkmer (2002, p. 9-32), who understands these information technologies, cyberspace and virtual reality in general as belonging to a kind of “fifth generation” of human rights, the idea “is to consider the 'new' rights as an affirmation of historical needs in relativity and in the plurality of social agents that hegemonize a given societal formation”. Thus, it can be concluded that the definition of a fundamental right depends on the “essential needs of each era, which are in permanent redefinition and creation”, inserted in a context of legal norms of a dynamic and changeable character inherent to a society in process constantly evolving.

Some authors also point to the need to formulate new categories or branches of rights, consistent with the current reality. According to the understanding of Daniele Blepper (1998, p. 121), it would be the case of creating

(...) a Civil Law of Informatics and a Criminal Law of Informatics. The first would encompass private relationships that involve the use of information technology, such as programs, systems, copyrights, commercial transactions, among others.

The second, the Criminal Law of Informatics (...), concerns preventive and repressive forms, aimed at the good and regular use of informatics in everyday life.

From this panorama, it is possible to affirm that the information age provided an approximation between Law and new technologies, affecting both existing and constitutionally guaranteed rights and new ones, which arose from the discussion on the development and interference of communication technologies. in society, such as the rights related to digital inclusion and the regularization of internet access.

Regarding access to information, Maria Eduarda Gonçalves is aware of the duty to "recognize true fundamental rights of citizens, in the social, economic and cultural spheres, opposed to both States and economic actors". The author defends the need for a minimum regulation of the forms of access to the network, allowing a broader social reach of information of relevant public interest, such as health, politics, environment and education.

Another aspect of the relationship between law and new technologies consists of using them to implement the constitutional principle of human dignity, which constitutes not only the foundation of the Federative Republic but also the starting point for the realization of other rights, such as the right of access to justice. Thus, if it is possible to provide a minimum internet access to the least favored parts of society, such digital inclusion would already mean a big step in the process of social inclusion, through the approximation between Law and society.

Finally, it is necessary that the new technologies, through the media, give rise to the construction of a different panorama in the context of the relationship between justice and the information society. In the words of the Portuguese Orlando Afonso:

*(...) justice is a public service without a doubt, but with a fundamental symbolic function. Now, the symbol acts only at a respectful distance (...). Now, the media abolish three basic essential distances in justice: the delimitation of a protected space, the deferred time of the process and the official quality of the actors in the socio-judicial drama. Social communication displaces the judicial space, paralyzes time and disqualifies authority (...).*

Thus, the role of journalism, especially in reporting cases of relevant public interest, whether in the economic, social or political spheres, can generate in the population the desire for urgent justice and according to common sense, which does not correspond to the way in which justice is processed in the jurisdictional scope, causing a

disreputable image of the institutions in the face of the social concept.

That said, the Law must adjust to technological and, consequently, social changes, which range from the computerization of jurisdictional systems to the relations between institutions and society. In the midst of the reality of digital exclusion, there is an urgent need to democratize access to new technologies based on the positivization of rights that expand the use and reach of networks, providing greater realization of rights and guarantees, as well as the satisfaction of social longing for information and connectivity.

#### IV. THE INFLUENCE OF NEW TECHNOLOGIES ON THE EFFECTIVENESS OF THE FUNDAMENTAL RIGHT OF ACCESS TO JUSTICE

Among the characteristics of a civilization deeply immersed in science and modern technologies, we highlight the amount and speed with which information reaches its individuals, albeit regardless of their wishes and actions, as it is the reality in which they are inserted. Thus, according to the Latin drill "ubi societas ibi jus", according to which Law accompanies society, it is possible to see a significant interference of new technologies with regard to the creation and enforcement of rights, especially the fundamental right of access the Justice.

The fact of living in a highly complex society from the point of view of technologies and means of communication suggests that its individuals have greater and better access to information and that, therefore, they will be able to use it for their own benefit through social movements. and politicians who aspire to the recognition and realization of their rights, or even a reinterpretation of those that have already been positivized. According to authors Cappelletti and Garth,

*The term "access to justice" serves to determine two basic purposes of the legal system - the system by which people can claim their rights and / or resolve their disputes, under the auspices of the state. First, the system must be equally accessible to everyone; second, it must produce results that are individually and socially just.*

In this context, an approximation between Law and society is reflected in the incorporation by the legal world of tools from the new information and communication technologies. However, although they allow greater integration of the individuals connected to them, the new technologies do not obey a parameter of social inclusion, causing an increase in inequality due to limitations in

access and use of information. In this way, social exclusion is projected onto the plane of virtual reality, which is called by Pierre Lévy as “cyberspace”. The philosopher explains the concept as being

*(...) the new means of communication that arises from the worldwide interconnection of computers. The term specifies not only the material infrastructure of digital communication, but also the oceanic universe of information that it houses, as well as the human beings who navigate and feed this universe.*

The digital exclusion process, mainly due to the restriction of information, presupposes a decrease in access to justice, making it necessary to create a right that guarantees the availability of the Internet and means of communication in a broad and equitable way. Thus, the fact that the citizen is aware of the existence of a benefit that is legally guaranteed constitutes the first step towards effective access to justice. According to Eduardo Bittar (2004, p. 125),

*Information technology, mainly via the World Wide Web - Internet, allows, from an instrumental point of view, access to a range of information [...]. However, such a notable advance, capable of eliminating the borders between people, is already proving, perhaps, the greatest abyss of human exclusion: it presupposes someone with the capacity to handle the referred instrument, who has the access or ownership of the necessary equipment and with the possibility of adding a plus of knowledge, given the monumental range of information available.*

Despite the contradiction between their potential to integrate and cause social exclusion, it is possible to make new technologies an instrument to challenge inequalities and reinforce the legitimacy of the search for new rights and guarantees. An example is the movements that use social networks to present their claims to society when the traditional means are insufficient to do so. Through mass dissemination in these media, the population in general becomes aware of the most urgent demands and, using politics, is able to elect representatives who defend their interests.

In Brazilian regions that are still difficult to access, such as interiors in the North and Northeast, as well as on the outskirts of large cities, individuals have great difficulties in accessing justice. Consequently, due to obstacles of an economic, social or cultural order, there is the implementation of proper methods of conflict resolution, usually accompanied by violence, as occurs in favelas or in regions of intense agrarian conflict.

Thus, in cases where the State is under-sufficient, private entities with resources to act provide legal assistance to citizens who do not have sufficient information or conditions to demand it, which is fundamental for guaranteeing access to justice. Whether they are totally independent or beneficiaries of state support, these institutions have proven to be efficient in producing solutions to disputes that bring satisfaction to both parties, usually free of charge or at low cost.

In these situations, the entities seek to establish aid through modern information and communication tools, being even able to expose the conflict to the social and political environment. Furthermore, they activate the judicial machinery and defend the interests of their representatives before the State. After all legal procedures, it remains to ensure that decisions are enforced and publicly disclosed, when there is a relevant public interest.

Regarding the democratization of the right of access to justice, the author Boaventura Santos (2005, p. 82-109) notes that the new information and communication technologies.

*(...) they allow more circulation of more information and, therefore, a closer and more transparent right and justice. For example, they facilitate access to legal databases, essential information for the exercise of rights, and enable the easy exercise of a set of rights and duties of citizens. Today, it is possible, through electronic networks, to submit applications, receive information, pay certain fees or taxes, or even consult processes.*

The electronic process, in turn, fulfills an essential purpose to provide quality justice, that is, the reasonable duration of the process. Due to the slowness with which the procedural procedure takes place, the electronic process allows the jurisdictional tutelage to be made more agile, since “it is not enough just to guarantee access to the judiciary and the adequate means of defense, since to satisfy the jurisdiction it is necessary to the protection sought is granted within a reasonable period, under the risk of becoming totally useless”.

The instrumentality of the new technologies in the face of the fundamental right of access to justice allows for a closer approximation of the citizen in relation to the jurisdictional system. When necessary or convenient, it is allowed to petition certain organs of public administration via websites, obtain certificates directly from the pages of public agencies, as well as participate in popular consultations online, among other possibilities.

Therefore, although slowly and gradually, the adoption of new technologies by the legal environment allows the

production of a more efficient and quality justice both from the point of view of the jurisdictional entity and of the person interested in the litigation, in order to considerably reduce bureaucratization and speed up the judicial system, given that many are still reluctant to sue the judiciary at all costs, whether due to the delay or the expectation of failure in the judicial provision.

In short, access to modern technologies facilitates access to rights, many of which are considered fundamental, such as access to justice. However, technologies, by themselves, are incapable of enforcing these rights and guarantees, requiring a social and political mobilization to take place in order to be truly effective. In this sense, it is essential to make communication tools as widely available as possible to different social strata, in order to alleviate inequalities and balance the demand for justice.

## V. FINAL CONSIDERATIONS

Through this study it was possible to conclude that, considering the right of access to justice as a fundamental guarantee, the insertion of new information and communication technologies in the legal world brings both positive and negative consequences for the social system and, in this sense, it is necessary to reinforce the instrumental character of technological tools in favor of achieving justice for society.

On the one hand, modern technologies enable a greater and better flow of information, becoming more and more responsible for informing and making the population aware of the facts and legal procedures. In addition, the computerization of justice through the installation of the electronic process allows for a faster and cheaper procedural process in the face of the vast number of processes in progress. Thus, in addition to bringing access closer and making it more practical, modern tools contribute to a more efficient jurisdictional provision.

However, it was also possible to verify that, being close to economically and politically hegemonic groups, new technologies - especially the world wide web - tend to significantly worsen the process of social exclusion and inequality in the country. Thus, political and social measures that guarantee the democratization of informational media are necessary, in order to prevent them from being widely employed in favor of society, reaching the least favored and providing them with the information necessary for the exercise of democracy and access to justice.

This work allowed us to add that, despite the advances that the historical, social and scientific processes have

been adding to the concept of access to justice, it is of fundamental importance the understanding that the effectiveness of this right needs to be reinforced by the State and its institutions, given that, in contrast to its ability to enhance the faculties of information and communication, the new technologies remain an obstacle to parts of society that do not have digital access at their fingertips.

In summary, it can be said that information technology, of course, has brought advances to the legal system, and should be used in favor of efficiency and the process of access to justice, since the Law should not be alien to technological modernity. However, its performance in society must be subject to control and regulation by the State, which, with a focus on the public interest and fundamental rights, especially the right of access to justice, must act to ensure maximum benefits as a way of compensating the harms that result from the modernization process of society.

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