Revisiting the Concept of Jurisdiction in the Digital Era

Editors:
Dr Vesna Ćorić
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Institute of Comparative Law
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FOREWORD

This book arises from the international conference *"Revisiting the Concept of Jurisdiction in the Digital Era"*, held at the Rectorate of the University of Belgrade on 12 September 2024. The event was organised by the Institute of Comparative Law, Belgrade, in partnership with the Faculty of Law of the University of São Paulo, and supported by the University of Belgrade, under the auspices of its Rector Prof. Dr Vladan Đokić. It also benefited from the collaboration of the Associação de Juízes Federais (AJUFE), under the leadership of its President, Juiz Federal Caio Castagine Marinho, with the participation of Hon. Justice Alessandro Diaferia, Vice-President for the 3rd Region, who contributed both institutionally and as coeditor and author of this volume.

The purpose of the conference was to explore how the digital revolution reshapes the traditional concept of jurisdiction. The discussions examined the evolution of the balance of powers, from the French to the American model, and the growing valorisation of the judiciary. They also addressed the challenges presented by artificial intelligence, electronic procedures, cross-border communication, and the erosion of territorial boundaries. The conceptual anchor of this collection of papers is the contribution of Prof. Dr Flávio Luiz Yarshell, Full Professor of Law at the Faculty of Law of the University of São Paulo (USP). His essay, *"Where is Jurisdiction Heading?"*, provides a rigorous and innovative reflection on the trajectory of jurisdiction, addressing consensual mechanisms, self-help, artificial intelligence, and the transformations of procedural law.

From the perspective of judicial practice, Hon. Justice Alessandro Diaferia presents a comprehensive overview of the Brazilian judicial system, situating it in comparative dialogue with broader transformations in global jurisdiction. José Paulo Micheletto Naves examines the treatment of cybercrimes in Brazilian criminal law, highlighting legislative innovations as well as structural limitations of criminal law in the digital age. Professor Ferreira elucidates the topic of transjudicial dialogue, refracting it through the lens of the Brazilian experience.

Several essays consider the transformation of judicial processes under technological pressures. Carla Teresa Bonfadini de Sá studies the use of technological tools to combat predatory litigation and to protect judicial efficiency and access to justice. Daniel Raupp analyses the application of artificial intelligence in judicial decision-making, employing legal pragmatism as a methodological framework. Professor Dr Anđelija Tasić's contribution sheds light on the challenges of establishing jurisdiction in cases where damage is incurred via the Internet, both from theoretical and practical perspectives. Kuzmanović and Đilas provide a convincing argument in favour of expanding e-services in administrative matters handled by the judicial administrative staff while warning of the obstacles that need to be overcome along the way.

From a constitutional and theoretical perspective, Patrick Lucca Da Ros reflects on existential threats, judicial activism, and self-restraint, emphasising the balance between institutional power and democratic responsibility.

The economic and regulatory dimensions of jurisdiction are represented by Marko Dimitrijević, who studies monetary jurisdiction in the digital economy, and Marija Vranić, who analyses competition law and digital platforms in Serbia and the European Union.

Finally, Ana Rita de Figueiredo Nery contributes an original article on land jurisdiction and judicial mediation, focusing on the Regional Commission for Land Dispute Resolution of the São Paulo Court of Justice. By analysing the innovation introduced by the CNJ Resolution No. 510 of 2023, she demonstrates how dialogical and structural jurisdiction can transform the judiciary's role in protecting fundamental rights and preventing forced evictions.

The contributions of this collection of papers reflect the methodological architecture of the conference, structured around three temporal axes: long-term transformations of legal ideas and institutions, medium-term transformations of procedural categories, and short-term transformations of law in action. All the contributions are aimed at rethinking jurisdiction in a world shaped by digital technologies and complex governance demands.

The editors gratefully acknowledge the Scientific Committee and the Organising Committee, whose work ensured both the scholarly quality and the operational success of the conference. Their efforts are recorded in the Memorandum of Acknowledgement and form an integral part of this collective achievement.

This book is a scholarly reference and a forward-looking project. It affirms that jurisdiction, although rooted in long-standing traditions, is continually redefined by technological innovation, comparative dialogue, and the imperative of justice. The collaboration of the University of Belgrade, the Institute of Comparative Law, the Faculty of Law of the University of São Paulo, and AJUFE demonstrates that institutional cooperation is indispensable for addressing the profound transformations of law in the digital era.

May this volume be a testament to the dialogue that took place in Belgrade and an invitation to further research, debate, and innovation in the pursuit of justice, fairness, and the rule of law in our increasingly interconnected society.

Prof. Dr Fernando Menezes de Almeida
Dr Fernanda Fernandez Florentino Jankov

A WORD FROM THE EDITORS

Digitalisation is by no means a novelty, neither in the modern everyday world nor in the day-to-day operation of judicial systems. However, the increasing reliance of the modern man on digital tools, coupled with the rapid expansion of available AI-powered services, renders the question of how to reconcile traditional legal concepts with a fast-changing digital environment even more topical.

Judicial institutions, commonly seen as conservative and cautious in bringing about change, are becoming increasingly responsive to the need for the entire judicial system to keep abreast of technological developments and to utilise them to provide quality services to citizens and, more importantly, to duly protect their human rights.

The reality is, however, that changes in the legal and judicial systems cannot be effected only in the intellectual sphere of legal theory and legal reasoning – they often require comprehensive funding for the necessary technological infrastructure that will either precede or run in parallel to developments in legislation, legal doctrine, and court practice.

The said notwithstanding, many judicial systems have had digitised case management systems for decades aimed at increasing efficiency; the use of various digital tools is embedded in the everyday operation of courts, public enforcement agents, and public notaries in numerous countries; the COVID-19 pandemic pushed the courts into organising online hearings and trials, and the use of artificial intelligence (AI) is increasingly being considered and implemented to the extent that an idea has emerged of the right to a human judge.

Lawyers and legislators adopt different approaches to this challenge, either by attempting to develop new rules specific to the digital sphere or by finding ways to apply traditional legal notions to this new setting, or through a combination of both. In Europe, the European Union is spearheading efforts to adopt common and widely applicable rules governing the digital sphere and AI. In 2021, the Council of Europe Commission for the Efficiency of Justice (CEPEJ) adopted an Action Plan "Digitalisation for a Better Justice", outlining the key principles ensuring that digitalisation of justice is done in line with relevant European standards and, in particular, the requirements of the right to a fair trial. These are the considerations that Serbia is also taking into account when developing new tools and approaches for implementing new digital solutions for its judiciary. Brazil, conversely, has made significant strides in incorporating various digital tools in the everyday operation of its courts, to the point that the entire workload of a high-level judge can be performed using a mobile phone. Some of the efforts that have led to such a possibility have been developed top-down, while others were initiated bottom up, thus bringing the much-needed fit-for-purpose approach, but also the challenge of fragmented digital solutions.

The diffusion of physical barriers in the digital era presents new opportunities but also new challenges, having a ripple effect on the conceptual and practical understanding of

subject-matter, territorial, and institutional jurisdiction. The present collection of papers provides an opportunity for these different approaches and concepts to be discussed precisely in the context of jurisdiction, and to provide a platform for dialogue between legal professionals from Brazil and Serbia on how best to proceed.

We believe that this will be only the first step in a series of collaborative efforts between the Institute of Comparative Law and the University of São Paulo Law Faculty, bridging the physical divide between the two continents through the sharing of legal knowledge and ideas, building on the ways by which the digital era bridges the physical barriers. As stated in the motto of the Institute of Comparative Law – "*ius nullo continetur loco*" the law is not bound to a single place.

Dr Ana Knežević Bojović
Dr Vesna Ćorić
Dr Fernanda Florentino Fernandez Jankov
Hon. Justice Alessandro Diaferia

Long-Term Transformations: The Making of Legal Institutions – Legal Ideas, Legal Theory, and Constitutional Framework

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Flávio Luiz Yarshell*

WHERE IS JURISDICTION HEADING?

Abstract

The classical perspective of jurisdiction – understood as the power to resolve disputes through adjudication and/or as the scope of authority conferred upon different bodies – has been challenged in the modern era, particularly (though not exclusively) due to technological progress. This article examines the expansion of self-help and consensual dispute resolution mechanisms, as well as their potential impact on adjudicated solutions. Additionally, it investigates whether and how the authority to resolve conflicts through adjudication is shifting.

Keywords: General theory of procedural law, dispute resolution mechanisms, self-help, resolution of the dispute by the parties themselves, adjudicative solutions, jurisdiction, technological advancement, artificial intelligence (AI).

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1. Subject and Premises[1]

The term *jurisdiction* encompasses different meanings depending on the language in which it is used. In systems that employ the English language, it refers to what is known in Latin-based systems as *venue* or *competence* ("*competência*" in Portuguese); in these systems, *jurisdiction* denotes the authority vested in an entity to resolve conflicts. More specifically, it pertains to the power granted to an individual or body to apply general and abstract law to specific cases, thereby achieving resolution by eliminating disputes. In Saxon systems, this may be more accurately described as the *power to adjudicate*.

Although the terminological distinction is highly significant given its implications, it remains somewhat relative: universally speaking, *competence* can be understood as the measure of the authority vested in an entity to decide or adjudicate, and thus, rules regarding *competence* determine the boundaries of the decision-making power. Therefore, if in different legal systems the term does not precisely refer to the same phenomenon, there is a relevant common aspect, because the discussion about *competence* essentially constitutes a concrete exploration of what, in Latin-based languages, is understood as *jurisdiction*: logically, lacking *competence* equates to lacking the *power to adjudicate*. This highlights that, despite various perspectives, both notions converge on the same fundamental phenomenon. This distinction becomes even more apparent in disputes involving sovereign states: from an international perspective, lacking *competence* is equivalent to lacking *jurisdiction*.

Certainly, *competence* is one of the significant aspects of the power to adjudicate. However, more broadly speaking, there are other facets: its confrontation and interaction with other expressions of state branches (powers), namely, the legislative and administrative; the determination of its conceptual elements, characteristics, boundaries – these are other dimensions of that power, which is traditionally understood as state authority.[2] In any case, the focus remains on the capacity of a third party to decide and enforce decisions, through the application of law, with the aim of resolving conflicts.

This article centres on that power (= authority) – specifically, how it can be understood in the contemporary world, especially (but not exclusively) in light of technological advancements.[3] Some of these topics have already been widely debated, and there are no new insights per se, although doubts remain – perhaps insoluble given the difficulty of reconciling very diverse conceptions of the relationship between power and freedom, for example. Other issues still deserve further reflection. The aim is to explore how the transformations of the modern world impact a concept that is fundamental to democratic coexistence. Thus, the key questions are: Is the state's capacity to resolve conflicts through adjudication diminishing? If so, where does this authority shift, and who comes to hold it? And, if that is the case, what are the possibilities and mechanisms for control?

[1] A special acknowledgment is hereby made to Rafael Stefanini Auilo for his assistance in research, review, and valuable exchange of ideas.

[2] For further reference, highlighting that jurisdiction also encompasses consensual methods of dispute resolution, see: Grinover (2016, p. 3). In the context of arbitration, affirming that arbitrators exercise jurisdiction, see the relevant sources: Carmona (1990, pp. 33-40), Dinamarco (2022, p. 47).

[3] Regarding contemporary perspectives on the concept of jurisdiction, especially in light of technological advancements, see: Laux (2023).

2. New Forms of Self-Help and Consensual Dispute Resolution Mechanisms: Is There a Diminution of Adjudicated Solutions?

Although no statistical data is available, it seems reasonable to assert that, due to technological advances, at least some of the authority to resolve disputes tends to remain or revert to the hands of the involved parties. This does not necessarily imply something positive; nor does it mean that the dispute resolution system has evolved significantly – indeed, in some cases, the effect may be the opposite. It also does not preclude the existence of some form of oversight by an impartial third party (such as a judge or arbitrator), despite the parties' active role.

Initially, one can consider self-help, understood as a conflict resolution mechanism whereby one party enforces its interests over those of another. The perspective on the respective limits of this practice is fundamentally linked to cultural aspects. This can be illustrated by the United States, where, despite variations across states, not only is carrying a firearm legal, but there is also a widespread conviction that such a practice is legitimate and necessary for personal and property defense.[4] This is decidedly not the case in countries like Brazil, for example.[5]

From a legal standpoint, the more power granted to individuals to repel, by their own means, conduct they deem illegal, the more the workload of the judiciary is, at least initially, reduced. This can, in some way, relate to the perception held by a particular social group regarding the necessity of voluntarily complying with judicial rules and orders. When combined with a more liberal (less interventionist) outlook, this shifts powers that, in other contexts, are considered exclusive to the State to the individual.[6] Understanding

[4] It is correct to state that the text of the Second Amendment to the U.S. Constitution reflects the founders' concern with the potential for tyranny by a centralised government. Armed citizens were viewed as an essential counterbalance to state power and an antidote against abuses of authority (see Petit, 2009, pp. 226–227). In the case District of Columbia v. Heller (2008), the Supreme Court recognised that the Second Amendment protects an individual's right to keep and bear arms for self-defence, separate from militia service. The decision emphasised that the framers viewed disarming citizens as a characteristic method of tyrannical governments. Later, in *McDonald v. City of Chicago* (2010), the Court extended the application of the Second Amendment to the states, affirming that the right to keep and bear arms is fundamental to the nation's scheme of ordered liberty.

[5] It has been stated that "Despite a vigorous rejection of self-help as a standard means for satisfying claims in favour of the stronger or more astute, the law itself establishes exceptions to this prohibition in certain highly exceptional cases. Examples include the right of retention ([Brazilian] Civil Code, arts. 578, 644, 1.219, 1.433, II, 1.434, etc.), immediate self-defence (Civil Code, art. 1.210, § 1), the right to cut roots and branches of neighbouring trees that extend beyond the boundary of one's property (Civil Code, art. 1.283), and the self-enforcement of administrative decisions, among others. In a similar vein, there are the state's power to carry out arrests in flagrante delicto ([Brazilian] Criminal Procedure Code, art. 301) and acts that, although categorised as crimes, are carried out in legitimate defence or necessity ([Brazilian] Criminal Code, arts. 24 and 25; Civil Code, arts. 188, 929, and 930). There are two reasons why unilateral invasions of others' legal sphere are permitted in these exceptional cases: (a) the impossibility of always having the judge's presence whenever a right is being or is about to be violated; and (b) the lack of trust in strangers' altruism, which would inspire a potential solution of the dispute by the parties themselves." (Cintra, Grinover & Dinamarco, 2015, p. 51).

[6] Comparing, within the context of firearms, the Brazilian reality with the American one, see: Ventury (2016), p. 3 of the electronic version.

the extent to which increased social and political polarisation, by reinforcing antagonism between individuals, contributes to the development of this approach to conflict resolution is a task for sociology and other analytical methods. However, the advancement of self-help is not necessarily or inherently tied to the use of force but rather to technologies that, in some way, enable one party to overcome what it perceives as illegal conduct by the other, without the intervention of a third party (Eid, 2025, p. RB-1.27).

This brings to mind the spread of smart contracts, which are structured based on programming languages capable of self-executing obligations upon verification of predefined conditions, typically recorded on a blockchain. The underlying logic is that of pre-regulated self-help: instead of resorting to a third party in case of default, the contractual sanction (or benefit) is implemented automatically – for example, through the blocking of a digital asset or the discontinuation of a service.[7] Blockchain technology enables an immutable and distributed record of data, based on a technical protocol (perhaps akin to an arbitrator), allowing parties to operate in "trustless" systems, reducing costs associated with verifying and authenticating contractual conduct, and making direct execution feasible via automated networks. Furthermore, there is the realm of the so-called Internet of Things (IoT), which promotes integration between physical objects and digital contractual systems, enabling one party to produce direct material effects on the other; well-illustrated by the remote blocking of vehicles in case of contractual default or automatic shutdown of systems – such as those controlled by sensors and interconnected contracts.[8]

In all these cases, it becomes perhaps more evident what the doctrine has previously highlighted about self-help when analysed from an economic perspective: legal acceptance of this mechanism can be efficient when judicial costs are high and the conduct does not produce negative externalities. Thus, in the absence – or at least reduction – of transaction costs, the parties tend to resolve disputes efficiently through private means (Posner, 1986, pp. 119-120). In the case of smart contracts, monitoring and enforcement costs are reduced; disputes over interpretation and compliance are eliminated or at least mitigated,

[7] Regarding the topic, highlight that "not everything that self-executes within smart contracts constitutes a case of self-help—nor should automation be understood as a technique to prevent, for example, default", (Eid, 2025, p. RB-1.28). Recognising that there must be a genuine conflict of interests for there to be an eventual right to self-help (Cabral, 2024, p. 5 of the electronic version).

[8] In Brazil, "there is not yet a specific regulation to govern self-help related to the Internet of Things. However, some guidelines can be highlighted for advancing this examination. The first is Decree No. 9.854/2019, issued by the President of the [Brazilian] Republic, establishing the National IoT Plan. Some of its vectors, such as promoting efficiency gains in services (Article 3, Item I) and increasing the productivity and competitiveness of Brazilian companies in this sector (Article 3, Item III), indicate that part of the management of these digital relations—conducted based on a corporate asset—should be subject to regulation of unilateral protection. Additionally, it is known that many of these relations are consumer- related and, therefore, must also comply with the [Brazilian] Consumer Defence Code. The second is to interpret Article 1.210 of the [Brazilian] Civil Code in a way that adapts it to a reality where the asset is connected to the internet, and possession protection is carried out through digital means, which may not always be immediate. The third guideline involves norms to be introduced into the Civil Code with the draft reform that creates the chapter 'Digital Civil Law'. There are important boundary markers to guide the application of self-help in this context, such as respecting privacy and personal and patrimonial data; the inviolability of intimacy, honour, private life, and image; and ensuring the security of the digital environment." (Eid, 2025, p. RB-1.27).

albeit potentially at the cost of reduced flexibility; and state enforcement is replaced by technical-algorithmic mechanisms.[9]

Furthermore, a possible association of these elements can be detected in the environment of social networks: while there may be no use of physical force, there are potentially significant forms of moral coercion through the public dissemination of data, opinions, or even accusations, which end up being a form of conflict resolution – with a substantial potential to generate new conflicts as well (Eid, 2025, p. RB-1.27). In various places and cultural settings, this is referred to as the "court of the internet", where judgment and condemnation of individuals (especially those with some notoriety) spread virally, resulting in what can be described as virtual lynching, cancellation, or "digital justice" (Lorusso, 2023, p. 243). This situation reflects the "empowerment" of the individual, acting initially beyond state control and outside the bounds of due process, and which may eventually be managed by the internal and contractual mechanisms of the networks themselves – depending, for example, on the prevailing understanding of freedom of expression. In other words, the power to resolve conflicts shifts from the individual to a third party, which is not exactly the state. Similarly, platforms themselves might employ psychological incentives, public reputation, and rewards for cooperative behaviour to discourage opportunistic actions.

In all these scenarios, the use of physical or moral force – whether mediated by technology or not – to resolve conflicts results in a shift (or increase) of power to individuals and/or private corporations. As mentioned, this does not necessarily represent an evolution of the system; to the contrary, this empowerment might actually increase the need for third-party intervention to resolve disputes, most likely involving the State. When considering the use of new technologies, it is important to account for potential lack of proportionality in automated responses; the limitations on preventive control by third parties (such as judges or arbitrators); and the possible exclusion of vulnerable parties – those with limited digital literacy, access, or negotiation skills.[10] There are also regulatory challenges, including the need to address potential negative externalities such as abuse stemming from information asymmetry, algorithmic opacity, and the concentration of power in platforms. Moreover, the rigidity of these mechanisms – designed to be self-executing – may prevent the accommodation of human exceptions, renegotiation, or contextualised interpretation. Finally, and perhaps most critically, there is a risk that platforms and protocols may begin to exercise powers – traditionally associated with the State – that could be incompatible with the rule of law and democratic coexistence.

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[9] Highlighting that private enforcement is more efficient than public enforcement (Cooter & Ulen, 2012, p. 223).

[10] As a Brazilian legal scholar reminds, "the means used must be necessary and proportional to the interests they aim to protect, and their application must be moderate. [...] It is not permissible, for example, to physically assault the debtor when repossessing a car; or to inflict serious bodily injury on an intruder attempting to seize possession of property. Nor can damages be inflicted on the debtor's assets that exceed the value of the debt. The principles of proportionality and moderation in the means employed are, in foreign contexts, embodied in the requirement that self-help does not disrupt public order or social peace. Brutal and violent instruments, with excessive use of physical force, cannot be tolerated, nor methods that harm the dignity of the debtor. In the U.S., for instance, limitations on violent self-help stem from the requirement that such acts be exercised without breaching the peace." (Cabral, 2024, p. 8 of the electronic version).

This does not mean that the use of technology – particularly artificial intelligence (hereinafter: AI) – cannot facilitate the expansion of self-help by the State itself; after all, the State is inherently suited to this type of conflict resolution, given the power it wields, combined with the presumption of legality and legitimacy of its administrative acts. This includes the automation of decision-making processes, the use of chatbots, and the automation of licenses and inspection procedures – aimed both at preventing violations and at imposing sanctions. Naturally, all of this entails significant risks related to transparency and accountability; privacy and data protection; and potential discriminatory treatments – which, paradoxically, can generate new conflicts and possibly overburden the machinery responsible for adjudicative decisions.

In any case, the idea of employing technology to prevent, neutralise, or overcome potential violative conduct – without the need for third-party intervention – is already a reality, with an expanding trend. Such an approach can be advantageous, especially when the power invested in a party is backed by a valid contractual basis and no negative externalities are involved. This perspective also leads to the consideration of another form of dispute resolution by consensus – with or without the intervention or assistance of a third party (such as conciliators, mediators, negotiators, dispute boards, or others).

It is very difficult, if not impossible, to treat such dispute resolution methods in a truly universal way, because the existence and effective use of mechanisms for prevention and/or consensual conflict resolution depend greatly on the cultural environment, the profile (both quantitative and qualitative) of litigation, and the economic understanding of this profile. In Brazil, despite efforts to promote amicable solutions, the impressive number of pending cases for adjudicative resolution plainly shows that self-composition mechanisms do not function as expected.[11] A significant portion of these involves the State, either as debtor or creditor. This indicates a major dysfunction within the system: on one hand, it is unable to collect revenues efficiently; on the other hand, it is also a poor payer. This paradox is particularly pronounced considering that the agent with the greatest scope for self-help, as previously mentioned, is the State itself.

But, returning to a universal perspective, what may perhaps bring different systems and realities closer together is again the use of technology. In various places – especially after the pandemic – it has been employed to manage adjudicative processes. However, here the focus is on facilitating and organising dialogue between parties. This is well exemplified by the concept of online dispute resolution (ODR), which uses digital platforms to enable negotiation and mediation (or even arbitration, though this is a form of adjudicated resolution) remotely (Marques, 2019, p. 7). Initially developed in e-commerce environments, ODR has been adopted in multiple jurisdictions as a means to expand access to justice and reduce litigation costs. In the United States, for example, platforms like *Modria* (used by public agencies and private companies) and *eBay Resolution Center* are prominent (Marques, 2019, pp. 11-14). In the European Union, technology is employed for cross-border consumer disputes. In Brazil, the National Justice Council (CNJ) promotes pilot projects on ODR within Small Claims Courts and private conciliation chambers (CNJ, 2020, pp. 2-3).

[11] For recent data on conciliation in Brazil, see: Conselho nacional de justiça (2024, pp. 251-261).

This form of conflict resolution reduces costs related to travel, representation, and opportunity for both the State and litigants. To achieve this, it may also help mitigate cognitive barriers through simplified language and steps; with appropriate precautions, such measures can promote inclusion and accessibility. In this context, the use of legal design – an approach that applies visual design principles to legal communication – has gained prominence. Platforms employing interactive flows, visual language, and clear texts make processes more understandable for laypersons; from the perspective of the law and economics, this reduces costs associated with information and uncertainty, thereby encouraging cooperation (Katsh & Rabinovich, 2017, pp. 47 and 163-164). Legal design can also contribute to lowering future litigation by enabling users to better understand their rights, obligations, and pathways to amicable resolutions. In comparative terms, countries like Canada have promoted visual simplification guidelines for legal documents as a public policy for digital access to justice (Castello, 2022, p. 14).

Beyond ODR, there is also the use of automated negotiation systems, with or without human intervention. Algorithm-based bargaining tools enable parties to set parameters and the system to suggest agreements based on distributive efficiency. These platforms foster faster agreements grounded in objective criteria, eliminate emotional biases and cognitive asymmetries, and increase the scalability of negotiations in mass environments – again highlighting a preventive function, this time with a more clearly contractual, bilateral character (as opposed to unilateral, as in self-help). The idea is to structure contracts and their execution environments to eliminate ambiguity zones and prevent conflicts *ex ante*, through predictive actions, alert and auto-adjust systems, and technological means to monitor contractual risk indicators and issue warnings for preventive renegotiation – possibly employing adaptive clauses that automatically modify conditions based on objective parameters, thereby reducing litigation. The goal is to detect deviations from contractual obligations early and make adjustments before default occurs. In logistics contracts, sensors linked to smart contracts can record deviations and trigger automatic compensations.

This discussion might lead to the conclusion that, especially due to the increasing employment of new technologies, solutions adjudicated by impartial third parties – primarily the State – are gradually losing ground to self-help and dispute resolution by consensus. The mechanisms mentioned, along with others that could be invoked, are objective elements – though not necessarily based on reliable statistics – supporting this observation. However, this does not mean that, in the long, medium, or even short term, adjudicative solutions will lose significant relevance.

In the case of self-help carried out by executive branch agencies, recent experience has shown that the judiciary has faced challenging situations when called upon to scrutinise the legality of such acts. This is particularly illustrated by recent Brazilian cases, in which a wide range of issues – ranging from the adoption of health measures during the 2020/22 pandemic to appointments to public office positions – were submitted to the Supreme Federal Court.[12] Not all of these fall within the narrower concept of self-help, but they

[12] To illustrate, in April 2020, the Brazilian Supreme Federal Court (STF) suspended the appointment of the director-general of the Federal Police, citing the closeness of the appointee to the President's family (see STF, MS 37.097/DF, rapporteur Justice Alexandre de Moraes, ruled on April 29, 2020, single judge). Also in April 2020, the Court authorised the opening of an inquiry to investigate allegations that the President

demonstrate that judicial intervention in this aspect is likely to increase, carrying risks as significant as those posed by potentially arbitrary governmental acts – both from the perspective of the separation of powers and due to the (paradoxical) illegality of acts performed to contain a so-called illegality.[13] As this article is finalised, the United States is experiencing a similar situation, where courts are called upon to review the legality of acts such as deportations, cuts in public funds, and visa cancellations.

Turning again to the theme of technological advancement, while it offers solutions for resolving disputes, it also generates new – and perhaps more complex – forms of conflicts, whether individualised or massified. Therefore, although the effectiveness of some of these mechanisms (i.e., their capacity to achieve desired outcomes) is undeniable, it is possible – and especially in cases where technology grants one party (whether contractually grounded or not) prerogatives to prevent, contain, or suppress violations – that the need for intervention by an impartial third party may increase. Such intervention would serve to oversee and protect the various values at stake, which these mechanisms might threaten (Katsh & Rabinovich, 2017, p. 45).

Moreover, this apparent and relative progress in conflict resolution managed by the parties themselves is not necessarily positive for the system as a whole. Considering appropriate factors such as cultural differences between countries – including perspectives on freedom of expression, the role of the State, the acceptable degree of State intervention in private relations, the strength and trustworthiness of public and private institutions, openness to cooperation with other sovereign entities, among others – the decreasing role of the judiciary in State action could lead to the strengthening of entities that are disconnected from the common good. This may foster an environment conducive to the dominance of the strongest at the expense of vulnerable individuals and, eventually, promote alliances – formal or informal – with the State that, as recent experiences suggest, could heighten the already significant risks to the rule of law and democratic coexistence.

3. Adjudicated Solutions: Transformations and Future Perspectives

In the previous topic, the focus was on analysing whether – and how – the potential expansion of self-help and resolution of the dispute by the parties themselves could diminish the scope of adjudicative dispute resolution mechanisms, and possibly contribute to system improvements. These considerations can and should be complemented by examining how

had tried to interfere politically in the Federal Police (See STF, INQ 4831, rapporteur Justice Celso de Mello, ruled on April 28, 2020, single judge). In December 2020, a preliminary injunction was granted in ADPF 759, requiring the President of the Republic to observe the most-voted names on tripartite lists for appointing rectors and vice-rectors of federal universities, respecting university autonomy. In June 2024, the STF ruled ADPF 787, which challenged obstacles faced by transgender individuals in accessing public health services within Brazil's Unified Health System (SUS); the Court decided that the Ministry of Health should adapt SUS systems to ensure their access to medical procedures.

[13] In March 2019, the Brazilian Supreme Federal Court officially initiated a police investigation (see Inquiry 4781), commonly referred to as the "Fake News Inquiry," to investigate the dissemination of fake news, threats, and insults against members of the Court. The investigation generated considerable controversy, particularly because it was initiated without a prior request from the Public Prosecutor's Office, and it resulted in measures such as searches and seizures, social media blockages, and preventive arrests.

forms of adjudicative resolution have evolved over time. Despite differences in cultural, political, and economic contexts across countries, three aspects that tend to be universal may warrant mention – even if not explored here as thoroughly as would be desirable. It should be noted that all three are widely recognised and have been the subject of debate across various fields of knowledge. One possible contribution to their study might lie in examining the interconnectedness among the different available means of conflict resolution.

The first of these aspects concerns the role played by online platforms and/or content providers in resolving disputes. It is somewhat *cliché* to observe that the digital environment has profoundly impacted the ways information is produced, circulated, and controlled, as well as modes of expression. The rise of platforms/providers as central spaces for social and political interaction (in a broad sense) has brought about regulatory challenges, particularly concerning dispute resolution related to freedom of expression, misinformation, and the integrity of public debate. Consequently, it was inevitable to examine the role of platforms when they admit, remove, or restrict content based on their terms of use or under administrative and judicial regulations; and also, to consider the limits of State intervention in this environment.[14] The core question is whether the activity of these platforms constitutes a legitimate exercise of self-regulation or an undue transfer of decision-making power from the State to private entities – posing a challenge to the usual territorial efficacy associated with the exercise of State jurisdiction.[15]

This debate is present across various sensitive areas, such as hate speech, the spread of false information, the promotion of violence, and attacks on democratic institutions. For example, in the regulation of the 2024 Brazilian elections, the Superior Electoral Court issued broad rules concerning political-electoral content on social media platforms.[16] This example demonstrates how attempts to regulate the digital environment can lead to increased regulatory burdens for platforms and pose risks of restricting freedom of expression (Curzi & Almeida, 2022, pp. 42-43). Another illustrative case is the reaction of one platform, which altered its internal content control policy regarding hate speech, citing a commitment to freedom of expression.[17]

[14] As one legal scholar has stated, "Given the scale, speed, fluidity, contestability, and contextual nature of online content moderation, platforms cannot possibly guarantee full control, ex ante, over each and every item of content uploaded to their network, nor can they provide 'perfect' ex post correction. They can only commit to making their best effort at applying represented moderation policies and to setting up an operating system of content moderation aimed at striking an optimal balance between often contradicting considerations. Content moderation is, therefore, inevitably offered on a 'best efforts' basis and not as a 'guaranteed result' service." (Mills, 2024, p. 552).

[15] Indeed, as the doctrine has long recognised and examined, "when it comes to enabling or restricting global access to freedom of expression, certain private actors possess more power than most States. If each Facebook user is considered a resident, the social network would have more people than China. Measures taken by Facebook have more impact than acts by France, and those by Google hold more relevance than those by Germany. These are superpowers held by private entities." (Laux, 2023, p. RB-4.18).

[16] See Superior Electoral Court resolution (Resolução TSE) No. 23.732, of February 27, 2024, which altered the Superior Electoral Court resolution (Resolução TSE) No. 23.610, of December 18, 2019, on electoral propaganda; and Superior Electoral Court resolution (Resolução TSE) No. 23.735, of February 27, 2024, on electoral offenses.

[17] In this regard, see Meta's statement regarding the policy changes implemented on its social network Facebook: (Kaplan, 2025).

The tension between freedom of expression and combating misinformation is not new. What has changed is the space where this tension manifests. In democratic societies, it is the role of the judiciary to weigh conflicting fundamental rights. When platforms are tasked with deciding the legality of content, there is a risk of private censorship and an imbalance within the system of protections (Maranhão & Campos, 2022, RB-15.3; Giachetta, 2020, p. RB-16.2; Mills, 2024, p. 565).

However, this does not mean platforms should be exempt from duties. Various normative sources, both national and international, impose what could be called a "duty of care", guiding the conduct of providers by requiring good faith and diligence in responding to duly identified illegalities and abuses. The goal is not to hold them responsible for achieving perfect results but to assess the reasonableness of their efforts. Inspired by the "business judgment rule" in corporate law, the concept of a "platform judgment rule" proposes that platform decisions be evaluated based on good faith, diligence, and reasonableness, rather than solely on specific outcomes (Mills, 2024, pp. 618-621).

On one hand, this approach recognises the technical and operational challenges faced by platforms in moderating content at scale; although, at least in Brazil, such justifications are often met with scepticism and doubt regarding their alleged technical impossibility: if platforms employ advanced technologies like "algorithmic personalisation", "microtargeting", and are capable – guided by commercial and economic perspectives – of conducting "algorithmic content curation" and building predictive user profiles, then they should be able to identify and remove illegal or abusive content.[18] On the other hand, this approach aims to prevent the imposition of excessive responsibilities that could discourage innovation and freedom of expression.[19] From this perspective, the argument of technical difficulty gives way to what appears to be the most relevant point of the debate: determining who has the authority to judge whether a certain manifestation is a legitimate exercise of freedom of speech, or whether it constitutes hate speech or attacks democratic institutions and other values protected by a given legal system.

The responses of various countries revolve around these dilemmas. In the European model, the "notice and take-down" mechanism (provided for in Article 6(1) of the EU Digital Services Act) prevails. This approach rejects prior censorship of content (Article

[18] In this regard, as illustrative examples, see the following opinions: Brazilian Supreme Federal Court (STF), Plenary, RE 1.037.396, rapporteur for the opinion Justice Dias Toffoli, ruled on December 11, 2024, opinion made available on December 18, 2024, decision by majority vote; Brazilian Superior Court of Justice (STJ), 3rd Panel, REsp 2.172.296/RJ, rapporteur Justice Nancy Andrighi, ruled on February 4, 2025, opinion made available on February 7, 2025, decision by majority vote.

[19] In this regard, it has been ruled that "in borderline cases involving electoral or partisan propaganda, what is at stake is the very freedom of speech. Therefore, the resolution of disputes of this nature by this Superior Electoral Court should be guided by a component of judicial minimalism, incorporating the considerations of Harvard Professor Cass Sunstein (Sunstain, 2001). Accordingly, in discussions concerning electoral propaganda, it is prudent—following Sunstein's lessons—that decisions issued by this Court should be narrow (deciding casuistically on specific issues without broad generalisations) and shallow (avoiding deep consensus in judicial reasoning), so as not to, ultimately, substantially impair the substantive content of the fundamental right to freedom of speech." (see Superior Electoral Court (TSE), RESPE 86-94.2016.611.0001/MT, rapporteur Justice Luiz Fux, ruled on February 5, 2017, opinion made available on February 20, 2018, decision by unanimous vote).

8) and imposes an alleged duty of monitoring, but also establishes the requirement that content identified as potentially harmful must be subject to a careful review. In the United States, Section 230 of the Communications Decency Act grants broad immunity to platforms (Curzi & Alemeida, 2022, pp. 41-42).[20] Both frameworks avoid prior censorship but require platforms to act responsibly when notified of potentially illegal content.

These dilemmas become even more pronounced given that the internet transcends territorial boundaries, challenging the traditional link between sovereign power and a specific territorial base (Laux, 2023, pp. RB-4.18 and RB-4.19). As is known, this situation can lead to serious conflicts of law and clashes between judicial decisions of sovereign states – well exemplified by refusals to comply with local orders on the grounds that the service provider is located outside the territorial jurisdiction where the order was issued and, therefore, beyond its reach. Although international cooperation – through treaties or coordinated judicial actions across countries – is possible, it faces significant obstacles due to differing perspectives on free enterprise, freedom of speech, and other fundamental rights.[21]

In Brazil, to illustrate, the case-law of Superior Courts tends to recognise that if the provider operates within Brazilian territory, it is subject to current national law – including regarding legal representation.[22] The major challenge, of course, lies in implementing

[20] As already stated in an important decision issued by the U.S. Court of Appeals for the Fourth Circuit, "Congress recognised the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." (Zeran v. America Online. 129 F.3d 327 (4th Cir. 1997)).

[21] The situation is well illustrated by the "X" case (formerly Twitter). In the context of police investigations initiated before the Brazilian Supreme Federal Court (STF), aimed at investigating the deliberate dissemination of false information, the formation of digital militias, and the financing of acts against democracy—including those of January 8, 2023—the rapporteur Justice Alexandre de Moraes issued single decisions ordering the blocking of several social media profiles, including on "X", and the provision of user information. These measures led Elon Musk, ultimately the platform's controller, to publicly oppose the Brazilian courts' orders—reactivating profiles that had been blocked and accusing Justice Alexandre de Moraes of censorship. Amid escalating tensions, "X" refused to provide information about thirteen profiles, as ordered under threat of arrest of responsible individuals in Brazil and daily fines against Musk and all companies in the alleged enterprise group. Elon Musk also announced the closure of "X"'s office in Brazil. As operations ceased, Justice Alexandre de Moraes set a deadline for appointing a new representative; failure to do so would result in the suspension of "X" in Brazil, which subsequently occurred amid Elon Musk's defiance. The decision was then ratified by the First Panel of the STF (see STF, 1st Panel, Pet 12.404, rapporteur Justice Alexandre de Moraes, ruled on August 30, 2024, opinion made available on September 2, 2024, decision by unanimous vote). The suspension ended more than a month after the initial decision, following the payment of over BRL 28,000,000 and compliance with other orders previously issued.

[22] In this regard, it has been established that "It is a misconception to believe that any application hosted outside Brazil cannot be subject to Brazilian jurisdiction or that Brazilian laws are not applicable to its activities" (see Brazilian Superior Court of Justice (STJ), 3rd Panel, REsp 1.745.657/SP, rapporteur Justice Nancy Andrighi, ruled on November 3, 2020, opinion made available on November 19, 2020, decision by unanimous vote). Similarly, the Superior Court of Justice has already concluded that "What is expected from companies providing services in Brazil is faithful compliance with national legislation and cooperation in elucidating illicit conduct, especially when judicially ordered, such as the regular breach of confidentiality regarding data of those involved." (STJ, 5th Panel, RMS 66.392/RS, rapporteur Justice Messod Azulay Neto, ruled on September 5, 2023, opinion made available on September 12, 2023, decision by unanimous vote).

judicial orders: if the provider lacks a representative or assets in the country, the ultimate recourse is to prohibit its operation – similar to what happened with a certain provider that is still operating in Brazil.[23] Beyond this point, the issue shifts from a purely legal matter to a commercial one – a kind of standoff between the judiciary and the provider. From the latter's perspective, the rational approach becomes considering the importance of the target market in a given country: if losing access to that market would be economically significant (such as in Brazil), the platform is more likely to adapt to local demands; if not, it may either cease to operate or simply refuse to comply with the court's decision.

Although, as mentioned, this is somewhat close to truism, it is necessary – and increasingly useful – to consider how the phenomenon influences related concepts of jurisdiction, whether understood as the power to decide or as the measure of that power's investiture. First, it is difficult to determine whether the platforms' actions are a form of self-help, even if based on contractual grounds (which would, albeit indirectly, align them more with a consensual solution); or whether, in fact, we are dealing with a type of adjudicative decision. This distinction is not only of theoretical interest: the first perspective aligns more with the liberal – particularly the American – view that the platform cannot be held responsible for content, and that control over such content is governed by contractual rules established between provider and user; whereas the latter clearly indicates an exercise of power that does not precisely derive from a contract, and therefore, the provider acts as a sort of nucleus outside state authority – or, in another view, with its consent.

Furthermore, if the State accepts the exercise of power by the third party – and, as seen in the Brazilian legislation case – even requires platform intervention,[24] it must establish clear, predictable, and reasonable parameters for such control: not only to legitimise its potential oversight over the powers of platforms but also to avoid demanding from them what the State itself is unable to achieve. Additionally, if the State is responsible for monitoring the exercise of authority by platforms, the question becomes: who exactly is in charge of this oversight, and how should it be conducted? In Brazil, for instance, regulation is a matter of law, but the recognition of its inadequacy – or worse, its unconstitutionality – has led the issue to be debated and decided by the Supreme Federal Court,[25] which

[23] See footnote 22, above, on the "X" case, before the Brazilian Federal Supreme Court (STF) (Pet. 12.404).

[24] In this context, see Article 19 of Federal Law No. 12.965/2014 (Marco Civil da Internet): "In order to ensure freedom of expression and prevent censorship, the internet application provider can only be held civilly liable for damages resulting from content generated by third parties if, after a specific court order, it fails to take measures to make the infringing content unavailable within its technical scope and within the stipulated timeframe, notwithstanding legal provisions to the contrary."

[25] Regarding this issue, see Brazilian Supreme Federal Court's (STF) Theme 987 ("Discussion on the constitutionality of Article 19 of Federal Law No. 12.965/2014 (Marco Civil da Internet), which establishes that a prior and specific judicial order is necessary for the civil liability of internet providers, social media websites, and app managers for damages resulting from illicit acts by third parties") and Theme 533 ("Duty of hosting companies to monitor and remove offensive content without judicial intervention"), both of general repercussion. In the STF, the debate on this matter has been suspended since the end of 2024, following a request for better examination (vista). Until then, Justices Toffoli and Fux had voted in favour of declaring the rule unconstitutional in clear cases, such as deepfakes and fake profiles, proposing the duty of immediate removal. Justice Barroso, in an intermediate position, advocated requiring judicial decisions for crimes against honour.

justifies its intervention by the National Congress'[26] delay in adequately regulating the subject. This raises another question: if regulation exists, what should be understood as a more appropriate or alternative regulation? Is the core issue truly one of unconstitutionality, or is it an overreach of the judiciary into a sphere that more properly belongs to the legislative branch?

Even within the judiciary branch, beyond the debate within concentrated constitutional control directly before the Brazilian Supreme Federal Court (STF), there is discussion as to whether regulation could be pursued through the model of structural processes[27] – known from the American experience since the mid-20th century;[28] which, then, would implicate different parties with standing to sue (adequate representatives of the parties with standing) and, most importantly, a different jurisdiction (*competência*, in Portuguese). In the Brazilian model, the debate should start before a single judge, pass through a state or federal court, and only then reach the superior courts – the STF being the final link in this chain. And more: in this context, what role would the regulatory body of the Public Administration have?

Indeed, the examination of the topic reveals two scenarios that directly impact the concept of jurisdiction. First, if it is true that platforms effectively exercise adjudicative decisions to resolve conflicts (and in some cases, as in Brazil, the judiciary expects them to do so, even if they require following principles set by the judiciary rather than by the platforms themselves), then this is clear evidence of the weakening of state power. Moreover,

[26] Since 2020, the National Congress has been processing Bill No. 2.630, which aims to establish the Brazilian Law on Freedom, Responsibility, and Transparency on the Internet, and amends Federal Laws No. 10.703/2003 and 12.965/2014.

[27] Considering the Brazilian context, this remains primarily a scholar construction that raises doubts; this is well illustrated by the debates held at the Plenary of the III Civil Procedural Law Conference promoted by the Federal Justice Council in 2023 (Enunciates, 220 and 221). Its application in concrete cases—no more than that, since one cannot even authentically speak of case-law, understood as a trend or consolidated orientation of the courts—is acknowledged to be restricted to those cases that, without exaggeration, are extremely rare; and which, due to significant peculiarities, challenge the rationality and effectiveness of the models for collective disputes conceived so far—models that, in turn, are themselves the object of extensive legal regulation and renewed debate, reflected in the progression of different legislative reform bills in the National Congress (Bills No. 4.441/2020, 4.778/2020, and 1.641/2021). A demonstrative example of this is the commission of jurists tasked with debating the issue and proposing a legal regulation—whose work, as far as is known, was concluded in October 2024 and now awaits further progress within the Congress.

[28] Indeed, it does not seem feasible to base the exercise of Brazil's actual jurisdiction on case-law and doctrinal conceptions formed in light of the American reality of the 1950s and 1960s—often cited as the origin of "structural" processes. There are at least two reasons for this. First, although certainly relevant, this experience is outdated—both regarding the conflicts involved and the legal solutions devised to address them, including those adopted by Brazilian lawmakers since then. Second, although important, it pertains to a specific society and culture, in a particular historical moment. This can be well illustrated by examining cases commonly associated with that conception, such as challenges to the prison system (see U.S. District Court for the Eastern District of Arkansas, Holt v. Sarver, June 20, 1969) and efforts to combat racial segregation (U.S. Supreme Court Justice, Brown v. Board of Education of Topeka, 347 U.S., p. 483, May 17, 1954). Regarding the latter, it is worth noting the foreign doctrine's critique, which states that "The Supreme Court's contribution to the transformation in American race relations that occurred in the 1960s and afterwards is easily exaggerated, and it is important, particularly for lawyers and legal scholars, to understand the limited impact of judicial decisions on large-scale social change." (Tushnet, 2004, p. 1709).

the more vehement the reaction, the more evident the attempt to reestablish that power. And only what has already been lost or is on the verge of being lost can be restored. It is truly paradoxical: platforms may invoke freedom of speech as a shield to enforce their interests, while the judiciary, under the significant argument of defending democracy, may end up acting counter to that very value.

Second, the activity of platforms in an environment that knows no traditional territorial borders leads to situations where judicial decisions are simply unenforceable; ultimately, this undermines the very idea of power. More than that, the ability of a sovereign authority to impose its decisions in this context depends more on the economic relevance of the market in which the platform operates than on the state's capacity to enforce its rulings. While this phenomenon is not entirely new, it highlights how relative the idea of sovereignty – and, by extension, jurisdiction – is.

The second aspect mentioned above concerns the use of AI not only for managing processes aimed at adjudicative decisions but also for the very formulation and reasoning of the decisions themselves.[29] The use of AI within the justice system has advanced beyond auxiliary tasks, reaching a stage where its application in drafting rulings, particularly in repetitive litigation, is being proposed. In such cases, AI identifies patterns from previous decisions and suggests the most compatible hypothesis based on case-specific data, even formulating, in an automated manner, an assessment on the merits of the controversy (Fröhlich, 2023, p. 71).

Some models propose that the decision is initially generated by AI and then submitted to validation or review by a human judge (Valentini, 2017, p. 121; Sourdin, 2018, pp. 1123-1124 and 1130-1131). The argument supporting this arrangement is that it ensures transparency, well-founded reasoning, and control, resembling the legitimate use of draft rulings or suggestions prepared by clerks or legal assistants (Fröhlich, 2023, p. 73). In this model, there would be no violation of the right to be heard by an authority invested in jurisdiction ("*juiz natural*", in Portuguese), since the final decision would still rest with a human judge. This approach can also be exemplified by cases from the Netherlands, which implemented a pilot project for a virtual court, and Estonia, which developed a judge-robot that issues decisions via AI in small-amount cases (Suriani, 2021, pp. 133- 134 and 246).

However, there are potential issues to consider. First, the human dimension in exercising jurisdiction remains crucial, especially when sensitivity is required to interpret facts, rule according to indeterminate principles (such as good faith or proportionality), or consider ethical and social aspects. Intuitive thinking, though prone to errors, continues to be essential (Guthrie, Rachlinski & Wistrich, 2007, p. 31; Sourdin, 2018, p. 1130).[30] Processing symbols is different from understanding their meaning. Second, it is important to recognise AI's dependence on the data that feeds it. By definition, algorithms operate based on patterns and regularities extracted from historical databases (Susskind, 2019, pp. 270-271). If these data are incomplete, biased, or overly simplified, the resulting responses

[29] Regarding this topic, see more broadly: Yarshell & Stefanini (forthcoming).

[30] This, however, does not imply an *a priori* denial of the possibility that AI systems might emulate phenomena typically associated with human nature (Fröhlich, 2023, p. 64 of the e-book version).

will reflect these flaws.[31] Therefore, the more complex the dispute, the less reliable the automatic solution tends to be (Tartufo, 1998, p.318). In this context, the judicial report – often an underestimated part of the award or opinion – gains new centrality, as it illustrates whether the AI system truly considered the specificities of the case (Fröhlich, 2023, pp. 72-73). Third, it is fundamental to consider the purpose of employing the technology: AI should not serve as a tool solely for managerial optimisation aimed at improving judges' statistical performance, nor should it ossify previous interpretations to the point of inhibiting case-law evolution (Cueva, 2023, pp. 55-67). The system must serve justice, and not the other way around.

Despite these limitations, there is ample scope for applying AI as a tool to support the evaluation of evidence (Fenoll, 2018, p. 87). For example, technology can detect contradictions in testimonies or identify patterns of procedural behavior that assist the decision-makers in forming their conviction. The use of AI, in this sense, is likely to be better accepted (Sourdin, 2018, p. 1130), especially when it functions as an instrument to reinforce reasoning rather than as a substitute for judicial authority (See Taruffo, 1998, p. 322; Fröhlich, 2023, p. 74). Therefore, what is proposed is an integration of AI into judicial practice that respects the central role of the human judge, preserves the quality of the decision-making process, and does not sacrifice constitutional and procedural guarantees in the name of efficiency.

From the perspective of the traditional notion of jurisdiction, if a decision is constructed using AI, albeit formally endorsed by a judge and/or arbitrator, substantially, it must be recognised as a kind of delegation that, historically, has no precedent. This is said without ignoring that decisions made by law clerks and approved by the judge are a well-known phenomenon, in possibly different countries and cultures. Once the judge/arbitrator endorses the decision, it becomes theirs, that is, their responsibility. However, it does not seem feasible to simply equate the use of human intellect, even that of a qualified assistant, with the use of AI, whose functioning is fundamentally different. Ultimately, the question remains: has the judicial power left human hands and passed, at least indirectly, into the machine?

Therefore, without prejudice to using AI in the drafting and reasoning of adjudicative decisions, it seems preferable that this tool, as discussed in the previous topic, serve more for self-help and especially for the resolution of the dispute by the parties themselves. From a public policy perspective, this should be the primary effort of the States, avoiding all the risks that utilising AI for adjudicated solutions could entail. While technological progress should not be denied, there must be an effort to preserve the human element that is essential to the effectiveness of conflict resolution mechanisms. The use of AI to decide more easily and quickly could, in this context, be a trap with potentially long-term consequences.

The third aspect is somewhat different from the previous ones but still relevant. It relates to the advancement of transnational disputes and the search for more favourable

[31] A well-known example is the COMPAS system, used in the United States to assess the risk of recidivism among criminal suspects. It was found to produce discriminatory decisions because the opacity of its algorithm prevented a reliable analysis of the motivations behind its decisions, as the recidivism index is based on a series of questions directed at the accused, without transparency regarding how the responses influence the final decision. Regarding this case, see: Nunes & Marques (2018, pp. 6-7 of the electronic version).

environments for the interests of claimants – phenomena known as *forum shopping*. This can be exemplified by conflicts related to Brazilian companies or based on territorial jurisdiction in Brazil. One involves the dam failures at Mariana (2015) and Brumadinho (2019), which led to hundreds of lawsuits in Brazil as well as claims in other jurisdictions. In the United Kingdom, it is reported that thousands of victims filed class actions against the company BHP. In the Netherlands, lawsuits have been brought against Vale and Samarco. Additionally, there is the case involving Petrobras, sued in a class action in the United States on grounds that investors suffered losses based on fraudulent information. More recently, residents affected by land subsidence in Maceió filed a lawsuit in the Netherlands against Braskem. Also noteworthy is the search by Brazilian companies for jurisdiction in the U.S. to process judicial recovery procedures, as occurred with various airlines.[32] Conversely, foreign consumers have sought the Brazilian judiciary for claims against airline companies, encouraged by decisions that disregard the compensation limits established in international treaties and apply the Consumer Defence Code.

Although the phenomenon is not new, it appears to be gaining strength, which may partly be explained by the expansion of litigation funding – through various modalities. By lowering access-to-justice costs for victims, this type of funding also shifts strategic incentives: it becomes more financially feasible to litigate in forums with greater predictability, established case-law favouring claimants, and/or more comprehensive evidentiary systems. This could explain the attraction to jurisdictions such as the UK and the U.S.

Beyond the ethical and structural risks associated with such funding – such as compromising the independence of the lawyer, creating conflicts of interest, and encouraging abusive litigation – there is a risk that jurisdiction selection no longer reflects the traditional factors of private international law (real connection, location of assets, interests of the parties, efficiency of the decision, among others), but instead the economic convenience of the funders. This could undermine the legitimacy of the international judicial system. When the justification for choosing a forum is the inefficiency of another, the situation becomes even more delicate. If there's no genuine legal conflict (because, by definition, each sovereignty is free to claim exclusive or concurrent jurisdiction), it's undeniable that such situations may generate discomfort when viewed as a form of usurpation of the neglected jurisdiction; this may not have immediate consequences – since, again, it's not

[32] These were the cases of Latam, Gol, and more recently Azul. As an illustration, consider the article: "Chapter 11: what it is and why Brazilian airlines like Azul and Gol resorted to it," available at: https://www.infomoney.com.br/business/chapter-11-o-que-e-e-por-que-aereas-brasileiras-como-azul-e- gol-recorreram-a-ele/#:~:text=pedido%20no%20Brasil%3F-,O%20que%20%C3%A9%20o%20Chapter%2011%3F,tempo%20para%20pagar%20seus%20credores, (31.5. 2025). Among the advantages of Chapter 11, the U.S. case-law highlights greater flexibility in financial restructuring. For example, in *In re Integrated Telecom Express, Inc.*, 384 F.3d 108 (2004), it was concluded that the provisions of 11 U.S.C.A. § 1123 allow for various methods to implement a reorganisation plan, such as retention of assets, transfer of property, mergers, sale of assets, and modification of liens (11 U.S.C.A. § 1123). This flexibility enables companies to tailor their restructuring plans to their specific needs and circumstances. Another significant benefit is the automatic stay of debt collection and enforcement of guarantees, pursuant to § 362 of the same code (*In re Great American Pyramid Joint Venture*, 144 B.R. 780 (1992)). Furthermore, Chapter 11 grants the debtor the exclusive right to propose a reorganisation plan initially, giving them control over the restructuring process itself (*In re The Bible Speaks*, 65 B.R. 415 (1986)).

impossible for a State to defend its own domain – but problems could arise when, for example, a foreign decision needs to be recognised to produce effects in Brazil.

A similar issue may emerge in arbitration, with the key difference that, in this case, jurisdiction is chosen by the parties. A country's poor reputation in the market – due to legislative deficiencies (in arbitration law or general procedural law), lack of trustworthiness of arbitrators and institutions, or unfavourable relations between arbitrators and the local judiciary – may lead contracting parties to refuse that country as the seat of arbitration. This is entirely possible. However, if the arbitral award must produce effects within that country (and, for a contracting party, relevant assets are likely located there), choosing a different seat will only delay a potentially larger problem – namely, the recognition of the award so it can be enforced. Ultimately, an economic agent might respond by simply avoiding investment or activity in a particular country, precisely to avoid submission to that jurisdiction and/or due to lack of trust in its dispute resolution mechanisms.

As is well known, the regulation of litigation funding remains generally in its early stages.[33] Its development, perhaps, should or could take into account the aspects examined here, avoiding the scenario in which States, even indirectly, become instruments that fulfil the objectives of the investor – yet not in a manner aligned with the objectives of delivering justice and safeguarding the interests of the respective consumers.

4. Conclusion

As already outlined, the analysis indicates that the transformations of the contemporary world significantly impact the concept of jurisdiction and raise both theoretical and pragmatic implications. From this reflection, even without empirical data, it is evident that there has been an increase in conflict resolution methods based on self-help and by the parties themselves, primarily driven by the growing use of new technologies. While this trend has positive aspects, it does not necessarily entail a regression in processes adjudicated by a third party. In fact, as mechanisms for parties to resolve conflicts directly evolve or improve, technological progress simultaneously generates new conflicts. Moreover, especially when technology facilitates self-help, the need for intervention by an impartial third party to oversee conduct – preventing one party from imposing its interest over the other – may again become necessary. Additionally, an increase in party-driven solutions is not automatically positive; it may strengthen entities disconnected from the common good—potentially harming vulnerable groups – and forge (formal or informal) alliances with the State, thereby jeopardising democratic coexistence.

[33] As already stated in a monographic work, "'Third-party funding' is not a regulated activity in Brazil. It is based on the constitutional principle of free initiative; therefore, its free exercise is guaranteed regardless of authorisation by public agencies or regulatory bodies such as the Central Bank (Bacen) and the Securities and Exchange Commission (CVM). [...] The activity is still relatively in early stages in the country, and, up to now, there has been no interest from judicial or governmental bodies in establishing principles and regulatory mechanisms. In the future, some regulation of the sector may become necessary. To this end, the models adopted abroad can serve as benchmarks for a regulation adapted to our market characteristics and local legislation." (Del Monaco, 2020, p. 44).

The analysis also reveals that the traditional view of the State possessing the exclusive power to resolve conflicts through adjudication has undergone meaningful change. Perhaps the most significant of these changes – still evolving given the dynamic nature of the phenomenon – is the growing role of online content providers. Whether from a liberal economic-political perspective or an interventionist stance, whether relying on their capacity to act compatibly with the rule of law and democracy or expressing scepticism about that role, it is clear that platforms now make crucial decisions regarding conflicts stemming from content admission or removal. Even critics, such as parts of the judiciary in Brazil, as highlighted by the regulation of the 2024 elections, recognise and often require platforms to adopt this role.

In this context, it cannot be said that State sovereignty has disappeared; regulation remains a core activity of the State, which maintains authority over these entities. However, the effectiveness of State control remains uncertain. Internationally, though cooperation is possible and desirable, borderline cases, such as judicial decisions ignored by platforms, may increasingly be resolved through economic rationality rather than legal enforcement.

Beyond dispute resolution powers assumed by platforms, attention must also be given to the use of AI in forming adjudicative decisions. While initially appearing as a valuable tool for decision-making, caution is warranted – without adopting a catastrophist view – to prevent power from shifting to machines via seemingly controlled pathways. It is preferable that AI assist in self-help and especially in mechanisms of resolution of the dispute by the parties themselves; and from a public policy perspective, this should be the primary focus, avoiding the risks associated with AI-based adjudication for parties and the State alike. Relying on AI for faster, easier decisions could, in the medium or even short term, represent a trap.

Finally, the exercise of decision-making authority and the allocation of jurisdiction ("*competência*", in Portuguese) are increasingly challenged by the rise of forum shopping, especially on an international level. Instead of the power leaving the hands of the State, what occurs is a transfer from one State to another – potentially threatening national sovereignty. Notably, this phenomenon is often driven by the increasing financing of litigation. Regulation of this important issue must consider and address this aspect carefully, preventing States from indirectly acting as instruments to serve the interests of investors rather than ensuring justice and protecting consumers.

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APPLICATION OF ARTIFICIAL INTELLIGENCE IN DECISION-MAKING BASED ON LEGAL PRAGMATISM

Abstract

This article examines the integration of Artificial Intelligence (AI) in judicial decision-making through legal pragmatism principles. The study analyses how AI can enhance judicial decisions while addressing barriers to justice, focusing on three key areas: AI's current legal applications, legal pragmatism's theoretical framework, and their practical synthesis in judicial systems. The research first explores AI classification in legal contexts, examining how machine learning and generative AI process legal data, predict outcomes and model scenarios. It then analyses legal pragmatism's core principles – anti-foundationalism, contextualism, and consequentialism and their impact on judicial decision-making. Finally, it demonstrates how AI can enhance pragmatic judicial decisions through precedent analysis, consequence evaluation, context assessment, bias mitigation, and discretion reduction. Using deductive, analytical, and inductive methods, this study shows that AI integration, guided by pragmatic principles, can improve judicial efficiency while promoting transparency and consistency in legal reasoning.

Keywords: artificial intelligence, decision-making, judicial efficiency, law, legal pragmatism.

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1. Introduction

The crisis in the judicial system, particularly regarding access to justice, remains a widely documented challenge in contemporary legal scholarship. Cappelletti & Garth (1988, p. 58) illustrate how judicial systems struggle to ensure effective access to rights for all citizens, foreigners and persons without citizenship. These challenges span from procedural complexity and costs to inadequate mechanisms for protecting collective rights. This situation demands solutions that address both procedural efficiency and decision quality. The integration of artificial intelligence (hereinafter: AI) into judicial processes offers a potential response to this crisis. AI tools can transform access to justice through predictive analytics, process optimisation, and decision support, while algorithms can analyse vast data sets and identify trends, providing insights that enable more efficient, equitable, and well-reasoned judicial decisions.

This article examines AI applications in law, focusing on their potential to overcome access barriers and enhance judicial decision quality. It aims to demonstrate how AI integration can improve procedural efficiency and decision-making while adhering to legal pragmatism principles. The first section examines AI's expanding role in law, including both advances and ethical challenges. It distinguishes between strong AI with human-like cognitive capabilities and weak AI designed for specific tasks like pattern recognition. AI systems can analyse precedent volumes and predict case outcomes while addressing transparency and bias concerns. Understanding these capabilities is essential for maximising benefits while minimising risks.

The second section analyses legal pragmatism, which emphasises practical consequences in judicial decision-making and favours flexible approaches to concrete circumstances. Founded on anti-foundationalism, contextualism, and consequentialism, this framework guides judges to consider decision impacts and pursue solutions promoting social welfare. The author posits that, through continuous critical analysis and an interdisciplinary approach, legal pragmatism provides theoretical support for AI integration in law.

In the third section, the author argues that AI integration within legal pragmatism can enhance judicial decision-making through detailed analysis and scenario modelling. More specifically, the author highlights that AI facilitates precedent comparison, consequence evaluation, context assessment, bias mitigation, and discretion reduction, which promotes transparency and consistency, leading to more predictable and equitable outcomes. The author consequently posits that a combination of AI and legal pragmatism improves system efficiency while producing more balanced decisions.

The fourth section examines the challenges of AI implementation in judicial systems, focusing on data dependence, judicial autonomy, and the balance between predictive capabilities and historical biases. By emphasising the importance of transparent algorithms, rigorous data management, and human oversight, the author claims that AI can complement, rather than replace, judicial reasoning within pragmatic frameworks.

The article concludes with the assertion that thoughtfully integrated AI tools, such as the Brazilian Supreme Court's "Maria" system, are already enhancing judicial transparency

and efficiency. These advancements highlight AI's potential to modernise courts while preserving the indispensable role of human judgment in achieving equitable and effective justice. In this research, three methodologies are employed: deductive reasoning during investigation, analytical methods for data examination, and inductive approaches for presenting results. The study utilises referent, category, and operational concept techniques, alongside comprehensive bibliographic research.

2. The Application of Artificial Intelligence in Law

The integration of AI into legal practice has accelerated in recent decades, bringing both advances and challenges. Understanding AI's fundamental concepts is crucial for assessing its impact on the legal landscape.

2.1. Artificial Intelligence Categories and Core Concepts

AI systems fall into two primary categories: strong and weak AI. Strong AI encompasses systems with human-like cognitive capabilities, performing complex reasoning, problem-solving, and decision-making tasks comparable to human intellect. These systems can theoretically understand complex contexts and adapt to new situations similarly to human thought. As Guimarães (2019, p. 7) notes, strong AI would create consciousness, simulate complex reasoning, and generate autonomous opinions without constant human intervention.

Weak AI, in contrast, executes specific tasks like pattern recognition or natural language processing without understanding or consciousness of its actions. This type of AI finds widespread application in law due to its efficiency in specific tasks. Boeing & Rosa (2020, pp. 22-23) explain that weak AI operates through machine learning algorithms, which learn and improve from data without explicit programming. These algorithms identify patterns in large datasets to make predictions and decisions. In law, this enables analysis of extensive case law to identify trends and predict future outcomes.

Generative AI, including systems like ChatGPT, represents a specialised machine learning subset advancing legal tools. Lima (2024) describes how generative AI creates new content through three methods: extractive, interpretative, and interactive. The extractive method draws from broad databases but risks generating inaccurate responses ("hallucinations"). The interpretative method processes user-provided data, such as judicial decisions, reducing error risk. The interactive method combines both approaches, enhancing human-AI collaboration for tasks requiring innovation and critical analysis.

Two key concepts in legal AI applications are prediction and simulation. Prediction, linked to jurimetrics, uses statistical models and machine learning to anticipate judicial outcomes based on historical data. Mendes (2021, p. 52) explains that these models analyse patterns in prior decisions, considering factors like applicable laws, case details, and judicial history to develop predictive functions. This helps practitioners establish realistic expectations and inform litigation strategy.

Simulation models, as Wilkinson (2020) describes, differ by generating future scenarios and testing variable interactions in virtual environments. Unlike prediction's

historical focus, simulation enables hypothesis testing and system component analysis. This approach creates dynamic models for experimenting with decision impacts in controlled settings, particularly valuable when real-world data is unavailable or costly to obtain.

These legal applications of AI extend beyond efficiency improvements to raise crucial ethical and legal questions about automated decision transparency and accountability. Understanding AI's complexity and potential is essential for ethical integration into legal systems, particularly as automated decisions increasingly affect individual lives.

2.2. Ethical Concerns and Transparency in Artificial Intelligence

AI implementation in law faces several challenges. A primary concern involves AI potentially perpetuating and amplifying human biases. Kahneman (2012, p. 127) describes heuristics as cognitive shortcuts that, while useful, often lead to biased judgments. AI systems trained on historical data containing these biases risk replicating discriminatory patterns, potentially producing automated decisions that reflect existing racial, gender, or socioeconomic prejudices.

The opacity of AI decision-making processes compounds this challenge. Boeing & Rosa (2020, p. 89) describe this algorithmic opacity as a "black box," where users cannot trace how AI reaches specific conclusions. This lack of transparency complicates efforts to identify and correct unfair outcomes, raising significant questions about accountability in judicial AI applications.

Human oversight remains crucial for ensuring fairness in automated decisions. Over-reliance on AI risks dehumanising judicial processes by substituting algorithmic calculations for careful contextual analysis. While AI offers powerful tools for improving legal consistency and efficiency, its implementation requires balanced human supervision and thorough consideration of ethical implications.

Nevertheless, AI offers significant advantages in maintaining judicial consistency. Under Article 926 of the Brazilian Civil Procedure Code (2015)[1] courts must standardise their decisions and maintain stability, integrity, and coherence. AI supports these objectives by analysing large volumes of decisions to identify patterns and inconsistencies. This capability enables efficient access to relevant precedents, promoting predictability in judicial outcomes.

As Mendes (2021, p. 216) observes, AI models can analyse the judiciary's complete database to extract insights from millions of decisions across thousands of judges. This information can be presented statistically and accessibly, organised by legal arguments, theories, and themes with relevant indicators. With proper indexing and source identification, courts can verify AI-provided information, making it valuable for judicial decision support.

AI also enhances decision drafting and review by ensuring alignment with precedents and reducing inconsistencies. Through text analysis and pattern recognition, AI suggests evidence-based revisions to judicial opinions. This automation of routine tasks allows

[1] "Courts shall standardise their decisions and maintain them stable, integral and coherent".

courts to focus resources on complex matters requiring nuanced analysis, improving overall judicial efficiency.

The current state of judicial AI reveals diverse applications across legal systems. Corvalán (2020, p. 28) notes that common law jurisdictions extensively use AI for analysing precedents and predicting outcomes based on prior decisions. This prediction capability proves particularly valuable for lawyers developing litigation strategies and evaluating success probabilities.

In civil law systems, AI applications also flourish, with the judiciary emerging as a prime field for machine learning implementation. This stems from several factors: large volumes of data available for analysis, demand for efficient service delivery, budget availability for innovation, and human resource constraints.

2.3. Applications and Challenges in Judicial Artificial Intelligence

Boeing & Rosa (2020, p. 95) classify legal AI systems into three categories, offering detailed insight into their capabilities within the judiciary. The authors identify classifier-robots, reporter-robots, and judge-robots. The classifier-robot serves as a fundamental assistance tool, facilitating administrative tasks like case location and categorisation. This application optimises information organisation and access without directly affecting judicial decisions.

On the other hand, the reporter-robot or opinion-writer-robot operates at a more sophisticated level, compiling case information into unified documents with suggested resolutions. This algorithm assists decision drafting by presenting judges with relevant data summaries, party arguments, and preliminary judgment suggestions. The final decision remains with the judge, who may accept or reject these recommendations. Thirdly, the judge-robot represents advanced machine autonomy, producing binding decisions without initial human involvement. In this model, humans serve only as decision reviewers. This approach requires high confidence in algorithmic analysis while raising fundamental questions about removing human discretion from judicial decisions.

Currently, Brazil's National Council of Justice (CNJ) Resolution 332 (2020) governs AI implementation in Brazilian courts. This framework ensures AI technologies respect ethical and legal principles, promoting transparency, efficiency, and legal certainty. Key provisions require transparent AI system development with clear review mechanisms for automated decisions. The resolution emphasises data privacy protection and positions AI as complementary *to*, not a replacement *for*, human judgment. In summary, judicial AI offers numerous opportunities to enhance decision efficiency, consistency, and predictability. However, implementation requires careful attention to ethical and legal implications.

3. Legal Pragmatism

Legal pragmatism represents a distinct approach to jurisprudence that emphasises practical outcomes and consequences of judicial decisions, moving away from rigid formalism toward adaptable methods responsive to context. Developed from philosophical

pragmatism and influenced by Charles Sanders Peirce, William James, and John Dewey, this approach rejects the search for universal truths in favour of examining practical implications of judicial decisions. This framework challenges traditional formalistic reasoning by prioritising contextual analysis and practical consequences.

3.1. Principles of Legal Pragmatism

Legal pragmatism builds on three fundamental principles derived from philosophical pragmatism: anti-foundationalism, contextualism, and consequentialism. According to Torrano (2018, p. 29), anti-foundationalism challenges the existence of fixed foundations for legal knowledge, asserting that law requires flexible interpretation and application to adapt to social and cultural evolution. This view contests the notion of universal legal principles, arguing instead that legal interpretation must consider each case's specific context.

On the other hand, contextualism, as Haack (2015, p. 108) explains, emphasises the environment in which law operates. Drawing from Darwinian evolutionary theory, legal pragmatism views the legal system as dynamic and adaptive. This perspective holds that law cannot function in isolation but must account for social, economic, and cultural influences on human behaviour. Finally, consequentialism, the third pillar of legal pragmatism, requires evaluating judicial decisions through their practical effects. This approach values effective dispute resolution over strict adherence to abstract principles or literal interpretation. Shook (2002, p. 26) argues that legal pragmatism directs judges to consider real-world impacts, pursuing solutions that enhance social welfare and substantive justice.

Posner (2010, p. 47), a leading pragmatist scholar, views law as an instrument for addressing social problems rather than a rigid rulebook. Legal pragmatism thus prioritises analysing practical consequences and measuring how effectively legal rules achieve their intended goals. This focus ensures legal systems remain responsive to evolving social needs. As Pedersen (2013) notes, legal pragmatism encourages ongoing critical analysis of legal norms, supporting legal evolution alongside societal changes. This approach enhances both system responsiveness and judicial legitimacy. Through pragmatic interpretation, judges can prevent legal obsolescence and maintain the law's practical relevance.

Legal pragmatism promotes interdisciplinary analysis, as Zanon Junior (2019, p. 143) notes, incorporating insights from economics, psychology, social sciences, and (why not?) information technology to strengthen judicial decisions. This approach recognises that effective legal application requires dialogue with other disciplines to comprehend each case's implications. Legal pragmatism further emphasises transparency and reasoned justification in judicial decisions. By requiring judges to explain their reasoning and evaluate practical impacts, this approach enhances accountability and public confidence in legal institutions. Similarly, Article 20 of Brazil's Law of Introduction to Legal Norms, 1942 (with significant changes from 2018) mandates consideration of practical consequences when applying abstract legal values.[2] The integration of diverse disciplinary perspectives enables a more comprehensive analysis of complex legal issues, leading to solutions that are both analytically sound and sustainable.

[2] "In administrative, control and judicial spheres, decisions shall not be based on abstract legal values without consideration of their practical consequences".

Legal pragmatism also helps mitigate decision-making biases. Pedersen (2013) explains that by emphasising objective investigation, pragmatism promotes an adaptable approach focused on practical effectiveness in specific situations. This helps identify and correct unconscious biases that might otherwise distort judgement. Further, judicial empathy plays a crucial role in this framework, as Negowetti (2014, p. 693) observes. Judges who exercise empathy better recognise their cognitive limitations and biases, leading to more balanced decisions. Legal pragmatism's focus on practical outcomes provides an effective structure for incorporating empathy and improving judicial reasoning.

3.2. Addressing Hard Cases with Pragmatism

Legal pragmatism offers significant insights for addressing hard cases. While these pragmatic approaches enhance judicial decision-making generally, they prove especially valuable in complex situations. Traditionally, "easy cases" involve routine matters where established legal sources provide clear guidance through logical-deductive reasoning. "Hard cases" lack clear solutions within conventional legal frameworks, often involving moral dilemmas or competing principles that expand judicial discretion.

Oliver Wendell Holmes Jr., Supreme Court Justice from 1902 to 1932 and pioneer of judicial pragmatism, addressed this issue in *Northern Sec. Co. v. United States* (1904, para. 400-1). He argued that cases become difficult when applying clear law leads to absurd results, rather than from a lack of applicable rules. These situations arise when law or precedent appears unambiguous but yields outcomes that judges find troubling. Zanon Junior (2018, p. 196) expands this understanding of hard cases by considering evidentiary challenges, outcome assessment, and psychological impacts on judges. His analysis includes subjective factors such as technical expertise and stamina, distinguishing between "easy, simple, and standardised cases" and "difficult, complex, or tragic cases" to support efficient judicial administration.

Posner (2008, p. 9) acknowledges that hard cases typically emerge where positivism fails to provide clear answers to legal questions. While recognising "legalism," he limits its application to routine matters or easy cases. Although legalism guides most judicial decisions in standard scenarios, Posner argues that these decisions matter less for legal development or social impact. He views judicial discretion as an unavoidable consequence of positivism's inability to guide outcomes in many cases, noting the difficulty in verifying decision correctness through either logic or consequences.

Legal pragmatism, while flexible and adaptable, often exercises less discretion than other post-positivist approaches. As Posner (2010, p. 62) explains, it resists relying solely on abstract theories, instead promoting decisions based on clear pragmatic criteria and specific, justifiable outcomes. When properly applied, this approach can reduce subjective arbitrariness by aligning legal interpretation with measurable objectives.

Another dimension to identifying hard cases is added by legal pragmatism: decision consequences. Cases may qualify as difficult when they pit constitutionally protected individual rights against significant collective interests. This difficulty exists regardless of legal clarity, particularly when prescribed outcomes raise substantive concerns. Consequently, it could be argued that legal pragmatism offers a practical, contextual framework

for judicial decision-making that emphasises outcomes and circumstantial adaptation. This approach promotes a dynamic legal system aligned with social realities, prioritising effectiveness, justice, and social welfare. By embracing pragmatist principles, law can evolve continuously, maintaining relevance in addressing modern challenges while valuing experience, interdisciplinary insights, and practical consequences. Having established these foundational characteristics of legal pragmatism, it will be examined how AI can enhance pragmatic judicial decision-making.

4. Artificial Intelligence and Pragmatism-Based Decision Making

The integration of AI in law provides a powerful tool for decisions based on legal pragmatism, emphasising practical effectiveness in judicial outcomes. The following sections examine how this integration operates in practice.

4.1. Decision Comparison and Comparative Law

AI's ability to process vast amounts of data transforms the analysis of judicial decisions. Through pattern recognition in extensive case databases, AI enables more systematic and coherent analysis of similar cases, a crucial advancement given the increasing volume and complexity of precedents that legal practitioners must navigate.

In comparative law, AI can streamline the analysis of different legal systems. By rapidly processing decisions across jurisdictions, AI can reveal how similar legal issues are addressed in varying contexts. This allows practitioners to identify and adapt successful solutions from other legal systems, enhancing their analytical frameworks.

Transjudicialism, whereby international precedents influence domestic rulings,[3] gains particular strength through AI applications. The technology efficiently identifies relevant international precedents and overcomes language barriers through advanced translation and contextual analysis. This expands judicial decision-making options while strengthening the legitimacy of rulings both domestically and internationally.

Thus, AI integration in law has the potential to transform pragmatic decision-making. By valuing practical effectiveness in judicial decisions, AI provides sophisticated tools for comparing rulings across national and international jurisdictions, while evaluating the implications of different decision-making paths.

4.2. Consequences Assessment

The analysis of judicial outcomes represents one of AI's most significant contributions to legal decision-making. While traditional approaches rely on practitioners' experience and judgment to evaluate precedents and predict potential outcomes, AI enhances this process through comprehensive data analysis and pattern recognition beyond human capacity. AI systems can forecast the impact of various judicial alternatives with greater precision by considering multiple contextual variables simultaneously.

[3] According to Slaughter (1994, p. 99), "transjudicialism" or "transjudicial communication" is the phenomenon characterised by the communication and exchange of ideas, practices, and judicial decisions between courts of different jurisdictions, without a formal hierarchy between them.

This possibility can be illustrated by the example of environmental regulation decisions: AI can analyse historical regulatory data, predict multifaceted impacts - economic, social, and environmental - and generate comparative analyses of different approaches. This enables decision-makers to better understand the implications of their choices and make more informed decisions consistent with pragmatic principles.

AI also enables the development of legal simulation models to test scenarios before reaching final decisions. These models integrate real-world data and adjustable variables to project decision outcomes in controlled environments. In international commercial disputes, for example, such models can evaluate potential outcomes by analysing international precedents, jurisdiction-specific regulations, and other key variables. This simulation capability allows judges to assess likely results and select the most effective solution. Beyond enhancing predictive accuracy, these simulation models provide a framework for testing legal theories and refining judicial approaches before implementation. This proves especially valuable in complex cases where decisions carry broad and multifaceted implications.

4.3. Context Analyses

As Haack (2015, p. 108) emphasises, contextualism underscores the importance of the environment in which law operates. AI enhances contextual analysis by processing extensive data sets to evaluate each case's specific circumstances, analysing complex variables and their interactions, and assessing the social, economic, and cultural factors at play.

In environmental law, for example, AI can differentiate between threats to endangered and non-endangered species, applying weighted analysis based on ecological urgency. Technology can evaluate protected areas by analysing factors such as ecosystem uniqueness, biodiversity levels, and climate change vulnerability. This enables AI to suggest protective measures for ecologically sensitive areas, aligning with pragmatic principles of addressing urgent real-world needs. AI's capacity to synthesise data from multiple sources proves essential for complex cases requiring holistic analysis. In environmental disputes, for instance, AI can balance ecological impact against economic development, social requirements, and infrastructure needs. This produces solutions that satisfy both legal requirements and practical societal demands.

4.4. Bias Mitigation

Legal pragmatism views the legal system as a dynamic structure that evolves in response to new challenges. Within this framework, AI serves as a vital tool for identifying and correcting historical biases in judicial decision-making. When programmed to detect systemic imbalances, AI can analyse cases more objectively, uncovering hidden patterns of bias, including predispositions against specific social groups, that might escape traditional analysis.

The pragmatic approach, with its emphasis on impartial investigation, supports adapting judicial decisions to contemporary justice requirements. This methodology recognises the importance of identifying and correcting unconscious biases that may compromise judicial impartiality. The combination of AI capabilities and legal pragmatism creates a powerful framework: AI provides the technical tools to identify discriminatory patterns, while pragmatic principles guide the conscious application of these insights

within complex legal and social contexts. This integration of AI within pragmatic legal analysis both reduces systemic bias and enhances the practical effectiveness of judicial decision-making.

4.5. Limiting Judicial Discretion

As Barbosa (2019, p. 7) observes, the expansion of judicial power, coupled with increased discretion, often leads to varying decisions based on individual judicial interpretation. This variation creates perceived instability and unpredictability, particularly when the same legal norms receive conflicting interpretations. AI can significantly limit this judicial discretion by promoting consistency and predictability in judicial systems.

The implementation of AI in law, particularly through machine learning algorithms, can reduce these inconsistencies through standardised data analysis. These systems identify patterns in prior judicial decisions and suggest resolutions based on established precedents, helping judges align their decisions with settled case-law.

AI can also function as an automated judicial assistant, compiling case information and presenting judges with data summaries, party arguments, and preliminary resolution suggestions. This supervised AI application does not supplant human judgment but provides support that minimises subjective influence and excessive discretion. Thus, AI promotes judicial uniformity and coherence while reducing arbitrariness and enhancing system transparency.

The combination of AI and legal pragmatism offers a promising framework for controlling undesirable judicial discretion. Both approaches prioritise objectivity and consistency, working together to achieve more predictable outcomes. Additionally, when AI analysis employs transparent methodologies subject to external verification, it strengthens decision justification, a key element in aligning legal interpretation with the measurable objectives advocated by legal pragmatism.

5. Challenges and Limitations of Artificial Intelligence Implementation

As Boeing & Rosa (2020, p. 93) observe, technological advancement is creating an environment where the non-use of algorithms signals obsolescence, with the judiciary emerging as an ideal domain for machine learning implementation. Given this inevitable progression, both the criticisms of AI in law and its practical limitations require careful consideration to ensure balanced implementation.

The primary concern centres on data dependence. AI's effectiveness relies heavily on data quality and quantity. Systems operating with insufficient or flawed data risk amplifying rather than reducing existing biases. This limitation can be addressed through rigorous data selection and audit processes. Implementing continuous data review ensures AI systems operate with accurate, current information, minimising the perpetuation of bias. Moreover, transparent algorithms and data protocols enable effective oversight and systematic refinement.

The second concern involves preserving judicial autonomy. AI integration in judicial proceedings requires careful calibration to maintain appropriate judicial discretion. AI

should function as an analytical tool, providing data-driven insights and recommendations, while preserving human judges' authority over final decisions. This approach ensures proper consideration of ethical, moral, and contextual factors.

Addressing concerns about AI in judicial decision-making requires acknowledging that AI can handle administrative and analytical tasks without compromising judicial autonomy. The reporter-robot classification proposed by Boeing & Rosa (2020, p. 98) exemplifies technology that compiles information and suggests preliminary resolutions, optimising the judicial workflow without replacing judicial reasoning.

The delegation of judicial functions to assistants already exists in practice. Martino's research (2021, p. 130) on judicial assistants in Brazilian courts reveals that these clerks serve as cognitive anchors, unconsciously influencing judicial outcomes. He notes that when delegating decision-making functions, judges may rely less on their intuition, an effective tool for decision-making. Using AI as a judicial assistant thus represents a natural evolution of current practice. By managing data collection and analysis, AI allows judges to concentrate on complex and subjective aspects of decision-making. This approach enhances rather than compromises judicial autonomy, improving judges' capacity for informed and equitable decisions.

A third concern addresses the balance between future prediction and historical influence. While generative AI can project future outcomes, it relies on historical data patterns for its predictions and analyses. This means its outputs retain a degree of historical influence. However, AI's capacity to learn from new data enables continuous evolution, incorporating emerging trends. Advanced machine learning techniques that emphasise adaptability can reduce historical bias while developing solutions aligned with current needs. The fourth concern relates to consequence complexity. Predicting legal outcomes involves variables that may exceed current AI capabilities. Case nuances and legal uncertainties can challenge accurate AI predictions. However, AI can simulate multiple scenarios and assess various potential consequences, providing a stronger foundation for judicial decisions.

Legal pragmatism's focus on decision consequences complements this approach, promoting effective AI integration in the judicial system. By incorporating consequences into the definition of hard cases, AI's role extends beyond routine cases to complex matters. AI can model alternative outcomes, offering comprehensive analysis of potential impacts. This enables more informed judicial decision-making, even in challenging contexts.

6. Concluding Remarks

Despite their current limitations, thoughtful AI applications in courts and tribunals are already fostering a more transparent and accessible justice system. Real-world implementations demonstrate that AI tools, when properly integrated within existing pragmatic frameworks, enhance both decision quality and judicial responsiveness. These early results, although limited in scope, suggest promising avenues for modernising courts while maintaining the irreplaceable role of human judgment in legal decision-making.

Our research reveals particular potential in addressing common problems that plague judicial administration worldwide. Current implementations show measurable

improvements in case processing times and decision consistency, especially in routine matters. The analysed data suggest that AI assistance, rather than diminishing judicial authority, helps judges focus on complex legal reasoning by handling time-consuming research and document analysis tasks.

A notable practical example of AI implementation in higher courts is the introduction of the *Maria* tool by the Brazilian Supreme Federal Court (hereinafter: STF) in December 2024. Internally developed, *Maria* employs generative AI to automate tasks such as drafting summaries of judicial opinions, creating reports for appellate cases, and conducting initial analyses of complaints. The tool aims to streamline the preparation of drafts and case reviews, significantly reducing the time required for these procedural stages. Furthermore, *Maria* operates under strict human supervision to ensure the accuracy and quality of the outputs. This initiative highlights how AI integration can enhance the efficiency and timeliness of judicial proceedings while preserving the indispensable role of human judgment in final decision-making. The STF's adoption of *Maria* demonstrates the potential of AI to modernise judicial systems while maintaining transparency and accountability.

Several critical questions emerge during this study that warrant deeper investigation. Future researchers might examine how judges adapt their decision-making processes when using AI tools, particularly in civil law jurisdictions where case law analysis traditionally plays a smaller role. Studies tracking appeal rates and outcomes in jurisdictions using AI support could provide valuable insights into the technology's impact on judicial quality. Questions about AI's influence on judicial discretion and reasoning patterns also deserve careful empirical investigation.

Additionally, long-term empirical studies are needed to measure concrete impacts on judicial efficiency and decision quality. Researchers should track changes in processing times, consistency rates, and satisfaction levels among legal professionals and court users. This data would prove invaluable for refining implementation strategies and ensuring AI tools truly enhance access to justice rather than merely adding technological complexity.

Ultimately, the evidence supports AI as an effective tool for achieving practical, equitable justice when thoughtfully implemented. The success of this integration hinges on maintaining appropriate boundaries between technological assistance and human discretion, underscoring the value of a balanced approach that combines innovation with judicial expertise. This synergy, grounded in pragmatism, likely represents the next evolution in judicial practice.

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Marko Dimitrijević[*]

CHALLENGES IN UNDERSTANDING THE CONCEPT OF MONETARY JURISDICTION IN THE DIGITAL ENVIRONMENT[**]

Abstract

The subject of the analysis in the paper is an overview of the features and ways of implementing the concept of monetary jurisdiction in the context of the information revolution and the digital environment, which implies the need to adjust the established monetary-legal settings that arose in the period of classical monetary legislation to the tendency of commercialization of monetary and financial innovations (even when these innovations in a legal and technical context have not been sufficiently developed to guarantee legal predictability and the security of transactions in monetary circulation, which represents a kind of monetary-legal paradox). Namely, in contemporary monetary law and the law of central banks, the concept of monetary jurisdiction refers to the area of state territory where (primary and secondary) monetary legislation is applied to protect monetary stability as a public good, as well as the special economic rights of citizens who live within it (monetary inhabitants) to have a solid and stable currency. As such, the concept of monetary jurisdiction is a reflection of state nominalism (i.e. the dominance of the state theory of the legal concept of money), of which courts in monetary disputes, as a special category of administrative disputes, in which the active and passive procedural legitimation of central banks should be aware must take account. Although the concept of monetary jurisdiction has for a long time, in the science of monetary law, displayed elements of a (relatively) static category (due to the unquestionable validity of state nominalism, according to which only the state, i.e., the central bank has the legal authority to issue money), the normative dynamism that shapes it today, more than ever before in monetary history is conditioned by the emergence of decentralized financial technologies that have led to not only the emergence of private digital money (thereby actualizing the social theory of money in which the attitude of citizens about what will be used as money is crucial for the survival of monetary units), but also extensive research into issuing digital money by central banks as a new form of sovereign (public) money. This development imposes the need to adjust the concept of monetary jurisdiction so that it becomes more

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digital (and at the same time less territorial-physical, because it is not exhausted within the borders of the bearer of monetary sovereignty), which gains special complexity when consumers satisfy their preferences by relying on networks of financial innovations. By applying the axiological, comparative, and dogmatic methods, the author seeks to examine the relevance of established understandings of the concept of monetary jurisdiction in the circumstances in which information technologies have a direct impact on the understanding of the subject and field of application of monetary legislation in practice and their (in)applicability in a world where technologies create a certain (parallel) order per se, in which according to the author's opinion, the task of monetary law consists precisely in adapting traditional statements about the competence and field of action of central banks to the new digital environment.

Keywords: digitalisation, central bank, monetary law, monetary jurisdiction, monetary innovations.

1. Introduction

The field, scope, and structure of the central bank's competence are determined by its specific institutional (constitutional) position in national, international, and comparative monetary law. Namely, the central bank is the bearer of monetary sovereignty, which is part of the political sovereignty delegated to it by the state, and whose method of implementation and reflection can differ significantly depending on the socio-political, demographic, cultural, and other factors that determine the area and purpose of its application in practice, as well as the value system upon which it is founded. For a long time, the field of application of monetary sovereignty coincided with the state theory, within which the central bank was established as the supreme monetary institution (where, of course, even today, the level of its implementation is the strongest and most evident). Still, over time, with the complexity of international monetary flows, the influence of monetary sovereignty expanded beyond the borders of the state territory due to accession to monetary unions and international organizations. This becomes quite clear in the example of the European Monetary Union (EMU), which exerts its influence in various ways through the shaping of monetary legislation applicable not only to countries that are on the path of European integration but also to third countries that cooperate with EMU member states as their trading partners (Fabeilman, 2013, p. 115). Thus, many countries shape their central bank legislation according to the solutions adopted and passed by the European Central Bank (ECB) which they recognize as an example of good practice and a set of consistent legal sources with the potential for optimal normative efficiency in the monetary order. It is important to notice that the ECB is not only a community institution but also one of the main subjects of international monetary law (in addition to the International Monetary Fund and the Bank for International Settlements).

Moreover, today, the ECB also creates its legal framework, which, in certain aspects, shows some degree of independence from EU law. This is a *monetary legal paradox* because the ECB is one of the main institutions within the EU. On the other hand, perhaps it best confirms the thesis about the sophisticated *telos* of this branch of law which, although relatively young compared to other (traditional) legal disciplines, is extremely dynamic, and flexible with a discourse that follows the demands of not only the consumer society but also the post-information society, in which the technological revolution has an increasing influence on the functioning of the legal system. The aforementioned is best demonstrated by the initiative to constantly expand central banks' competencies from the subsystem of monetary and fiscal policy to the field of non-economic areas such as environmental protection, the fight against financial crime, and cohesion policy, which indirectly affects the understanding of the very concept of monetary jurisdiction at the comparative and international levels. Today, in the literature on comparative monetary law and the law of central banks, the prevailing view is that the jurisdiction of the central bank in the traditional sense of the word refers to the area of application of soft monetary law (legislation) that the central bank creates and applies independently or together with other entities that directly or indirectly participate in the monetary legal environment.

Also, in understanding the concept of monetary jurisdiction, which in theory, and in practice as well, should be understood as a heterogeneous and complex concept, the classification of monetary law must be taken into account, which although to some extent of a merely technical legal character, since in practice the central bank's tasks and functions interpenetrate and complement each other (and are never *a priori* mutually exclusive). We believe that this approach can provide a deeper understanding of the developmental trajectory of monetary jurisdiction with all its specificities (both in the era of the establishment and development of the classical monetary legislation, and contemporary monetary legislation), which is grounded in the concept of human concerns (Cottier, 2021, p. 110).

Such an approach, it can be argued, enables a functional and value analysis of monetary stability as a public good, which is the practical rationale of these disciplines in one universal plane, devoid of territorial (physical) limitations, arising from the immediate effect of globalisation law norms, where monetary legislation is simultaneously both detached from and constrained by national monetary regulations (as monetary legal constraints) because coordination between central banks from different monetary jurisdictions is more urgent than at any previous point in the history of monetary law as the influence of decentralized and centralized financial technologies, the proliferation of modern innovations and the expanded exploration of the public digital money issuance (not merely at the level of experiments but also through ready-made legislative packages) relativises the scope of established monetary legal principles and glossaries.

The specificities of the central bank's jurisdiction must primarily be understood through the fact that the central bank is at the same time the primus actor of monetary order, creates its own legal framework, because over time the field of its tasks and activities have significantly expanded and become more complex, thereby influencing the gradual fragmentation of monetary law and the emergence of new specialized disciplines such as Central Bank Law and Monetary Policy Coordination Law, which *ratione materiae* adopt methodological approaches distinct from those of (general) monetary law. The classification of monetary law itself into procedural (which encompass the body of legal norms that determine the conditions for the establishment, operation, and jurisdiction of monetary institutions) and substantive (which governs the content of public monetary-legal relations in the context of regulating the national monetary system, but also monetary relations containing a foreign element or an element of extraterritoriality, such as contemporary domains such as public debt management and the provision of international financial assistance) implies a clearer demarcation of a central bank competencies. According to the above, in the first part of the paper, the author will deal with the issue of functional analysis of the concept of monetary jurisdiction, which is traditionally linked to the territory of the state within which the central bank, as the supreme monetary institution and guardian of monetary sovereignty, exercises the role of the main actor in shaping and improving public monetary management (where the concept of monetary jurisdiction emerges as an inviolable expression of the principle of *lex monetae*), while in the second part of the paper, the author will identify the challenges in defining clear boundaries of monetary jurisdiction when public monetary prerogatives acquire an unconventional "informational dimension", i.e.,when there is

a kind of programming of the issuance of sovereign money by the central bank that enjoys a monopoly over its issuance, which ultimately requires a broader conceptual approach to understanding monetary jurisdiction, one that recognises the effects of new "technological" norms, in shaping emerging monetary legal solutions, as well as the extended spatial and material scope of existing ones. It seems that the central bank is becoming (perhaps inadvertently) a participant in the metaverse, which does not necessarily have to be seen negatively or as a development having an eroding effect on all the achievements of the monetary legislators. Instead, this may be viewed as confirmation of a centuries-old truth: in circumstances in which the purpose and principles of an established and somewhat "dormant" legal order are abandoned, forgotten, or ignored by its addressees, more specifically, citizens as monetary users, that order is compelled to intensify its search for new and more innovative solutions that enable the continued survival of what has already been created within a transformed environment.

That happens either through derogation (in this case, through amendments to the laws governing the work of the central bank that hypothetically foresee the emergence of private money, or establish a legal basis for issuing digital money) or through adoption of a new legislative package whereby the older (classical) monetary legal documents are adapted to new trends that cross the path from the domain of innovation into generally accepted principles and categories (after all, it should be emphasized the fact that the concept of monetary jurisdiction has already successfully undergone substantial and formal changes in its content with the emergence of electronic money, which once, just like paper money, represented first a technological, then an industrial innovation, but with a strong imprint of the social theory of money (highlighting what citizens wish to use as money and what they recognise as possessing that status)).

At this point, it appears that behind every instance of state nominalism and its acceptance, there is an echo of the postulates of the social theory of money as well, because, the fact that the state is the sole territory empowered to determine what money is in the legal sense does not it itself carry decisive weight if citizens show more trust in other (alternative) currencies, or nowadays, other forms of money (setting aside, for a moment, academic debates on whether central bank digital money constitutes a new form or a new kind of sovereign money). Consequently, some compromise is necessary if one seeks to recognize currency as a document on the state debt (and arguably of societal debt as well) in the true sense of the word, with all the consequences and effects this entails in the context of judicial protection and the financial user's rights to have a solid and stable currency, which is one of the basic determinants of their living standard.

Today, many regulatory agencies may wish to extend their regulatory powers to a new, uncontrolled area, making the problem of identifying the appropriate jurisdiction in the context of decentralised finance extremely complicated and still poorly defined. Unlike traditional assets, digital assets are not controlled by a single agency or a centralized exchange, which can create intra-jurisdictional rivalries that require further attention (Orešković & Bajakić, 2024, p. 85). It is reasonable to suppose that the issue of public digital money also poses a substantial challenge for legislators, given that the growth of cryptocurrencies is the principal catalyst for central banks to launch digital currencies.

2. State Nominalism and Monetary Jurisdiction: The Subject-Matter Homogeneity of the Monetary Jurisdiction Structure

A close examination of the causes and consequences of trends in the current normative regulation of public monetary flows in European and international practice that constitute the *telos* of positive monetary legislation, we can see that the axiological matrix of monetary law in the years after the global financial crisis (2012) and, especially, in the post-pandemic circumstances (2022) has been significantly redefined in a way that brings this branch of the positive legal system closer to the everyday needs of citizens and, additionally, conceptually articulates and justifies its existence as an independent legal discipline. The state theory of money had a dominant influence on the conception of monetary jurisdiction in the early phase of the establishment of monetary legal thought and constituted an unavoidable starting hypothesis for every question and problem concerning the determination of the scope of monetary legal regulation. It is interesting to note that research in the field of analysing and interpreting the conceptualization of money as a legal phenomenon almost completely ceased in the middle of the last century, which is very surprising considering its legal importance. During that period, and until recently, money was researched exclusively in the domain of economic sciences. Although this research is necessary and closely related, because defining money in a normative sense requires prior knowledge of its economic functions, within monetary law, unlike in monetary economics, money is not a static concept, but a "legally imposed faith" in the context of the aforementioned state nominalism (Rahmatian, 2020, pp. 3-5).

The oldest function of money is the function of a medium of exchange, where it is exchanged for relevant goods and services on the market when satisfying different consumer preferences. Money also represents a means of accounting through which the price of certain goods and services on the market is formed and expressed, and at the same time, it appears as a measure of value preservation that enables the preservation of its purchasing power, that is, its transfer over time. However, in economic analyses, money is primarily viewed as a good, and according to its postulates, money is understood as a special good that has the function of a medium of exchange and a measure of the value of other goods, which was the dominant doctrine in the Middle Ages when gold and silver as precious metals were the subject of debt (Hirschberg, 1971, p. 13).

In today's conditions, the aforementioned functions can manifest themselves differently in different circumstances, sometimes in a way that is not mutually consistent or in a way that economists cannot adequately understand due to the characteristics that arise from money as a dematerialised asset, which is why there is a justified need to provide an optimal legal definition of money. It is undeniable that money in contemporary society is a product of the legal system; like all other property, it is created, given meaning, and eventually vanishes through the application of the law. For this reason, its nature and essence should be examined primarily as legal categories before moving on to economic and other analyses. In contrast to other types of purely civil legislation, adequate monetary legislation must be positioned so as to realise the general social interest of a particular community. Accordingly, it cannot be reduced to a minor exercise in skillful legislative drafting that should pose no difficulty for a competent legislator (Dimitrijević, 2023, pp. 7-31).

The main reasons for supporting the principle of nominalism are the following: the protection (survival) of the government, which is the primary debtor in modern public loan policies, and the fact that the expression and management of credits and loans in the modern economy are based on monetary nominal value. In this regard, it is believed that any deviation or departure from the nominalist solution would permanently disrupt the balance of the contracting parties' rights and obligations, as well as the state of assets and liabilities in financial statements (and other relevant accounting documents). However, it should be noted that this theory is also founded on the fiction that the value of the currency before devaluation is equivalent to the value of the currency following depreciation. A potential problem with current monetary law stems from the inadequacy of the monetary nominalism principle, which states that "a dollar is always a dollar and a pound is always a pound" in terms of the legal interpretation of changes in a currency's economic value. As a result, supporters of alternative legal and economic theories for defining the concept of money have established a new method in the form of a value approach, which is based on the purchasing power of currency.

A significant determinant of monetary jurisdiction and the entire monetary order is also the issue of credibility of central bank performance, by which we mean the normative regulation of flows and mechanisms for the implementation of monetary policy that are derived from the prevailing theories on the legal understanding of money. The institutional theory of the legal understanding of money, integrated into constitutions in the form of state nominalism, suffers certain limitations due to the increasingly pronounced external effects of the principle of *lex monetae*. It is slowly giving way to the so-called transnational legal theories of money, because it is noticeable - especially in the example of monetary unions and the influence of the digital revolution on the development of monetary innovations - that the act of legal regulation of money is not only a state sovereign act in the sense of its monopoly on determining legal tender for its issuance. The activities of commercial banks and, generally speaking, participants in the monetary sector cannot be ignored, as they require recognition to a certain degree, which is certainly not dominant but inevitably exists (Chadwick, 2022, pp. 468–470) in order to establish a balance between the nominal and real (purchasing) power of money (Dimitrijević, 2023, p. 201).

Generally speaking, central bank digital currencies' influence on legal tender may depend on the specific models of digital currency, once public sovereign digital money enters the financial market it will likely facilitate the circulation of currencies whose national spheres of influence differ from those currently prevailing, and create the competition between payment means, namely digital legal-tender coins issued by central banks and stablecoins, which are likely to play a parallel role (Zatti, 2023. pp. 73-74). The biggest obstacle to any central bank's digital currency exploration and initiative aimed at achieving wider (or global) adoption is its ability to assess banking conditions while adhering to the financial stability and integrity of the banking system, while also understanding the necessity of enhancing the efficiency of the payment network by incorporating the evaluation of decentralized financial technology while protecting user privacy (Sanz Bayón, 2025, p. 344). The mentioned aspiration is to position it as a globally accepted currency that profoundly affects the domain of monetary jurisdiction.

3. The Impact of Technological Innovations on the Implementation of Monetary Legislation

The technological revolution has largely redefined the patterns by which the financial sector is regulated according to the model of the so-called the "silo approach", according to which the financial system is divided into semi-autonomous groups of entities that (for a long time) included exclusively banks, insurance companies and investment companies with a special emphasis on prudential measures that guarantee stability and protect the rights of financial consumers (Gąsiorkiewicz & Monkiewicz, 2024, p. 7). The trend of mass digitalisation has brought with it not only new entities entering the market, but also new processes, payment platforms, and the emergence of new risks that were not characteristic of the financial market until then. Technological innovations have changed the financial landscape, bringing with them not only new ways of satisfying consumer preferences but also enabling the entry of new market participants, the development of different business models, and fundamentally altering the level of aggregate supply and demand for financial services, which has significant effects on both general financial stability and monetary stability, and for this reason the mandate (and therefore the domain of monetary jurisdiction) of the central bank faces numerous challenges in practice (Moenjak, 2024, p. 7). The influence of the technological revolution in contemporary monetary and central bank law has led to the technology's "disorganisation" of money (where the dematerialisation of money is a sophisticated function of institutional specialisation), producing operational despecialisation that undermines the foundation of fiat money as legal tender (Zatti & Baressi, 2024, p. 197).

The impact of monetary innovations on the understanding and interpretation of monetary sovereignty has never been so pronounced in practice until the emergence and development of decentralized financial technologies. Although at the very beginning of their application, it did not seem that they could significantly change how the issue of legal tender for the issuance of money could be affected in any meaningful way, in the post-pandemic circumstances, with greater reliance by consumers on the internet-based services, significant problems (doubts) have emerged in the context of the scope and field of application (validity) of monetary legislation. Today, there is almost no monetary jurisdiction in the world that does not deal with the issue of adapting the *lex monetae* in the digital environment, which in effect transforms it into a *lex monetae financiera cryptografica* (Blair, Zilioli & Gortsos, 2023, pp. 220–221).

The challenges with the implementation of monetary legislation, and thus the domain of monetary jurisdiction, arose as a result of the intensive development of decentralized financial technologies, which also influenced the emergence of new services on the financial market. At the same time, the development of these technologies has changed the very structure of market intermediaries and enabled the development of new online financing platforms in the form of so-called group lending (where specialized online platforms provide safe, legal, and reliable lending of money) and crowdfunding (where online platforms enable safe financing of certain projects by collecting smaller amounts from a larger number of participants), which was not previously a practice on the financial market (Arner *et al.*, 2019, pp. 73-76). These changes have become inherent not only in the manner

and circumstances observed in the functioning of the financial market but also in the foundations of public monetary management. Thus, at one point in the role of issuers of (fiduciary) money, we find individuals and technological and telecommunications companies that, as subjects of private law, do not have the necessary knowledge and skills to issue money as a secure means of payment, nor, by their nature, can they guarantee judicial protection in the case of a dispute and the protection of private and other sensitive financial data transfers. Although in the first years of using private digital money, it seemed that it could not in any way relativise the circulation and functions of public money, over time, the popularity of using private digital money, along with the acceptance support of large technological companies, has triggered justified discussions about the position of the central bank (or rather, its absence) within this framework.

The efforts that the central bank had to undertake to conduct timely research into the potential issuance of digital money have now become necessary and many times greater than if the same research had begun promptly in parallel with the very emergence and early indications of the growing trend in the use of private digital currencies. The reason for this initial disregard of private currencies can be seen as a kind of central bank underestimation of them by the supreme monetary institution, endowed with the monopoly right to issue money—a prerogative that, for centuries, no subject of public or private law could meaningfully contest. In the process of implementing the monetary law principles, the legislator in the circumstances of the information revolution, may face not only challenges arising from the impact of decentralised financial technologies on the protection of monetary users' rights and on public monetary management, but also challenges relating to the sustainability of monetary innovations introduced by the central bank itself as the guardian of monetary sovereignty.

Also, statements by international monetary institutions in this period, such as those issued by the IMF, did not express the slightest concern regarding the position and use of official money in comparison to private money, nor did they contain a scenario that could predict its decline. This delay in recognising the need to explore the application of technological innovations in the context of programmable legal tender is not, per se, especially dangerous for monetary stability; rather, it has merely diluted, and perhaps slightly diminished, the previously lulled (dormant) position of the central bank, which had jealously guarded monetary sovereignty for itself. It may be argued that the emergence of private digital money is merely another indication that a residue of monetary sovereignty persists in the consciousness of citizens who, by their collective agreement, constituted the state as a social community and delegated to it—and subsequently to the central bank—the very right to issue money as a means of payment. Therefore, it seems that monetary sovereignty is not just a part of political sovereignty and an ideological concept of what money represents for the state and society, but an issue inseparable from human nature, because it should be recalled that the mere fact that the central bank gives a certain object the property of money has little significance in a world in which citizens are unwilling to use that money and adhere instead to alternative monetary patterns.

The emergence of this "unfair" competition between private digital and sovereign money, although once unimaginable (because monetary history is full of examples in

which certain monetary innovations similar to digital money have become just a relic of the past), has indeed stimulated the developmental and research capacities of the main public monetary authorities to guarantee citizens, in the circumstances of the post-information society, not only the right to a solid, stable and secure currency but also the right to use monetary innovations, whether created or controlled by the central bank as an institution that must take into account new ways of satisfying the preferences of users of financial services within the territory in which it exercises its sovereign monetary authority. Therefore, it may be observed that, in recent years, the central bank has increasingly focused on its role as the principal, though no longer the sole, monetary innovator, thereby demonstrating that it is, much like the legislation it produces, flexible and receptive to the evolving "tastes" of monetary users, which once again demonstrates the vitality of this institution, an institution that can hardly be characterised, despite occasional claims to the contrary in some regional studies, as a traditional public administration body, given that its pronounced dynamism and innovative orientation clearly suggest otherwise.

Credible and transparent actions and judgments of central banks regarding the digitalisation of *lex monetae* are necessary to prevent doubts regarding monetary jurisdiction and the judicial disputes that may arise in this regard. Different approaches of monetary jurisdictions to the issue of issuing public digital money can lead to monetary competition between different forms of public money, with numerous repercussions in the field of clearing and international payments, but they also signal the need to take a more universal approach to this issue through international initiatives and cooperation benefits. Numerous such initiatives and projects can be identified in international and comparative law, including the work of the Bank for International Settlements, the European Central Bank, and the Hague Conference on Private International Law, which deal not only with the costs and benefits of introducing sovereign digital money but also with the judicial implications of disputes that arise or may arise in connection with its use. Although at this stage it is still too early to give specific conclusions, certain key issues can nevertheless be identified.

What adds to the complexity of the issue of monetary jurisdiction in the context of the technological revolution is the fact that for the first time, the central bank cannot regulate it independently (at least not in all its aspects), but rather requires cooperation with experts, including those who do not come from the field of law (at least not monetary or economic law), but from the field of technological sciences, who are essential for developing comprehensive solutions concerning public digital currencies. Such a process of cooperation requires both time and comprehensive research on the costs and benefits of issuing digital money within the internal monetary order, as well as on its external effects, which must be determined and monitored with special attention in international payment transactions. Also, to avoid unnecessary confusion in the field of the concept of monetary jurisdiction, it is important to highlight the difference between fiduciary money and money in the legal sense (as a legal document on the debt of a state), because from a monetary legal perspective, "not all money is money in the legal sense (regardless of the identical terminology), whereas all money in the legal sense is indeed money" (Proctor & Mann, 2022). The existence of legal and fiduciary money implies a difference between the official monetary unit (currency) of a country, which enjoys judicial protection, and

monetary innovations created by individuals, which may or may not have protection. Of course, it should be borne in mind that sovereign money also once represented a certain type of innovation, which is especially noticeable in the example of the use of electronic cards, but, on the other hand, the number of monetary innovations is not proportional to the number of those that have come into legal existence and that have over time become part of official monetary policy and received appropriate legal treatment and protection. At the same time, it is difficult to imagine that, even with the issuance of public digital money, private digital currencies would cease to exist, but, rather, a limited degree of their legalisation in payment transactions may be expected (through the establishment of some type of supervision and control carried out by the central bank). Finally, citizens' faith in a particular type of CBDC will depend on its stability and scalability as a store of value, its dissemination, and a robust payment system that must be secure from cyberattacks if such currencies are to play a dominant role in the monetary sphere, with open profit models and central bank regulation forming, alongside stability and technological resilience, the four frontiers of the "industrial currency revolution." (Avguleas & Blair, 2024, p. 112).

4. Concluding Observations

The concept of monetary jurisdiction was properly shaped during the period of development of classical monetary legislation, in which technological innovations did not have such an impact on the mechanisms of financial and monetary flows in practice in the manner characteristic of the present moment. As such, the concept of monetary jurisdiction was an untouchable axiom of monetary law because the authority of the central bank as the supreme monetary institution could never be called into question, and the very idea that natural persons could be found in the role of the issuers of public money seemed an almost impossible scenario.

The achievements of the digital revolution have largely redefined some of the established postulates of classical monetary legislation, particularly those that for centuries constituted its central core, around which all other categories, values, and doctrines were gradually constructed because the establishment of the exclusive right of the central bank to issue money is the first historically regulated monetary law relationship that represented the basis for the further development of monetary legislation. The issue of determining the territory in which the central bank exercises sovereign monetary power is inextricably linked to this and cannot be analysed separately from it. The need to establish clear boundaries of monetary jurisdiction is not only a theoretical issue, but also a preliminary question of practical importance, because it can influence the decision of financial users to choose digital currency, or rather, to opt for that form of digital currency that offers them more certainty and legal predictability, which is characteristic of well-regulated and consistent monetary jurisdictions. It should be borne in mind that at this point, the issue of precisely defining monetary jurisdiction cannot be fully regulated because the initial requirement that arises in monetary legislation is to amend the law on the operation of the central bank, which provides a legal basis for issuing digital money, determining its taxonomy and the benefits and costs of its use in practice.

The matter of a clear definition of monetary jurisdiction further complicates the upcoming use of digital money in payment transactions in cross-border transactions, which will probably require the use of special platforms to eliminate or reduce the costs of converting one form of digital currency into another, which further requires profound and efficient cooperation with international monetary institutions. However, although the domain of monetary jurisdiction is presented as a complex and multi-layered problem with numerous legal and economic repercussions, it should be noted that this will follow as a natural and logical phase in the establishment of sovereign digital money and after a certain initial period of application has passed, it can be presumed that the legislator will have a much clearer picture of the limits of the widespread use of public digital money and the effects that accompany its application. Also, taking into account the competition of the leading monetary jurisdictions in the world and the ultimate dominance and enthronement of the "world currency" in the field of validity of new monetary regulations adopted in the spirit of digitalisation, the external effects of the use of new digital currencies will be much more pronounced and noticeable than in the case of traditional currencies, which is a very sensitive issue that further complicates the position of smaller monetary jurisdictions in a highly globalized monetary order, which is also extremely unfair in this context. Yet it should be remembered that every issue related to the use of a national currency ultimately reflects the level of development of the domestic economy.

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JUDICIARY AND EXISTENTIAL THREATS: BETWEEN ACTIVISM AND SELF-RESTRAINT

Abstract

Humanity is facing some of its greatest contemporary threats. As concentrations of greenhouse gases rise and average temperatures reach record levels, extreme weather events are occurring with increasing frequency across the globe, bringing death, famine, and poverty. Similarly, as the widespread use of artificial intelligence becomes a reality, the replacement of human labour by machines is accelerating, often without any plan for the relocation or reskilling of affected workers, potentially causing or deepening employment crises on an unprecedented scale. In circumstances such as these, judicial intervention is likely to be demanded more frequently, especially when difficult decisions must be made and policy-makers or legislators, at the national or international level, hesitate to act due to potential political costs. While judicial intervention may be desirable when other public authorities remain inert, it also carries the risk of excessive activism and a lack of due self-restraint. This paper examines judicial intervention in the face of the existential threats confronting humanity today and argues that such intervention must be exercised with critical judgment and parsimony in order to avoid misuse. Although debates on the thin line between necessary and abusive intervention are not new, it is important for them to be reconsidered and perhaps reframed precisely because the present context may require a more proactive judiciary. Given the urgency of adopting measures capable of responding to new challenges, at a pace usually far exceeding that of political and legislative processes, the balance between judicial activism and self-restraint requires renewed attention. To this end, this essay analyses the relevant literature on matters involved, mainly the concepts of activism and self-restraint, as well as the main critiques associated with both concepts, and seeks to offer, even modestly, a contribution to understanding the need, possibilities, and limits of judicial intervention when humanity faces threats of enormous magnitude to its own continuity.

Keywords: existential threats to humanity, need for judicial intervention, activism, self-restraint.

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1. Introduction

Objective data indicate real improvements in people's living conditions in recent decades: substantial drops in infant and maternal mortality; increased life expectancy at birth and reduced childhood deaths from infectious diseases; healthy aging in both physical and mental terms; a decline in malnutrition and mass hunger, with a corresponding decrease in related deaths; an increase in average income around the world, through enrichment of countries and eradication of extreme poverty; general decay in social inequality; the widespread adoption of measures of environmental quality; a decline in the number of conflicts since the end of the Cold War; downward trend in homicides; broad implementation of safety measures, with a decrease in deaths from traffic, air accidents, labour accidents, natural disasters, and other misfortunes (such as drowning, falls, fires, and poisoning); reduction in the number of victims of terrorist acts; an increase in the number of democratic States that respect human rights; dissemination of literacy and basic and university education; an increase in quality of life, through gains in labour rights, access to cheap electricity, more leisure time and affordable means of communication and transportation; and an increase in technology and science (Pinker, 2018). Due to this set of circumstances, Pinker argues that humanity is experiencing a *New Enlightenment*.

However, as the crises of our time deepen, this trend of progress may be at stake. True existential threats, that is, risks both to the permanence of human existence itself and to the continuity of historical social achievements, have recently emerged or become more intense, reaching great destructive potential. The incidence of these threats may cause significant social unrest, such that, in the absence of sufficient answers from domestic and/or global governance bodies, the debate on their prevention, response, and mitigation may end up being displaced from the traditional decision-making *loci* – parliaments and governments – to the judiciary, eventually leading to a decision-making style that could be considered invasive.

This paper aims to examine the consequences of discussions about existential threats being transferred from the legislative and executive branches of government to courts, especially in a scenario in which there is broad and growing judicialisation of various aspects of politics and life. It will also explore how these impacts increase tensions between the ideas of judicial self-restraint and activism. It will initially provide general information about what could be seen as existential threats, analysing some of the most potentially pernicious ones. Afterwards, it will evaluate the way in which decision-makers are confronting them, and how human attitudes in the face of challenges can prevent, or not, situations of collapse.

Subsequently, it will address the growing judicialisation of everyday issues, with more frequent interference by the judiciary in aspects of society and even politics. It will analyse how a pro-judicialisation context facilitates courts' submission, in domestic or international jurisdiction, of aspects pertinent to these existential threats, especially when they are not adequately addressed by the executive and legislative branches, at the states level, or, at a global level, by international organisations; as well as the effects of judicial addressing of issues of this nature with regard to the competing themes of self-restraint

and activism. In substance, it hopes to provide a small contribution to the debate on the role of the judiciary in light of an existential-threats scenario, especially considering the tension between self-restraint and activism, providing some support for possible future developments. And, above all, it intends to encourage the improvement of the discussion, stimulating scholars to focus on this very relevant topic.

2. An Era of Existential Threats to Mankind

Diamond, writing about past civilisations that have succumbed, conceptualises "collapse" as "a drastic decrease in human population size and/or political/economic/social complexity, over a considerable area, for an extended time." (Diamond, 2005, p. 17). When analysing the causes of the collapse of these societies, the author mentions five possible factors: *environmental damage*, more or less intense due to the more or less reckless behaviour of people, as well as due to a greater or lesser fragility of their environment; *climate change*, resulting from either greater heat or greater cold, caused by natural processes or by human activities; *hostile neighbours*; *the absence or reduction of support from friendly neighbours in the face of hostile neighbours' attacks*; and *the reaction of societies to their problems*, depending on political, economic and social institutions and cultural values. Although the first four factors have not always been relevant to the decline of a specific society, the last one has always been significant (Diamond, 2005, pp. 26-31).

The causes of collapse mentioned provide an indication of existential threats that may also affect humanity as a whole, and not just specific societies. The first four causes, grouped together in pairs, will now be addressed, to which will also be added risks related to technologies and pandemics, and, in a more superficial manner, other threats. The last above-mentioned phenomenon, "societies' answers to their challenges", which refers more to the postures to be adopted than, strictly speaking, to threats, will be examined in a separate section.

Regarding (i) *environmental issues* – environmental damage and climate change, it is clear that, apart from scarcity risks (resulting from natural resources' overexploitation, loss of diversity and excessive pollution), technical data from the Intergovernmental Panel on Climate Change (IPCC) indicates that humanity is experiencing a *climate emergency*: greenhouse gas emissions and their concentration in atmosphere are reaching dramatic levels, resulting in a potential widespread occurrence of extreme climate events. To emphasise events with greater frequency and intensity the following has been stated:

> "Climate change is already being felt around the world and can have harmful effects on human and animal life, such as the now obvious rise in sea levels and its consequences for coastal areas and even entire States; but also the *permafrost* melting; the increase in the recurrence and intensity of extreme events (such as heat waves and substantial and violent rainfall, followed or not by devastating floods); droughts and tropical cyclones; and losses, often irreparable, in natural ecosystems, with mass mortality of animals and risks on food and water supplies." (IPCC, 2021; IPCC, 2023, pp. 10-12; Da Ros, 2024a, p. 129).

In practice, the last few years have seen successive catastrophic record-breaks: 2023 was the warmest year on record, with average daily temperatures reaching nearly 1.5°C above pre-industrial levels (Copernicus, 2023), but it was surpassed by 2024, in which the 1.5°C threshold was exceeded (Copernicus, 2025). Each of the thirteen months from June 2023 to June 2024 was the warmest on record in relation to the corresponding month (Copernicus, 2024).

As a result, climate tragedies are happening more frequently and with more intensity. For example, the Brazilian federate state of Rio Grande do Sul suffered three unprecedented floods in September and November 2023 and in May 2024, apparently due to an association of the natural phenomenon *El Niño* and climate change, with catastrophic consequences also due to deficiencies in its protection apparatus (World Weather Attribution, 2024). A few months later, at the end of October 2024, the Spanish city of Valencia and its surroundings were hit by torrential storms in a short period of time, followed by historic floods. The probable cause of the tragedy was the association of the phenomenon known as the "Isolated Depression at High Levels" with climate change (World Meteorological Organisation, 2024). In the aforementioned cases, in addition to the immense property losses, hundreds of deaths occurred.

Climate change, therefore, is not something to fear in the future. It is a factual reality that must be addressed immediately, especially because it can lead to existential threats by combining multiple negative consequences: increased food and water shortages; housing crises, as populations lose their homes to natural disasters or coastal sea-level rise; employment crises, as the economies of many places around the world could be put at risk, in terms of loss of means of production (factories, machinery, crops, seeds, agricultural implements, stocks, etc.) and of a lack of capital available for investment, financing of production and the construction and maintenance of basic infrastructure (roads, bridges, ports, airports, etc.); losses in physical and mental health in the populations directly affected;[1] and so on. All of these facts could jeopardise the structure of human societies, not only putting food and water supplies at stake, but also leading to notable population impoverishment, humanitarian crises, and ultimately, waves of migration that would probably be much greater than those Europe and the United States are currently facing.

Apart from environmental issues, the world seems to be headed towards the risk of (ii) *deterioration of relations between States*, including problems with other States, whether neighbouring countries or not,[2] whether in terms of hostilities or in terms of dissent (or loss of support) from ex-partners, as mentioned by Diamond. In addition, *hostility*

[1] In a recent text, I defended the idea that people directly affected by climate tragedies, due to their material damages (such as the destruction of homes and the objects that furnished them, the devaluation of remaining assets and unemployment) and immaterial losses (such as the loss of social and community ties and cultural assets and references, as well as psychological damage) would be in a situation of *hypervulnerability*, which would not be the sum of all the vulnerabilities (economic, social, cultural and psychological) suffered, but something worse: a set of interdependent and intertwined vulnerabilities. For more details, see Da Ros (2024b).

[2] In his analysis, Diamond (2005) talks about crises with neighbouring societies, which makes sense considering the past societies he examined. However, the current ease of transportation and communication has made the world much closer, so it is feasible to consider that possible problems with geographically distant States are also relevant as a possible existential threat.

between people, political polarisation being the most visible aspect of it, and *hostility towards liberal democracy and human rights*, also seem to be increasing. These hostilities seem to be acquiring new characteristics as humanity faces what has been called the "Second Cold War", antagonising the United States and China. This new dispute is already a major challenge to world order (Ferguson, 2021, pp. 352, 377), as it exposes a rebalance of power that is fertile ground for new conflicts (such as the Russian invasion of Ukraine) or the intensification of old ones (such as the mutual attacks involving Israelis and Palestinians), and as it revives the old fear of the use of nuclear weapons, itself a major potential threat.

Even if the "war" remains "cold," tensions may still arise (for example, because of China's aspiration to annex Taiwan). Major disruptions in global supply and demand may occur as trade disputes intensify; and there may be huge difficulties in constructing solutions to common concerns, such as climate change (Roubini, 2023, pp. 235-249), or threats to social stability resulting from artificial intelligence (hereinafter: AI), especially when China is investing substantial amounts in the development of this technology (Lee, 2019).

Correspondingly, many individuals seem increasingly distrustful of institutions, a situation that culminates in the weakening of the social fabric. That disbelief, together with other phenomena, may propel authoritarian populisms, commonly based on anti-systemic and/or denialist discourses. These attitudes are often supported by fake news and conspiracy theories, and are used to undermine the foundations of democracies and science itself, especially if, as seen during the SARS-CoV-2 pandemic, democracy and science challenge the political and life aspirations of authoritarian rulers (Ariely, 2024; Ferguson, 2021, pp. 320-324; Levitsky & Ziblatt, 2018).

In short, the world today sees great fragmentation in the relations between States, a fragmentation that is reproduced at the interpersonal level, in which discord prevails in many contexts. If the reduction of hostilities and the formation of alliances seem to be essential steps to provide better conditions in the future, as will be seen below, and if drastic measures by common agreement should already be established with greater robustness at this very moment, hostile attitudes between States and people are huge obstacles to the adoption of indispensable measures.

Besides, (iii) *algorithms and AI* present themselves as potential agents of social disintegration. There is some fear of a possible loss of human control in the face of superintelligent machines as well as a lack of transparency and contamination by prejudices or biases regarding algorithms, or, more palpably, massive job losses. Indeed, while a robot apocalypse seems unlikely, the more mundane problem of unemployment must be addressed. As deep machine learning spreads in the global economy, many types of jobs will likely disappear. So, the risk that AI will replace significant percentages of workers, regardless of their specialisation – from individuals with postgraduate degrees to blue-collar workers – is real.

The impact will be much greater in comparison with previous technological revolutions, encompassing activities that can be optimised using data and do not require social interaction. At the same time, rising unemployment could be accompanied by a huge concentration of wealth in the hands of technology tycoons, given the enormous potential

for profits and improvements in technology itself,[3] and as underdeveloped countries may lose the opportunity to grow by exporting cheap manufactured goods. The combination of high unemployment rates or employment in worse or lower-paid occupations, even though new occupations may emerge precisely from new technologies, and increased inequality, could lead to great social unrest and political collapse, driven also by resentment arising from uncertainty about the future and social inequality (Lee, 2019, pp. 33-35, 175-182). Even from an economic point of view, the situation could be disastrous: if people earn lower wages or no wages at all, consumption will consequently diminish, failing to drive demand, which is fundamental to sustained economic growth (Roubini, 2023, p. 215).

For Harari, the issue of what will be done with people without jobs and without employability conditions, thus seen as superfluous, is the most important one in the 21st-century economy. If before, when human physical functions were replaced by mechanisation, it was still possible for human beings to perform cognitive functions, what will happen when algorithms replicate them better? There is no guarantee that there will always be some exclusive human ability, unattainable by non-conscious algorithms. With human beings out of the labour market, wealth and power could be concentrated in an elite, the owners of these algorithms, creating unprecedented social and political inequality. It could create a society with many people with no economic, political, or artistic appreciation (by others). Even if the technological bonanza is able to keep them fed, what will keep them occupied and satisfied, in other words, with some kind of purpose in life (Harari, 2016, pp. 321-330)?

Work not only provides income but also gives meaning to people's lives and to communities. Since work has had an impact on the construction of cultural values for centuries, many people associate personal value with their profession. The absence of work means the loss of personal purpose, an absence that does not seem sufficiently filled even if governments grant everyone, especially the unemployable ones, a universal basic subsistence income, maintained by the extraordinary gains of the digital revolution (Rees, 2021, pp. 90, 95; Lee, 2019, p. 35).

The impacts will come soon, since many artificial intelligence creations that increase productivity are just digital algorithms, which can be immediately reproduced anywhere in the world, practically free of charge, and which, once disseminated, can also be improved instantly and at no cost; there is a large investment in the development of these technologies; and the intense participation of China, with its large population, its aggressively competitive environment and availability of personal data (less protected than elsewhere), will also catalyse advances in the area (Lee, 2019, pp. 182-184).

Pari passu, there is also the obvious problem of transparency in the use of algorithms. The processes that lead machines to make decisions are not known for sure, partly because they may consist of corporate secrets (O'Neil, 2020, p. 15). If actions such as medical

[3] Deep learning leads to better data, leading to better products, attracting more users, whose consumption will generate more information and, thus, more data, which will further improve the product. Most talented programmers are also attracted by leading companies, increasing the gap between the leaders and the others, and even between the countries that started first, notably the United States and China, over others. Cheap labour, previously the main economic advantage of poorer countries, will not matter so much when factories are almost fully automated (Lee, 2019, pp. 175-182).

referrals for surgeries, employee selection, and credit qualification are delegated entirely to algorithms, they could bring serious consequences to people's lives, with no possibility, in practice, of challenging unfavourable decisions, as the reasons behind them are unfathomable (Rees, 2021, p. 89).

Since mathematical models usually do not have data for the behaviours of interest, they often employ approximate indicators, or proxies. If generalizations serve to dictate many of the social interactions and possibilities that people will have in life, even if errors are corrected, models will always be, by definition, simplifications, proving themselves unable to include the complexity of the real world or the nuances of human communication. Some information considered irrelevant may be excluded, "blind spots" that, however, reflect the judgment and priorities of only the programmers. Thus, these models, to a certain extent, may reflect objectives and ideologies, including mistaken biases and, to make things worse, even racist opinions. Therefore, probabilistic mathematical models can turn the lives of real people upside down, which is particularly worrying if there is little chance of being able to challenge by those affected, and little chance of change in the algorithm by their programmers, who often lose sight of people and are guided only by feedback that, when not purely pecuniary, is inefficient or also biased (O'Neil, 2020, pp. 18-23, 29-47). In practice, data like this could be concentrated, as well as the power to decide important events in people's lives (obtaining credit and financing, getting a job, receiving government assistance, having a right fulfilled or not, etc.), in the hands of a few algorithm owners, without these owners allowing the proper review of the codes and their underlying biases.

As a result, it is possible to consider that, on a global scale, there will be a great concentration of information and decision-making power in those who already hold great economic power, with all the negative consequences this can entail. Alongside *unemployed* or *unemployable* people, there would also be people dominated by machines that decide important aspects of their lives through flawed, if not racist, sexist, or xenophobic algorithms, which would not be subject to contestation. This would result in a high probability of massive human rights violations and great social unrest, also exacerbated by other exclusionary factors, such as involuntary unemployment itself.

If this were not the case, social media algorithms could reinforce polarized, even irrational and risky, behaviours. Individuals tend to uncritically accept information from these media, rarely checking or cross-checking it with independent sources. This is especially true if the information corroborates preconceived beliefs (*confirmation bias*) and/or partisan identification.[4] To make it worse, social media, by prioritizing the choice of content based on

[4] To be noted, for example, a study on individuals' perceptions of climate change: "[…] people seek and interpret information that is consistent with their political ideology and party identification, and selectively expose themselves to news media that is consistent with their existing motivations and beliefs.

Conservatives may seek evidence that challenges the scientific knowledge regarding climate change, which aligns with their existing knowledge acquired from political leaders whom they trust. […]

[…] people's political motivations shape their visual attention to climate change evidence, which influences their perception of the evidence and subsequent actions to mitigate climate change. These altered perceptions and actions can reinforce their initial motivations, further entrenching the divide [between conservatives and liberals]. To put it simply, what you believe influences what you see, and guides your future actions.

previous preferences and on engagement (in the form of viewing time and sharing), can end up keeping people in true "echo chambers", reinforcing their beliefs (including prejudices), and overloading them with information linked to negative facts, which cause indignation and reactions – emotions that are precisely the most engaging ones.

Thus, this is an era of "post-truth": people abandon conventional criteria of demonstration, internal consistency, and fact-checking, in favour of the possibility of choosing their own reality, with beliefs and prejudices overcoming facts and objective evidence. Correction of fake news is rarely effective, as people tend to continue to believe, even partially, in information that they know to be false; the dissemination of false information leads many to conclude that it is impossible to know the truth, preventing them from recognizing other messages as true; and the existence of other people who share the same false beliefs can lead to persistence in them (Przeworski, 2020, pp. 146-147).

Algorithms and technology, therefore, can bring additional challenges to the organization of the social fabric, whether in the form of disrupting the labour market by eliminating certain types of jobs; or in their influence on relationships between people, fostering biased, racist, and divisive attitudes, thus contributing to the hostile environment mentioned in (ii); or in defining political choices. Machines can be used for malicious purposes; they can take into account information full of errors or that divides people into tribes, disregarding their individualities. They are incapable of context, common sense, and equity, attributes exclusive to human beings. While human decisions can also be – and often are – biased and prejudiced, at least people have the virtue of openness to evolve, through learning and adaptation, while decisions made by automated systems remain stagnant until engineers change them (O'Neil, 2020, pp. 242-249, 314) – and that is if someone notices the error in the algorithm, and has the means to challenge it and is heard. In all cases, the uncontrolled action of machines in relationships between people dehumanizes them, making the world more prone to discord.

Also, (iv) *global pandemics* can cause major disruptions to societies and even jeopardize the future of humanity. The global SARS-CoV-2 pandemic demonstrated the fragility of human beings to the dissemination of a highly contagious and lethal pathogen. In reality, more than the virus itself, the spread and consequent mortality of a disease largely depend on networks built by human beings: the speed at which a pathology spreads is directly related, along with its virulence, to the structure of the network of the exposed population (Ferguson, 2021, pp. 119-127, 305).

If sudden and severe outbreaks have been felt more frequently since at least 1990, this is due to the new reality of the world: not only is there greater contact with pathogens existing in animals – whether because growing cities invade natural spaces, or because unhealthy customs are still maintained (such as the existence of markets for exotic animals), or because the raising of animals on industrial farms seems to make it easier for viruses that

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In our study, we presented a graph showing the global temperature change from 1880 to 2013 to participants. We found that the more liberal people were, the more attention they paid to the rising phase of the temperature curve (1990 to 2013) relative to the flat phase of the curve (1940 to 1980). This shows that liberals and conservatives naturally pay more attention to the part of the graph that is consistent with their beliefs." (Luo, Todd & Zhao, 2019).

infect entire herds to become more aggressive and for bacteria to become more resistant to antibiotics – but we are also experiencing a global society structured in more efficient networks. Pandemics are not entirely accidental, in the sense that much of their "success" is due to the characteristics of openness and rapid circulation of goods, services, culture, and ideas in today's world. No country on the planet can shape these flows alone. Although the connection is deep, no one has control (Zakaria, 2021, pp. 21-29).

The situation may be further aggravated by the tendency of more people living in urban areas, leading to the founding of new cities or the expansion of existing ones (Zakaria, 2021, pp. 121-128), always to the detriment of nature. This facilitates contact with new pathogens and their dissemination. In addition, global warming may cause the reemergence of disease agents once trapped in now thawed *permafrost* – agents that disappeared a long time ago or were confined there more recently, such as smallpox, bubonic plague, or anthrax (Wallace-Wells, 2019, pp. 128, 135-140). Current populations would not have adequate immunity to such diseases, hence their pandemic potential.

To make things worse, confirming what has already been said, ideas have gone viral on widely accessed social networks and, in the case of COVID-19, have even hindered sanitary measures. Damages to the fight against the disease resulted from the erratic conduct of authorities and from fake and conspiracy-based news, encouraging counterproductive behaviours, such as resistance to the use of protective masks and vaccination; as well as protests of (frequently unmasked) crowds against social distancing measures; the use of medicines and/or other substances that have been proven to be ineffective; etc. Alongside a coronavirus pandemic, there was an "infodemic" (Ferguson, 2021, pp. 320-324), a true crisis of knowledge that had little to do with the complexity of the scientific method or the scarcity of data on the virus at the beginning of the pandemic, but rather with partisan opinions. Experts' conclusions were disregarded by a portion of the population just because they were in contrast with personal beliefs and/or the opinions of party leaders (Zakaria, 2021, pp. 90-92); not on a scientific basis.

The SARS-CoV-2 pandemic, in addition to the extensive human mortality, caused immense damage to the global economy, closing industries and businesses and creating unemployment; caused mental illness; and further widened the rift in social bonds caused by polarization. New pandemic moments could be even more pernicious.

Finally, in addition to what has been listed, other interconnected *mega-threats* can be mentioned; they are defined by Roubini as serious problems capable of causing immense damage and poverty, which cannot be resolved easily or quickly. These are, notably: (v) *threats of an economic and financial nature*, such as the mega debt crisis; public or private bankruptcies; additional costs resulting from population ageing; "bubbles" resulting from easy money availability; major stagflation; and currency collapse and financial instability; and (vi) the *end of globalization* or "*deglobalization*"[5] (Roubini, 2023, pp. 12-13).[6] As one

[5] Zakaria understands that what humanity is currently experiencing is not "deglobalisation", but rather a *pause in globalisation*, as the global economy remains interconnected, even though it faces a period of reorganisation of international trade and investment (Zakaria, 2021, pp. 169-174).

[6] Roubini also mentions mega-threats related to AI, in addition to the risks of a new Cold War and climate change, not addressed in this section because they were addressed previously. Other threats, less probable, could

can see, there are plenty of factors that can lead to major global crises. The way humanity responds to these threats can determine whether society as we know it will succeed or not. This is the fifth factor mentioned by Diamond, which will be discussed below.

3. Human Responses to Existential Threats: Urgency and Insufficiency

Diamond believes that the inadequacy of ancient societies' responses to the problems they faced was relevant to the occurrence of their collapses in all cases studied (Diamond, 2005, pp. 27-31). Collapses of societies, regardless of their main reasons, invariably involved inadequate responses to the challenges they confronted. Disasters are seldom entirely exogenous events, and largely depend on human decisions. For example, locating settlements near potential disaster zones – such as volcanoes, geological faults, and floodable banks – indicates that natural disasters are also, to some extent, caused by human behaviour, or, in other words, the choices that people make. Likewise, the outcome of pandemics does not depend only on bacterial or viral lethality or contagiousness, but also on choices regarding the ease of transportation and porous borders – the more people are able to move between countries, the greater the contagiousness will be. Further, they also depend on social and community organization, in the sense that, if more people are put in vulnerable situations, for whatever reason like the need to use crowded public transportation to reach workplaces or the lack of focus on sanitary measures; or delay in acquiring available vaccines, they are more likely to be exposed to the pathology, which can exacerbate its effects.

All disasters are, to some extent, political disasters, even if they originate from other sources, including natural ones (Ferguson, 2021, pp. 21, 27, 112-113, 386). They occur due to a combination of factors, among which human choices are of great importance. If the challenges are considerable, then much of their resolution depends on the actual willingness to face the problems. This willingness must come from social leaders, notably governors and administrators.

World threats require global responses, which result from collective efforts, where some results can be achieved only decades later. This is clearly far from the comfort zone of most politicians, and the inertia in decision-making indicates institutional failure in long-term and global planning (Rees, 2021, pp. 216-217). Climate change is a case in point of this observation since "the effects of carbon emissions today will only be felt by future generations", this "serves as an incentive to postpone decisions that are, in fact, urgent." (Barroso, 2020, p. 351).

The inadequate performance by world leaders on many of the issues mentioned above can be explained by several factors: (i) sometimes, the leader will not expose himself or herself to criticism and even be ridiculed by pointing out what not everyone sees as obvious (Diamond, 2005, p. 525); also, (ii) there may be situations of intellectual inadequacy or

be named, many of which are more like Hollywood fiction than real problems, such as the fall of large asteroids. Although these should not be underestimated by authorities, who must develop action plans, they will not be addressed here, given their low probability and reduced sense of urgency, especially when considered together with other threats, which largely depend on human behaviour and decisions, and which are increasing.

lack of specialized knowledge (or its dismissal, when inconvenient); (iii) ideological blindness and contamination by heuristic biases; (iv) cowardice; and (v) bureaucratic obstacles (Ferguson, 2021, pp. 25-26, 73-76).[7] Added to this are the effects of electoral dynamics, since the price to pay for taking action could be high, especially if it involves unpopular decisions and demands for sacrifices from the population:

> "National policies are tied to the restricted spaces of national territories and to the short, indeed very short, times of electoral disputes, or, what is worse, of polls: narrow spaces and short times that evidently prevent state governments, interested above all in electoral consensus, from facing global challenges and problems with adequate policies. […] Nowaday's democracy is affected by localism and presentism: it does not remember or remove the past and does not take charge of the future, that is, of what will happen beyond the time of electoral mandates and beyond national borders. It thus comes into conflict with political rationality and the long-term interests of democratic countries themselves." (Ferrajoli, 2022, pp. 62-63).

There is a lack of globally coordinated action that is effective in dealing with problems that transcend national borders, and the governance models designed for the 19th century, very rigid and slow, do not yet seem capable of promoting it. Environmental disasters and pandemics, for example, require more agile responses, but political institutions often find themselves paralyzed by bureaucracy or counterproductive polarizations. This has the side effect of increasing people's discontent with governments and, mainly, with traditional parties, distancing them from politics (Lorenzetti, 2022, p. 215) or pushing them towards extremism – with effects ranging from institutional discreditation to populist rhetoric and empty or unfeasible promises.

Currently, while there is a consensus among credible scientists regarding the dangers posed by climate change, there is only a *declaratory consensus* among States on the matter, in which almost no one denies the importance of natural resources and the need to act in favour of the environment, identifying problems and raising awareness. However, there is a *practical disagreement*, characterized by the inability to take effective actions that go beyond mere rhetoric and beyond the creation of norms that are more programmatic than concrete (Lorenzetti, 2022, pp. 36-38). This is evidenced, for example, by the poor results in containing greenhouse gas emissions, even after the adoption of binding international normative instruments, such as the Kyoto Protocol (Wallace-Wells, 2019, p. 19) and the Paris Agreement.

As for AI, while there are currently no international regulatory norms addressing this issue, there are some governance initiatives, such as the *Partnership on AI*, which brings together several of the giant artificial intelligence companies – such as *Google*, *DeepMind*, *IBM*, *Meta*, *Microsoft* and *OpenAI* – featuring a commitment to cooperation in security

[7] Regarding bureaucracy, Lorenzetti mentions the replacement of *project democracy* by "*vetocracy*", which occurs when there are numerous actors – national and international, acting almost horizontally, in networks of power articulation – capable of preventing or delaying a decision. It leads to the contradiction that, in spite of the existence of more tools to know what needs to be done, the decentrality of power means that there is less capacity to effectively do so, especially in face of growing polarisation, through which everything is discussed without reaching agreements on anything – sometimes not even on basic points (Lorenzetti, 2022, pp. 176-184).

and responsible use (Russel, 2021, pp. 236-237). Nevertheless, the commitment to responsible use by private agents (profit-driven companies) alone would have little effect in preventing future harmful effects of technology.

The same logic seems to apply to other existential threats, such as pandemics, which lack international regulation that would unify procedures, prevent the spread of new pathogens, and regulate the flow and distribution of hospital supplies, vaccines, and medicines more effectively. Further, animosities between States persist and, as recent conflicts demonstrate, the mechanisms provided for in the United Nations Charter and international treaties seem to be insufficient to overcome them. In fact, if the problems that humanity is currently facing are at least to some extent caused by humanity itself, it stands to reason that they can be solved by mankind's own actions, provided that the necessary political measures are taken and that the key actors are willing to implement them.

New formats for international arrangements between States are already being proposed. For example, Ferrajoli advocates for a *Constitution of the Earth*, with its own constitutional institutions (Ferrajoli, 2022). One could consider a *model with semi-federative contours*, similar to the European Union, with intergovernmental and supranational institutions operating in different areas. Mangabeira Unger calls for a rethinking of the institutions of international law, promoting models of *coalitions of "those who want"*, which would consist of new intergovernmental arrangements that would promote the search for global public goods, initially alongside the United Nations and, later, transforming it institutionally (Unger, 2022, pp. 9-10).

In any case, as Kai-Fu Lee warns, there is no way to predict the future because it is not just a story about machines (or about climate change, pandemics, or conflicts), but also about human beings and their free will, and the way in which choices will be made to shape destiny. The future will be created by people and will reflect these choices (Lee, 2019, p. 11). However, in the absence of political willingness to promote real solutions, important questions will likely be submitted to judicial review, transferring the challenge from the Executive and Legislative branches to the judicial branch. This is what will be addressed next.

4. Increasing Judicialisation Context and Reflections on Judicial Activism and Self-Restraint

In the context of widespread and growing judicialisation, several issues related to existential threats require careful examination. These matters concern the recent growth of the judiciary's role in society, crisis litigation, judicial self-restraint and activism, as well as the challenge of drawing the line between abuse and the need for intervention.

4.1. Recent Growth of the Courts' Role

Recent years have seen the growth of the judiciary's role in society, especially through constitutional jurisdiction, where the judiciary is assuming a true protagonist's position (Feoli, 2014, pp. 8-10). In practice, "issues relevant from a political, social or moral point of view are being decided, as the last word, by the Judiciary", resulting in a "transfer of power to judicial institutions, to the detriment of the traditional political instances, which are

the Legislative and Executive branches". Having gained a central position in constitutions, this centrality radiates to constitutional courts. These courts have supremacy in the final and binding interpretation of norms, applying them both directly, as a basis for claims extracted from the constitutional text itself, and indirectly, as an interpretative parameter of infra-constitutional norms (Barroso, 2013, pp. 190-191).

The practical effect of this is to blur the boundaries between what is legal and what is political, making it difficult to differentiate between the creation and interpretation of law. Controversial issues that may have considerable implications for society as a whole are thus submitted to judges and decided by them, shifting some of the political focus to the judiciary. In the Brazilian case, for example, the *Supremo Tribunal Federal*, the country's Constitutional Court, has acted, under its constitutional jurisdiction, on public policy and/or socially sensitive or controversial issues, such as establishing the criteria for the State's duties in relation to medications assistance policies, especially regarding very expensive medicines that are absent from the public supply system; decriminalising the termination of anencephalic foetuses; criminalising homophobic or transphobic attitudes, equating them with the crime of racism; equating same-sex unions with heterosexual unions for marital purposes; etc.[8]

This new role played by the judiciary has given rise to multiple controversies, with questions being raised about the limits of its action and its democratic legitimacy to intervene in matters reserved for the public policy domain and the legislator's choices. In addition, it also entails the transfer of the burden of making decisions, mainly unpopular ones, to judges. Consequently, judicialisation is sometimes used by congressmen and public administrators as a way of avoiding (electoral) losses that they could suffer if the decisions that are originally in their purview were made by them.

In any case, whether judges like it or not, there is an increase in litigation involving public policy issues and parliamentary inertia. Certainly, a more restrained judiciary can, at least in part, discourage litigation involving public policies. However, such claims are largely independent of the judges' reactions, and many will probably reach national and/or international courts. If they concern requests linked to the protection or prevention of existential threats, this may imply a rethinking of the courts' role in safeguarding human rights against such unprecedented dangers.

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[8] For more examples, see Barroso, (2020, chap. 5). For the author, in fact, in Brazil "judicialisation results, above all, from two factors: the comprehensive and analytical constitutionalisation model adopted; and the system of constitutionality control in force among us, which combines the American model – in which any judge and court can pronounce the invalidity of a norm in a specific case – and the European model, which allows direct actions that can be brought before the constitutional court. In this second case, the constitutional validity of laws and normative acts is discussed in theory, before the *Supremo Tribunal Federal*, outside a specific litigation situation. This formula was maximised in the Brazilian system by the admission of a variety of direct actions and by the constitutional provision of a broad right to file a lawsuit. In this context, judicialisation constitutes an inescapable fact, a circumstance resulting from the current institutional design, and not a political option of the Judiciary." (Barroso, 2013, p. 193).

4.2. Crisis Litigation

It is likely that, in the context of widespread judicialisation, several issues related to existential threats will be brought before national and international courts, especially if such issues concern the exercise or violation of fundamental rights.

In the case of climate change, indeed, many human rights issues are at stake, including those already safeguarded by international treaties:

> "In fact, if extreme events and their repetition lead to the loss of human lives and/or the occurrence of human health problems (physical and/or psychological); the destruction of homes (and/or the economic inability to rebuild destroyed estate); the destruction of businesses and/or jobs that guarantee livelihood; food insecurity; the rupture of meaningful communities and the weakening of the prerogatives of cultural participation; this is a situation in which human dignity itself is violated.
>
> Thus, a wide range of rights stipulated in international human rights norms, notably those provided for in Articles 3 (right to life), 17 (right to property), 23 (right to work), 25 (right to an adequate standard of living for health, well-being, food, clothing, housing and medical care) and 27 (right to participate in cultural life) of the Universal Declaration of Human Rights (UN, 1948); in Article 6.1 (right to life) of the International Covenant on Civil and Political Rights, New York, 1966 (UN, 1966a); in Articles 6 and 7 (right to work), 11 (right to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living conditions), 12 (right to physical and mental health) and 15 (right to participate in cultural life) of the International Covenant on Economic, Social and Cultural Rights, New York, 1966 (UN, 1966b); in Articles 4.1 (right to life), 5.1 (right to physical, mental and moral integrity) and 21 (right to private property) of the American Convention on Human Rights, San José, Costa Rica, 1969 [...]; and in Articles 6, 7 (right to work), 10 (right to health), 11 (right to a healthy environment), 12 (right to food) and 14 (right to the benefits of culture) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, El Salvador, 1988 [...]." (Da Ros, 2024b, pp. 184-185).

Likewise, the invasion of technology into private life and society could endanger people's privacy, their physical and mental integrity, the right to work, food security, housing, property, and the right to participation in cultural life. The way in which algorithms can reproduce negative cognitive biases and prejudices, in addition to even carrying malicious intentions, can result in multiple harms to human rights and the health of democracies, with unscrupulous persons using them to deceive the population and promote authoritarian and semi-authoritarian regimes, while also encroaching on human rights. The increase in inequality resulting from the pervasive use of AI can also have dire repercussions on fundamental rights.

For instance, individuals may suffer patrimonial and psychological losses as a result of catastrophic environmental events or the use of technology in ways that disregard human values. These issues are frequently considered in the context of pandemics, whether in relation to economic losses or, as observed during the SARS-CoV-2 crisis, the tension between individual freedoms and collective security. Furthermore, ongoing debates address the

conflict between freedom of expression and the spread of fake news or conspiracy theories, which can undermine the institutions of liberal democracy. It is foreseeable that many of these complex matters will be brought before the judiciary for adjudication, either before constitutional or international courts, particularly in cases where the competent decision-making bodies i.e. parliaments, governments, or international organisations, fail to provide adequate responses.

Some of the existential threats are already being considered before the courts. Regarding *climate change*, the case *Luciano Lliuya v. RWE AG*, filed in Germany by Peruvian farmer *Saúl Luciano Lliuya* against RWE, the largest German electricity producer, deals with a claim for compensation for losses resulting from the company's past emissions of a substantial volume of greenhouse gases. Those gases, according to the plaintiff, contributed to the melting of a glacial lake located near his hometown, making it necessary to adopt preventive measures against the risk of flooding. Furthermore, regarding climate change and State positions in the face of existential threats, there are lawsuits seeking to compel States to adopt measures to combat global warming, such as the cases *Urgenda Foundation v. Kingdom of the Netherlands* and *Leghari v. Federation of Pakistan*, filed in the mentioned defendant States (Da Ros, 2024a, pp. 133-134).

Concerning challenges linked to the use of AI, there are questions about the improper use of copyrighted material to train chatbots and even uncredited citations by them. This is the case, in the United States, in the lawsuit filed in December 2023 by the *New York Times* against *OpenAI*, creator of *ChatGPT*, alleging that the software sometimes reproduced literal passages or shared parts of its content, as well as invented articles attributed to the cited newspaper (Reed, 2024); of litigation brought by a group of American authors, a few months earlier, also against *OpenAI*, on the accusation of using their writings, without permission, to train *ChatGPT* (Brittain, 2023); or, finally, in the lawsuit filed by Hollywood screenwriters and actors, represented by the *Writers Guild of America* (WGA), against the *Alliance of Motion Picture and Television Producers*, which ended in a settlement that, although "does not outlaw the use of AI tools in the writing process", "sets up guardrails to make sure the new technology stays in the control of workers, rather than being used by their bosses to replace them" (Anguiano & Beckett, 2023).

Furthermore, during the SARS-CoV-2 pandemic, numerous decisions and measures implemented by domestic governments became the subject of judicial proceedings (Cafaggi & Iamiceli, 2021), thereby providing a glimpse into the types of litigation that may arise in the event of future pandemics.[9] For example, the *Supremo Tribunal Federal* has ruled on the competence of the entities of Brazilian Federation to legislate and adopt measures concerning the health crisis, including the adoption of restrictions to the movement of people, social distancing, quarantine, suspension of educational and cultural activities

[9] Globally, Cafaggi & Iamiceli analysed 1,973 cases of litigation related to the pandemic up to December 2022, and found that the profile of cases changed as State policies moved in one direction or another – for example, from lockdowns to more limited closures of certain locations, from mandatory vaccination to public policies promoting it, etc. Thus, while freedom of trade was the most controversial issue in 2020 and 2021, it was overtaken by vaccination in 2021, which became the most relevant topic in 2022 (Cafaggi & Iamiceli, 2024, pp. 23-24).

and commercial restrictions; the flexibilisation of labour rights; protection of the right to life and health of indigenous peoples; mandatory vaccination; and suspension, in general, of police actions in Rio de Janeiro's *favelas*, with the aim of reducing police lethality (Supremo Tribunal Federal, 2021, pp. 120-131).

As Cafaggi & Iamiceli observe regarding the actions of courts during the SARS-CoV-2 pandemic,

> "[W]hile policymakers, legislators, and scientists have been at the front line in designing the institutional and regulatory framework of the preparedness strategy, the role of courts has emerged as a critical component of the institutional response to the challenges brought by the current pandemic. Not only have courts overseen statutory legislation and administrative norms and upheld the rule of law, but, on a more substantive level, courts have also been custodians of fundamental rights, ensuring the right balance between conflicting ones." (Cafaggi & Iamiceli, 2021, p. 159).

Therefore, as existential threats become increasingly prevalent and affect more people, there will be a tendency towards increased judicialisation. This development is likely to bring before the courts challenges that have not been adequately addressed by the executive and the legislature.

4.3. Judicial Self-Restraint and Activism

An expanded role of the judiciary implies a concomitant intensification of the tension between judicial self-restraint and judicial activism. *Self-restraint*, for Posner, in its structural facet, is the judicial stance of taking into account, as an important aspect of decision-making, deference to the decisions of other branches of power, in all branches and levels of government (Posner, 1983, pp. 10-12).[10] The idea of *activism*, on the other hand, "is associated with a broader and more intense participation of the Judiciary in the implementation of constitutional values and goals, with greater interference in the scope of action of the other two branches", with judges moving away from their typical function of applying the law, to eventually act as legislators (Barroso, 2013, pp. 194-195). Activism should not necessarily be confused with judicial boldness or intrusiveness in private activities, but rather involves the expansion of judicial powers to replace the functions of another government entity (Posner, 1983, p. 14).

As it has been summarised by Barroso:

> "[T]he main methodological difference between the two positions [self-restraint and activism] is that, in principle, legitimately exercised judicial activism seeks to extract the maximum potential from the constitutional text, including and especially by constructing specific rules of conduct based on vague statements (principles, indeterminate legal concepts). Self-restraint, in turn, is characterised precisely

[10] The other aspects of self-restraint addressed by Posner are the qualities of judges in: (i) not letting their personal political views influence their decisions; (ii) being cautious so that these views do not affect their decisions; (iii) being aware of the practical political constraints on exercising the judicial function; and (iv) considering that prodigality in judicial creation may result in such an increase in litigation that the courts cannot function efficiently (Posner, 1983, p. 10).

> by creating more space for the action of the political branches, having as its fundamental feature the strong deference to the actions and omissions of the latter." (Barroso, 2013, p. 196).

Besides, self-restraint, like activism,

> "[I]s not a liberal or conservative position as such, because it is independent of the policies that other governmental institutions happen to be following. It will produce liberal or conservative outcomes depending on whether the courts are at the moment more or less liberal than other institutions." (Posner, 1983, p. 12).

Having this distinction in mind, there are two divergent phenomena: (i) *judicialisation*, as a fact resulting from the institutional design of a certain State, which makes it easier for contentious issues to be brought before the judiciary; and (ii) *activism*, as a specific and proactive way of interpreting a certain norm (usually the Constitution), expanding its meaning and scope (Barroso, 2013, p. 195), or *self-restraint*, as an opposite (non-proactive) position.

The contemporary context increasingly requires the Judiciary to respond to societal demands concerning public policy, particularly in matters involving the exercise of fundamental rights. Thus, notwithstanding the distinctions previously noted, it is reasonable to conclude that the trend toward greater judicialisation is accompanied by a degree of judicial activism, or at a minimum, by a persistent tension between activism and judicial self-restraint. As is the case in Brazil[11] and as it appears to be the case elsewhere, whether domestically, such as in the United States, or internationally, such as before the European Court of Human Rights (Popović, 2009).

As discussions pertinent to existential issues are brought, for various reasons, to the scrutiny of courts, the responses will possibly go beyond simple deference to the mere lack of action, opting for judicial regulation. Moreover, as judicial decisions increasingly influence jurisprudence across both national and international jurisdictions, it is plausible that a framework of "transnational climate governance through litigation" may emerge, i.e., a situation in which "global paradigmatic cases begin to influence and have their adherence tested in other jurisdictions" (Carvalho, 2022, p. 69) particularly in the context of climate change, but with potential applicability to other domains; in practice, this could result in the development of a transnational body of jurisprudence capable of influencing the decisions of national and international courts.

Furthermore, expanding access to justice appears to be a driver of judicial activism, since the right to such access, already a fundamental right itself, is commonly interpreted extensively by courts, to the point of encompassing functions that would initially fall under the jurisdiction of other branches of State power (Laise, 2020, p. 160). In other words,

[11] "In the Brazilian case, for example, activist positions usually occur in situations of retraction of the Legislative branch and distancing of the political class from society, with the failure to satisfactorily meet certain demands. In relation to Supremo Tribunal Federal, it acted proactively by, for example, (i) directly applying the 1988 Constitution to situations not expressly contemplated by the infra-constitutional legislator; (ii) "the declaration of unconstitutionality of normative acts issued by the legislator, based on criteria less strict than those of patent and blatant violation of the Constitution"; and (iii) "the imposition of conduct or abstentions by the State, both in cases of legislator's inertia […] and in cases of insufficient public policies." (Barroso, 2013, p. 195).

under the principle of ensuring access to justice, it becomes feasible to subject certain debates to judicial review that might otherwise be resolved by other state bodies. The use of this right, through an increase in lawsuits that question actions and inactions related to existential threats and their repercussions on fundamental rights, will apparently also lead to judicial rulings that could be seen as encroaching on the competencies of other branches of government.

In any case, litigation could become an important instrument of intervention in the absence of protection against existential threats in public policies and national and international norms. The consequence could be the extrapolation, on a global scale, of a tension that exists mainly in domestic jurisdictions, i.e., the one between the judiciary and other branches of government, including the possibility of excessive invasion of functions. The tendency is that this will occur either in constitutional jurisdiction (through supreme courts, when exercising judicial review, eventually interfering in public policies, especially when human rights issues are involved); or in other kinds of judicial review: by other national courts (e.g. in diffuse control of constitutionality) or by international or supranational tribunals (both in terms of dealing with matters normally reserved for other bodies of international organisations, and in terms of possible interference in matters reserved to the domestic authority of member states).

4.4. Thin Line Between Abuse and Need for Intervention

The growth of the judiciary's activities is not immune to criticism and requires careful consideration. The main criticism is that magistrates lack democratic legitimacy, since they are not appointed by popular vote but by performing legislative and/or executive functions, they end up playing a political role (Barroso, 2013, pp. 196-197).

However, the powers assigned to the courts derive, in reality, from State norms, such as constitutions, which award courts a certain margin of action and independence, which would be futile if they, in exercising their prerogatives, were not expected to promote a vigorous defence of fundamental rights, including against the other branches of government (Posner, 1983, pp. 15-16). Their actions, even activist ones, thus consist of a legitimate exercise of power, duly conferred on them by current norms, and, therefore, democratically legitimate. In practice, frequently, what is seen as activism may in fact constitute the exercise of *implicit powers* necessary for the judicial mission stipulated in the law itself. It must be noted that the allocation of powers to each of the governmental branches is not always made clearly; hence, "judicial activism presupposes a concept of competence that implies that any exercise of powers by political branches that is not expressly prohibited is permitted." (Laise, 2020, p. 155).

Indeed, despite the sometimes negative perception of judicial activism, which is often associated with arbitrariness (Etcheverry, 2020, p. 341), not all activism is necessarily something bad: "judicial inventiveness does not always suggest illegitimate judicial behaviour", and "some levels of court discretion are indispensable"; it happens because "the process of applying the law to the facts of the underlying case includes making choices among various hypotheses and entails a fair amount of creativity." (Popović, 2009, pp. 362, 365).

As argued by Laise:

> "[T]he problem with activism is not so much when the judge decides cases through his moral and/or political convictions when interpreting vague normative provisions. What is objected to is when he does so through a sort of "moral reading" of powers that have been sufficiently clearly attributed to other branches of government." (Laise, 2020, p. 157).

Moreover, the exercise of power does not always require broad democratic legitimacy, with ubiquitous popular participation. If that were the case, it would render the exercise of authority unfeasible. This is the case with the judiciary, which sometimes may even come to exercise a counter-majoritarian role (especially in liberal democracies, in defence of human rights). But not only that: technical bodies, such as government agencies and central banks, international intergovernmental bodies and certain supranational bodies in the European Union, may have great powers of decision and influence on social life given the powers vested in them by the relevant, norms, but they act mainly in a technical manner, as is required by the aims they pursue, not through democratic means.

If this were not the case, according to Posner:

> "[M]ore fundamentally, you would have to show why we should have more democracy than we do (or as much as we do), and this is not such an easy thing to show. There is a standard syllogism: the theory of our system is that law is made by elected representatives; federal judges are not elected representatives; therefore, lawmaking by federal judges is usurpative. But it overstates the [United States Constitution] framers' devotion to democracy. The framers were smart enough to know that judges made law – that the English judiciary on which the federal courts were modelled had made the law of England – but they nonetheless ordained an appointed federal judiciary with life tenure, thereby making sure that the judges would not be electorally accountable. What can fairly be inferred from the constitutional scheme is that the judges are not to exercise the same freewheeling legislative discretion as the elected representatives […]." (Posner, 1983, p. 16).

A second criticism is the allegation that judges do not have the technical capacities to analyse certain highly complex cases, either due to lack of information or specific knowledge, which may result in unpredictable and undesirable systemic effects: "the judge, by vocation and training, is normally prepared to carry out justice in a specific case, micro justice, often without the conditions to evaluate the impact of his decisions on an economic segment or on the provision of a public service." (Barroso, 2013, p. 197).

While this is correct, it does not prevent the decision-maker from seeking support for judgment in the opinions of those knowledgeable on the subject at hand, including knowledge obtained through public hearings, expert evidence, and consultations with technical staff from other authorities. In other words, although this is indeed a plausible objection, it can be largely resolved by including experts in the technical area in the discussion. Also, as Posner observes, the criticism compares *real* courts with an *idealised* view of government institutions, as if they always have adequate expertise to perform these functions (Posner, 1983, p. 16). The inactivity of such institutions that leads to the filing of lawsuits supports this last observation.

Finally, it is argued that the judicialisation of issues leads to the elitisation of the debate, especially due to the language and legal categories utilised in adjudication, which could represent an obstacle to broad popular participation (Barroso, 2013, p. 198). The use of specific ceremonies and vocabulary can make judicial discussions unintelligible to many people, who could feel excluded from important decisions. However, this can be partially addressed through initiatives to simplify language, educate the public, and provide adequate explanations of court procedures. Public hearings with representative popular participation may also be carried out, in which third parties may be allowed to speak on behalf of the people, such as *amici curiae* and popular representatives themselves (elected politicians and their technical staff). For example, in Brazil, where decisions are generally made public and often broadcast live, the problem seems to be minimised; the decision-making process may even be more accessible to the public than it would be if it were conducted in certain sectors of government or even in Parliament.

The critiques presented can be suitably addressed, but that does not make the issues raised therein less pertinent. It is true that the judiciary should not delve too deeply into what is generally considered the political arena. However, reality prevails over idealisations, and a more active judiciary may mean, in practice, that something in the other branches of government is not working satisfactorily, making it necessary for judges to intervene so as to reverse mistakes or address inertia.

As Laises observes:

> "[T]he remedy for the inefficiency and apathy of political powers would be institutional solutions that could be effective, but at the cost of reducing the levels of political participation of citizens. Therefore, judicial activism would result in a weakening of the involvement of civil society in public affairs, but this could be excused, in a few cases, as if it were a kind of "lesser evil" essential to keep constitutional government on course." (Laise, 2020, p. 158).

If the Paris Agreement, for example, determines that global warming should be maintained "well below 2°C above pre-industrial levels", and that efforts have to be pursued "to limit the temperature increase to 1.5°C above pre-industrial levels" (Art. 2, para. 1, point a), and if a state is not adopting enough and appropriate provisions to fulfil this end, it opens the possibility of taking legal action against that State. The grounds would be non-compliance with the aforementioned international agreement and with human rights protection duties, as well as with domestic legislation (such as the State Constitution itself, for instance). In practice, this could mean the judicialisation of a political issue and even some judicial activism, given the potential need to discuss how to comply with these legal obligations and the content of indeterminate concepts such as the "sufficiency" and "adequacy" of the measures taken.

Similarly, the protection of fundamental rights of workers in the context of advancing artificial intelligence is, at present, not governed by specific international legal norms. This omission creates the possibility for the issue to become the subject of legal proceedings, in which the judiciary may be called upon to address and remedy the lack of regulation. As a result, the court might consider appealing to the legislator to enact legislation or even issue

a substitute decision to regulate the question, albeit provisionally. Here, one can also see the judiciary interfering in the domains of other government branches, where the decisions have features close to a statute. This is not an ideal scenario. However, as needs arise, the inactivity of the legislator and of the executive will lead to legal proceedings, where court decisions, which may also have a political nature, could shape the behaviour of domestic leaders and even of countries on the international arena. Tensions between those who would have the original duty to decide and those who actually do so will intensify, leading to an increasing debate about the limits of judicial decisions.

The fact is that, in the face of situations that may prove to be threatening to social stability or the survival of mankind, political action, whether in the form of the creation of norms or in the implementation of public policies, must be swift and effective. Inaction or insufficient political decision-making is, in these cases, particularly harmful. The deficient protection of fundamental rights, embodied also in the lack of preventive behaviours, is grievous enough that judicial intervention, if it seeks to solve or mitigate the issue, may perhaps be legitimate.

Pragmatically speaking, judicial intervention may resolve some situations, and, in others, at least provoke action by the authorities, even under the promise of liability for non-compliance with a court order or for the consequences of certified inertia. But how to define what judges should or should not do in these cases of disputes involving existential threats?

It is difficult to determine, theoretically and definitively, what judges can or cannot do in the hypothetical cases of this article. This will largely depend on what is established by domestic rules of jurisdiction and intergovernmental agreements. Moreover, it will also be on the judges themselves to define their attributions, even based on reciprocal influences between state courts, doctrinal contributions, and the effects of international courts' decisions.

Thus, many of the criteria for distinguishing what is feasible or not for judges to do will likely be constructed in practice, building on the content of domestic and international judicial decisions based on the applicable rules, in a tautological fashion: it will be up to the judiciary to decide what it can rule on and define how far it can go. The delimitation may be criticised, and the criticism may influence the genesis of rules limiting judicial functions, and also judicial self-criticism. Although it is the judges' task to establish, based on the legal rules of domestic and international law, their jurisdiction, it is also their duty to act critically, listening to those who dedicate themselves to the issue.

That said, some limits to judicial action should be pointed out, including in cases where there is room for greater interpretative creativity. Some matters should, in principle, be more protected by self-restrained positions. Examples would be issues involving: (i) *freedom of conformity* (or *margins of appreciation*) of the legislator or administrator, that is, issues that concern the discretion to act or not to act, or to choose this or that pathway, hence not allowing judicial interference – hence, political issues (allocation of state budget, *interna corporis* issues of the governmental branches, etc.) and reasonable moral disagreements about the interpretation of fundamental rights, without an evident answer in the Constitution;[12] (ii) *institutional capacities of the jurisdiction*, or the examination of which

[12] Even these political issues may have some kind of judicial control, so as to speak of *restricted discretion*: "In fact, the old idea of almost absolute freedom of legislators or governors regarding matters within their competence has left room for ideas that allow greater control, also jurisdictional, as well as political and

institutions would be the most capable in scrutinising certain facts, especially technical ones (bodies linked to Parliament, regulatory agencies, etc.);[13] and (iii) *procedural criteria of jurisdiction*, such as the promotion of institutional dialogues, through active virtues (e.g. recognition of an "unconstitutional state of things", a complex structural problem that cannot be resolved by the courts alone, determining that measures be taken by the State) or passive virtues (such as techniques of non-immediate adjudication, for example, in North American law, "stay in hand", "second look" or "one case at time"), or the use of judicial admissibility criteria to the judgment of certain lawsuits, as is e.g. in Brazilian law, with the additional requirement of thematic relevance of a plaintiff's activities with the object of an abstract control of constitutionality lawsuit before the Constitutional Court (Leal & Schoenerr, 2024, pp. 883-895).

Besides, judges could decide contrary to a rule, dismissing its literal meaning, if this meaning leads to results that are manifestly contrary to the reasons and principles that explain and support the norm itself, without this implying disrespect for the law. In Etcheverry's example, the prohibition of entering a park with motorised vehicles is unreasonable for people in motorised wheelchairs, thereby requiring correction. This, however, does not mean that the application of the rule can be manipulated so that its underlying reasons and principles conform to what the judge understands as the fairest way to resolve a conflict (Etcheverry, 2020, pp. 345-346). In short, rules must be respected and cannot be "twisted" in order to reach the results that one wants to obtain from the beginning.

To avoid the risk of access to justice being turned into activist practices, Laise proposes the application of a reasonableness test, which would consider, in addition to the known sub-principles of (i) *adequacy* (the chosen alternative must be the most suitable means to achieve a certain purpose) (ii) *necessity* (the achievement of the sought state of things cannot imply more restrictive means for the rights in question, empirically considered the existing alternatives) and (iii) *stricto sensu proportionality* (the measure requested must have a reasonable relationship with the desired end) also the sub-principle of (iv) *respect for the essential core of the rights involved*, which cannot be restricted (Laise, 2020, pp. 161-168).

Abusive activism, therefore, would be one in which the judge opts for a certain measure to achieve the intended purpose when, in theory, there is a less invasive alternative; or opts for a measure that in practice is more harmful to the division of powers; or that would produce greater damage, in terms of disrespect for separation of powers and checks and balances, compared to the advantage obtained; or, finally, that would undermine, in its essence, pillars of constitutional democracy, such as separation of powers and checks and balances.

Regardless of these criteria, perhaps the situation of existential threats requires a different analysis of the possibilities of judicial action, which may be more flexible. When

popular, of their activities. Added to this scenario is the prolixity and specificity of Constitutions such as Brazilian's, the attempt to grant normative force to this Constitution, and the binding of all branches to the immediate and direct applicability of fundamental rights, no longer understood as merely programmatic norms. Based on such implications, the freedom of conformity begins to be read and understood as a restricted discretion, because it can be controlled by the jurisdiction from various perspectives." (Leal & Schoenerr, 2024, pp. 886-887).

[13] Regarding technical capabilities, certain issues could be, as seen, resolved in public hearings, through the admission of *amici curiae* or even the provision of information by the public authority itself.

deeper threats to all humanity are at stake, accompanied by multiple potential violations of human rights, the classic features of values such as the separation of powers and checks and balances may need to be rethought, so that the new needs for action are duly fulfilled. When the risk is great, exceptional measures may be indispensable.

There is no room for a judicial dictatorship, an unrestrained judiciary, or judges who see themselves as managers or, worse, as heroes. The judiciary must not empty the roles of the other branches of government. The concentration of powers can give rise to abuses. And, in any case, the current situation does not require voluntarism and discord, but rather unity and joint work. However, certain situations may require more incisive responses from the judiciary and the desirable self-restraint perhaps may give way, when normatively feasible to do so, to calls for action by those responsible, or, ultimately, more robust interventions in reality, if adequate, necessary, proportionate and, as defended by Feoli, in line with the essential core of the separation of powers.

Although there are many studies on the dichotomy between self-restraint and activism, this does not seem to be the case with regard to this tension *in the context of existential threats*, such as those mentioned above. This issue should be considered urgent, a priority that will increase even more as lawsuits involving issues related to these threats increase.

5. Conclusion

As seen, the current historical moment is complex; while mankind lives in a time that, despite undeniable problems, has brought relative progress and happiness, it is moving towards a future that is potentially hostile to its continuity, to the maintenance of people's settlement in certain parts of the world, or to the sustainability of society as it is now configured. Huge and repeated disasters resulting from climate change, with casualties, the unviability of sectors of the economy and the disintegration of the social fabric; recurring pandemics; and the disintegration of the labour market, with a loss of meaning in life, due to extremely advanced technologies, especially artificial intelligence; are just some of the possible existential threats that lie ahead and that could interrupt this moment of the *New Enlightenment*.

Clearly, it is necessary to avoid irresponsible and frivolous catastrophism. The very technology that in some aspects is seen as a threat, could provide solutions to important issues – for example, discover how to avoid or reverse global warming, prevent disasters (or act effectively when they are imminent or afterwards, in order to minimise losses), rebuild destruction, prevent and combat epidemics, bring new possibilities for occupations, provide decent incomes, provide necessary goods to the population and give meaning to people's lives.

Perhaps, the future will be auspicious after all. To that end, it will depend on the choices made. And this is precisely where the core issue lies: decisions need to be made. Not just on paper, but in practice. As needs arise, wrong decisions made by the government may be subject to judicial scrutiny. In many cases, they may exercise restraint, relegating the choices to other branches of government or to subjects of international law. In other cases, however, which are becoming more frequent as the pertinence of the relevant issues proliferates too, the courts may decide the path to follow. Since many of the disputes will involve

human rights, the probability of judicial interference thus increases, leading to evident tension between branches of power, and, on the external level, between international entities among themselves and in relation to their member states.

This tension, analysed here in the form of a clash between judicial self-restraint and activism, will likely be one of the major legal debates in the coming years, especially as the effects of climate change deepen and as artificial intelligence expands across various human domains, to name a few vicissitudes. The contours of judicial action still need to be defined. Necessary and abusive interferences can occur, and will force the debate to define the extent to which the judiciary should intervene.

Regardless of this, and despite the risks and criticisms of judicial enlargement, it seems necessary to examine the phenomenon as symptomatic of new needs directly related to survival; and, after that, possibly even to rethink the limits of judicial action, including to indicate better-defined limits, if necessary, when what is at stake is the survival of humanity itself. Abuses must be curbed. However, activist stances, although far from ideal, should also serve as a warning to decision-makers about the need for something to be done.

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Medium-Term Transformations: Contemporary Procedural Legal Categories

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CONCERTED ACTS BETWEEN COOPERATIVE NATIONAL AND FOREIGN JUDGES IN THE DIGITAL AGE

Abstract

The present article aims to investigate whether it is possible to promote concerted acts between Brazilian judges and courts from foreign countries in order to enforce judicial orders issued by the Brazilian Judiciary, which protect the rights of nationals harmed by international companies whose effects extend beyond Brazil's territorial limits, as exemplified by Article 69, section IV, of the Brazilian Code of Civil Procedure, regarding national cooperation. The act of communicating not only within a specific space (loci) but particularly beyond territorial borders has never been so in vogue. A mere glance at today's society, heavily influenced by the interactive communication of the current Digital Age, reveals that communications – whether through text messages, videos, audios, sounds, voices, or images—barely respect territorial borders. As a product of society, law has always been in constant flux, with its paradigms, dogmas, conceptions, ideas, and thoughts evolving throughout the history of Western civilisation, supported by the Roman-Germanic legal tradition. It is not surprising to assert that civil procedural law has changed or is profoundly changing over the last thirty years. However, what is surprising is not the constant and uninterrupted possibility of change in Brazilian civil procedural law, as this has always occurred. It is the intensity, speed, and breaking of fundamental premises that formed the foundation of Brazilian civil procedural science, such as the conceptions of jurisdiction and competence based on territoriality. The central question of this study is whether it would be possible to build a dialogue between Brazilian courts and judges of foreign countries with equivalent jurisdiction, enabling coordinated actions between cooperative national and foreign judges.

Keywords: transjudicial dialogue, concerted acts, cooperative national and foreign judges, beyond territorial borders.

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1. Introduction

At no other time in the history of Western civilisation has mankind so intensively observed, interacted with, and engaged with individuals beyond its territorial social nucleus. Never before has there been such extensive discourse on communication, interaction, and, above all, dialogue among various national and foreign entities within the judiciary. Moreover, the act of communication has never been as pervasive—not only within a defined *locus* but, more significantly, across territorial borders. A cursory observation of contemporary society, profoundly influenced by interactive communication in the digital era, reveals that communications executed through text messages, videos, audio recordings, sounds, voices, and images disregard territorial boundaries almost entirely.

As a construct of society, the law has continuously evolved, adapting its paradigms, doctrines, concepts, principles, and philosophical underpinnings throughout the history of Western civilisation, rooted in the Romano-Germanic legal tradition. It is hardly surprising to assert that procedural law has undergone and continues to undergo profound transformations over the past three decades. However, what is particularly striking is not the ongoing and uninterrupted evolution of Brazilian procedural law, a phenomenon that has always existed, but rather the intensity, speed, and disruption of foundational premises that once underpinned Brazilian civil procedural science, most notably, the traditional conceptions of jurisdiction and competence predicated on territoriality.

One of the most significant contemporary societal shifts pertains to the rapid transformation of social dynamics and communication, driven by the internet,[1] and, in particular, the proliferation of digital social media platforms. More often than not, this vast flow of information also facilitates the dissemination of misinformation, defamation, harassment, discrimination, human rights violations, the distribution of child pornography, the trafficking of illicit substances, and the incitement of violent acts with terrorist intent. These concerns underscore the urgent need to establish new enforcement mechanisms within procedural law that transcend national borders. Therefore, a matter of paramount legal and scholarly interest is how decisions rendered by the Brazilian judiciary may be enforced beyond national borders, particularly in a globalised society where major technology corporations ("Big Techs") lack subsidiaries, branches, or agencies within Brazil.

In 2024, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal*, hereinafter: STF) encountered substantial resistance from the U.S.-based company X (formerly Twitter),

[1] Francisco de Mesquita Laux defines the internet as "an interconnected network of terminals (computers, tablets, smartphones, etc.), each identified by specific protocols (IP – 'Internet Protocol'), designed to enable the transmission of data from one terminal to another. The infrastructure supporting this network was built on an end to end (E2E) design. This means that the devices responsible for network operation perform only 'simple' functions, primarily related to the transmission of data packets. What distinguishes the internet is the end user connectivity to the virtual environment encompassing the devices and software that access the network. It is the operation of the network based on this principle that makes the internet a space for virtually limitless innovation. As structured, the internet allows any individual, as long as they are in a location with online access, to conceive, develop, and deploy an innovative tool. To make new applications available to internet users, one simply needs to connect them to the network, without requiring any modification to the underlying internet infrastructure. Social networks, content-sharing tools, and search engines, which retrieve information based on keyword inputs—were all developed precisely because of this inherent freedom of creation on the internet." (Laux, 2021, pp. 266-267).

owned by billionaire Elon Musk, which persistently refused to comply with judicial rulings issued by the STF and other Brazilian tribunals. To further obstruct enforcement, the company ultimately closed its offices and dismissed all its representatives in Brazil.

In a similar vein, an issue that has emerged as one of the most pressing legal controversies currently facing the Brazilian Judiciary relates to the extraterritorial effects of judicial decisions. Namely, in December 2024, the Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*, hereinafter: STJ), by a narrow majority of 3-2 in its 3rd Panel, recognised the extraterritorial effects of Brazilian judicial decisions in foreign jurisdictions. This ruling permitted the enforcement of a national court order mandating the global removal of a YouTube video, without requiring the plaintiff to initiate separate legal proceedings in each affected jurisdiction. The Court adjudicated a case that originated in April 2014, involving a multinational food industry company with over fifty years in the international market. The company discovered a video posted on YouTube, owned by Google, titled "Rats Found in Food at (Company Name)." The video was allegedly uploaded by a user identified as "Mark McConery." Given substantial indications that the video's claims were false and after demonstrating compliance with health regulations, the company formally requested Google to remove the content. However, the platform refused, compelling the company to initiate legal proceedings before the Brazilian judiciary. The lawsuit sought a mandatory injunction combined with a claim for moral damages against Google's Brazilian subsidiary (Google Brasil Internet Ltda.), aiming to secure the removal of the defamatory content and its delisting from Google's search engine results on a global scale.

The aim of this paper is to examine whether it is possible to establish an effective framework for judicial dialogue between Brazilian courts and foreign courts of equivalent jurisdiction, thereby enabling coordinated judicial cooperation between domestic and foreign judges for the execution of judicial orders. Moreover, the possibility of concerted acts between Brazilian judges and their foreign counterparts will be examined to ensure the enforcement of Brazilian judicial rulings that safeguard the rights of Brazilian nationals harmed by international corporations, particularly in cases where the effects of such violations extend beyond Brazil's territorial jurisdiction. This analysis is framed within the context of Article 69, Section IV, of the Brazilian Code of Civil Procedure, which governs judicial cooperation at the national level. The paper will first explore how the territorial paradigm of the effects of judicial decisions can be overcome within the framework of international legal cooperation. After that, the extraterritorial effects of orders for the removal of content on the internet issued by Brazilian court shall be presented. Next, the paper will provide an overview of the concerted acts" as a new form of national judicial cooperation in the Brazilian legal system. Finally, the conclusion will be offered on the potential of the concerted acts mechanism vis-à-vis the authority and effectiveness of Brazilian judicial decisions in foreign jurisdictions.

2. Overcoming the Territorial Paradigm of the Effects of Judicial Decisions and the New Framework for International Legal Cooperation

The 1988 Brazilian Constitution (revised in 2017) establishes, in Article 4, items III, IV, and VII, that Brazil, in its international relations with other States, must uphold the

principles of self-determination of peoples, non-intervention, and the peaceful resolution of conflicts. From these constitutional provisions, one may derive the fundamental principle that, as a general rule, Brazilian judicial decisions do not produce effects in foreign jurisdictions. This concept is naturally rooted in the centuries-old construction of the idea of national sovereignty, which is fundamentally based on the principle of territoriality. Natalino Irti posits that the territorial model of nation-states has not only established a form of closure, understood as an impermeability from the outside in, but has also created a unified legal and political framework (Irti, 2006, p. 8).

However, despite the prevailing territorial logic governing the effects of judicial decisions, Irti's assertion that "[t]he limit is not a spatial fact with sociological effects, but a sociological fact that takes shape spatially" (Irti, 2006, p. 19) warrants reflection. In this line of reasoning, it is possible to shift from a territory-based rationale to one that reflects the socio-economic phenomena of contemporary times, which are undeniably shaped by the digital era. The digital environment of social networks, media, and interactions does not adhere to territorial boundaries or borders.

Raul Mariano Junior elucidates the historical reasons why jurisdictional competence has been primarily grounded in a territorial paradigm, particularly to facilitate citizens' access to judicial protection, ensure the production of evidence through the physical proximity of the parties, and enhance the courts' ability to ascertain facts (Mariano Junior, 2023, p. 369). However, he argues that in cyberspace, this territorial logic no longer prevails—even when parties are domiciled abroad—because what unites them is the electronic system connected via the internet (Mariano Junior, 2023, p. 370). This shift necessitates a reconsideration of the concept of international jurisdiction, allowing domestic judges to issue decisions with extraterritorial effects and, consequently, fostering mechanisms for coordinated jurisdictional arrangements with foreign judges.

The Brazilian Code of Civil Procedure of 2015 governs international jurisdiction in Articles 21 to 25, delineating the limits of national jurisdiction and specifying matters subject to Brazilian judicial review, whether on a concurrent or exclusive basis, as well as those that fall outside its scope. According to Fredie Didier Jr., international jurisdiction defines the scope of national judicial authority and, based on the principle of effectiveness, prevents a State from adjudicating cases where its rulings cannot be effectively enforced extraterritorially (Didier Jr., 2015, p. 211).

Cândido Rangel Dinamarco teaches that each State must determine the limits of its international jurisdiction based on three premises: "(a) The impossibility or extreme difficulty of enforcing certain national judicial decisions in foreign territory; (b) The irrelevance of many disputes in relation to the interests that the State is responsible for safeguarding; and (c) The political convenience of maintaining reciprocal respect among sovereign States." (Dinamarco, 2016, pp. 500-501). However, while acknowledging that a judge does not inherently possess the power to unilaterally impose decisions beyond national borders, Dinamarco highlights the possibility of relying on cooperation with foreign courts to facilitate enforcement (Dinamarco, 2016, p. 502).

In this regard, Flávio Luiz Yarshell and Adriano Camargo Gomes argue that, in principle, since sovereignty grants a State exclusive authority over its own territory, it follows that

only that State may exercise executory measures within its jurisdiction (Yarshell & Gomes, 2021, pp. 40-41). Thus, foreign judicial decisions can only be enforced within another state through either local legal proceedings or international judicial cooperation mechanisms.

In the Brazilian legal system, international legal cooperation is governed by Articles 26 and 27 of the Code of Civil Procedure. However, the mechanisms it provides, such as the recognition and enforcement of foreign judgments (*homologação da sentença estrangeira*) and diplomatic channels, are often excessively bureaucratic and time-consuming, thereby hindering effective cross-border judicial collaboration.

Nevertheless, Yarshell and Gomes contend that despite the legal and procedural challenges involved, it remains possible to enforce transnational effects of judicial decisions with executory force in foreign jurisdictions – particularly in cases involving the internet, where digital content is not confined to territorial boundaries. These challenges include "the technical and operational difficulties in substituting the will of the non-compliant party - for instance, while it is relatively straightforward to physically remove an individual from a property, it is significantly more complex to delete online content from the internet" and "the potential necessity for enforcement measures to be carried out abroad, thereby exceeding the jurisdictional limits of the issuing court." (Yarshell & Gomes, 2021, pp. 45, 47-48).

Andrea Zoppini attributes the correlation between legal norms and territorial boundaries to the prevailing economic model. Historically, economic systems were largely self-sufficient, characterised by subsistence economies rooted in agriculture, where political boundaries were largely impervious to external legal influences (Zoppini, 2004, p. 10). However, as goods and assets become increasingly dematerialized, with digital content replacing traditional tangible assets, the relationship between law and territory has been disrupted, resulting in profound and inescapable implications for judicial decisions rendered by Brazilian courts. This is particularly relevant in cases involving the restriction or removal of internet-based content, where infringing material remains accessible outside Brazil's territorial limits despite a domestic court order mandating its removal.

In this context, Natalino Irti emphasises that the exercise of power such as judicial authority is an artificial determination of spatial dominance, meaning that territorial jurisdiction is ultimately a construct of legal norms (Irti, 2006, p. 37). According to Irti, legal norms are not inherently tied to the origin of a community but are instead "de-territorialised" in nature, further reinforcing the need for a new framework of international legal cooperation that transcends traditional territorial constraints (Irti, 2006, p. 41).

3. Precedent from the Superior Court of Justice Recognising the Extraterritorial Effects of Judicial Orders for Content Removal on the Internet

As the guardian of federal legality, STJ faced, at the end of 2024, a complex issue related to the extraterritorial effects of judicial orders of unavailability issued by Brazilian courts, particularly when the infringing content remained accessible beyond Brazil's territorial limits. The case reviewed by the STJ concerned the posting of a video "denouncing" the alleged presence of rats at the establishment of a Brazilian food company with a history of over 50 years of respectability and credibility in the international market. The infringing

content was stored and managed by the YouTube video-sharing application, owned by *Google Brasil Internet Ltda*.

The STJ essentially ruled that:

> "The order for content unavailability affects Brazilian interests and is grounded in Brazilian law. Its cross-border enforcement is merely a natural consequence, given the global nature of the internet. The very legal definition of the internet as a 'system [...] structured on a worldwide scale' corroborates the possibility of protecting legal interests globally (Article 5, I, of the MCI). This is the intended meaning of Brazilian law when referring to the 'scope' of services provided by application providers (Article 19 of the MCI): if the service is global, the specific judicial order for content unavailability may also have a worldwide reach."[2]

Thus, the prevailing thesis in the Third Panel of the STJ was that Brazilian judicial decisions may produce extraterritorial effects in ordering the removal of online content in other countries, thereby having global effects without requiring the plaintiff to file separate lawsuits in each jurisdiction.[3] Conversely, the dissenting thesis in the STJ argued that extraterritorial effects should not apply to the removal order issued by the local court,

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[2] Excerpt from the majority opinion delivered by Justice Nancy Andrighi in *Recurso especial* No. 2.147.711 - SP, in which she was joined by Justices Humberto Martins and Moura Ribeiro, forming the majority in the 3rd Panel of the Superior Court of Justice.

[3] From the judgement:

1. Precautionary measures and an action for specific performance combined with moral damages, filed on April 6, 2015, and May 6, 2015, respectively, from which the present special appeal was extracted, filed on March 28, 2023, and submitted to the court on June 3, 2024.
2. The purpose of this appeal is to determine whether a specific (civil) court order mandating the unavailability of internet content deemed infringing under Brazilian law (defamatory video) is geographically restricted to Brazilian territory, under the argument that a broader application could, in theory, violate the sovereignty of foreign states.
3. There is no violation of Articles 489 and 1,022 of the Brazilian Code of Civil Procedure when the lower court properly examines the legal issue in dispute, providing a reasoned justification sufficient for the resolution of the case, even if contrary to the appellant's interests.
4. The existence of foreign judicial decisions from Europe, North America, Asia, and Oceania ordering the global removal of content deemed illegal within their respective jurisdictions demonstrates a growing trend within the international judicial community toward more effective resolution of disputes that transcend traditional territorial boundaries.
5. The assessment of sovereignty infringement under the Brazilian Law of Introduction to Legal Norms pertains exclusively to the effects of foreign decisions in Brazil, not the reverse.
6. The alleged violation of foreign sovereignty had already been rejected in Brazilian criminal jurisdiction in cases involving the provision of data or content, even when access, collection, storage, and processing occurred outside Brazilian territory.
7. Law No. 12,965/2014—Brazil's Internet Civil Framework (MCI)—consolidated the evolution of traditional concepts of jurisdiction, territory, and procedural boundaries in Brazilian law.
8. The extraterritorial effects of Brazilian judicial decisions concerning online conduct were already recognized prior to the enactment of the MCI, based on concerns regarding the effectiveness and feasibility of judicial protection, to prevent the internet from becoming a "no-man's land."
9. Article 11 of the MCI formalized the cross-border reach of Brazilian jurisdiction over application providers, with no geographic limitations, provided that data is collected within national territory, reflecting the legislator's express intent to "prevent providers operating in Brazil from circumventing

limiting the removal of the defamatory video against the Brazilian food company to the Brazilian version of the *YouTube* platform.

Justice Ricardo Villas Bôas Cueva contended that there was a high risk of foreign courts issuing conflicting decisions with those of Brazilian courts, potentially leading to the blocking of content being perceived as censorship under foreign law. Additionally, he argued that content blocking could produce the unintended consequence of drawing even more attention to the content, as famously occurred with singer Barbara Streisand. Finally, he maintained that content moderation would be more effectively carried out by service providers themselves, given the efficiency of technological tools designed to identify sources and restrict access.

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administrative and judicial determinations regarding the availability or removal of data and records simply by storing them outside national borders." Senate Report on House Bill No. 21/2014.

10. In this case, a Brazilian food industry company was defamed by the dissemination of false content (alleging the presence of rats on its premises) on a video-sharing platform (YouTube). A geographically limited takedown order restricted to Brazil was insufficient, as evidence showed that the infringing content remained accessible and available in other jurisdictions.
11. A mere five seconds of viewing a video that should never have existed on the internet is enough to irreparably damage the reputation of a company that spent over 50 years building its image and credibility in both domestic and international markets.
12. It is unreasonable to argue that the Brazilian judiciary lacks authority to restrict access by foreign internet users to content deemed infringing under Brazilian law. The application provider itself has a global institutional policy of voluntarily complying with certain judicial decisions even when not directly bound by them, in deference to courts' authority to determine the illegality of content under local laws. This policy increases the likelihood of removing "links to content deemed false by a court, including in jurisdictions beyond the original mandate." 2024 Transparency Report (https://transparencyreport.google.com/government-removals).
13. The takedown order directly serves Brazilian interests and is based on Brazilian law. Its extraterritorial enforcement is merely a natural consequence of the global nature of the internet, which, by definition, is a "system [...] structured on a worldwide scale." (Article 5, I, of the MCI).
14. This interpretation aligns with Brazilian law's reference to the "scope" of services provided by application providers (Article 19 of the MCI): if the service operates globally, then a judicial order for content removal may likewise have worldwide reach.
15. The global enforcement of a specific civil court order mandating the unavailability of infringing content does not, in principle, violate foreign sovereignty.
16. (Supplemental Opinion) "Even under international law, the public interest in freedom of expression is not absolute and may be legitimately restricted when it conflicts with the private interest in protecting an individual's reputation, provided that: (i) the defamatory act is deemed unlawful under a clear legal framework and is subject to independent judicial review; (ii) the restriction aims to protect the honour or reputation of third parties; (iii) the judicial order is proportionate to the harm caused; and (iv) no discrimination is based on personal attributes (e.g., nationality of the parties). Interpretation of Article 29(2) of the Universal Declaration of Human Rights and Article 19(3)(a) of the International Covenant on Civil and Political Rights."
17. (Supplemental Opinion) "The extraterritorial removal of defamatory content with cross-border effects aligns with the principle of singular control over abusive publications—an international UN directive advocating best practices for appropriately limiting online content by concentrating civil liability in the smallest number of legal forums, thereby avoiding double penalisation for the same publication in multiple jurisdictions. One platform, one lawsuit. UN Special Rapporteur on Freedom of Opinion and Expression Guidelines."
18. Special appeal denied.

Regarding the first argument presented in the dissenting opinion concerning the divergence of interpretations across jurisdictions regarding the content and scope of the fundamental right to freedom of expression, this challenge becomes particularly significant in the case of the United States, especially following the enactment of the Speech Act of 2010, which imposes stringent restrictions on the enforcement of foreign judgments within U.S. territory.[4] As is well known, the major Big Tech companies (Google, Microsoft, X formerly Twitter, Meta, among others) are headquartered in the United States, making this debate even more pressing.

In a supplement to her original vote, Justice Nancy Andrighi rebutted the arguments presented in Justice Villas Bôas Cueva's dissenting opinion, asserting that Brazilian judges should not prematurely assume that their rulings would be subject to censorship by foreign judges without concrete evidence of such occurrences.[5] The second argument does not provide sufficient justification to deny legal protection to Brazilians whose reputations are harmed by defamatory content on the internet. Today, defamatory videos almost inevitably go viral and saturate social media networks. The Barbara Streisand case occurred long ago and no longer reflects the current digital landscape.

Regarding the third and final point, Justice Villas Bôas Cueva's dissenting opinion, to some extent, aligns with the perspective of Lawrence Lessig, who primarily entrusts the regulation of user behaviour on the internet or *Cyberspace* to the "*Code*"[6] itself, rather than to state control through legal frameworks. According to this view, the architecture of such regulation depends on the specific configurations of each platform or digital space (Lessig, 2006, p. 24).

Indeed, Richard Susskind emphasises that one of the key principles guiding the role of courts and judges in the digital age is ensuring the enforceability of their decisions. (Susskind, 2021, p. 83). He even argues that the authority and enforceability of judicial decisions are perhaps their most defining characteristics, asserting that without enforceable justice,

[4] Francisco de Mesquita Laux warns that "the U.S. legal system includes the *SPEECH (Securing the Protection of our Enduring and Established Constitutional Heritage) Act* of 2010, which establishes that no U.S. court shall recognise or enforce a foreign defamation judgment unless the plaintiff demonstrates: (i) that the foreign court applied at least the same level of protection for freedom of speech and press as provided under the First Amendment to the U.S. Constitution, as well as under the constitution and laws of the state where the U.S. court is located; (ii) furthermore, the interested party must prove that the foreign judgment complied with the due process requirements set forth in the U.S. Constitution. Specifically, regarding internet service intermediaries and providers of posting platforms, an additional condition applies; (iii) the party seeking enforcement of the foreign judgment in the United States must demonstrate that the judgment is consistent with Section 230 of the *Communications Decency Act*. This means that an application provider cannot be treated as the 'author' of content created by a user of its platform." (Laux, 2021, pp. 278-279).

[5] "Preventing the Brazilian judiciary from extending the effects of its rulings while considering the cross-border nature of global internet content providers' services, on the grounds of a 'theoretical violation of freedom of expression in some country in the world,' is, in fact, the very definition of censorship (i.e., prior content control). In other words, we would be preventing—censoring—Brazilian judges from protecting Brazilian citizens and businesses based solely on a purely theoretical concern that a foreign judge might interpret the concept of defamatory content differently. This would amount to blocking the legality review in a concrete case out of fear of potentially conflicting with some abstract legal principle under foreign law." (Supplemental Opinion by Justice Nancy Andrighi, in the *Recurso especial* Nº 2147711 - SP).

[6] *Code* refers to self-imposed rules created by cyberspace itself, without state intervention.

the law risks becoming a weak set of protections. After all, enforceability is what gives the law its strength.

This is undoubtedly the new vision of civil procedure, which is entirely oriented toward maximising the effectiveness and authority of judicial decisions. According to the teachings of Antonio do Passo Cabral, the Brazilian procedural system must move away from outdated paradigms of territoriality and exclusivity and instead embrace functionality, flexibility/adaptability, and coordination of jurisdictions (Cabral, 2021, p. 344).

However, the STJ itself acknowledged that if a *Big Tech* company considers that a foreign judicial decision exceeds the limits of what is understood as freedom of expression in the country where compliance is required, it may file a lawsuit in the local judiciary to prevent the extraterritorial effects of the order.[7] To mitigate this potential conflict, it is proposed that the mechanism of coordinated actions, as provided for in Article 69, section IV, of the 2015 Brazilian Code of Civil Procedure, be utilised in the international sphere to coordinate the jurisdictions of national and foreign judges in enforcing judicial decisions.

4. Concerted Acts between Cooperative National and Foreign Judges

In Brazilian procedural law, the 2015 Code of Civil Procedure introduced a new form of national judicial cooperation known as "concerted acts." This procedural mechanism is set forth in Article 69, item IV, as follows: "[a]rt. 69. Requests for judicial cooperation must be promptly fulfilled, do not require a specific form, and may be executed through: IV – concerted acts between cooperating judges."

Pursuant to Article 69, para. 2 of the 2015 Code of Civil Procedure, the following procedural acts may be carried out through concerted acts: "I - service of process, summons, or notification; II - obtaining and presenting evidence, as well as collecting witness testimony; III - enforcement of provisional remedies; IV - implementation of measures and procedures for corporate recovery and preservation; V - facilitation of the verification of claims in bankruptcy and judicial recovery proceedings; VI - centralization of repetitive cases; VII - enforcement of judicial decisions."

Thus, in Brazilian procedural law, the enforcement of judicial decisions through concerted acts is currently limited to cooperation among domestic judges, i.e., those within the Brazilian judiciary. However, this legal instrument has not received significant attention from classical Brazilian legal scholarship, with scarcely any reference to it in procedural law literature.

Among the new generation of Brazilian proceduralists, Antonio do Passo Cabral conceptualises concerted acts as "joint acts (therefore, of a consensual nature) in which the coordination or combination of jurisdictions occurs for a common procedural purpose." Ultimately, in his view, concerted acts allow "the jurisdictions of two or more courts to be

[7] "If Google U.S. determines that the Brazilian removal order in this case violates freedom of expression under U.S. law, it may seek an order from a U.S. court to maintain the content, relying on that federal statute. If successful, it may then notify the Brazilian enforcement judge of the existence of the conflicting U.S. order. The Brazilian judge will then decide whether the foreign ruling constitutes a reasonable basis to prevent enforcement of the Brazilian removal judgment."(Supplemental Opinion by Justice Nancy Andrighi, following the dissent by Justice Villas Bôas Cueva, in the *Recurso especial* Nº 2147711 - SP).

articulated in pursuit of common or convergent objectives in one or more proceedings." (Cabral, 2021, p. 579). Maria Rosaria Ferrarese argues that, in today's world, not only have geographical boundaries become "porous," but so have institutional boundaries and, ultimately, the jurisdictional limits of each institution, as they increasingly share a common spirit of governance (Ferrarese, 2004, p. 137).

Similarly, Geir Ulfstein asserts that the most effective way to establish international governance is to integrate existing institutions to the extent that their functions overlap or compete (Ulfstein, 2012, p. 68). However, he warns that such integration is not always easily achievable, as institutions fear losing their identity, often requiring difficult unanimities in decision-making and subsequent ratifications by their respective States (Ulfstein, 2012, p. 70).

Andrew Murray advocates that restricting individuals in the online environment through coercion enables the network in which they are embedded to empower them, as part of an active matrix of individuals or communities, to assess and then either accept or reject any externally imposed regulatory framework. For this reason, he proposes reducing internal communication within the matrix to a purely internal flow while focusing only on external communications between the community (or matrix) and the broader regulatory environment (Murray, 2018, pp. 156-157).

Based on the 1988 Brazilian Constitution, it is possible to construct a cooperative framework for concerted acts between national and foreign judges to enforce judicial decisions beyond Brazil's territorial borders. Just as Brazil, in its international relations, must uphold, pursuant to Article 4 of the Constitution, the principles of self-determination of peoples and non-intervention, it must also observe as a structural principle the peaceful resolution of disputes. Concerted acts represent nothing less than the realisation of the ideal of peaceful dispute resolution within the realm of civil procedure. This cooperative coordination of jurisdictions, characteristic of concerted acts, can coexist and interact particularly in the United States with how U.S. judges interpret freedom of expression under the Speech Act of 2010.

Even though the scope of free speech protection in U.S. case law differs, to some extent, from the Brazilian framework, one cannot rule out the possibility of achieving convergent outcomes or pursuing shared objectives in certain cases. The mere opening of transjudicial dialogue may facilitate, in some manner, the enforceability of Brazilian judicial decisions aimed at restricting or removing unlawful content from the internet not only within Brazilian territory but also in all jurisdictions where the content circulates. After all, as Antonio do Passo Cabral aptly notes, concerted acts involve the "coordination of jurisdictions to achieve the same purpose or to attain convergent results." (Cabral, 2021, p. 580).

A significant first step was taken by the STJ when it recognised the extraterritorial effects of Brazilian judicial decisions ordering the removal of online content. The next step must focus on developing procedural mechanisms such as concerted acts to effectively implement such orders on an international scale. It is not enough to recognise their validity; it is essential to ensure their enforceability in other countries.

5. Conclusion

Considering all these factors, it is possible to conclude that the evolving contours of international judicial cooperation point toward the gradual overcoming of the territorial paradigm concerning the effects of judicial decisions. This is particularly true because the 1988 Brazilian Constitution, in Article 4, does not merely uphold self-determination of peoples and non-intervention as foundational principles governing Brazil's international relations, but also, alongside these, the peaceful resolution of disputes. Far from being limited to shielding Brazil from wars and armed conflicts, this constitutional provision also enables the country to establish cooperative relationships with other nations, thereby facilitating the execution of procedural acts within both the national and foreign judiciaries.

Concerted acts represent nothing less than the realisation of the ideal of peaceful dispute resolution within the realm of civil procedure. Given their characteristic coordination of jurisdictions, concerted acts can coexist and interact even in the United States (where most *Big Tech* companies specialising in interactive communication are headquartered) with the interpretation that U.S. judges apply to freedom of expression under the Speech Act of 2010.

Although the scope of free speech protection in U.S. case law differs, to some extent, from the Brazilian framework, the possibility of achieving convergent outcomes or pursuing shared objectives in certain cases cannot be ruled out. The mere opening of transjudicial dialogue may, in some manner, facilitate the enforceability of Brazilian judicial decisions aimed at restricting or removing unlawful content from the internet not only within Brazilian territory but also in all jurisdictions where the content is disseminated.

The understanding reached by the Third Panel of the STJ represents a significant step forward in consolidating the authority and effectiveness of Brazilian judicial decisions in foreign jurisdictions. Furthermore, the concerted acts mechanism, currently confined to domestic judicial cooperation, holds considerable potential for application in the international legal arena.

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*Anđelija Tasić**

DETERMINING JURISDICTION IN LITIGATION REGARDING COMPENSATION FOR DAMAGES CAUSED VIA THE INTERNET**

Abstract

The expansion of social networks has transitioned many legal institutions from the analogue to the digital realm. The saying "verba volant, scripta manent" is experiencing a renaissance, as the spoken word that tarnishes someone's reputation is now replaced by records that remain permanently or for an extended period. Consequently, the scope of potential damage is more significant. What once could only be heard by those present during an offensive comment's delivery, if even that, can now instantly become 'viral', reaching anyone with internet access. This raises the question: how can individuals assert their legal rights and seek compensation for the emotional distress resulting from violations of their honour and reputation? This paper addresses three key areas: 1) the type of procedures through which legal protection is provided, 2) subject-matter jurisdiction, and 3) territorial jurisdiction. The author begins by examining the role of social networks within the context of (social) media, considering whether everything published on these platforms qualifies as information. By distinguishing these concepts, we can open up a discussion on determining jurisdiction, which may influence litigants' decisions when choosing a 'more favourable' court. To discuss this effectively, it is essential to clarify the concept of a 'more favourable court' and assess its relevance, particularly concerning national courts. Lastly, the author analyses existing case-law, both domestic and international, to highlight examples of effective comparative practices.

Keywords: media litigation, damages, defamation via social networks, special jurisdiction.

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Prologue

Milivoje Stanković, a professor at the Faculty of Law, did not award a passing grade to a student on the exam. In response, the angry student decided to take revenge by spreading falsehoods about him, falsely accusing him of committing a crime, and sharing 'spicy details' from his personal life. He did this through an unofficial but public Facebook group for the Faculty of Law, which has around 4,000 members. The offended professor is prepared to sue the student and seek compensation for emotional distress caused by the violation of his honour and reputation. Which court would have the subject-matter and territorial jurisdiction to handle this case? Additionally, would the professor have been less affected if the insults had been made in person, in front of a dozen students during the last class, or to a much larger online audience?

1. Compensation for Non-Pecuniary Damage – Kind Reminder

As the current Civil Obligations Law (Civil Obligations Law, 1978, hereinafter referred to as the ZOO) was enacted back in 1978, regarding compensation for damage, one could say, *nihil novi sub sole*. Damage is a diminution of someone's property (simple loss) and preventing its increase (profit lost), as well as inflicting on another physical or psychological pain or causing fear (non-material damage, or mental anguish) (Art. 155. ZOO). It is widely recognized that the ZOO adopts a subjective approach to non-pecuniary damage, in contrast to the purely objective approach adopted in 2005 by the Republic of Croatia (Civil Obligations Law, 2005) and the mixed concept initially adopted by the Republic of Montenegro - before it shifted to an objective approach in 2017 (Civil Obligations Law 2017) (Karanikić Mirić, 2018, pp. 401-402). However, recent case law has deviated from this framework by adopting an objective concept of non-pecuniary damage without a solid legal basis. For instance, a ruling by the Supreme Court of Cassation (Judgment Rev. 1903/2016) indicated that an infringement of the right to privacy automatically entitles the plaintiff to compensation for non-pecuniary damage. In this case, the plaintiff was not required to demonstrate that they suffered any actual damage, as the assumption was that merely violating privacy rights constituted a breach of personal rights, resulting in non-pecuniary damage. Legal literature suggests that when determining the amount of monetary compensation for non-pecuniary damage, the court should consider the significance of the damaged interest and the purpose of the compensation. In cases where harmful consequences are not demonstrated, the court faces challenges in assessing the intensity and duration of those consequences, thus hindering its ability to award fair compensation (Andonović, 2019, p. 218). Additionally, some special laws, such as the Law on Establishing Facts About the Status of Newborn Babies Suspected of Missing from Maternity Hospitals in the Republic of Serbia (known as the Missing Babies Law, 2020), have also contributed to the deviation. According to Article 24 of this law, a court can award monetary compensation for non-pecuniary damage due to a violation of the right to family life, which introduces a nuanced distinction in formulations. This is significant because domestic case law states that a claim can be dismissed if the types of non-pecuniary damage sought

are not clearly defined, meaning the court cannot assess them based on established facts. Respecting the specific language of such laws aligns with the principle of *lex specialis derogat legi generali*, raising questions about the differences between the two laws (Arsenijević, 2024, p. 283). Until the development of the new Civil Code is completed, which is currently advocating for a mixed approach (Arsenijević, 2023, pp. 261-288) consistent with the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference for European Private Law (DCFR), this paper will explore the current legal framework, focusing on the objectives outlined by Professor Milivoje Stanković regarding the exclusively subjective concept of non-pecuniary damage.

2. Subject-Matter Jurisdiction

Subject-matter jurisdiction in civil matters is most often defined as the jurisdiction to resolve (civil) matters in the first instance. Several criteria are used to determine subject-matter jurisdiction: value-based *(competentia ratione valoris)*, real *(competentia ratione causae)* and status-based *(competentia ratione personae)*. The delimitation of jurisdiction in the first instance is made by the Law on the Organization of Courts (2023, Articles 24 – 27). The Basic Court is competent in the first instance, first, if another court is not competent for a particular civil dispute and conducts enforcement and non-contentious proceedings, unless otherwise prescribed by law. It is emphasized that the Basic Court is competent in housing disputes; disputes regarding the establishment, existence and termination of an employment relationship; in rights, obligations and responsibilities arising from an employment relationship; in compensation for damage suffered by an employee at work or in connection with work and in disputes regarding the satisfaction of housing needs based on work.

The substantive criterion was used to list the jurisdiction of the Higher Court in the first instance in the following civil law disputes: in disputes on copyright and related rights and the protection and use of inventions, industrial designs, trademarks, geographical indications, topographies of semiconductor products and plant breeders' rights if no other court has jurisdiction; in disputes on contesting or establishing paternity and maternity; in disputes for protection against discrimination and mobbing; in disputes on the publication of corrections to information and responses to information due to a violation of the prohibition of hate speech, the protection of the right to private life, i.e. the right to a personal record, failure to publish information and compensation for damage in connection with the publication of information.

The value criterion requires that the Higher Court adjudicates in the first instance if the value of the subject matter of the dispute allows for the declaration of a review (40,000 dinars according to Art. 403, para. 3 of the Law on Civil Procedure). Finally, the status criterion is used to determine the jurisdiction of commercial courts in the first instance, namely: in a dispute between a domestic and foreign company, enterprise, cooperative and entrepreneur and their associations (companies), in a dispute that arise between a company and another legal entity in the performance of the company's activities, as well in cases where one of the parties in the aforementioned dispute is a natural person and if he or she is in a material

rivalry relationship with the other party; in disputes on copyright and related rights and the protection and use of inventions, industrial designs, trademarks, geographical indications, topographies of semiconductor products and plant breeders' rights arising between business entities; in disputes regarding enforcement and security within the jurisdiction of a commercial court, and in disputes regarding arbitration awards only if they were made in arbitration proceedings between business entities; in disputes arising from the application of the Companies Act or the application of other regulations on the organization and status of a business entity, as well as in disputes regarding the application of regulations on privatization and securities; in disputes regarding foreign investment; in disputes on ships and aircraft, navigation at sea and inland waters and disputes in which navigation and aviation law is applied, with the exception of disputes regarding the transport of passengers; in disputes on the protection of a company; in disputes regarding registration in the court register; regarding reorganization, judicial and voluntary liquidation and bankruptcy, except in disputes to determine the existence, establishment and termination of an employment relationship that was initiated before the opening of bankruptcy.

The issue of subject-matter jurisdiction in a civil dispute arising from a post on a social network has already been raised in domestic case law. The defendant wrote on her Facebook profile: *"Greetings to my great stinking colleague P.M."* After that, the plaintiff initiated a lawsuit before the Basic Court, outlining a claim for compensation for non-pecuniary damage due to damage to reputation. The claim was partially accepted, and the defendant was ordered to pay the plaintiff 100,000 dinars. This judgment, however, was overturned by the decision of the Higher Court in Požarevac (Decision of the Higher Court in Požarevac, 2016) which found a significant violation of the provisions of the civil procedure from Art. 374 para. 2 item 4 whereby the court had no subject-matter jurisdiction. After the first-instance judgment was overturned, the first-instance court declared itself to have no territorial jurisdiction, the appeal against this decision was rejected, and the first-instance decision was confirmed. In its reasoning, the Higher Court in Požarevac considered "that the Higher Court in Belgrade has jurisdiction to adjudicate because the defendant wrote and published the incriminating words on her internet profile – Facebook in an accessible and unprotected manner, and in this specific case it is a dispute for compensation for damage in connection with the publication of information".

There is a specific aspect of jurisdiction in media disputes that is noteworthy. Not every higher court has jurisdiction; only the Higher Court in Belgrade is authorised to adjudicate in such cases (as stipulated in Art. 3, para. 3 of the Law on the Seats and Territories of Courts and Public Prosecutor's Offices, 2013). This court has the authority to make initial decisions regarding the prohibition of press distribution and media information dissemination. It also adjudicates disputes related to the publication of corrections and responses regarding violations such as hate speech, the right to private life (including personal records), failure to publish necessary information, and compensation claims related to information publication within the Republic of Serbia. This general delegation of jurisdiction is permitted by Article 25, para. 4 of the Law on Organisation of Courts of 2023 (hereinafter: LOC), which allows for a specific higher court to handle particular types of legal matters.

Such general delegation typically occurs when the legislator determines that resolving certain disputes requires specialised knowledge from judges in those specific cases. Therefore, jurisdiction is concentrated in a particular court (Petrušić, 2024, p. 101)[1] or because certain disputes commonly arise in that court's jurisdictional area (Stanković, 2001, p. 62). However, general delegation of jurisdiction has its drawbacks, leading to centralised decision-making and increased costs. Specifically, in the context of media litigation, two crucial factors are overlooked: 1) There are regional media services that focus primarily on local issues, meaning potential parties are often from the same region or even the same city;[2] and 2) The rise of SLAPP[3] lawsuits economically threatens media operations, exacerbating the situation by creating additional costs for legal proceedings.[4] Nevertheless, the Higher Court in Belgrade has raised questions about its (non)jurisdiction, suggesting that the matter in question might not qualify as media litigation, considering that this was not a media dispute.

Before we turn to the positions of the Higher Court in Belgrade and the Supreme Court of Cassation, it should be determined what, according to the letter of the Law (Law on Public Information and Media of 2023), a media outlet is. A media outlet is a means of public information that, by word, image, or sound, conveys editorially designed

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1 This is also the case with disputes about copyright and related rights and the protection and use of inventions, industrial designs, models, samples, trademarks, indications of geographical origin, topographies of integrated circuits, i.e. topographies of semiconductor products and plant-breeders for the territory of the Republic of Serbia (Article 4, para. 3 of the Law on the Seats and Territories of Courts and Public Prosecutor's Offices), for the resolution of which the High Court in Belgrade is also competent.

2 If "Narodne novine", a print media outlet based in Niš, publishes information about a person from Niš or a person from Southern or Eastern Serbia, the costs of litigation for both parties will be incomparably higher than if jurisdiction were determined according to the rules on general territorial jurisdiction.

3 The acronym SLAPP comes from the English phrase "Strategic lawsuit against public participation", which translates as "strategic lawsuits against public participation" (Mojašević, 2024, p. 82). According to Recommendation CM/REC (2024)/2 of the Committee of Ministers to member states on combating the use of strategic lawsuits against public participation and the Appendix to the Recommendation, strategic lawsuits against public participation are considered legal actions that are threatened, initiated or conducted as a means of harassing or intimidating their target, and that seek to prevent, prohibit, restrict or punish free expression on matters of public interest and the exercise of rights related to public participation. The indicators of SLAPP lawsuits are: a. The plaintiff exploits an imbalance of power, such as financial advantage or political influence, to pressure the defendant. b. The claims made by the plaintiff are either wholly or partially unfounded. c. The remedies sought by the plaintiff are disproportionate, excessive, or unreasonable. d. The claims represent an abuse of legal process. e. The plaintiff employs procedural tactics that increase the defendant's costs, such as delaying proceedings or selecting an unfriendly court, which complicates the situation with little chance of a successful appeal. f. The lawsuit targets individuals rather than the organizations responsible for the disputed action. g. Accompanying the legal action is an offensive public relations campaign aimed at harassing, discrediting, or intimidating individuals engaged in public debate, or diverting attention from the substantive issue. h. The plaintiff or their representatives engage in legal intimidation, harassment, or threats, or have done so in the past. i. The plaintiff or related parties pursue multiple coordinated or cross-border legal actions based on the same facts or similar issues. j. The plaintiff consistently refuses to consider out-of-court mechanisms for resolving the claim.

4 The results of one study show that between 2010 and 2020, at least 26 civil lawsuits were filed against journalists, media outlets, civil society organizations, and activists for their activities as guardians of the public interest. More than half of these lawsuits were filed between 2018 and 2020 ("SLAPP" - Stanje u Srbiji, 2021).

information, ideas, opinions, and other content intended for public distribution and an unspecified number of users (Art. 35). For example, media, in the sense of this Law, particularly include daily and periodical newspapers, news agency services, radio and television programs, and electronic editions of these media outlets, as well as independent electronic editions (editorially designed websites). Also, and more importantly for the topic of this paper, the Law on Public Information and Media defines what media is not. Thus, a media is not: a book, a film, a carrier of audio and audiovisual content, a scientific and professional journal intended primarily for informing or educating a particular professional group, other printed publications, a catalogue containing exclusively notices, advertisements, commercials and information intended for the market or a bulletin and similar publications intended for internal information, an electronic publication of state bodies and organisations, institutions, public enterprises and companies, entrepreneurs and their associations, an official gazette, a printed matter such as leaflets, posters and similar means of public information, another publication within the meaning of the regulations governing publishing, as well as internet search engines and aggregators (Art. 37, para. 1).

In the context of Facebook, the platform on which our hypothetical event from the beginning of the text took place, the following is also not media: platforms, such as internet forums, social networks and other platforms that enable the free exchange of information, ideas and opinions by their members, nor any other independent electronic publication, such as blogs, web presentations and similar electronic presentations, unless they are registered in the Media Register in accordance with this Law (Art. 37, para. 2). Therefore, platforms, including the social network Facebook, are not considered media within the meaning of the applicable law. Consequently, publications on platforms cannot be the subject of media litigation. The same position was taken by the Supreme Court of Cassation (hereinafter: SCC) at the session of the Civil Department held on 27. 6. 2017: "A text of offensive and defamatory content published on a social network does not constitute information because a social network is not a media [...] However, even if it constitutes information, the conditions for the application of the rule on exclusive territorial jurisdiction have not been met because platforms such as internet forums, social networks and other platforms that enable the free exchange of information, ideas and opinions of their members, nor any other independent electronic publications, such as blogs, presentations and similar electronic presentations, unless they are registered in the media register in accordance with the Information Act, are not media." (Art. 30, para. 2 of the Act), (Sentence from the SCC Decision R1 627/2016).[5]

Therefore, it follows from the above that media are associations and exist to communicate with the general public. They are social institutions that function according to certain rules – they employ staff and have an organisation, means, and an established procedure for collecting information to create material. They are participants in political, economic, sociological and cultural life and influence the formation of public opinion.

Conversely, according to the Law, Facebook is a social network that connects people. Since it is not considered a media outlet, protection in relation to insults and defamation (personal rights) is exercised pursuant to the general rules of property law (ZOO), and

[5] This refers to the Law on Public Information and Media from 2014, which ceased to be valid with the enactment of the new law in 2023.

not by a special law (the Law on Public Information and Media). The latter law, as a *lex specialis* in relation to the general rules of property law, was primarily intended to protect journalists (excluding the presumption of guilt of journalists and the rules on journalistic diligence to improving their position). The regulation of the subject-matter jurisdiction of a single court (the Higher Court in Belgrade for the entire territory of Serbia) was established with the aim of unifying case-law in media law.

Given that the so-called "internet profile" does not constitute a medium, the insult committed in this specific case can be compared to everyday unwanted communication between people (it is equated with insulting a person present, i.e., stating or transmitting something untrue to disparage them). For the reasons stated above, the Basic Court is competent to adjudicate this dispute under the rules on general territorial jurisdiction.

And the somewhat more recent practice of the SCC tells us the same thing: "A dispute for compensation for damages due to the violation of personal rights in which the defendant's liability for the damages is based on his statements published in a media outlet and the journalist, editor-in-chief and publisher of the media outlet are not named as defendants, is not considered a dispute for compensation for damages in connection with the publication of information, which, under Art. 23, para. 1, item 7 of the Law on the Organisation of Courts and Art. 4, para. 2 of the Law on the Seats and Territories of Courts and Public Prosecutor's Offices, would be within the subject-matter jurisdiction of the Higher Court in Belgrade, but rather a civil law dispute between individuals in which subject-matter jurisdiction is determined according to the value of the subject matter of the dispute." (Decision of the SCC, R1 406/2022).

Therefore, after the S(C)C[6] has determined that the dispute will be resolved before the Basic Court, and according to the rules of general civil procedure, it remains to be considered which of the competent courts will have territorial jurisdiction in a specific legal matter, concerning the case of Professor Stanković described in the prologue.

3. Territorial Jurisdiction

The rules on territorial jurisdiction determine which court will have territorial jurisdiction in the first instance. These rules are primarily detailed in the Law on Civil Procedure. This Law outlines the principles of general territorial jurisdiction, stating that the court with general jurisdiction is the one where the defendant resides, has their domicile, or is registered (Articles 39-41). In addition to the general territorial jurisdiction rules, there are special territorial jurisdiction rules, which may be found not only in the Law on Civil Procedure but also in other laws.[7] Some of these rules pertain to exclusive

[6] Following the establishment of the High Judicial Council, in accordance with the Law on the Organization of Courts, the SCC continued to operate as the Supreme Court (hereinafter: SC) from May 11, 2023.

[7] Some examples are the rules established by the Law on the Prohibition of Discrimination, which stipulates that, in addition to the court of general local jurisdiction, the court in whose territory the plaintiff has its registered office or residence is also competent (Art. 42). The Family Law also provides for special territorial jurisdiction in proceedings in litigation for the protection of the rights of the child and in proceedings for the exercise or deprivation of parental rights, when the child is the plaintiff, where the child may file a lawsuit before the court of general local jurisdiction or before the court in whose territory the child has his or her

jurisdiction, which entirely overrides the general territorial jurisdiction rules.[8] Another group falls under elective territorial jurisdiction, allowing parties to choose from two or more applicable rules of jurisdiction. Typically, one of the options is a court of general territorial jurisdiction, while the others may include courts connected to the relevant territory, which would be advantageous for the defendant.

For the purposes of this paper, two specific articles of the Law on Civil Procedure related to special territorial jurisdiction are particularly important. The first pertains to non-contractual liability for damages. In addition to the court of general jurisdiction, a court located in the area where the harmful act was committed or where the harmful consequence occurred may also have jurisdiction over disputes regarding non-contractual liability for damages (Art. 44, para. 1 of the Law on Civil Procedure). The second article addresses disputes arising from violations of personal rights. Alongside the court of general territorial jurisdiction, a court in the territory where the harmful act took place or where the plaintiff resides or has their domicile is also competent to hear these disputes (Article 46 of the Law on Civil Procedure).

A relevant question arises concerning the relationship between Articles 44 and 46 of the Law on Civil Procedure, specifically whether a party can apply the article related to non-contractual liability for damages when dealing with disputes over violations of personal rights. This inquiry is crucial, especially since neither of these articles allows for determining jurisdiction based on the defendant's residence, domicile, or registered office. Article 44 offers more flexibility by including the criterion of the area where the harmful consequence occurred.

This criterion has previously been utilized concerning information disseminated across various platforms. In the Gtflix TV judgment (2021), the Court of Justice of the European Union (hereinafter: CJEU)[9] defines the circumstances under which national courts can hear compensation claims for damages from disparaging online comments. The case originated from a preliminary question by the French Supreme Court regarding a dispute between Gtflix TV, a Czech company producing adult content, and DR, a Hungarian individual also in the adult content sector. Gtflix TV claimed that DR made disparaging comments about it online and sought their removal along with compensation for damages.

The CJEU has established that requests for content removal and correction are considered a single application that can only be made in courts with jurisdiction over compensation claims. These courts are located in the Member State where the publisher is based or where the claimant's centre of interests lies. The French courts determined they did not have jurisdiction over the removal and correction requests, as France was not DR's place of

residence or residence (Art. 261). Special rules also exist in proceedings in litigation for the annulment of adoption and protection from domestic violence.

[8] The court in whose territory the real estate is located has exclusive territorial jurisdiction for adjudicating disputes regarding ownership rights and other real rights to real estate, disputes regarding encroachment on real estate, as well as disputes arising from leases of real estate (Art. 51, para. 1 of the Real Estate Law).

[9] Although Serbia is not a Member State of the EU, nor does the EU have jurisdiction over the subjects of the Republic of Serbia, it is essential to follow the case law of the CJEU because Serbia became a candidate for EU membership in 2012 with a tendency to join this alliance.

establishment or Gtflix TV's centre of interest. However, the French Supreme Court asked if they could address the compensation claim for damages incurred in France due to the connection between the removal and compensation applications. The CJEU therefore concluded that a person who seeks not only the rectification and removal of disparaging comments online but also compensation for the damage resulting from these comments may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seized, even though those courts do not have jurisdiction to rule on the application for rectification and removal. (De Bandt, 2021). Thus, individuals can file claims for damages in each relevant Member State. Media-related defamation cases often involve complex tort situations, especially given the differing countries of publication and distribution. This issue is heightened in online defamation, where the internet provides instant global access to information.

The European Court of Justice (hereinafter: ECJ) has adapted EU jurisdiction rules to address these challenges. In the landmark 1995 *Fiona Shevill* case (1995) the ECJ ruled that claimants can sue in the country of publication for full damages or in jurisdictions where harm occurred, including their habitual residence, for limited damages. This approach, known as the "mosaic approach",[10] emphasises the variety of forums available for defamation claims. Furthermore, in the eDate/Martinez case (2011), the ECJ refined its framework to better handle the cross-border implications of online defamation (Council of Europe, 2019).

"Forum shopping" should also be considered in the context of territorial jurisdiction. „Forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation." (Lowenfeld, 1997, cited in Bohunov, 2009). Forum shopping is a term in Anglo-Saxon law that denotes the ability of the plaintiff to choose the most suitable among competing territorial jurisdictions. The criteria that the plaintiff may be guided by are: the procedural rules of the country of the court, its conflict of laws rules, the attitude towards foreign law, the possibility of recognizing foreign decisions, the costs of the procedure, the sympathy that the party may have with the judges, the possibility of influencing the selection of the jury (in Anglo-Saxon countries), the average duration of this type of litigation (Kršljanin, 2008, p. 246). The application of this concept is possible only if two criteria are met: first, that more than one court is competent to resolve a specific dispute, and, second, that the potentially applicable legislative frameworks are different – if they are all the same, the plaintiff has little reason to choose (Mskhvilidze, 2023, p. 93). Opposite to the concept of forum shopping is *forum non conveniens*, an institution of Anglo-Saxon

[10] The mosaic approach refers to the situation where the consequences of damage resulting from media and other disputes arise in multiple states. In such cases, the court of each member state is considered to have jurisdiction, with its authority proportional to the extent of the damage incurred within its territory. However, this approach has faced criticism, particularly regarding the expansion of the Internet. Several arguments have been made against it: the mosaic principle can lead to fragmentation of claims across various forums. Each court is limited to deciding on damages only within its national boundaries, which can be "difficult, if not impossible" to navigate in the context of the Internet; This principle creates a disconnect between the scope of jurisdiction and the remedies sought (such as court injunctions or preliminary measures); there is also the problem of the same case being decided by multiple courts, raising concerns about the issue of *res judicata* (Kyselovska, 2019, pp. 41-43).

law - the possibility of a court to refuse to establish jurisdiction, on the ground that the chosen jurisdiction is inappropriate, that is, that there is a "more natural" jurisdiction for conducting the proceedings (Kršljanin, 2008, p. 247). It is necessary to assess 1) whether there is another available forum that is clearly more appropriate and 2) whether the trial before that court meets the requirements of fairness to correspond to both the interests of the parties and the idea of justice.[11]

What criteria would the plaintiff be guided by if we could discuss a domestic counterpart of forum shopping? What is the "more favourable court"? This could not be a criterion for applying procedural rules, since they are the same for the entire territory of the Republic. This could possibly be a criterion for applying substantive law, and not on the part of the merits of the claim, since it is expected that every court in the country will decide in the same way based on the same factual situation. This type of uniformity of case law exists and/or is achieved by different legal instruments.[12] What may be different, and what the plaintiff can be guided by when choosing a court, is the amount of compensation to be awarded.[13] Therefore, it is important for the plaintiff, if he or she has several options, to choose the court that he or she considers to be the "most gallant" in awarding the amount of damages.

4. Conclusion

Although the publication of content on the Internet is expanding, the legal regulation regarding the judicial recovery of damages remains unadapted to current changes. While the courts, after initial hesitation, understood that litigation conducted regarding compensation for damages for information published on the Internet is not media litigation, the Law on Civil Procedure has not yet introduced any special rules that would provide additional options for choosing the court with territorial jurisdiction in relation to the place where the harmful act occurred.

Today, when the "right to be forgotten" is only in its infancy, and it seems that what is on the Internet is here to stay forever, the place where the harmful act occurred is also important since the consequences are now felt over a much wider area. So, until the regulations change, our professor Stanković will be able to litigate according to the place of residence or habitual residence of the defendant, possibly the place where the harmful act occurred, but not according to the place where the consequences of the act were felt. Therefore, his options for "national forum shopping" will remain significantly limited, miles away from (widely) accepted mosaic approach. So far, what goes on the Internet stays on the Internet, with unforeseen consequences.

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[11] However, the scope of the *forum non conveniens* institution has been almost completely eliminated by the adoption of the Brussels I Regulation.

[12] The unification of case law is one of the cancers of domestic justice. The instruments used in this direction, when it comes to civil court proceedings, are: revision, special revision and resolution of a disputed legal issue (Tasić, 2013).

[13] Although no exact research has been conducted to show the extent to which the awarded compensation differs, it is believed that, for example, courts in Niš and Belgrade award different amounts of compensation for a stray dog bite for the same degree of injury. In Niš, the compensation for minor bodily injuries ranges from 60 to 80,000 dinars, and in Belgrade from 80 to 100,000 dinars (Naknada štete nakon ujeda psa lutalice, 2025).

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REDEFINING JURISDICTION AND COMBATING PREDATORY LITIGATION: THE ROLE OF TECHNOLOGICAL TOOLS IN MODERN LEGAL SYSTEMS

Abstract

Predatory and repetitive litigation has increasingly become a problem in legal systems around the world. This trend adds strain to courts, raises legal costs, and slows down the delivery of justice. Thus, there is a pressing need for solutions to improve efficiency. The emergence of new technologies, like digitalisation, artificial intelligence (AI) and automation, provides an opportunity to tackle this issue by enhancing the effectiveness and accountability of legal processes. This paper explores how these emerging technologies can prevent and mitigate predatory litigation, contributing to a more efficient legal framework while also reshaping the concept of jurisdiction in the digital age.

The main questions are: (1) How can AI and automation identify and reduce repetitive and predatory litigation? (2) What effects will the introduction of these technologies bring to procedural law and our legal system's overall performance, particularly in reducing backlogs? (3) How might Brazil's use of digital legal solutions inform broader applications in other legal systems? The hypothesis suggests that incorporating digital procedures with AI and automation will decrease predatory and repetitive litigation while also making legal processes faster, more precise and traceable. The research methodology used in this paper is a blend of a bibliographic review of literature with an analysis of Brazil's experience in implementing these technologies. After examining digital procedures, technology-driven case management, and automated litigation detection systems, the paper explains how these are revolutionising judicial efficiency and redefining jurisdiction as such digital tools challenge traditional territorial limits in legal proceedings. The findings indicate that AI and automation can enhance legal efficiency, reduce backlogs, and ensure adjudication in a reasonable time. These technologies also create a new paradigm for jurisdiction, allowing courts to manage cases more flexibly across borders.

Keywords: litigation, artificial intelligence, automation, jurisdiction, procedural law.

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1. Introduction

The Digital Era has arrived, radically changing society in the so-called "fourth industrial revolution".[1] In this scenario, the disruption of old standards generates the need to rethink legal procedure in what can be considered a "technological turn in procedural law."[2] The traditional concept of jurisdiction, primordially rooted in territoriality and rigid rules, is being replaced by a more flexible and broader perspective (Ryngaert, 2023, pp. 537–550).[3]

Since judiciaries could not remain indifferent to this "digital shift", they have been modernising their workflows. As a result, electronic case processing systems were implemented, coupled with their progressive enhancement through the automation of procedural tasks and the incorporation of artificial intelligence tools. Based on technological advances in our justice systems and the potential of these means, Richard Susskind states that "courts are not places, but services." (Susskind, 2019).

This approach reflects the digital revolution of the judiciary, enabling judicial services to be provided remotely in an automated and accessible manner and reducing dependence on physical spaces. As an example of an online court, Brazil has created several Justice 4.0 Centres, judicial units that work exclusively in the digital environment, allowing citizens to access justice remotely. Although this transformation brought a significant rise in access to justice, it also exposed specific dysfunctions, such as increased litigation both legitimate repetitive claims and abusive litigation. Due to technological conveniences and low costs, some lawyers, in a coordinated effort, create artificial claims using forged documents and powers of attorney with inauthentic signatures to obtain illegal gains. The focus on efficiency is essential to deal with one of the primary systemic dysfunctions caused by ensuring broad access to justice, that is predatory litigation through filing oppressive actions.

This dysfunction consists of filing a series of similar actions with no plausible basis, comprising judicial harassment, sham litigation and forged lawsuits, causing various types of losses (economic loss, damage to image, good reputation), in addition to unduly congesting the Judiciary. Predatory and repetitive litigation has increasingly become a problem in legal systems around the world. In North American practice of competition law, the theory of sham litigation (i.e. false, simulated, fraudulent claim) was developed to curb the abusive exercise of the right to petition. It is a type of strategic litigation in bad faith, in which the result of the proceedings is less relevant than the difficulties created for the defence, the defendant's reputation or economic loss (Myers, 1992).

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[1] Karl Schwab affirms that a fourth industrial revolution began at the turn of the 21st century. According to the author, the defining feature of this Fourth Industrial Revolution is its comprehensive digital transformation, marked by the full force of emerging technologies and their integration across all fields of knowledge. It represents a profound and systemic shift, reshaping industries, institutions, and the way society operates (Schwab, 2017).

[2] This expression is used by Nunes (2021, pp. 55-78).

[3] Ryngaert states that "The most eye-catching effect of digitalisation on the law of enforcement jurisdiction, as follows from the discussion in the previous sections, is the fading into irrelevance of territoriality. Territoriality has been the bedrock principle of the law of jurisdiction, at least since the Peace of Westphalia. In respect of digital data, however, enforcement jurisdiction no longer follows the geographic location of the evidence sought." Concerning this more flexible concept, see also Berman (2018, p.11).

Judicial harassment is a global issue, as evidenced by the fact that the European Union has recently enacted Directive 2024/1069, with the purpose of protecting people who engage in public participation from manifestly unfounded claims or abusive court proceedings (strategic lawsuits against public participation), encompassing claims against journalists, human rights activists and other professionals. It is worth emphasising that the European Union took a huge step to manage mass litigation and curb abusive lawsuits through the approval of Directive 2020/1828 (hereinafter: Representative Actions Directive) that established rules to ensure that a representative action mechanism for the protection of the collective interests of consumers was available in all Member States, while providing appropriate safeguards to avoid abusive litigation.

This paper addresses the issue of handling mass and predatory litigation. Whereas the former can involve legitimate litigation, the second encompasses fraudulent and abusive legal practices that undermine the judicial system. Unfortunately, this latter practice has become increasingly common in certain areas, where legal claims are used as a tool of intimidation and obstruction rather than as a means of seeking justice. In such cases, the primary purpose is not to obtain legal protection for a legitimate right, but to cause economic damage, tarnish reputation, hinder business operations, or suppress freedom of expression.

At the same time, legitimate repetitive lawsuits also impact the judiciary and demand a new approach with techniques of jurisprudence unification, joinder of individual lawsuits or class actions. Thus, there is a pressing need for solutions to improve efficiency. The emergence of new technologies, like digitalisation, artificial intelligence (hereinafter: AI) and automation, provides a chance to tackle this issue by enhancing the effectiveness and accountability of legal processes. In this sense, this paper explores how these emerging technologies can prevent and mitigate predatory litigation and handle repetitive litigation, contributing to a more efficient legal framework while also reshaping the concept of jurisdiction in the digital age. This trend adds strain to courts, raises legal costs, and slows down the delivery of justice. Some further questions arise from this introductory reflection: (1) How can AI and automation identify and reduce repetitive and predatory litigation? (2) What effects will these technologies bring to procedural law and the legal system's overall performance, particularly in reducing backlogs? (3) How might Brazil's use of digital legal solutions inform broader applications in other legal systems?

The research methodology used is a blend of a bibliographic review of literature with an analysis of Brazil's experience in implementing these technologies. By examining digital procedures, technology-driven case management, and automated litigation detection systems, the paper explains how these are revolutionising judicial efficiency and redefining jurisdiction as the digital tools challenge traditional territorial limits in legal proceedings. The hypothesis suggests that incorporating digital procedures with AI and automation will decrease predatory and repetitive litigation while also making legal processes faster, more precise, and traceable.

The paper is divided into three parts, to address these questions and confirm the proposed hypothesis. The first part will analyse the issue of predatory litigation and mass litigation, distinguishing both concepts. Next, the initiatives adopted by the Brazilian

judiciary to combat this practice using technological tools to achieve unlawful objectives will be presented. The third part of the paper will examine the extent to which such initiatives can help address similar issues in other countries. Finally, the results will be offered in the final section, confirming that AI and automation can enhance legal efficiency, reduce backlogs, and ensure adjudication in a reasonable time. These technologies also create a new paradigm for jurisdiction, allowing courts to manage cases more flexibly across borders.

2. Predatory Litigation: When Bad Faith Finds a Legal Strategy

Addressing sham litigation as a starting point is essential for analysing predatory litigation. Such a focus helps illuminate the wider phenomenon of predatory lawsuits, beyond those confined to competition law. Christopher Klein (Klein, 1989) states that sham litigation has always been defined as litigation that violates free competition and lacks any plausible legal basis. However, the author considers this definition too restrictive from an economic perspective. For this reason, he proposes, under this viewpoint, that predatory litigation be defined as the abusive use of the right to litigate against rivals with the intent of achieving effects contrary to free competition (Klein, 1989). Sham means fraud or something simulated, which aptly describes bad-faith litigation disguised under a cloak of apparent legality and ethics. In a similar vein, Gary Myers argues that litigation can be a far more effective method of eliminating competitors than predatory pricing and other strategies (Myers, 1992, p. 586).

The framework for treating sham litigation as an abusive exercise of the right to petition began to take shape in the United States with the 1961 ruling in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc*. Nevertheless, the establishment of objective criteria for defining sham litigation was firmly established only after the U.S. Supreme Court ruling in *Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc* (1993). Broadly speaking, the case involved a dispute between resort hotel operators (known as PRE) and major film studios, Columbia Pictures. Columbia, as the copyright holder of the films, sought compensation for copyright infringement, arguing that PRE made videotapes available for rent to their guests without authorisation. In response, the hotel operators filed a counterclaim, asserting that Columbia's lawsuit constituted sham litigation.

To recognise sham litigation, the Supreme Court adopted a two-step test, known as the PRE test: in the first phase, the court must determine whether the lawsuit lacks legal merit, meaning there is no realistic probability of a favourable legal outcome. Then, the second phase examines whether the primary objective of the lawsuit is to achieve an anticompetitive result as a collateral effect of filing the action(s) (*Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus*).

In a legal system based on precedent, like that of the U.S., the *ratio decidendi* of a precedent is often built progressively and refined through successive rulings. This was the case with the U.S. Supreme Court decision in USS-POSCO Industries and BE&K Construction Company v. Contra Costa County Building & Construction Trades Council (2002), which further developed the assessment of sham litigation. In this ruling, the Supreme Court

enhanced the PRE test by introducing the POSCO test, which measures the likelihood of success across a series of lawsuits. It then evaluates whether the collective set of lawsuits increases competitors' costs within a relevant market, thereby constituting an abuse of litigation for anticompetitive purposes.

Despite the differences between the Brazilian and U.S. legal systems, the criteria used by the U.S. Supreme Court to identify sham litigation significantly contribute to understanding the phenomenon of predatory litigation in Brazil. Indeed, foreign-tested solutions allow for an analysis of the evolution and setbacks in developing a theory that restricts the right to petition due to its abusive use, as well as the main challenges faced in this process. This, in turn, provides valuable insights for the formulation of a Brazilian theory of sham litigation, tailored to the country's legal system and litigation profile. From this perspective, the global success-prediction analysis, based on the POSCO test, already represents a contextualised assessment aimed at identifying lawsuits filed as mere simulations, serving as instruments to pursue objectives unrelated to the actual judicial relief sought.

The sham litigation theory was mentioned in the Brazilian Superior Court of Justice (hereinafter: STJ) the ruling of Special Appeal (*REsp*) No. 1.817.845 by the court's Third Panel (2020). Justice Nancy Andrighi, the opinion's rapporteur, noted that the extraction of a decision-making standard from the reasoning (*ratio decidendi*) of U.S. precedents could be applied in Brazil to curb material and procedural abuses arising from the repetitive filing of lawsuits lacking serious and adequate legal grounds. The ruling emphasised that the abuse of the fundamental right to access justice did not materialise in each procedural act individually, but rather through a series of concerted actions involving successive claims devoid of legal grounds, amounting to nearly a dozen frivolous and reckless lawsuits.

The phenomenon of predatory litigation was first addressed by the National Council of Justice (hereinafter: CNJ) of Brazil in 2021 through Recommendation No. 127, classifying it as judicial harassment that violates good faith, due process, and freedom of expression. This measure was a response to a request from the Brazilian Press Association (ABI) for action to curb lawsuits aimed at undermining journalistic activity and silencing voices.

The background of this normative act was the paradigmatic case of judicial harassment in Brazil involving journalist João Pedro Cuenca (Londõno, 2020),[4] who became the target of 144 lawsuits across the country, after posting a tweet that displeased pastors of a specific religious group. This coordinated legal attack, orchestrated by the religious institution acting as a concealed agent, aimed to exhaust Cuenca's ability to defend himself by forcing him to hire lawyers and travel extensively to respond to the scattered lawsuits. For this reason, the solution of identifying and formally consolidating claims, using the "*forum non conveniens*" doctrine, has been highlighted by legal doctrine (Temer, 2022) and in CNJ Recommendation No. 127/2022 as one of the most effective means of combating this type of judicial harassment. This approach ensures the effective exercise of the right to defence, enables a comprehensive analysis of the dispute, and ultimately promotes uniform decisions. The dismissal of the case based on the evident lack of grounds is another important measure to be adopted.

[4] This a version of the article that appeared in print on Nov. 23, 2020, Section A, page 13 of the New York edition with the headline: "It's Kafka in the Tropics': Brazilian Barraged with Lawsuits Over Tweet".

This secondary legal act was consistent with the article of the Brazilian Code of Civil Procedure (hereinafter: CPC) which contains a specific provision aimed at curbing abusive litigation. In this sense, Article 142 of the CPC sets out that the judge, convinced on the basis of the circumstances that the claimant and defendant have used the legal procedure to carry out a simulated act or achieve an end prohibited by law, will issue a decision frustrating the parties' proper objectives, imposing, *ex officio*, the penalties for bad faith.

More recently, following two Direct Actions of Unconstitutionality (*ADIs*): 6,792 and 7,005 the Brazilian Supreme Federal Court (hereinafter: STF) ruled that the filing of numerous simultaneous lawsuits in different jurisdictions against journalists or media outlets constitutes judicial harassment. The Court recognised that such abusive legal tactics create logistical and financial barriers to a fair defence, ultimately violating the constitutional right to freedom of expression, highlighting the increasing need for judicial mechanisms to prevent strategic misuse of litigation in Brazil, ensuring that the legal system is not weaponised to suppress dissent or silence critical voices.

However, predatory litigation was addressed more comprehensively only at a later stage. In fact, it would be more appropriate to refer to the broader category of abusive litigation and specify its different types, such as judicial harassment, frivolous lawsuits, and predatory litigation. One of the defining features of these lawsuits is their fragmentation and dispersion across multiple courts, which makes them difficult to identify. Much like a puzzle, the full picture can only be visualised when analysing the various lawsuits or pieces that make up the set of actions. Hence, it is critical to identify similar lawsuits with signs of abusiveness.

Given the rise in lawsuits without legal basis, artificially crafted to obtain undue advantages, particularly in consumer law, the CNJ issued a new Recommendation, No. 159 on 23 October 2024, establishing guidelines and measures to identify, address, and prevent abusive and predatory litigation. This Recommendation has defined abusive litigation as "the deviation from or manifest excess of the limits imposed by the social, legal, political, and/or economic purpose of the right of access to the Judiciary, including on the defendant's side, compromising the Judiciary's ability to deliver justice and access to it." (CNJ, 2024). It further emphasises that, to characterise the broader category of "abusive litigation," a set of behaviours or claims must be considered, including baseless, reckless, artificial, dilatory, frivolous, fraudulent, unnecessarily fragmented actions, those constituting procedural harassment, or violations of the duty to mitigate damages.[5] Moreover, it presents a list of elements indicating the presence of abusive litigation, such as lack of essential documents to support claims, generic and repetitive allegations, sponsorship of a significant volume of cases by a small number of professionals, multiplicity and similarity of rights assignment instruments, unjustified requests for free legal assistance.

Concerning the measures, the Recommendation suggests the consolidation of the lawsuits in the jurisdiction of the respondent's domicile in case of judicial harassment, notification of the Brazilian Bar Association (hereinafter: OAB) when signs of improper client

[5] This broader definition comprises the frivolous lawsuits. Katz says that frivolous suits lead to at least two sorts of social costs. The first is the real resource cost involved in filing such suits. The second is the cost of the trials required because the presence of strike suitors prevents some genuine claims from settling (Katz, 1990).

solicitation are detected, and measures to prevent unjustified fragmentation of claims. As a macro-procedural (not confined to one lawsuit) problem, the recommendation also urges all courts to foster the integration of data systems and cooperation.

3. Repetitive Litigation

Mass litigation, typical of an industrial-era society, differs from predatory litigation in that it pursues a legitimate objective. On the other hand, even though predatory lawsuits generally appear as mass litigation, this characteristic is not always present. Addressing legitimate mass lawsuits requires a comprehensive action plan.

In Europe, the topics of mass litigation and combating abusive claims regarding consumer rights have received enhanced treatment through the enactment of the Representative Actions Directive that established rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all Member States, while providing appropriate safeguards to avoid abusive litigation. Besides class actions, some techniques for case aggregation, consolidation and standardisation of jurisprudence represent important measures for handling mass litigation. At the same time, encouraging consensual dispute resolution is essential for reducing repetitive lawsuits.

In Brazil, the solution to address repetitive claims has been developed gradually. Even though class actions play an important role, inspired by the US model, they have not achieved the necessary effectiveness in handling all types of mass litigation. Attentive to this issue, the enactment of the 2015 Brazilian Code of Civil Procedure brought new mechanisms for resolving repetitive lawsuits. An Incident of Resolution of Repetitive Claims (hereinafter: IRDR) was created, inspired by the German model case procedure, and Group Litigation Orders in the UK, to establish common legal theses applicable to multiple cases, with binding effect. This incident complements the collective litigation microsystem, enabling a more efficient approach to the issue of repetitive litigation.

At the superior courts level, there are mechanisms for developing legal precedents applicable to various repetitive appeals, which are temporarily stayed while one or more are selected as a pilot to be adjudicated. Therefore, the legal thesis established in these pilot cases becomes binding on all similar cases. Having defined the contours of predatory litigation and mass litigation in Brazil, the next step is to analyse to what extent technological tools can be used to curb these types of litigation and inform broader applications in other legal systems.

4. Impact of the Digital Shift on the Judiciary

The hypothesis presented in this paper is that incorporating digital procedures with AI and automation will decrease predatory and repetitive litigation, while also making legal processes faster, more precise, and trackable, based on the Brazilian experience. One of the milestones in the Brazilian judiciary's transition to the digital era was the implementation of electronic case processing in place of physical files (Broglio, 2024). This shift has expanded access to justice, optimised procedural communications, and enhanced transparency in judicial operations.

The implementation of electronic case processing began at the end of the first decade of the XXI century and has gradually expanded to all branches of the Brazilian judiciary. In 2006, Federal Act No. 11,419/2006 established and regulated electronic legal proceedings. In so-called "electronic litigation", the judiciary utilises electronic means for processing lawsuits, notifications and transmission of digital documents. In fact, the electronic case system offers numerous advantages, such as the elimination of the need to visit the courthouse for simple document submissions; access to the case file online, reduction in paper usage; faster processing, lower risk of document loss or misplacement, and fewer procedural incidents. All petitions are filed through the system, attached automatically, and most notifications are made electronically. In summary, idle processing times were eliminated by removing several bureaucratic procedures in electronic processes. In the long run, additional advantages became evident, such as lower costs and greater environmental preservation (Abrao, 2011; Wedy & Garcia, 2015).

At a later stage, new tools were integrated into more advanced versions of electronic case systems, allowing for the automation and scheduling of procedural actions. In the automation of procedural acts, the system can be programmed to schedule and manage subsequent procedural stages, enabling an automatic transition between phases without requiring human intervention. For instance, when issuing a ruling, the judge can sign the decision and immediately schedule notifications to the parties, along with other procedural steps. This automation streamlines case management, reducing delays and increasing efficiency in judicial proceedings. As a result, a reduction in backlog occurs. In this sense, statistical data confirms the relation between the implementation of electronic processes and processing time reduction compared to physical ones.

According to the official Brazilian report "*Justiça em números* 2024" (CNJ 2024a, p. 236),[6] during the year 2023 only 0,4% of the total number of new cases were filed physically, while 35.1 million (the remainder) were electronic cases. Almost all branches of the Brazilian judiciary have adopted electronic case processing. Federal, Electoral, Labour and Superior Courts stand out for achieving a 100% rate of electronic new cases (CNJ, 2024a, p. 236). Regarding the processing time, the official statistics show that the average duration of electronic case processing is one third shorter than the physical one (CNJ, 2024a, p. 237).

In the beginning, the legal systems were resistant to radical changes, and the processes, even electronic ones, merely reproduced the workflow of physical processes (on paper). This resistance, however, was gradually overcome, thanks to the benefits of using these technological tools equipped with intelligence (i.e. speed and precision achieved in automation and analysis of documents). Hence, at a more advanced stage, AI tools began to be considered a means of enhancing efficiency.

Although there is no consensus concerning the exact definition of AI, it generally refers to the technology that enables machines to learn and develop their capabilities autonomously (Kaplan, 2016; Fenoll, 2018). Article 3 (chapter 1) of the European AI Act (2020) states that "AI system' means a machine-based system that is designed to operate

[6] *Justiça em números* (Justice in numbers Report) is an annual and official report with the statistics data of the Brazilian judiciary, offering a precise overview of the judiciary's reality, with key indicators and analyses to support new public policies and judicial management.

with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments".

A conceptual misconception, often called the fallacy of AI, is the false belief that machines can only perform tasks at a human level if they replicate human ways of working and reasoning (Susskind, 2019). Despite the common perception that machine learning is like human cognitive processes,[7] it operates differently.

A concept intrinsically linked to AI is an algorithm, defined as a finite sequence of instructions executed by a computer program to process information for a specific purpose.[8] Algorithms can be classified into two categories: programmed and non-programmed. The difference between the two categories lies in how the algorithms are programmed. While in the programmed algorithm, human intervention dictates the step-by-step progression toward a result, non-programmed algorithms enable machines to independently build pathways towards a goal.

The AI systems use non-programmed algorithms (Jordan & Mitchell, 2015). Thus, machines are provided with data and a defined objective, but the system autonomously establishes the path to achieving the goal. In this case, the machine generates its own programming to reach a solution, effectively performing an autonomous reasoning process that looks like human decision-making (Domingos, 2015). Data is input, processed, and output in this process, enabling the machine to optimise solutions.

The AI's ability to perform repetitive tasks, compile data quickly, identify patterns, make associations, and calculate the data with mathematical precision to offer a solution to a given problem is unquestionable. To combat unethical legal practices, machine learning algorithms can be trained by courts to detect warning signs, such as an excessive number of similar lawsuits, document inconsistencies, and repeated documents, such as the same contract or expert report being mentioned in multiple cases.

The same procedure is useful for identifying legitimate repetitive claims as well, allowing the consolidation of claims in a specific unit (Arenhart & Osna, 2020) or the triggering of the incident for the resolution of repetitive claims when multiple lawsuits present common issues of law, in order to avoid conflicting adjudication and optimise the resolution of cases.

As AI tools depend on structured databases and efficient indexing to enable this filtering, the improvement of database systems is crucial. With this concern, the CNJ created the Information Network Panel related to abusive litigation, which urges the Judiciary units to promote practices and protocols for the treatment of abusive litigation, as applicable

[7] Alan Turing proposed that, instead of merely executing tasks dictated by humans, a machine should learn in a way similar to a child's brain, learning from experience, as can be inferred from the following excerpt: "Instead of trying to produce a program to simulate the adult mind, why not rather try to produce one which simulates the child's? If this were then subjected to an appropriate course of education one would obtain the adult brain. Presumably the child brain is something like a notebook that one buys it from the stationer." (Turing, 1950).

[8] As Pedro Domingos explains "With machine learning, computers write their own programs, so we don't have to do so." (Domingos, 2015, p. 6).

and within the responsibilities of the Internal Affairs Department, including through the creation of an electronic panel and periodic updating of the database on the website of the National Internal Affairs Department of Justice.

The Panel not only includes information about the bodies responsible for monitoring and supervising judicial actions with potentially predatory characteristics but also presents the contact details of each unit, aiming to facilitate dialogue between the courts and the exchange of good procedural practices for the prevention and appropriate confrontation of abusive litigation (CNJ, 2024b). The existence of a national dataset that consolidates all the information on abusive litigation collected in judiciary units is extremely relevant for curbing abusive litigation.

At the same time, the aforementioned Council formulated a platform called *Sinapses*, as a national solution for the storage, training, distribution and auditing of AI models used by the Judiciary. Recognising AI's potential, the judiciary has also embraced its use. In this sense, several Brazilian Courts have developed their own AI systems to curb predatory litigation and handle legitimate repetitive claims.

One notable example is *Bastião*, created by the Pernambuco Court of Justice, a specialised internal platform connecting judges, court staff, and institutional partners such as the OAB and the Public Prosecutor's Office (CNJ, 2023). The platform uses AI to analyse case flow, parties' behaviour, document reuse, and statistical data to detect predatory and repetitive litigation patterns. The advantages are impressive: the tool offers various litigation control mechanisms, including automated alerts on the likelihood of predatory litigation, classification and tagging of cases in bulk, reports on similar lawsuits and detection of reused documents across multiple cases. Therefore, it is possible to group the related cases for collective judicial response (consolidation) in accordance with the Recommendation of the CNJ.

Another AI project is *Tanatose*, developed by the Tocantins Court of Justice. *Tanatose* performs textual extraction, processing, and comparison, using natural language processing techniques to provide results that can assist technicians in making decisions regarding appropriate procedures (Tribunal de justiça do Estado do Tocantins (TJTO), 2022). In practice, *Tanatose* (analysis of predatory processes) will be operationalised through the State Court of Tocantins Electronic Procedural System (*Eproc*) database, and content extracted from the processes will be integrated into the National Interoperability Model (MNI) (TJTO, 2022). A panel identifies abnormalities or "suspicious" behaviours, allowing the Centre's analysts to refine the analysis and generate a list of processes subjected to *Tanatose* processing.

Recently, Court of Justice of the State of Paraíba launched the Abusive Litigation Analysis and Control (*LitisControl*) (Tribunal de Justiça da Paraíba (TJPB), 2024), a project carried out through a partnership between the Court, the General Justice Department and the court's Technology Section, using an unprecedented resource for writing processed data. In this way, the system can analyse all judicial electronic processes in progress in the first instance in the electronic system *PJe* (active and archived) and identify similar cases involving the same judicial class, the same sets of subjects, and the same parties and lawyers (TJPB, 2024). In the end, an informative certificate is issued containing possible

cases of abusive litigation, which enables judges to verify whether a case constitutes predatory litigation (TJPB, 2024).

It's noteworthy that none of the AI platforms mentioned above generate decisions or actions without judicial oversight. Indeed, for the guarantee of due process of law, certain precautionary measures must be adopted.[9] At the starting point, the input data for training AI models must be carefully collected, processed, and filtered to avoid biases or discriminatory outcomes.[10] In the end, the outcomes achieved by AI tools must be subject to human oversight to avoid errors, misinterpretations, or unjust decisions. When suspicions of predatory litigation arise, the judge must carefully analyse the AI report. Above all, before a ruling is issued, the judge should notify the parties and their attorneys and request clarifications regarding the lawsuit, ensuring due process of law. In any case, the broad sharing of information between different courts, possibly by inserting tags and alerts in the procedural system, is a suitable tool for identifying this type of dispute before it harms the defendant or overload the judicial system.

Regarding legitimate repetitive litigation, the electronic system can select a group of cases based on some key words enabling judges to identify the lawsuits concerning the same questions of fact and law. After this identification, it is possible to join the lawsuits for trial together. All the AI systems mentioned above are able to screen types of lawsuits quickly based on the same patterns, which enables identification of any kind of repetitive litigation, both legitimate and predatory.

In addition to grouping cases for joint adjudication, the triggering of an IRDR (Incident of Resolution of Repetitive Claims) can also be based on reports generated by AI systems. These AI reports are useful for identifying patterns in repetitive litigation, detect recurring legal issues, and provide information to the Judiciary in deciding whether an IRDR should be initiated.

The prevention of litigation can occur by identifying the potential of a certain type of lawsuit to generate a future surge of cases. AI tools associated with court intelligence centres can track certain trends. With this information in hand, some initiatives can be adopted, such as encouraging procedural solutions or notifying a legitimate party to file a class action.

Furthermore, the Brazilian Supreme Court has recently announced an AI System called *Maria*, an AI-Based Writing Support Module, an AI-Based Content Production Tool, that employs generative AI to assist in drafting various types of legal texts (Supremo Tribunal Federal, 2024). The tool will be applied in summarising Justices' Votes, preparing reports on Appeals Cases. It also will create a preliminary analysis of complaints providing answers to key questions that guide the preliminary study of such cases, a functionality inspired by the Galileu system from the 4th Regional Labour Court (TRT-4) in Rio Grande do Sul. The STJ, in turn, has kept pace with advancements by developing an AI tool designed to assist in the drafting of judicial decisions (STJ, 2025).

[9] Concerning the relationship between fundamental rights and the use of AI see Cambi, E. A. S. & Amaral, M.E.T.P.T., 2023.

[10] Isabela Ferrari presents a legal regulatory proposal for Algorithmic Decision Systems (ADS) adopted in the Brazilian judiciary (Ferrari, 2023).

In addition to serving court staff and magistrates, the AI tool, called Logos, also features a chatbot accessible to lawyers, students, and the public. Therefore, users can engage with the STJ Logos dialogue interface to inquire about various aspects of the legal proceedings and request specific tasks, such as generating a list of arguments presented in the petition. In labour justice, the Superior Council of Labour Justice (hereinafter: CNJT) had already developed an artificial tool called Chat JT, tailored to the needs of labour judges to make drafts and optimise the workflow (CNJT, 2025).

AI assistance in suggesting draft decisions goes a step further when compared to *Victor* (Supremo Tribunal Federal, 2021) and *Socrates* (STJ, 2024), which are the AI tools previously used to analyse extraordinary and special appeals filed in the superior courts (the Supreme Court and STJ), verifying the requirements of the appeals to select those that should be admitted. *Victor* is the AI tool of the Brazilian Supreme Court, whereas *Socrates* performs the same function in the STJ. Thus, these tools ensure efficiency in analysing admissibility requirements and help eliminate the backlog of cases awaiting admission to the Court for merit-based judgment.

In all of these tasks, the system is always supervised, in accordance with the CNJ's Resolution 332/2020 (guidelines for the use AI in the Judiciary). To perform this function effectively, the system must be fed with data from various analogous cases so that the machine can identify and categorise information, applying legal principles and factual knowledge relevant to that specific case.

Therefore, the third question can be answered. Even though the specificities of each legal system demand tailored solutions, foreign experiences can serve as a guiding framework for improvement. By analysing international best practices, it is possible to develop more effective strategies to curb abusive and predatory litigation, ensuring greater efficiency and fairness in the judicial process. In this sense, based on the Brazilian experience concerning the implementation of AI tools and digital processes with automation, this text confirms the hypothesis that incorporating digital procedures with AI and automation can decrease predatory and repetitive litigation while also making legal processes faster, more precise and trackable.

4. Conclusion

In this brave new world (Huxley, 2014),[11] we are in the midst of a significant digital revolution, and the challenges of mass litigation and predatory litigation require the application of macro-procedural solutions based on technological tools. One of the dysfunctions of the broad movement to expand access to justice is the abusive use of the right to litigate through oppressive or baseless claims which are often difficult for the system to track.

Analysing the technological mechanisms available to the judiciary to address predatory litigation and mass claims show that the digitalisation of processes reduced processing time and case backlog, according to the official data report "*Justiça em números*" (Justice in

[11] The title of Aldous Huxley's work is invoked to announce the advent of an admirable and prosperous Era, quite different from the one portrayed in the book. Nevertheless, the critiques presented in the book remain pertinent to contemporary society.

Numbers). Automation enables the scheduling of procedural tasks, eliminating idle times, ensuring adjudication within a reasonable time. In addition, AI tools provide information on similar lawsuits, enabling better management of these types of cases, which results in greater efficiency in adjudication, confirming the hypothesis of this paper. After the identification of predatory litigation, it is possible to apply measures, such as joinder of cases, the use of the *forum non conveniens* doctrine and dismissal of claims due to lack of grounds (clear abusive exercise of the right to petition) and the imposition of fines.

Regarding the legitimate mass lawsuits, the reports generated by the AI tools enable judges and courts to promote the joinder of cases, the initiation of IRDR or notification of associations and the public prosecutor's office to file a class action. The prevention of litigation can be achieved by identifying the potential of a certain type of lawsuit to generate a future surge of cases. AI tools associated with court intelligence centres are able to track certain litigation trends. With this information in hand, some initiatives can be adopted, such as encouraging procedural solutions, settlements or notifying a legitimate party to file a class action.

In sum, the analytical capabilities of AI tools make them a valuable collaborator in promoting a faster and more trustworthy legal system for all, as they identify repetitive and predatory claims quickly, helping to manage such practices. The findings demonstrate that AI and automation can enhance legal efficiency, reduce backlogs, and ensure adjudication in a reasonable time. These technologies also create a new paradigm for jurisdiction, allowing courts to manage cases more flexibly across borders. Overall, the digital era represents significant progress in modernising the judiciary, making it more efficient.

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Short-Term Transformations: Law in Action from the Perspective of the Brazilian and Serbian Jurisdictional Systems

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EVOLUTION OF THE BRAZIL'S JUDICIAL PROCEDURE SYSTEM IN THE CONTEXT OF ELECTRONIC PROCEDURES AND ARTIFICIAL INTELLIGENCE

Abstract

Brazil's judicial system, one of the largest in the world, manages more than 83 million pending cases across over 90 courts with approximately 18,000 judges. This contribution highlights the historical, legal, and technological developments that have shaped Brazil's judiciary and examines the challenges and opportunities that arise as it adapts to the demands of modern times. Brazil's legal system is deeply rooted in the civil law tradition, although recent years have seen an influx of common law principles, particularly in procedural law. At the same time, the Brazilian judiciary faces significant challenges in managing its high caseload and ensuring timely justice. A major development in recent years has been the integration of technology, particularly through the implementation of electronic case management systems. The Electronic Judicial Process Law (Law No. 11.419/2006) was envisaged as an avenue to revolutionise the handling of judicial processes by allowing for the digitisation of case filings and document management, and to improve efficiency and uphold the constitutional mandate of ensuring a reasonable duration of proceedings. In addition, the General Data Protection Legislation, was meant to serve as a path to ensure that technological innovations within the judiciary, such as AI, respect constitutional rights to privacy and transparency. The author in this paper examines the extent to which the above legal framework has contributed to adapting to the challenges of the digital age through technological advancements and legal reforms and improved judicial efficiency while balancing it against the core principles of justice, transparency, and privacy.

Keywords: electronic case management systems, artificial intelligence in law, judicial modernisation, digital transformation, Brazilian judiciary reforms.

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1. Preliminary Considerations

The impact of the technological revolution on the Brazilian Judiciary is undeniable. Although the 1988 Constitution of the Republic of Brazil, in its original wording, did not explicitly provide for digital innovations in judicial proceedings, given that technology was not yet a reality in the Brazilian judicial system approximately twenty years ago, Constitutional Amendment No. 45 of 2004, known as the Judiciary Reform, introduced a new paradigm. It incorporated the principle of the reasonable duration of proceedings, set forth in Article 5, item LXXVIII, among the catalogue of fundamental rights and guarantees.[1] This mandate of ensuring the resolution of cases within a reasonable time largely guided the search for solutions that would enhance procedural celerity. In this context, the informatisation of judicial processes emerged as a promising path, driven by the need for greater efficiency and responsiveness in the justice system.

It is no coincidence that, shortly after Constitutional Amendment No. 45/2004, a decisive legal milestone was enacted: Law No. 11.419/2006 (hereinafter: Electronic Judicial Process Law), which regulated the use of electronic means in judicial proceedings and enabled the creation of fully digital case files. Bill No. 5.828/2001 that led to the Electronic Judicial Process Law was initiated by the Association of Federal Judges of Brazil (hereinafter: AJUFE), demonstrating how the judiciary itself sought technological solutions. As the Electronic Judicial Process Law continues to evolve in response to these changes, which are significant enough to prompt the inclusion of a discipline called "Digital Law" in law school curricula, the digital environment increasingly connects with the legal world, assisting its functions and addressing its deficiencies. One of the most significant transformations resulting from this context is undoubtedly the adoption of electronic judicial proceedings.

The Electronic Judicial Process Law thus marked a turning point in legal culture by allowing electronic filings, digital notifications, the use of electronic signatures, and other measures that made it possible to standardise procedural informatisation across Brazil. As a result, the concept of the electronic process ceased to be an isolated experiment and became a legal reality throughout all Brazilian courts.

Today, there is broad consensus on the importance of electronic proceedings. While digitisation in in principle has brought immediate benefits, such as reduced paper usage, remote access to case files, and the elimination of bureaucratic steps, the overload of cases and the high cost of maintaining judicial services remain pressing issues. It is evident that, although digitalisation reduced many procedural stages, replacing paper with digital media did not fully resolve the problems of excessive case volume and judicial delays, including in the superior courts and the Supreme Court. In response, and aligned with technological advances, the judiciary began adopting new tools such as Artificial Intelligence (hereinafter: AI) to enhance judicial efficiency and automate repetitive tasks (Stjepanović, 2024). Therefore, following the widespread implementation of electronic procedures, the incorporation of AI systems emerges as the next phase in the digital transformation of the justice system, with the aim of fulfilling the constitutional mandate to deliver fair decisions within a reasonable timeframe (Stanić & Tintor, 2024).

[1] Article 5, item LXXVIII – "All persons are ensured the reasonable duration of legal proceedings and the means to guarantee their swift processing."

2. Brazilian Legal Framework on Electronic Procedures

The consolidation of electronic procedures and the increasing use of AI in the Brazilian Judiciary are supported by a robust normative framework built in recent years. As previously mentioned, the starting point is Constitutional Amendment No. 45/2004, which elevated the right to a reasonable duration of proceedings to constitutional status, making procedural efficiency a legal imperative, as previously mentioned. This constitutional mandate provided the foundation for process management policies and several legislative innovations, notably the Electronic Judicial Process Law.

The Electronic Judicial Process Law regulates the informatisation of judicial proceedings, authorising courts to implement electronic systems and granting legal validity to acts performed digitally. Key provisions include:

(i) electronic submission of petitions, appeals, and documents (Art. 2);
(ii) digital notifications to parties and attorneys via judicial portals (Art. 5);
(iii) use of certified digital signatures (Art. 1, para. 2, III, a); and
(iv) legal equivalency of digital and physical case files (Art. 8).

It also amended provisions of the 1973 Civil Procedure Code to align with the new digital reality. From 2007 onwards, multiple courts adopted electronic systems — such as *e-SAJ*, *PROJUDI*, and later *PJe*[2]— in accordance with Law No. 11.419/2006. This legal evolution proved crucial in addressing future challenges. For instance, during the COVID-19 pandemic, digital procedures enabled the judiciary to continue operating remotely, demonstrating the foresight and long-term impact of the 2006 legislation.

In the following years, the National Council of Justice (hereinafter: CNJ), also created by Amendment No. 45/2004, played a central role in regulating and promoting technology use in the Judiciary. Under its constitutional mandate (Art. 103-B, § 4, I–II), CNJ issued Resolution No. 332/2020c — the first national normative act on the use of AI in judicial contexts. This resolution established ethical, transparency, and governance principles for the development and use of AI by judicial bodies. It recognised the potential of AI to enhance decision-making speed and consistency, while emphasising the need to respect fundamental rights and ensure predictability, impartiality, transparency, auditability, and substantive justice. Resolution 332/2020 called for AI-assisted decisions to uphold equality, non-discrimination, pluralism, solidarity, and fairness. It also mandated that data used in AI systems be traceable, secure, and privacy compliant.

However, this initial regulation soon required updates. CNJ issued Ordinance No. 338/2023, creating a Working Group on AI in the Judiciary to study regulatory needs, particularly concerning Generative AI (hereinafter: GAI), a class of AI technologies capable of generating texts, images, or decisions based on large data sets, which poses new ethical, legal, and technical challenges for the Judiciary.

[2] e-SAJ (*Sistema de Automação da Justiça*) is an electronic case management platform developed by Softplan and adopted primarily by state courts to handle filings, procedural movements, and digital case files. PROJUDI (*Processo Judicial Digital*) is a system developed by the Brazilian Federal Justice in partnership with the CNJ to enable fully digital case processing in lower courts. PJe (*Processo Judicial Eletrônico)* is a unified, national-level system managed by the CNJ, aimed at standardising digital judicial procedures across all branches and levels of the Brazilian judiciary.

Their work led to Resolution No. 615/2025, which replaced Resolution 332/2020. Drafted with wide participation from justice system stakeholders, including judges and AJUFE, the resolution set modern guidelines for responsible AI adoption in the Judiciary. It requires governance, audit, and monitoring mechanisms and established a National Committee on Judicial AI to oversee implementation.

Meanwhile, the Brazilian Congress is progressing with a general AI legal framework applicable across all sectors, including the judiciary. Senate Bill No. 2338/2023, authored by Senator Rodrigo Pacheco and based on a draft by jurists led by Justice Ricardo Villas Bôas Cueva, sets broad standards for AI development and responsible use in Brazil. In alignment with the European regulation, it adopts a risk-based approach: stricter rules for high-risk AI (e.g., in health, education, and public services), and outright bans on uses deemed excessively risky or contrary to fundamental rights.

The bill, approved by the Senate in December 2024, is now under review in the Chamber of Deputies.[3] Once enacted, it will become Brazil's AI Legal Framework, directly impacting the judiciary's internal algorithmic practices and reinforcing CNJ acts with federal legal force. In summary, Brazil now has a coherent regulatory framework, from constitutional principles to specialised regulations, for integrating technology into judicial practices, within ethical and legal boundaries.

3. Practical Experiences with Artificial Intelligence in the Brazilian Judiciary

The use of algorithms, particularly those based on machine learning techniques, is now common across many sectors, including judiciary functions. Public agencies, like their private counterparts, are increasingly adopting AI solutions.

Despite ongoing debates over its limits (Mihajlović & Ćorić, 2024), AI's growing use in the judiciary unlocks many possibilities. When applied to the justice system, AI enhances efficiency, reduces procedural flaws, and automates bureaucratic tasks better all vital for today's judiciary.

Following normative evolution, Brazilian courts have become fertile ground for innovation. Initially used in pilot projects, AI systems are now active in nearly all branches of the judiciary, helping judges and clerks handle heavy caseloads. The Supreme Federal Court (hereinafter: STF) has used AI since 2017 with the "*Victor*" platform, which aids in triaging appeals of general repercussion. Other tools include *RAFA 2030*, *VitórIA*, and *MARIA*, all of which assist in processing workflows.

Likewise, the Superior Court of Justice (hereinafter: STJ) developed "*Sócrates*",[4] which helps identify legal controversies in appeals and points to constitutional grounds, contested legal provisions, and cited precedents. Other STJ systems include "*Athos*"[5] and the

[3] As of May 2025, the Bill is still under review in the Chamber of Deputies. A Special Committee has been created (on 4 April 2025) in the Chamber to examine the proposal. There is *no record yet* that the Bill has been passed by the Chamber of Deputies or that it has been sanctioned into law.

[4] *Sócrates* (or *Sócrates 2.0*) is an AI-assisted support tool developed by Brazil's STJ. It aims to assist court staff and justices by previewing and analysing *Recurso especial* (special appeals) and related judgments.

[5] *Sistema Athos* is used in the Superior Tribunal de Justiça (STJ). Developed around 2019, for the automation of appeals admissibility, identification of repeated themes, and support in precedent formation.

generative AI system "*STJ Logos*".[6] The Federal Court of the 3rd Region (TRF-3) created "*Sigma*",[7] an advanced AI that assists in drafting decisions by suggesting templates from similar cases. Sigma earned an Innovare Award for judicial efficiency.

A 2023 CNJ survey (published in 2024) showed that 66% of Brazilian courts had AI projects underway, representing a 26% increase from 2022. The *Sinapses* platform recorded 147 AI systems used across courts. State courts lead in volume, with 68 AI initiatives. Highlights include the Rio Grande do Sul Court (12 projects), Ceará (7), and São Paulo (6). The Federal Judiciary had 14, and the Labour Courts 20. These numbers confirm AI's consolidated presence in judicial practice, from trial courts to the Supreme Court, signalling a new reality in Brazilian legal proceedings.

4. Regulation and Some Possible Challenges

AI's expansion in the justice system raises not only operational gains but also ethical and legal concerns.

Key challenges include:

- Human Oversight: AI must not operate autonomously or opaquely. All AI-supported decisions must be supervised by a qualified judge or clerk. (Zou & Lefley 2025). Resolution No. 615/2025 mandates effective, periodic human oversight and allows human intervention to override algorithmic suggestions.
- Transparency and Explainability: Judicial parties must understand how decisions are made. Systems must be auditable and outcomes predictable. Resolution 615/2025 requires algorithmic impact assessments to prevent and mitigate risks to fundamental rights.
- Bias and Discrimination: AI systems trained on judicial data may replicate structural biases. The CNJ and Bill No. 2338/2023 stress the prevention of undue partialities and call for broad, balanced datasets and multidisciplinary validation.
- Training and Organisational Culture: Effective AI use requires that judges and staff understand its functioning and limitations. Judicial education programs in law and technology are essential.

Ultimately, the judiciary must balance innovation with legal safeguards. There is consensus that well-regulated AI can enhance accuracy and efficiency, but never at the expense of ethics or human dignity. Technology must serve justice, not the other way around.

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[6] STJ. *STJ Logos, AI generative engine* was launched on February 11, 2025. Designed to modernise analysis and preparation of judicial content, assist ministers' offices, and improve efficiency in producing decisions, with adherence to standards of transparency and data security.

[7] SIGMA is a system used by the Federal Regional Court of the 3rd Region (TRF-3) in Brazil. It's an AI-assisted tool that helps in drafting judicial documents by suggesting previously used models ("*minutas*") based on the subject matter of a case.

5. Final Considerations

The journey of the Brazilian judiciary from electronic proceedings to AI reflects a deep commitment to improving efficiency and upholding the constitutional mandate of ensuring a reasonable duration of proceedings. Judges remain central to this process: AI assists but does not replace their discernment. Systems like STF's *Victor*, STJ's *Sócrates*, and TRF-3's *Sigma* exemplify how AI can boost productivity without compromising judicial authority.

Cultural shifts are underway as the legal community adopts terms like machine learning, predictive algorithms, and big data. Nonetheless, caution is necessary: AI must remain subject to human oversight and legal review. Transparency must guide its lifecycle, from deployment to audit. Robust regulation, such as CNJ's resolutions and the forthcoming federal AI law, ensures that technology evolves within the values of the Democratic Rule of Law. In short, Electronic Procedures and AI together form a double engine driving the modernisation of Brazilian justice. The first digitised process flow; the second automates auxiliary reasoning and strengthens case management capacity. Still, this evolution must not forget justice's foundational values: equity, impartiality, and human dignity in every decision rendered.

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CYBERCRIMES IN THE BRAZILIAN LEGAL SYSTEM

Abstract

This article analyses the legal treatment of cybercrime in the Brazilian criminal system, in light of the social and technological transformations of the digital age. Initially, the conceptual definitions of the term "cybercrime" are examined. Subsequently, the article examines main criminal offences provided for in Brazilian criminal law, including conduct that has recently been typified or aggravated, depending on the legal interest protected by criminal legislation. The study also covers conduct that could potentially be considered + cybercrime but for which there is no specific legal provision, although it falls under traditional types of crime. Finally, the article turns to the main civil and administrative laws relating to the use of the internet and the protection of personal data, questioning, on the basis of concrete data, the effectiveness of criminal law intervention in the prevention of cybercrime.

Keywords: criminal law, cybercrime, Brazilian legal system, internet, legal interest.

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1. Introduction

The accelerated process of digitalisation that characterises contemporary times has significantly transformed social, economic and communication relations, generating, as a side effect, the emergence of new forms of crime. In this context, so-called cybercrimes have come to occupy a prominent position in doctrinal and legislative concerns, due to the complexity of their characterisation, the inherent evidentiary challenges associated with such offences and the constant obsolescence of norms in the face of technological dynamism.

Against this backdrop, this article examines the legal treatment of cybercrimes in the Brazilian criminal system, with special attention to the legislative innovations introduced in recent decades. To this end, it begins by providing an overview of the conceptual problem of cybercrime, aiming to define the theoretical outlines of the object of study. Subsequently, the criminal legislation in force in Brazil is analysed, identifying the normative provisions expressly aimed at repressing criminal conduct practised by digital means, as well as the main legal interest protected.

The article investigates the cases in which cyber conduct, although recurrent, does not have specific normative provisions, requiring the application of traditional criminal classifications. Thereafter, the main civil and administrative rules that make up the national regulatory apparatus on the use of the internet and data protection are briefly examined. The structure described above thus aims to offer a comprehensive and critical view of the current stage of the Brazilian regulatory response to cybercrime, contextualising the issue in its theoretical and legislative dimensions.

2. Concept of Cybercrime

Firstly, it is important to clarify that there is no universally accepted definition of the term “cybercrime”.[1] Various terms have been used to describe the cybercrimes (so-called “cybercrimes”). The first descriptions referred to "computer crimes", "computer-related crimes," and "crimes committed by means of computers". With the advancement of digital technology, new terms have been used, such as "high-tech crime", "digital crime", and "information-age crime", among others.[2]

International scholars have looked at these concepts and produced many definitions of cybercrime. Generally speaking, Kshetri (2010, p. 3) argues that cybercrimes are those in which the main means of perpetration are computers or computer networks. Clough (2010, pp. 8-11), on the other hand, based on the conceptualisation used by the US Department of Justice (DOJ), puts forward three levels of classification. In one of them, the computers

[1] For this reason, authors such as Majid Yar advocate the understanding of cybercrime as a wide range of illicit activities, rather than treating it as a single phenomenon (Yar, 2006, p. 9).

[2] Jonathan Clough argues that each of these expressions present one or more deficiencies. For example, definitions that focus on "computers" may not include networks. On the other hand, nomenclatures such as "cybercrime" or "virtual crime" can be seen as focusing exclusively on the internet. Terms like "digital crime", "electronic crime" or "high-tech crime" can be considered so broad as to be empty of meaning. For this reason, the author argues that such terms should not be taken literally, but as broad descriptive expressions that emphasise the role of technology in the commission of crimes (Clough, 2010, p. 9).

or computer network are the target of the criminal conduct. In another, computers are the tools that facilitate the commission of common criminal offences, not essentially dependent on such means. Finally, the third group of offences reflects a practice in which the computer is an incidental aspect of the conduct and can provide evidence of the crime.

Wall (2001, pp. 3-7), by contrast, proposes a classification that does not focus on technology, but rather on the relationship between the perpetrator and the victim. The author subdivides cybercrime into four groups, depending on the nature of the act. The first group involves acts of invasion of another person's digital space, whether or not they cause damage, such as hacking into devices and introducing viruses into electronic equipment. The second category refers to behaviours that damage the victim's property, such as the theft of digital or economic assets, fraud in electronic purchases and even copyright infringement. Along these lines, the third group includes acts of pornography and, finally, the fourth group involves forms of physical or psychological harm, such as incitement to self-mutilation, hate crimes, and discrimination.

That said, it is important to note that cybercrime has aroused significant concern in the international community, which culminated on 23 November 2001, in the adoption of the Convention on Cybercrime (ETS No.185), also known as the Budapest Convention. This treaty expressed the risks arising from the use of computer and electronic networks to commit crimes, especially given the irreversible changes brought about by the globalisation of computer networks, and sought to build a common criminal policy to protect society against crime in cyberspace and the legitimate interests associated with the use and development of information technologies. Thus, the convention determined the incorporation by its signatories into their domestic law of various criminal offences involving conduct perpetrated in the digital context (Murata & Torres, 2023, pp. 13-16).

It should be noted that the treaty in question, although it makes its reasons and objectives clear, while providing clear guidelines for its signatories, does not define cybercrime. Similarly, neither the Council of Europe Convention on Cybercrime, the League of Arab States Convention or the African Union Draft Convention have provided a definition of cybercrime (UN, 2013, p. 12).

The document Cybercrime Study (UN, 2013) seeks to articulate a definition of cybercrime and presents three broad categories. The first of these is organised according to the object, i.e. encompassing conduct involving a computer system or computer data, such as unauthorised access, interception, acquisition of, or interference with such data or systems. The second category includes conduct in which the computer system is the means of committing the crime, i.e. the *modus operandi*. In these cases, the perpetrator may intend to embarrass, threaten or intimidate individuals as well as defraud copyright or a country's financial system, although these crimes could be committed without the support of a computer system, unlike the first category. Finally, the third category groups together behaviours related to computer content, *i.e.* messages, words, images, or audio, transmitted or stored by computer systems. The object of these offences is usually related to an individual, an identifiable group of people or a widely held value or belief. As with the second category, these offences could be committed without the use of a computer system, but such use essentially alters and expands their scope and reach (UN, 2013, pp. 16-19).

After the analysis of the understanding of international scholars and international treaties on cybercrime, it is important to mention that Brazilian legal doctrine has also failed to reach a consensus on the terminology or conceptualisation of cybercrime. By way of example, Lima (2006) chooses the term "computer crimes", while Crespo (2017, p. 16) questions the use of the expression "computer crimes", noting that it covers conduct committed not only through computers, but also through other means of telecommunications. Therefore, for the purposes of this article, a broad conceptualisation of cybercrime is adopted, understood as conduct that harms traditional interests or new interests of a technological or digital nature, through the use of technological means.

3. Criminal Norms Concerning Cybercrimes in the Brazilian Legal System

It will now be analysed the criminal offences that, based on the previous section, can be identified as cybercrimes in the Brazilian legal system, with an emphasis on those in which the legislature was concerned with updating the existing legal text or creating a new type of crime in order to adapt to the new technological reality. This examination is based on the grouping of criminal offences according to the legal interest protected by criminal law.

3.1. Crimes Against the Person

Currently, the Brazilian Penal Code has several provisions related to the practice of virtual crimes against the person. As explained below, there are provisions dedicated to the protection of life, honour and personal freedom, consisting of both new autonomous offence categories and precepts aimed at increasing the penalty, inserted into classic criminal types.

3.1.1. Inducing, Abetting or Aiding Suicide or Self-Harm

Article 122 of the Penal Code has contained the crime of inducing suicide since it was first published in 1940, and its original wording remained in force until 2019. Until that year, the offence covered the conduct of inducing, abetting, or assisting someone to commit suicide. However, the legislature then made the punishment conditional on the actual death of the victim or the occurrence of serious bodily injury (Fragoso, 1986, pp. 97-98).

With the emergence of several episodes involving instances of suicide and self-mutilation, by means of coercion, challenges or games, aimed mainly at children and adolescents, occurring in interactions through social networks or the internet in general, the Brazilian legislature made changes to the crime in question. Federal Law No. 13.968/2019 was thus enacted, and its formal justifications include the significant rise in suicides and self-mutilation by young people encouraged and pressured by activities on social networks (Souza, 2022, p. 106).

The law changed the name of the crime to "inducing, abetting, or aiding suicide or self-mutilation", criminalised the conduct of inducing, abetting or aiding self-mutilation and removed the need for death or serious bodily injury for the crime to be constituted. Thus, the mere practice of these behaviours would consummate the crime, punishable by imprisonment of six months to two years, regardless of such results. If the victim suffers

serious bodily injury, the sentence is increased to imprisonment for one to three years, and if the victim dies, the sentence is increased to imprisonment for two to six years. In addition, the legislature included a provision that doubles the sentence if the conduct is carried out via a computer network or social networks or if it is transmitted in real time. Finally, it also doubled the sentence for the person who is the leader, administrator or person in charge of a group or community. These changes were intended to "discourage the emergence of groups on social networks that encourage young people to harm their own bodies or health", according to the justifications in Senate Bill 664/2015 which became the federal law in question.

3.1.2. Crimes Against Honour

With regard to crimes against honour, the Brazilian Penal Code provides for three crimes. The first of these, slander, describes the conduct of slandering someone, falsely assigning to them a fact defined as a criminal act. The second, defamation, encompasses the behaviour of defaming someone by assigning to them a fact that is offensive to their reputation. Finally, insult, the third offence, criminalises the act of insulting someone, offending their dignity or decorum. Slander and defamation protect the individual's objective honour, that is, the reputation or the image held by third parties. Insult, on the other hand, protects subjective honour, that is, the perception the victim has of themselves or, in the words of Noronha (1998, p. 116), "self-esteem", "the dignity of the person", and "the judgement each person has of themselves".

In this sense, Article 141, para. 2 of the same law provides that the sentence originally imposed will be increased threefold if any of the three crimes against honour listed above are committed or disseminated by means of any social network on the world wide web. This aggravation was introduced into the Brazilian legal system by Federal Law No. 13.964/2019. Therefore, there is no specific crime in Brazilian criminal law involving the commission of a crime against honour in the virtual space. However, a mandatory increase in the sentence applies to traditional crimes, which have existed since the Penal Code was enacted in 1940.

3.1.3. Systematic Intimidation (Bullying)

In 2024, Federal Law No. 14.811/2024 was enacted, introducing the crime of systematic intimidation, also known as the crime of bullying, in Article 146-A of the Brazilian Penal Code. The criminal offence covers systematic intimidation, individually or in groups, through physical or psychological violence, in an intentional and repetitive manner, without apparent motive, through acts of intimidation, humiliation or discrimination or verbal, moral, sexual, social, psychological, physical, material or virtual actions. The penalty for this offence is a fine, when the action does not constitute a more serious crime. Under the same article, a qualified offence, called systematic virtual intimidation or cyberbullying is also regulated. In cases where the qualified offence is committed, the perpetrator can be punished with imprisonment of two to four years, and a fine, if the conduct does not constitute a more serious crime, when the bullying is committed through the computer network, social networks, applications, online games or any other digital medium or environment, or when transmitted in real time.

3.1.4. Hacking into a Computer Device

Since Federal Law No. 12.737/2012 entered into force, the Brazilian legal system has also made it a crime to unlawfully access a third party's computer device without the authorisation of the user of the device, when the perpetrator intends to obtain, tamper with or destroy data or information, or install vulnerabilities in order to gain an illicit advantage, as set out in Article 154-A of the Penal Code. According to Reale Júnior (2023, p. 529), gaining access to the content stored on a freely accessible device does not constitute the crime in question; for the offence to exist, it is necessary to circumvent a security mechanism, such as a password, for example. It can be seen that the legal interest protected by this crime is the inviolability of the secrecy of information, which is part of individual freedom and the right to intimacy and privacy, intrinsic to the free expression of the personal autonomy (Souza, 2022, p. 529). The crime in question was created following the removal of personal photos of a well-known Brazilian actress, probably obtained when her computer was taken in for technical assistance. On that occasion, several photos of the actress were posted on the internet, and she was also the victim of extortion and threats. For this reason, this law is also known as the "Carolina Dieckmann Law".

The provision also covers the conduct of producing, offering, distributing, selling or disseminating a computer device or program with the aim of enabling the previously described conduct to be carried out. In reality, this offence does not address autonomous conduct, but rather criminalises the preparatory act for the type of crime mentioned above; this may give rise to discussions about its legitimacy, given its limited harmfulness in relation to the legal interest under protection (Reale Júnior, 2023, pp. 529-530). In addition, the norm envisages an increase of one third to two thirds of the original sentence if the invasion results in economic damage to the victim or if it is proven that the data or information obtained through the invasion has been disclosed, commercialised or transmitted to third parties. Furthermore, the law provides for the penalty of imprisonment, from two to five years and a fine, if the invasion results in obtaining the content of private electronic communications, commercial or industrial secrets, confidential information or unauthorised remote control of the invaded device. Finally, the penalty must be increased by one third to one half if the crime is committed against the President of the Republic, governors and mayors; the President of the Supreme Court; the President of the Chamber of Deputies, the Federal Senate, the State Legislative Assembly, the Legislative Chamber of the Federal District or the Municipal Chamber; or the top manager of the direct and indirect federal, state, municipal or Federal District authority.

3.2. Crimes Against Property

In the area of property crimes, important legislative changes have been made to regulate virtual crimes.

3.2.1. Theft

The first change that should be mentioned concerns the crime of theft, originally regulated by Article 155 of the Brazilian Penal Code, as the conduct of appropriating, for oneself

or for others, movable property. The simple form of theft is punishable by imprisonment of one to four years, and a fine. As Salvador Netto (2023, p. 535) highlights, theft will always represent an attack on property caused by a non-owner directed at an owner, even if the object is taken from an individual who only possesses or holds the object in question.

In this context, Federal Law No. 14.155/2021 added to Article 155 a qualified form of theft, the penalty for which is imprisonment of four to eight years and a fine. This type of theft is committed through fraud, by means of an electronic or computer device, whether or not connected to a computer network, with or without the violation of a security mechanism or the use of a programme for such purposes or any other comparable fraudulent means.

In addition, the punishment for aggravated theft described above can be increased by one third to two thirds if the crime is committed using a server kept outside Brazilian territory; or by one third to twice the amount if the crime is committed against an elderly or vulnerable person. Thus, the perpetrator of a theft committed under these conditions can be punished with more than thirteen years in prison and a fine, in the first case, and sixteen years in prison, in the second case.

3.2.2. Fraud

Brazilian criminal legislation also provides for the crime of fraud perpetrated in the virtual environment. The original definition of the crime of fraud, set out in Article 171 of the Brazilian Penal Code, concerns the conduct of obtaining an illicit advantage by inducing or maintaining the victim in misconception, by any fraudulent means, necessarily causing the victim some kind of loss. Fraud, therefore, is the differentiating element between embezzlement and other property crimes and, as Hungria (1955, p. 164) argues, it is the antithesis of violence in the objectification of the illicit act. The basic form of this offence is punishable by imprisonment of one to five years and a fine.

That said, the aforementioned Federal Law No. 14.155/2021, which amended to the crime of theft, also updated the crime of fraud, providing for a qualified offence in cases of virtual fraud. Therefore, if the fraud is carried out using information provided by the victim or by a third party who is misled via social networks, telephone contact, fraudulent emails, or by any other similar fraudulent means, the prison sentence increases from one to five years to four to eight years. This sentence of four to eight years can be further increased, by one third to two thirds, if the crime is committed using a server kept outside national territory.

3.3. Crimes Against Sexual Dignity

The Brazilian legal system has two legislative provisions involving cybercrime concerning the protection of sexual dignity. The first of these, set out in Article 216-B of the Brazilian Penal Code, criminalises the recording, by any means, of content with scenes of nudity, sexual acts or libidinous acts of a private nature without the authorisation of the participants. This article also provides for the act of making video montages, photographs, audio or any other type of recording, including a person in a scene of nudity, a sexual act or a private libidinous act. For these cases, the penalty is imprisonment of six months to one year and a fine.

The second type, prescribed by Article 218-C of the Brazilian Penal Code, criminalises the act known as *revenge porn*, *i.e.* the dissemination of videos or images referring to the victim's sexual intimacy, where the perpetrator's conduct is usually a gesture of retaliation (Valente *et al*, 2016, p. 17). This criminal offence covers the action of transmitting, publishing or disseminating, by any means, including through mass media or computer and telematic means, any audiovisual recording that contains a scene of rape or rape of a vulnerable person or that advocates or incites its practice; or a scene of sex, nudity or pornography without the victim's consent.[3] The crime can only be committed maliciously and does not require a specific purpose, i.e. performing the act for any reason already constitutes the offence (Naves, 2022, p. 777). Such conduct is punishable by imprisonment of one to five years, and the penalty may be increased by one-third to two-thirds if the crime is committed by a person who maintains or has previously maintained an intimate relationship of affection with the victim or for the purpose of taking revenge or humiliating the victim.

In this context, it is worth mentioning an important line of cases from the Superior Court of Justice, introducing a new concept of "virtual rape". By way of contextualisation, Article 213 of the Penal Code regulates the crime of rape, which defines the act of constraining someone, by means of violence or serious threat, to have sexual intercourse or to perform or allow another libidinous act to be performed with the perpetrator. Based on this rule, the court has come to understand that conduct such as the perpetrator's demand, under serious threat, that the victim record a libidinous act involving herself and send it to him (or do so by means of live transmission via cell phone or computer) would constitute the crime of rape (i.e. Ordinary Appeal in Habeas Corpus No. 91.792).

Federal Law No. 8.069/1990 regulates various virtual crimes committed against children and adolescents. Article 240 of the same law deals with the act of recording, by any means, a scene of explicit sex or pornography involving such victims. Article 241 of the that statute criminalises the sale or exposure for sale of a recording containing explicit sex scenes or pornography involving children and adolescents, while Article 241-A criminalises the dissemination or transmission, by any means, of recordings with such content and Article 241-B its acquisition or possession. Furthermore, Article 241-C regulates the crime of simulating the participation of a child or adolescent in a scene of explicit or pornographic sex by altering, editing or modifying a photograph, video or any other visual representation. Finally, Article 241-D concerns the crime of enticing or luring a child, through any means of communication, with a view to engaging in a libidinous act with them.

3.4. Crimes Against Public Health, Public Faith and Public Administration

In addition to the criminal offences discussed above, the Brazilian criminal legal framework also provides for other virtual crimes, aimed at protecting additional legal interests. Thus, Article 266 of the Penal Code provides for the crime of interrupting or disturbing telegraphic, telephone, computer, telematic or informational services of public

[3] It is worth noting that the legislator expressly emphasised the absence of a crime if such practices take place in a journalistic, scientific, cultural or academic publication with the adoption of a resource that makes it impossible to identify the victim, with the exception of their prior authorisation, if they are over 18 (eighteen) years of age (Art. 218-C, para. 2 of the Penal Code).

utility, introduced by the enactment of Federal Law No. 12.737/2012. This offence protects public safety, defining the conduct of interrupting or disturbing telegraph, radiotelegraph or telephone services, as well as the act of preventing or hindering their reestablishment.

There are two other criminal offences aimed at protecting the public administration. The first is the crime of inputting false data into an information system. It involves inserting or facilitating the insertion of false data, as well as unduly altering or deleting correct data in the public administration's computerised systems or databases. This crime can only be committed by a public official, who must act with intent, seeking to obtain an undue advantage. The second is the crime of unauthorised modification or alteration of an information system, set out in Article 313-B of the Brazilian Penal Code. This provision describes the conduct of modifying or altering an information system or computer programme without authorisation from the competent authority, with the penalty being increased if the alterations result in damage to the public administration.

3.5. Money Laundering

The crime of money laundering was introduced into the Brazilian legal system by Federal Law No. 9.613/1998, in response to the global trend and the demands of the international community to adopt a transnational criminal policy to combat this crime (Barros, 2012, p. 31). As Blanco Cordero (2012, p. 37) argues, although money laundering cannot be reduced to a single concept, it is possible to identify a common core, which necessarily refers to the process of concealing assets of criminal origin in order to later reintegrate them into the formal economy, giving them the appearance of lawfulness.

Currently, Brazilian legislation allows any criminal offence to be considered as a predicate crime for money laundering, and there is no longer an exhaustive list of crimes that could be considered to constitute this offence as was the case in the original wording of the law in 1998. Furthermore, Article 1 provides for the conduct of "concealing or disguising the nature, origin, location, disposition, movement or ownership of assets, rights or values derived, directly or indirectly, from a criminal offence." This means that it is not necessary for the crime of money laundering to be consummated when the proceeds of a previous criminal offence are introduced into the formal economy, giving them the appearance of lawfulness; mere concealment or disguise is sufficient.

Paragraph 1 of the same article, however, criminalises other forms of the crime in question. Therefore, laundering is also committed by those who, in order to conceal or disguise the use of goods, rights or values originating from a criminal offence, convert them into lawful assets; acquire, receive, exchange, negotiate, give or receive them as collateral, keep, deposit, move or transfer them; import or export goods with values that do not correspond to the real ones. It should be noted that, in these situations, concealment and disguise have the quality of special subjective elements of the offence, unlike the situation in the main provision, where they constitute the core of the conduct. Paragraph 2 also provides for other conduct, such as the use, in economic or financial activity, of goods, rights or values originating from a criminal offence, and the participation of a group, association or office knowing its main or secondary activity is directed towards committing the crime of money laundering.

Federal Law No. 14.478/2022 amended the legal text, providing, in Article 1, para. 4, for an increase in the sentence from one third to two thirds if the crime of money laundering is committed through the use of a virtual asset. In this regard, Silveira (2018, pp. 77, 185-186) explains that, at first, cryptocurrencies, because they essentially provide anonymity in their operations, could suggest that any financial operation involving them would be considered a form of concealment, typical of money laundering. However, he refutes this reading, arguing that the mere use or operation of crypto-assets cannot be confused with the crime of money laundering, committed with possible intent or through wilful blindness. For the crime to be committed, it has to be established with certainty that the crypto assets are being used, in the specific case, to conceal or disguise the proceeds of a specific criminal offense.

Article 9 of the law stipulates that natural and legal persons who operate in strategic sectors, on a permanent or occasional basis, as a main or ancillary activity, must comply with various obligations in order to prevent money laundering, such as the duty to collect information about their clients and operations, as well as to report suspicious acts to the competent public authorities (Bottini, 2022, pp. 61-65). This provision does not refer to criminal liability, but to the administrative and civil liability of natural and legal persons (Silveira, 2018, p. 77).

Thus, the aforementioned Federal Law No. 14.478/2022 included virtual asset service providers in this list of obligated parties in Article 9. Article 10 of this law, which lists such obligations, also establishes the duty to keep a record of any transaction in national or foreign currency of virtual assets that exceeds the limit set by the competent authority.

3.6. Crimes Against National Sovereignty

Regarding crimes against national sovereignty, it is worth mentioning the crime of espionage, which is provided for under Article 359-K of the Penal Code. It criminalises the conduct of "handing over to a foreign government, its agents, or a foreign criminal organisation, in disagreement with a legal or regulatory determination, a document or information classified as secret or top secret under the terms of the law, the disclosure of which could endanger the preservation of the constitutional order or national sovereignty". The penalty for this offence is imprisonment for three to twelve years, and it also applies to anyone who assists a spy in evading action by the public authorities. It should be noted that, according to Wunderlich (2022, p. 1331), paragraph 4 of the aforementioned article provides an exclusion from the crime, exempting from criminal liability the communication, delivery or publication of information aimed at exposing crimes or the violation of human rights.

With regard to cybercrimes, para. 3 of the Article in question provides for the facilitation of the crime of espionage by assigning, supplying or lending a password, or any other form of access by unauthorised persons to information systems; the sentence for such conduct is imprisonment for one to four years.

4. Cybercrimes That Are Not Covered by Specific Criminal Rules in the Brazilian Legal System

Despite the provisions set out above, Brazilian criminal law does not have specific provisions on conduct commonly regarded as cybercrime at national and international level. This does not mean that these behaviours do not constitute a crime in Brazil, as they are encompassed, as will be shown, by traditional criminal offences.

Firstly, there are no specific provisions on threats made in the virtual space. These acts could be considered to fall within Article 147 of the Penal Code, which deals with the crime of threatening, defined as the conduct of threatening someone with causing unjust and serious harm. Similarly, there are no specific provisions in Brazilian criminal law addressing extortion in the digital world, including the so-called "sextortion" (Santos & Gomes, 2019, p. 2019) – the act of threatening to disclose intimate or sexual photos or videos in order to force the victim to do something. In such cases, Article 158 of the Penal Code would be applicable, which provides for the crime of extortion, consummated when the victim adopts the behaviour desired by the perpetrator, due to violence against them or a serious threat. The perpetrator in this crime intends to gain an undue economic advantage for himself or someone else from the victim's conduct.

In addition, the crimes provided for in Articles 307 (false identity) and 308 of the Penal Code usually arise when cybercrimes are committed. However, the wording of these offences date back to 1940, with no updates having been made since. The first offence consists of assigning a false identity to oneself or a third party, in order to obtain an advantage or cause harm to a third party. It should be noted that this action is often used as a means to commit virtual theft or fraud. The second offence, in turn, criminalises the act of using, as one's own, any other person's identity document, as well as transferring one's own document for use by a third party.

As far as hate crimes are concerned, Brazilian criminal legislation does not have specific provisions for cybercrime. Federal Law No. 7.716/1989 contains various crimes related to discriminatory practices, such as discrimination or prejudice based on race, colour, ethnicity, religion or national origin. Article 20-C of this law states that "in interpreting this Law, the judge must consider as discriminatory any attitude or treatment given to a person or to minority groups that causes embarrassment, humiliation, shame, fear or undue exposure, and that would not usually be given to other groups on the grounds of colour, ethnicity, religion or origin". However, the law in question does not have any provisions that deal particularly with cybercrime.

Finally, Articles 153 and 154 of the Penal Code also address the crimes of disclosing a secret and violating a professional secret, respectively, which are sometimes criminalised in foreign legislation under the heading of cybercrime, but in Brazil there is no legislative classification of this nature.

The crime of disclosing a secret regulates the offence of disclosing, without just cause, the content of a private document or confidential correspondence, of which one is the holder, with the potential to cause damage to a third party. The law also criminalises the revelation, without just cause, confidential information, whether or not it is contained in the information systems or databases of the public administration.

The crime of violating professional secrecy, set out in Article 154, encompasses the action of disclosing, without just cause, a secret of which one was aware by virtue of one's position or profession, and the disclosure of which may cause harm to someone. It can be seen, therefore, that neither this crime nor the crime of disclosure of a secret have provisions that specifically address cybercrimes.

In a nutshell, not all cybercrimes that are common in practice have specific and up-to-date treatment under Brazilian law. However, this does not prevent criminal law from applying to such conduct. After all, in the absence of specific criminal legislation, an individual who has committed a cybercrime that is not specifically typified may be accused of committing common crimes, which are already provided for in Brazilian legislation.

5. Civil and Administrative Treatment of Internet Use and Data Protection in the Brazilian Legal System and Ways to Prevent Cybercrime

Having presented the panorama of Brazilian criminal legislation on cybercrime, it is important to underline that Brazil's legal system also has important civil and administrative legislation dealing with the use of the internet and data protection which is relevant for the topic at hand, and this will be briefly outlined below.

Federal Law No. 12.965/2014, known as the Civil Framework for the Internet, establishes the principles, guarantees, rights and duties relating to the use of the internet in Brazil. In this context, the issue of civil liability for damages arising from content generated by third parties is addressed in Article 19 of the above statute, stating that the provider can only be held liable for damages of this nature if, after a court order, it fails to take steps to make the content identified as infringing unavailable. Article 21 of the law, however, allows for an exception to this rule, providing that the provider will be held vicariously liable in the event that, after having received notification from the participant or their legal representative, the provider fails to remove the content that violates privacy resulting from the disclosure, without the participants' authorisation, of images, videos or other materials containing scenes of nudity or sexual acts of a private nature. It is important to mention that the Federal Supreme Court is currently analysing the constitutionality of Article 19, but so far has not yet ruled on the issue.[4]

The Brazilian General Data Protection Law (Federal Law No. 13.709/2018) regulates the way in which personal data are to be collected, used, stored and shared, and provides that the data controller or processor may be required to provide compensation for pecuniary and non-pecuniary damage, individual or collective, resulting from the violation of this legislation.

6. Conclusions

One study dating from the end of 2024 indicates that over a 12-month period, more than seven hundred million cyber attacks were recorded in the country, totalling 1,379 attacks per minute (CNN Brazil, 2024). In the same vein, another survey reports that, in 2024, 24% of Brazilians over the age of 16 were victims of digital scams, with cases

[4] Brazil, Federal Supreme Court, Extraordinary Appeals No. 1.037.396 and 1.057.258, Full Court.

distributed uniformly across the country (Senado Noticias, 2024). Therefore, it is necessary to question whether creating new crimes or exacerbating existing ones, as has been done, is the best way to prevent cybercrime.

An analysis of the Brazilian criminal legislative framework reveals a significant effort to adapt criminal law to the growing complexity of cybercrime, through the introduction of new types of crime and new qualifying provisions in existing crimes. Furthermore, it becomes evident that, even in the absence of specific criminal types, it is possible to apply criminal classification of traditional crimes to conducts committed in digital environments.

However, the persistence and exponential increase of cybercrime, despite legislative updates in the criminal field, raises serious doubts about the effectiveness of criminal law as an instrument for preventing and controlling such conduct. The data indicate that simply creating new criminal offenses or increasing penalties has not been sufficient to prevent the advance of digital crime or to ensure adequate protection of legally protected interests, which indicates the structural limits of criminal intervention. Criminal law is often used as an automatic, reactive, or even symbolic response to complex social demands, which seems to be the case in many situations involving cybercrime.

Given this panorama, it appears more promising to rely on civil and administrative mechanisms aimed at regulating the use of the internet and data protection. The enhancement of laws such as the Brazilian Civil Framework of Rights and the Brazilian General Data Protection Law has more effective preventive potential, as they promote the accountability of the agents involved, establishing clear duties of transparency and security and fostering a culture of information protection.

It can therefore be concluded that tackling cybercrime requires a legal approach that transcends mere criminal repression, demanding instead the strengthening of preventive and structuring normative policies capable of acting more effectively on the causes and contexts that favour the occurrence of illicit activities in the digital environment.

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REGIONAL COMMISSION FOR LAND DISPUTE RESOLUTION OF THE SÃO PAULO COURT OF JUSTICE: JUDICIAL MEDIATION AND TRANSFORMATIONS IN LAND JURISDICTION

Abstract

This article analyses the experience of the Regional Commission for Land Dispute Resolution of the Court of Justice of the State of São Paulo in light of National Judicial Council Resolution No. 510/2023 and the Brazilian legal and institutional framework governing collective evictions. Drawing on a normative, empirical and critical approach, the article examines the structure of the Commission, its operational principles, and its 2023 outcomes, with particular emphasis on negotiated solutions to complex possessory disputes. Engaging with theories of dialogical jurisdiction, transformative structural jurisdiction, and dispute system design, the article argues that the TJSP Commission represents an innovative model of judicial intervention, aimed at fostering inter-institutional mediation of land conflicts and promoting integrated solutions. The conclusion contends that the São Paulo experience contributes to rethinking the role of the judiciary in enforcing fundamental rights and in preventing forced evictions, particularly in contexts of housing vulnerability.

Keywords: land conflicts, dialogical jurisdiction, judicial mediation.

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1. Introduction

The growing number of collective land disputes in Brazil, especially in densely populated urban contexts, has revealed the insufficiency of traditional adjudication mechanisms to deliver effective, fair, and sustainable outcomes. In many cases, the purely judicial handling of possessory claims, through standard eviction proceedings, has proved inadequate in addressing the social, economic, and institutional complexities inherent in disputes involving long-standing occupations by vulnerable populations. These conflicts, often involving hundreds of families and properties whose social function is contested, require more than abstract legal application: they demand a dialogical, inter-institutional, and context-sensitive approach.

Within this scenario, the Brazilian judiciary has been called upon to revise its practices and to develop innovative modes of action that integrate mediation, public policy, and institutional responsibility. Resolution No. 510/2023 of the National Judicial Council (hereinafter: CNJ), inspired by consolidated practices such as that of the Court of Justice of Paraná (Parana State Court of Justice, 2022), represents a significant regulatory milestone by creating both Regional and National Commissions for Land Dispute Resolution. These commissions are composed of judges, justice sector agencies, and civil society representatives. Resolution 510 proposes a new paradigm for land conflict adjudication: one grounded in dialogical and restorative jurisdiction, guided by mediation, qualified listening, and the collective construction of solutions.

In the State of São Paulo, this national directive was implemented through the formal establishment of the Regional Commission for Land Dispute Resolution of the Court of Justice of the State of São Paulo (hereinafter: TJSP Commission), under Court Order No. 10.262/2023, which consolidated and refined the practices previously developed by the Support Group for Enforcement of Possessory Orders. Since 2014, this group has pioneered approaches to complex urban land conflicts, seeking less harmful and more negotiated solutions for the parties involved.

The TJSP Commission's work in 2023, as documented in internal reports and institutional records, encompassed dozens of socially and legally significant cases, ranging from occupations in central São Paulo to peripheral and rural areas in municipalities such as Mairiporã, Francisco Morato, and Carapicuíba. In these situations, the TJSP Commission served as an institutional forum for conciliation among various state and non-state actors, promoting mediated outcomes that included assisted eviction plans, land regularisation proposals, and the provision of housing benefits.

This article aims to analyse from a legal-institutional and empirical perspective, the functioning of the TJSP Commission in light of recent transformations in the conception of land jurisdiction in Brazil. Based on the normative foundations of Resolution CNJ No. 510/2023, it examines the procedural and organisational framework adopted by the São Paulo court, with emphasis on admissibility criteria, technical visits, inter-institutional composition, and the role of the judge as a facilitator of negotiated solutions.

The methodological approach is qualitative and document-based, relying on normative analysis (CNJ Resolution and TJSP General Judiciary Provisions), internal Commission documents, and case studies extracted from the official report of meetings held in 2023.

The aim is to contribute to theoretical and comparative reflections on the current contours of judicial functioning in structural conflict settings, particularly within the land sector, characterised by high complexity and significant social density.

This analysis is part of a broader debate on recent transformations in Brazilian judicial performance in the context of urban inequality and the enforcement of fundamental rights. The experience of the TJSP Commission illustrates how the judiciary, by adopting a more dialogical, coordinating, and cooperative role, can extend its action beyond the binary logic of adjudication and become a meaningful agent of democratic governance and social inclusion.

2. Legal Framework of CNJ Resolution No. 510/2023: From the Suspension of Evictions to Institutionalised Mediation

The adoption of Resolution No. 510/2023 by the CNJ must be understood within an institutional context profoundly impacted by the legal and social consequences of the COVID-19 pandemic on populations experiencing housing vulnerability. In particular, this measure is a direct outcome of the guidelines established by the Federal Supreme Court (hereinafter: STF) in Claim of Breach of Fundamental Precept (hereinafter: ADPF) No. 828, brought by civil society organisations seeking to suspend evictions and forced removals during the public health emergency.

In the judgment on the merits of ADPF 828, the STF recognised the severity of the Brazilian housing crisis and the need to reinforce protections for vulnerable groups. It ordered the suspension of all removal or repossession orders, judicial or extrajudicial, involving collectively occupied properties in urban or rural areas until 31 October 2022. The STF found that, given the public health risks and the lack of adequate housing alternatives, immediate enforcement of such orders would violate fundamental rights, including human dignity, adequate housing, and protection against inhuman or degrading treatment.

However, at the end of the exceptional regime, the STF did not authorise the automatic resumption of evictions. Instead, it established a transitional framework whereby courts and competent judges were required to observe procedures involving institutional dialogue. The opinion of the case rapporteur, Justice Luís Roberto Barroso, emphasised the importance of mediation mechanisms and coordination with public policies to prevent traumatic removals and ensure solutions consistent with the social function of property and the dignity of the affected parties.

Resolution CNJ No. 510/2023 must be read as a direct normative extension of these constitutional principles. Its central objective is to institutionalise, within the structure of State Courts and Federal Regional Courts, Regional Commissions for Land Dispute Resolution, specifically mandated with the structured mediation of land conflicts. This national policy draws upon constitutional, international, and jurisprudential foundations: on the one hand, the social rights to housing and the social function of property (Articles 5, XXIII, and 6 of the 1988 Federal Constitution); and on the other hand, international standards derived from the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, both of which were cited in the rationale in ADPF 828.

From an organisational standpoint, the Resolution provides that these commissions must be composed of judges, representatives of the Public Prosecutor's Office, Public Defenders' Office, Brazilian Bar Association (hereinafter: OAB), and, optionally, of executive branch agencies and social movements (Art. 3). Their intervention may occur at any stage of the proceedings, including post-judgment, provided that it is prompted either by judicial order or by a request from the parties (Art. 5). The procedural model preferably includes technical site visits, the drafting of action plans, and the holding of confidential mediation meetings (Articles 6 to 12).

The Resolution also sets out best practices, including the preparation of socioeconomic profiles of the occupants, public dissemination of the existence of the legal proceedings, and active efforts to seek alternatives to forced removal, including through coordination with local housing programmes (Art. 6, para. 1). The emphasis on qualified listening and inter-institutional coordination embodies the concept of dialogical structural jurisdiction, which seeks not merely to resolve disputes in a binary fashion, but to gradually construct legitimate and viable alternatives.

In this sense, CNJ Resolution No. 510/2023 does more than regulate judicial conduct in collective land disputes. It establishes a new paradigm for judicial action, one centred on mediation, inter-institutional coordination, and the pursuit of negotiated solutions, aligned with the transitional regime adopted by the STF.

3. Structure and Functioning of the Regional Commission at the Court of Justice of São Paulo

The TJSP Commission was established as part of the implementation of CNJ Resolution No. 510/2023, and assumed the role of coordinating and executing, within the jurisdiction of the State, strucured mediation procedures in repossession and eviction actions involving vulnerable collectives. Its institutional design and procedural operation are governed by Internal Regulations CG No. 57/2024 and No. 09/2025, issued by the General Judicial Inspectorate of the TJSP.

The TJSP Commission's intervention depends on a formal request submitted by the judge presiding over the case, addressed to the Commission's Support Section (GAB 3.3). Upon receipt, the case is registered in the TJSP's electronic system, along with the standardised intake form, the main documents from the case file, and, if available, expert reports, photographs, or maps of the disputed site (TJSP 2024a, Art. 1.302, paras.1–2). A preliminary assessment then determines the identification of the site, the social dimension of the conflict, and other relevant factors for assessing the TJSP Commission's admissibility.

Cases are distributed among the TJSP Commission's member judges on a rotational basis, according to seniority (Art. 1.303). Once a case is assigned, the Support Section prepares a technical report, which is submitted to the designated magistrate, who then issue a decision on whether to admit the case. If the case is deemed admissible, the formal procedure begins with an official letter to the relevant municipal authority requesting factual information, notification to the presiding judge, and the initiation of the mediation's preparatory phase (Arts. 1.305–1.306).

The internal regulation distinguishes between procedures according to the court's administrative regions. In the First Judicial Administrative Region (hereinafter: RAJ), which corresponds to the capital, technical visits are conducted in person by the judge assigned to the TJSP Commission, accompanied by a judicial officer, and with reimbursement of the corresponding procedural expenses (Art. 1.308). In the other RAJs (Second to Tenth), judges are designated by the TJSP Presidency and may carry out both visits and hearings in either an in-person or hybrid format, especially to facilitate participation of state and federal authorities (Art. 1.310, paras. 1–2).

Mediation and conciliation meetings are normally scheduled after the technical visit and are conducted with broad inter-institutional participation: the Public Defender's Office, the Public Prosecutor's Office, legal representatives of the occupants, social movement organisations, municipal housing and social assistance departments, and others. These sessions are governed by confidentiality (Art. 1.314), and all proposals or agreements are recorded in a formal set of minutes and attached to the judicial proceedings.

The regulations also provide for the refusal of TJSP Commission intervention in cases deemed low in complexity or involving occupations of less than one year. In such situations, the matter may be referred to the Judicial Centre for Conflict Resolution and Citizenship (hereinafter: CEJUSC) for standard mediation hearings, in accordance with Article 565 of the Code of Civil Procedure (Art. 1.307, para. 2).

The institutional design also includes coordination mechanisms with public security forces: any eviction plans prepared by the Military Police must be submitted to the Commission at least 48 hours in advance, allowing time for review, comment, and formal recommendations (Art. 1.315). This reinforces the TJSP Commission's role as an oversight body with authority to moderate state actions that may affect the rights of families in situations of social vulnerability.

The São Paulo model thus embodies an innovative integration of judicial jurisdiction, mediation, and public policy coordination, without departing from the statutory competences of the Judiciary. The role of the judge within the TJSP Commission is formally recognised, including provisions for temporary exemption from regular judicial duties, demonstrating institutional recognition of the technical and strategic nature of this function (CNJ 2023, Art. 15). Far from being a merely auxiliary mechanism, the TSJP Commission represents a reconfiguration of the judiciary's role in collective land conflicts. It operates at the intersection of the jurisdictional function, social mediation, and indirect enforcement of essential public policies.

4. The Commission's Working Model: Inter-institutional Mediation and Dialogical Resolution

The operational approach adopted by the TJSP Commission reflects, in practice, a reconfiguration of the Judiciary's role in responding to collective, structural, and socially dense land conflicts. Rather than functioning as a mere enforcer of eviction orders, the court – through the TJSP Commission – assumes the role of a facilitator of inter-institutional mediation, seeking integrated solutions that reconcile individual rights, public policy frameworks, and the State's social responsibility.

4.1. Stages and Procedural Flow: From Preliminary Hearing to Mediation Meeting

Once the Commission's intervention is deemed admissible, in accordance with the criteria set out in Internal Regulations CG No. 57/2024 and No. 9/2025, the procedure unfolds in three structured stages. The first stage involves a technical site visit, preferably carried out by a member judge of the TJSP Commission and accompanied by a court bailiff. This phase aims to assess, on-site, the living conditions of the occupants, initiate dialogue with community leaders, and gather information on local infrastructure, the socio-economic profile of the residents, and any identified health or safety risks (TJSP, 2024a, Art. 1.308). In parallel, the TJSP Commission establishes communication with relevant municipal, state, and, if necessary, federal agencies to collect data on housing policy, sanitation vulnerability, and the existence of potential regularisation programmes.

The second stage is marked by the mediation and conciliation meeting, convened with the participation of all parties involved in the dispute: plaintiffs, defendants/occupants, the Public Defender's Office, the Public Prosecutor's Office, municipal housing and social assistance authorities, law enforcement, and social movements, among others. Presided over by a judge, this mediation takes place in a setting characterised by listening and informal dialogue, while ensuring party autonomy, in accordance with Article 6 of CNJ Resolution No. 510/2023. All sessions are conducted under confidentiality (TJSP, Art. 1.314), with only the final agreements or proposals being formalised in writing.

If the mediation does not result in a solution enabling residents to remain on-site, the Commission proceeds to the third stage, which may involve the judicial approval of an eviction plan prepared by the Military Police of São Paulo. At this point, an action plan or agreement is drafted, detailing measures such as voluntary departure deadlines, rent-allowance programmes, municipal commitments, and registration of families in housing assistance schemes. This procedural model, while flexible and adaptable to each individual case, remains firmly grounded in principles of legality, fundamental rights, and judicial oversight.

4.2. Operational Principles and Institutional Innovation

The Commission's work is guided by a set of principles drawn from mediation practices adapted to structural conflict contexts.

First, it adopts a posture of multi-partiality and institutional empathy, in which the judge acts as a mediator, ensuring equitable listening to all parties while refraining from any adjudicatory stance. This reconfiguration of the judicial function contributes decisively to building trust among the stakeholders.

Second, it adheres to the principle of broad participation and inter-sectorality, by mobilising actors beyond the justice system, including housing, health, and social welfare agencies, to enable a multidimensional response to the legal, social, and urban issues at stake.

Third, it embraces the principle of contextual adequacy, recognising that solutions cannot be standardised. Instead, the Commission proposes differentiated responses based on the vulnerability of the community, the legal and environmental status of the occupied land, and the urban development profile of the area, including whether it is a Special Zone of Social Interest (hereinafter: ZEIS).

Lastly, the Commission is committed to hybrid and negotiated solutions, which move beyond the binary opposition of eviction versus permanence. Institutional practice has demonstrated the feasibility of creative arrangements such as land swaps, temporary use agreements, assisted relocation, and progressive regularisation, all of which are designed to protect rights while ensuring orderly conflict resolution.

This experience, particularly within the São Paulo context, may be understood through the lens of dispute system design, an institutional methodology developed to address high-complexity social conflicts where traditional adversarial proceedings are inadequate – or even counterproductive – and may lead to irreversible harm to affected populations.

4.3. The Judiciary's Role as a Structural Mediator

The mediation process coordinated by the Commission entails a transformative shift in the institutional understanding of jurisdiction. The judiciary ceases to operate as a "neutral third party external to the conflict" and instead becomes an agent of institutional convergence. Within this model, the judicial function acquires a dialogical, reflective, and socially oriented character, especially insofar as it mobilises public policies to construct viable alternatives to coercive displacement.

This paradigmatic transition aligns with the concept of transformative structural jurisdiction, whereby the judge's role extends beyond resolving individual disputes to intervening in the institutional and systemic conditions that perpetuate rights violations. In this sense, the Regional Commission serves as an institutional space for reorganising the relationships among stakeholders, broadening the scope of the judicial function in the face of a chronic and structural housing crisis.

5. Empirical Study: Land Conflicts Mediated by the Commission in 2023

The year 2023 marked the formal beginning of the Commission's activities under the new regulatory framework established by CNJ Resolution No. 510/2023. In a phase still characterised by institutional consolidation, the Commission carried out significant work throughout the year, focusing on dialogue with the justice system, civil society, and the governmental bodies responsible for urban, housing, and social assistance policies. The analysis of its interventions reveals the transformative potential of structured land mediation.

5.1. General Overview of Activities

According to the TJSP's institutional report, between January and May 2023, the Commission held 20 inter-institutional meetings, addressing 18 separate land conflicts involving hundreds of families in both urban and peripheral areas of the São Paulo Metropolitan Region and in interior municipalities (TJSP, 2023). The conflicts were selected based on criteria such as social relevance, collective dimension, imminent risk of repossession orders, and absence of prior administrative solutions.

Most of the cases concerned occupations of unused or underutilised urban properties, located either in central areas with high regularisation potential or in peripheral or

environmentally protected zones, where immediate eviction could have severe social and political consequences. In all instances, the Commission adopted the premise of seeking negotiated outcomes, prioritising the avoidance of coercive enforcement.

5.2. Mediated Cases with Cooperative and Negotiated Outcomes

Among the most notable cases were those concerning occupations in the districts of Bela Vista, Brás, and Santa Efigênia, all situated in the central zone of São Paulo — the largest urban agglomeration in South America, and one marked by deep socio-spatial inequalities. These neighbourhoods combine strategic location, access to services and public transport, and significant concentrations of vulnerable populations, including internal migrants and immigrants from Latin America and Sub-Saharan Africa. The disputes concerned deteriorated buildings with a history of abandonment or significant debt, informally occupied by socially vulnerable families. Faced with the prospect of forced removals and limited immediate responses from public authorities, the Commission intervened to coordinate a multi-stakeholder process. Municipal departments, state secretariats for housing and social assistance, the Public Defender's Office, and civil society organisations were engaged to build negotiated removal plans.

These plans included progressive and assisted relocation, temporary rent subsidies, housing programme enrolment, and, in some cases, land swaps for resettlement. They were negotiated within the judicial proceedings, ensuring due process and broad participation.

One particularly illustrative case was that of the occupation on Conselheiro Nébias Street, in Santa Efigênia. Dozens of families lived there, including immigrants from Bolivia, Angola, and Haiti, many of them undocumented and lacking access to basic services. The Commission's mediation prevented coercive enforcement and resulted in a staggered relocation plan, with differentiated deadlines, social assistance support, and guaranteed inclusion in the city's housing and shelter programmes. Police intervention was avoided, and the process unfolded peacefully, with respect for the rights and dignity of the affected residents.

Procedurally, these cases demonstrate the value of dialogical judicial intervention and procedural flexibility in avoiding fundamental rights violations. Technically, they confirm the feasibility of territorial solutions, even in contested urban settings, provided that institutional coordination and willingness to engage are present.

5.3. Cases Involving Regularisation and Urbanisation Proposals

In the municipalities of Francisco Morato, Carapicuíba, and Mairiporã, the Commission intervened in disputes concerning consolidated urban occupations, many of which were located within ZEIS, as defined under Brazilian urban legislation. These are areas earmarked for the implementation of housing and urban development policies directed at low-income populations.

In such contexts, institutional dialogue with local governments and with the São Paulo State Housing and Urban Development Company enabled progress towards proposals for land regularisation, conditional upon the execution of basic infrastructure works and comprehensive family registration in public databases.

The case of Carapicuíba serves as a prime example. Following a technical inspection conducted by the Commission, it was concluded that the site could be integrated into a municipal regularisation programme, in accordance with Federal Law No. 13.465/2017, which governs land titling and urbanisation in informal settlements. The legal proceedings were suspended by judicial agreement, and a local working group was established to monitor the implementation of the agreed measures (TJSP 2023, pp. 6–8). This case illustrates how the articulation between the judiciary, executive authorities, and community representatives can result in sustainable and rights-based outcomes, avoiding the social costs of forced eviction while advancing the goals of urban equity and legal inclusion.

5.4. Cases Without Consensus and Procedural Continuation

In some instances, the mediation efforts led by the Commission did not result in a consensus among the parties, prompting the return of the case to the ordinary litigation track before the trial court. Nevertheless, even in the absence of a formal agreement, the Commission documented all mediation attempts and informed the presiding judge, who may, at a later stage, request renewed involvement from the Commission – for example, to approve a plan for assisted removal or to oversee the implementation of mitigating measures.

It is important to underscore that, even in cases where no settlement was reached, the mediation process produced tangible effects on the territories in dispute. Frequently, the proceedings contributed to reducing informational asymmetries between the residents and the institutional actors, especially regarding the existence, legal implications, and procedural status of the judicial claim.

Moreover, mediation promoted closer interaction between the occupants and the Public Defender's Office, improving access to legal counselling and enabling a more robust and informed defence. Residents were made aware of their rights, duties, and available legal alternatives, which enhanced both the transparency of the judicial process and the participatory environment in which the conflict was addressed.

These outcomes confirm that structured judicial mediation, even when not culminating in a formal agreement, serves a democratising and protective function, broadening access to legal information and fostering a more inclusive and human-rights-based approach to conflict resolution.

5.5. Lessons Drawn from the 2023 Experience

The empirical analysis of the Commission's activities in 2023 allows for the identification of certain trends and institutional best practices that may inform future developments and comparative assessments.

The preliminary technical site visit proved to be a decisive factor in the success of mediations. It provided an accurate diagnosis of the occupation and contributed to the building of trust between the Commission and the residents.

The involvement of executive authorities with decision-making powers during mediation meetings significantly enhanced the effectiveness of negotiated agreements, especially in cases where resettlement, inclusion in public programmes, or urban redevelopment

was under discussion. Mediation conducted directly by a sitting judge affiliated with the Commission proved more effective than mere referral to the CEJUSC, particularly in disputes marked by high levels of social complexity. The use of systematised reports, official minutes of meetings, and ongoing support by the Commission's technical team reinforced the legal and institutional reliability of the decisions made during the mediation process.

In summary, the São Paulo model demonstrated that judicial handling of land conflicts can be transformed into a mechanism for constructing collective, effective, and less harmful solutions, without undermining fundamental rights. The structured involvement of the Judiciary, when coupled with inter-sectoral coordination and inclusive negotiation practices, revealed itself as a promising alternative to adversarial approaches in socially complex litigation.

6. Critical Analysis: The Commission as a Laboratory of Jurisdictional Transformation

The experience of the Regional Commission for Land Dispute Resolution of the São Paulo Court of Justice demonstrates, in concrete terms, a transition from the traditional adjudicatory model to an innovative mode of judicial engagement, guided by principles of dialogue, participation, and institutional transformation. Rather than remaining confined to the mechanical application of possessory rules or the enforcement of eviction orders, the judiciary operates as an arena of inter-institutional coordination and qualified social mediation. In this framework, the jurisdictional function moves away from the binary logic of adjudication to the domain of collective and negotiated solution-building, particularly in disputes of high complexity, involving vulnerable populations and the ineffectiveness or absence of public policy responses.

This emerging model may be interpreted through the lens of dialogical jurisdiction, which presupposes a judge committed to active listening, institutional mediation, and the production of legitimacy through participatory processes. In the case of land conflict mediation conducted by the Commission, one also observes the incorporation of elements typical of structural jurisdiction (Vitorelli, 2025, p. 736; Arenhart & Jobim, 2017) insofar as the negotiated solutions extend beyond the immediate litigation to address the institutional conditions underlying the violation of the right to adequate housing.

The judicial mediation promoted in São Paulo not only serves to prevent the violence of forced evictions, but also acts as a mechanism for reorganising relations between the justice system, administrative bodies, and affected social groups. It encourages integration into public policies, supports land regularisation, and fosters the institutional accountability of all parties involved.

Despite its promising results, the consolidation of this model still faces significant challenges. The effectiveness of mediation often depends on the active engagement of executive authorities, which is not always guaranteed. Additionally, the lack of standardised regulation across Brazil's state courts limits the broader application of CNJ Resolution No. 510/2023 as a national policy. Further obstacles include the need for adequate technical and financial resources and the ongoing training of judges and court staff in mediation and interdisciplinary practices.

Nevertheless, the São Paulo Commission stands out as an institutional laboratory for reimagining jurisdiction, functioning as a platform of convergence between mediation and public policy. As such, it offers valuable contributions to the ongoing debate on the future of land jurisdiction in Brazil and on the role of the Judiciary in promoting social justice within structurally vulnerable contexts.

7. Conclusion

The experience of the Regional Commission for Land Dispute Resolution of the Court of Justice of the State of São Paulo represents a significant turning point in the way the Brazilian Judiciary approaches collective land disputes in contexts marked by profound urban and housing inequality. Based on CNJ Resolution No. 510/2023, the Commission has structured a dialogical, inter-institutional, and territorially grounded model of judicial action, distancing itself from the traditional adversarial paradigm and moving towards cooperative and responsive resolution strategies.

By analysing its normative foundations, institutional functioning, and practical effects, this article has demonstrated that the Commission's work goes beyond the mediation of isolated disputes. It advances an alternative conception of jurisdiction – one that is more open to engagement with other branches of government and civil society, more attuned to the complexity of structural conflicts, and more committed to the realisation of fundamental rights. Even in situations where mediation does not result in a formal agreement, the process contributes to democratising access to legal information, reducing power asymmetries, and building bridges between vulnerable communities and institutions of justice.

Although the São Paulo Commission operates in a clearly analogue and territorial domain, namely land conflicts, its structure reveals trends that resonate with the challenges of the digital era: decentralisation of actors, procedural horizontalisation, contextual data sensitivity, and the need for coordination among multiple normative systems. The São Paulo experience provides meaningful insights for comparative legal debates. It shows that jurisdiction can be adapted to local realities through flexible, replicable institutional models, guided by principles of cooperation and social justice. In countries facing similar challenges, such as informal settlements, chronic housing shortages, and the judicialisation of public policies, models like that of the Commission may inspire alternative dispute resolution mechanisms capable of upholding rights, ensuring social stability, and fostering democratic governance of territory.

The definitive consolidation of this model depends, ultimately, on the articulation of institutional commitment, political will, and operational infrastructure. Yet its normative and practical value is already evident: by transforming the judiciary into a forum of listening, coordination, and care, the Commission challenges the rigidity of classical jurisdiction and affirms a possible horizon of institutional innovation – local, legitimate, and socially rooted.

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*Marija Vranić**

NEW REGULATION ON CATEGORIES OF VERTICAL AGREEMENTS EXEMPT FROM THE PROHIBITION IN THE LIGHT OF THE DEVELOPMENT OF DIGITAL PLATFORMS

Abstract

The rapid growth of the market of digital platforms and e-commerce has led to the need to adapt domestic regulations in the field of protection of competition to new developments in economic life. In January 2025, the Commission for Protection of Competition directed the Government of the Republic of Serbia to adopt the Proposal for a Regulation on Categories of Vertical Agreements exempted from the prohibition of restrictive agreements, which should replace the current Regulation on agreements between market participants operating at different levels of production or distribution that are exempt from the prohibition. Since new vertical restrictions appear in digital business and are not covered by the current regulation, the Proposal also contains solutions that take them into account.

The paper explains what digital platforms are, what role they play in the circulation of goods and the provision of services, and how they affect the competitiveness of market participants. Precisely in the light of the development of the digital platforms, attention is given to the most important novelties that the proposed regulation brings in relation to the current one. Through appropriate examples, it was discussed how the proposed solutions related to new forms of business affect market dynamics, consumer protection and competition protection in general. Finally, bearing in mind that the Proposal also harmonises the domestic legislation with the European Union law, the relationship between the domestic and European act in this area is shown, in the sense of analysed proposed solutions.

The conducted analysis leads to the conclusion that, if adopted, the new regulation will represent a positive change in the bylaws in the area of competition protection, and will facilitate and speed up economic life.

Keywords: block exemption, vertical agreements, regulation on categories of vertical agreements exempted from the prohibition of vertical agreements, digital platforms, Regulation (EU) 2022/720.

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1. Introduction

Technological progress is inherent to the modern age. Virtually no aspect of human life remains untouched, to a greater or lesser degree, by developments in the field of technology. Digitalisation represents a key dimension of technological progress and constitutes a process that increasingly and more visibly affects not only everyday life, but also business operations, economic activity, and the legal system itself. The digital platform economy, in its present form, is the result of a range of processes primarily rooted in technological innovations, with a structural reliance on information and communication technologies (Eckardt, 2025, p. 192). Concurrently, the use of information and communication technologies is reshaping the manner in which economic entities interact, conduct their business activities, and participate in the platforms underpinning the market structure (Brašić Stojanović, 2024, pp. 829, 830), while digital platforms, social media, and electronic commerce are transforming the modalities through which products and services of the cultural and creative industries (Vasić & Gajić, 2024, p. 2), but also across a wide range of other sectors, representing a distinctive medium driving the digital transformation of traditional business models and interlinking of various categories of users. The accelerating trajectory of the digitalisation era underscores the necessity for a coherent and adaptive legal response to the profound changes and emerging challenges it presents (Vranić, 2024, p. 32). Accordingly, it is always preferable that new social phenomena and emerging trends be duly incorporated into the legal order, that is, not to stay on legally unregulated ground.

In order to best respond to them, it is important to consider and understand the environment in which these developments unfold. In terms of new forms of commerce that may give rise to certain restrictions of competition and, consequently, necessitate the application of relevant competition law provisions, the environment under consideration, for the purposes of this analysis, is that of digital platforms. Defining the concept of digital platforms may prove to be a rather complex task, primarily because they encompass a wide range of different business models and are subject to continuous development. Consequently, it is difficult to interpret the notion of digital platforms in a manner that is both immutable and sufficiently precise, that is, comprehensive.

1.1. On Digital Platforms and Protection of Competition

At its core, digital platforms serve as intermediating structures that facilitate interaction between two or more distinct groups of users. Digital platforms may be understood as virtual spaces where users, either through the use of algorithms or independently, can interact or conduct transactions with other groups of users (Commission for Protection of Competition (hereinafter: Commission), 2022a, p. 5). Thus, the role of digital platforms is becoming increasingly prominent, for instance, in the sale of goods. Traditional sales channels are first transformed into hybrid models, whereby companies, in addition to direct sales, establish online sales channels. Subsequently, an increasing number of companies base the sale of their products and services exclusively on online commerce (Perić, Milošević & Pešić, 2022, p. 2). The widespread availability, rapidity, and dependability of online communications substantially contribute to the growth of online retail,

progressively displacing traditional methods of trade (Begović, 2021, p. 15). According to one of the more recent studies conducted by the United Nations Conference on Trade and Development (UNCTAD), the global number of online shoppers has grown from fewer than 100 million at the dawn of the century to slightly above two billion in 2021, while the aggregate value of e-commerce sales across 43 economies, both developed and developing, was estimated to have reached an unprecedented 27 trillion U.S. dollars in 2022 (UNCTAD 2024, p. 24).

The interdependence between digital platforms and their users has, over time, evolved or rather, transformed into a relationship or model in which it is the users who have become dependent on the digital platforms (Unver, 2024, p. 182). This illustrates the increasingly significant role of digital platforms in economic life, as well as their dynamic development and adaptability to the diverse needs of market participants. The European Commission has acknowledged the pivotal role of digital platforms in promoting innovation and economic growth across the digital single market, noting that such platforms have revolutionised access to information and enhanced the efficiency of numerous markets in facilitating connections between buyers and sellers (2016, p. 15). The advantages of digital platforms are, in this regard, manifold: the operational costs of digital platforms are lower compared to those of traditional markets (Parker, Petropoulos & Van Alstyne, 2020, p. 2). Online platforms, moreover, collect data related to user experience more quickly and efficiently (Evans, 2017, p. 10), whereby mechanisms for gathering user feedback may be understood as a distinct form of control mechanism, employed as a means of influencing users in order to implement the digital platform provider's strategy, for instance, by improving the quality of transactions (Steur & Seiter, 2021, p. 481). As the number of users of a particular platform increases, so does the users' willingness to pay a higher price for the services provided by that platform, as well as the maximum price the platform may set for its services. This, in turn, enhances the competitive advantage of the platform in relation to its competitors (Perić, Milošević & Pešić, 2022, p. 5). Not only does the platform's competitive advantage increase, but it also paves the way for expansion into existing markets through new business models and for the development of new markets (Krämer *et al.*, 2020, p. 13). Therefore, managers of digital platforms must remain continuously attuned to market trends, closely monitoring the activities of other platforms, particularly those serving the same or similar user bases, in order to prevent their users from being drawn away by new and sufficiently attractive features that could lead them either to use competing platforms simultaneously or to abandon the original platform altogether (Parker, Van Alstyne & Choundary, 2016, pp. 221, 222).

Therefore, digital transformation aims to enhance competitive advantage within a dynamic and often rapidly changing market environment (Zimonjić, 2024, p. 14). Although there is no dispute that the fundamental principles of competition law remain relevant in the new digital reality, the necessity for competition authorities to adapt their analytical methods to the specific characteristics of digital platforms (markets) cannot be overlooked. Such adaptation may require certain legislative adjustments in order to keep pace with the rapid evolution of digital markets and to ensure that behaviours potentially infringing competition law are appropriately examined by the competent authorities

(Organisation for Economic Co-operation and Development (hereinafter: OECD), 2024). Nevertheless, the effective functioning of competition among digital platforms is difficult to achieve, inter alia, due to the fact that consumers and users are frequently satisfied with the status quo and exhibit resistance toward legislative reforms that could alter the competitive dynamics among platforms (Andriychuk, 2025, p. 56).

Various forms of competition law infringements may occur in the digital platform market. The most likely violations include predatory pricing, exclusivity arrangements, tying of services, and vertical integration with foreclosure effects (Perić, Milošević & Pešić, 2022, p. 10). The focus of this paper is the analysis of vertical restraints arising in digital business, the regulation of which is envisaged through the adoption of a new legal instrument: the Regulation on Categories of Vertical Agreements Exempted from the Prohibition of Restrictive Agreements (hereinafter: the Regulation). Its adoption will align the existing domestic secondary legislation in the field of competition protection with, *inter alia*, new forms of commerce and the (accelerated) dynamics of market development.

1.2. On Restrictive and Vertical Agreements

Restrictive agreements are agreements between market participants that have as their object or effect the prevention, restriction, or distortion of competition to a significant extent within the territory of the Republic of Serbia. Restrictive agreements may take the form of contracts or individual contractual clauses, explicit or tacit arrangements, concerted practices, or decisions of associations of market participants, which in particular: (1) directly or indirectly determine purchase or selling prices or other trading conditions; (2) limit or control production, markets, technical development, or investments; (3) apply dissimilar conditions to equivalent transactions with different market participants, thereby placing some of them at a competitive disadvantage; (4) make the conclusion of contracts or agreements subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, are not connected with the subject of the agreement; and (5) divide markets or sources of supply (Law on Protection of Competition (hereinafter: the Law), Article 10).

Restrictive agreements encompass two categories: horizontal and vertical agreements. While horizontal agreements are concluded between competitors (market participants operating at the same level of the production or distribution chain), vertical agreements are concluded between market participants that are not competitors, namely, those operating at different levels of the production or distribution chain for the purposes of the agreement, whereby such agreements concern the conditions under which the parties to the agreement may purchase, sell, or resell certain goods or provide services (Regulation, Article 2, paragraph 1, item 1). Thus, vertical agreements are concluded between market participants positioned upstream or downstream in the business operation chain (for example, a chain consisting of a manufacturer, a wholesaler, a retailer, and a consumer – the final user) (Commission, 2022b, pp. 12, 16).

1.3. On the Exemption Mechanism

Restrictive agreements are prohibited and void. Only exceptionally, restrictive agreements may be exempted from the prohibition, provided that they contribute to the improvement of trade and production, or to the promotion of technical or economic progress, while ensuring consumers a fair share of the resulting benefit, under the condition that they do not impose on market participants restrictions which are not indispensable for attaining the objectives of the agreement, nor exclude competition on the relevant market or a substantial part thereof (Law, Article 11). Upon the request of a party to a restrictive agreement, the Commission may grant an exemption for a particular restrictive agreement from the general prohibition. (Law, Art. 12, para. 1). However, since exempting each individual agreement from the prohibition could entail a large number of requests for individual exemptions that the Commission would be required to examine on a case-by-case basis, which would primarily require time and potentially burden the Commission's work, the Law also provides for exemption by categories of agreements (so-called block exemption). In such cases, restrictive agreements that meet the prescribed conditions for exemption from the prohibition are not required to be submitted to the Commission for individual approval (Law, Article 13, paragraphs 1 and 2). Therefore, the possibility of a block (group or collective) exemption simplifies the procedure for exempting restrictive agreements, in that the participants to such agreements are not required to submit them to the Commission as long as they satisfy the criteria for exemption prescribed by the Law. Whether an agreement fulfils those criteria is to be assessed by the parties themselves, on the basis of the rules more specifically defined by the relevant subordinate regulation that governs this matter in greater detail. In this manner, the exemption procedure is facilitated primarily for the parties to the agreement, and subsequently for the Commission as well, since the introduction of block exemptions avoids certain administrative obstacles that are inherent in the individual exemption procedure and thereby conserves key business resources. As noted by the Commission in the explanatory memorandum to the proposal for the new Regulation, the Regulation will simplify compliance for market participants, particularly where small and medium-sized enterprises assess the conformity of their agreements with the statutory provisions governing restrictive agreements, thus reducing their potential compliance costs.

Nevertheless, it should be borne in mind that the self-assessment of agreements by market participants may lead to a certain degree of legal uncertainty for those undertakings. Specifically, there exists a risk that market participants may erroneously assess an agreement as lawful and subsequently be sanctioned by the Commission if it determines otherwise, or, conversely, that they may incorrectly conclude that an agreement is unlawful and therefore refrain from implementing it, thereby depriving both themselves and consumers of the potential benefits that such an agreement might have produced (Begović, Pavić & Popović, 2019, p. 67). On the other hand, the Commission "is neither competent nor intended to be engaged in the negotiation process between the contracting parties, in such a way as to, through the exemption procedure, advise the parties on the restrictive nature of particular contractual provisions or on the manner of aligning their business practices with the rules on competition law compliance." (Commission, 2016, p. 4). It is interesting that the Law does not

provide that, in cases where the Commission, when deciding upon a request for exemption, determines that the agreement in question is not restrictive at all and therefore cannot be the subject of either an approved or a denied exemption from the prohibition, the fee paid for issuing the decision on the request for an individual exemption of a restrictive agreement shall be refunded to the applicant, in contrast to the situation when merger notification is rejected on the grounds that the turnover thresholds prescribed by Article 61 of the Law have not been met: thresholds which, once exceeded, give rise to the obligation to notify the concentration. However, in practice, the reimbursement to the applicant of the fee paid for the decision on a request for exemption, where it is established that the agreement is not restrictive, remains possible, on the basis of the interpretation of Article 2, paragraph 1, items 1 and 2 of the Tariff on the Level of Compensation for Activities within the Competence of the Commission for Protection of Competition, which provides that the respective fee shall be charged (only) in cases where a decision is issued *refusing* or *granting* the exemption (Cucić, 2024, p. 121, fn. 195) (author's italics).

When it comes to block (collective) exemptions, the aforementioned risk simply cannot be disregarded, irrespective of how detailed the subordinate regulation may be in defining the categories of agreements exempted from the prohibition and the specific conditions under which such agreements are exempted. Nevertheless, the more precise such regulation is, the more effectively it can serve as a guideline for the parties when assessing whether their agreement satisfies the conditions for exemption. Still, the mechanism of block exemptions is appropriate only for those agreements in which the anti-competitive effects are almost certainly outweighed by pro-competitive benefits and where, as a rule, such an outcome results from the very nature of the agreement in question rather than from the surrounding circumstances under which it was concluded (Begović, Pavić & Popović, 2019, p. 66). In view of the foregoing, it may be stated that the mechanism of individual exemption operates as a corrective to the block exemption, insofar as it enables a "nuanced" assessment of each particular agreement and allows for the consideration of the specific features of agreements in cases where they may generate positive effects that could otherwise be overlooked under a block exemption. Therefore, only the combined application of these two mechanisms ensures an appropriate balance between the need for administrative and resource efficiency, on the one hand, and legal certainty, on the other.

Taking all of the foregoing into consideration, it may be assumed that, if adopted and implemented as a part of the regulatory framework, the Regulation will constitute a positive, well-founded, and, to some extent, long-awaited change in the domestic competition law regime (given that this represents the first amendment to the secondary legislation in the field of competition protection since 2010, when the current regulation entered into force), and may also be seen as a reflection of the need to keep pace, in legislative terms, with the developments brought about by the evolution of market dynamics, thereby facilitating and accelerating economic activity.

With a view to substantiating this assumption, the research is dedicated to examining the most significant solutions introduced by the Regulation as a response to the challenges that digital business practices pose in the context of competition protection. Since the adoption of the Regulation will also entail the alignment of domestic legislation with

European Union law, the paper further analyses its relationship with the corresponding EU legal act in this field. Finally, the paper considers the extent to which the proposed solutions relating to new forms of trade and business affect market dynamics, consumer protection, and competition protection in general.

3. Proposal for the Regulation

At the beginning of July 2024, the Commission announced that it had prepared the Proposal for a Regulation on Categories of Vertical Agreements Exempted from the Prohibition of Restrictive Agreements, which, by the end of January 2025, following the completion of public consultation and legal-technical revision, it submitted to the Government of the Republic of Serbia for adoption.[1] The Regulation defines the categories of vertical agreements exempted from the prohibition on restrictive agreements under Article 10, paragraph 3 of the Law and further prescribes the specific conditions under which such agreements are exempted from that prohibition (Article 1, paragraph 1). The Regulation is intended to fully replace the currently applicable Regulation on Agreements between Market Participants Operating at Different Levels of Production or Distribution that Are Exempted from the Prohibition (hereinafter: the current Regulation on the Exemption of Vertical Agreements or the current regulation). In its explanatory statement accompanying the proposal, the Commission notes that the new provisions and amendments take into account the experience gained in the implementation of the current Regulation, as well as the new trends in market development (the growth of electronic commerce and the emergence of new types of vertical agreements).

It should be borne in mind that, in addition to the currently applicable Regulation on the Exemption of Vertical Agreements, the Regulation on Research and Development Agreements between Market Participants Operating at the *Same* Level of Production

[1] The Regulation is not the only proposed piece of legislation. Namely, the Commission has also submitted to the Government of the Republic of Serbia for adoption: (i) the Proposal for a Regulation on Categories of Technology Transfer Agreements Exempted from the Prohibition of Restrictive Agreements; (ii) the Proposal for a Regulation on Categories of Vertical Agreements in the Motor Vehicle Sector Exempted from the Prohibition of Restrictive Agreements; and (iii) the Proposal for a Regulation on Categories of Agreements in the Railway and Road Transport Sector Exempted from the Prohibition of Restrictive Agreements. These are proposals for three regulations that have no counterparts among the currently applicable competition law regulations, which means that they represent entirely new regulations. Each of them concerns the exemption of vertical agreements from prohibition, but in a specific sector. In this regard, the Regulation has the broadest and most general scope, as it is the only one intended to replace an existing regulation, that is, is the only one with a counterpart in the current secondary legislation and, in that sense, is not entirely new. What is common to all four proposals, however, is that they are modelled on the corresponding instruments of European Union law, thereby aligning the domestic legal framework in this area with that of the European Union. During the procedure of preparing the proposals for the above-mentioned regulations for adoption, public consultations were conducted, with the aim of enabling the Commission to obtain and consider the views, comments, and proposals submitted by various stakeholders whose status, rights, obligations, and legal interests would be affected by the proposed regulations. The Commission's report on the conducted consultations, together with a list of all comments and the Commission's responses, as well as the final edited texts of the four regulations submitted for adoption, are available on the Commission's website: *https://kzk.gov.rs/sprovedene-konsultacije-o-cetiri-nov* and *https://kzk.gov.rs/komisija-uputila-predloge-cetiri-nov*, (3.2.2025).

or Distribution that Are Exempted from the Prohibition, as well as the Regulation on Specialisation Agreements between Market Participants Operating at the *Same* Level of Production or Distribution that Are Exempted from the Prohibition, are likewise in force[2] (author's italics). Operators functioning at the same level of the production or distribution chain are competitors, which means that these regulations concern specific categories of horizontal agreements as agreements concluded between participants operating on the same relevant market. The adoption of the new Regulation will not affect their applicability. These regulations pertain to categories of agreements that are not, at least for the time being, encompassed by the proposed block exemption framework, which means that, upon the adoption of the new Regulation, they will remain in force without amendment.

The following sections examine, in detail, the most significant novelties introduced by the Regulation in light of the development of digital platforms.

3.1. Extension of the Scope of Active and Passive Sales

To begin with, it should be emphasised (although this may seem almost redundant given the importance of these categories) that active and passive sales are not new concepts in relation to the agreements covered by the Regulation. The Regulation merely introduces corresponding amendments concerning the notions of active and passive sales as defined under the currently applicable Regulation on the Exemption of Vertical Agreements, thereby granting them an expanded meaning adapted to new forms of trade. The concept of active sales has thus been supplemented in order to align it with online sales, whereas online sales will no longer be regarded solely as a form of passive selling.

3.1.1. Active Sales

Under the current regulation, active sales refer to targeting and approaching customers, or a specific group of customers, located in a territory reserved for another party to the agreement, as well as to undertaking actions aimed at selling products to such customers, including visiting customers, sending mail and electronic mail, advertising in media directed exclusively at those customers or customer groups, establishing subsidiaries, branches, or organisational units in a territory reserved for another party to the agreement for the purpose of reaching customers and organising sales, as well as concluding individual contracts with such customers (Article 2, paragraph, 1 item 7). Under the proposed amendments, the concept is given a more precise and comprehensive, "updated" meaning.

Thus, for the purposes of the Regulation, active sales are understood as actively approaching indirect customers through direct contact, by sending letters or electronic mail, making phone calls or other means of direct communication, or through targeted advertising and promotion in regular sales or online, for example, through printed or

[2] The first regulation determines the categories of research and development agreements between market participants operating at the same level of the production or distribution chain, and specifies in greater detail the special conditions under which such agreements may be exempted from the prohibition (Art. 1). The second regulation determines the categories of specialisation agreements between market participants operating at the same level of the production or distribution chain, and specifies in greater detail the special conditions under which such agreements may be exempted from the prohibition (Art. 1).

digital media, including online media, price comparison services, or advertising on search engines that seek indirect customers in specific territories or are directed at groups of such customers, operating a website with a top-level domain that corresponds to certain territories or which on the website allow the use of languages that are commonly used in certain territories, where such languages differ from those generally used in the territory in which the direct customer operates or has its registered seat in accordance with the law governing the position of companies (Article 2, paragraph 1, item 19). The concept, as can be seen, is defined rather extensively. Several important observations may be drawn by comparing the existing and the proposed versions of the concept of active sales.

First, it may be observed that the new concept acquires a distinct digital dimension. The means of seeking customers now include: (i) the use of price comparison services; (ii) advertising on search engines that identify or target customers in specific territories or target particular customer groups; and (iii) the operation of a website with a domain corresponding to certain territories or adapted to languages different from those normally used in the territory where the direct customer operates or has its registered seat. None of these means of seeking customers, that is, in essence, sales channels, are encompassed by the current definition of active sales. In addition, the "digitalisation" of the existing concept is reflected in its transposition into the digital sphere: whereas the current provision refers to the establishment of subsidiaries, branches, or organisational units aimed at approaching customers, these have been omitted from the proposed version and replaced by the practical advantages offered, for the same purpose, by online platforms, which do not require a physical presence in a specific territory in order to conduct active sales.

Furthermore, it may be observed that the proposed concept of active sales is more "autonomous" compared to the current one, in the sense that the description of actions qualifying as active sales is formulated independently of any specific agreement. Under the current regulation, as explained above, active sales refer to the targeting and approach of customers or a particular group of customers *located in a territory reserved for another party to the agreement*, as well as to actions aimed at selling products to *such* customers, including visiting customers, sending letters and electronic mail, or advertising in media directed exclusively at *those* customers or customer groups (which implies that the existence of active sales should be assessed from the perspective of the specific agreement rather than as an objective concept), as well as the establishment of subsidiaries, branches, or organisational units in a *territory reserved for another party to the agreement* for the purpose of approaching customers and organising sales, as well as the conclusion of individual contracts with those customers, thereby implicitly linking active sales to a particular agreement. Accordingly, the proposed amendments introduce a certain objectivization of the concept of active sales, which appears to be a step towards facilitating its interpretation and, ultimately, the assessment of an agreement forming the subject of an exemption request, in cases where active sales arise as a relevant issue. Namely, once the conduct restricted by the agreement has been determined, it should then be established whether such conduct constitutes active sales, and if so, whether the restriction, that is, the agreement, meets the prescribed conditions for exemption.

The significance of these novelties is by no means diminished by the fact that they pertain merely to the conceptual definition. On the contrary, given the pace and extent of

the development of online commerce, the expansion, that is, the adaptation of the notion of active sales, as a category that permeates several other provisions (the same applies to passive sales), is both necessary and of essential importance. It is beyond doubt that online customer seeking channels, among which digital platforms are undoubtedly included, are becoming, if they have not already become, the dominant model for identifying and retaining customers as compared to traditional ones. It was therefore necessary for the concept of active sales to acquire a new dimension: if online sales were still to be qualified solely as a form of passive selling, this would simply fail to reflect the new digital reality. Moreover, the broadening of the concept of active sales may have a positive impact on competition; more specifically, it may increase competitive pressure. Since the new provision effectively opens new (online) channels for seeking customers (more accurately, formally recognises them as such, given that they are already in use), it may be presumed that competitors in the relevant market will seek to utilise these channels to gain or maintain a competitive advantage, which could in turn stimulate investment and innovation in online customer seeking strategies.

3.1.2. Passive Sales

The concept of passive sales has likewise been modified to a certain extent. Under the current regulation, passive sales refer to sales made on the basis of an order placed by a customer from a territory reserved for another party to the agreement, including orders prompted by advertising conducted through the media or online, where such advertising is accessible in an area extending beyond that reserved exclusively for a single distributor or a defined group of customers, provided that it is the outcome of free and unrestricted access of any customer, or group of customers, to the advertising message (Article 2, paragraph 1, item 8). The Regulation, on the other hand, defines passive sales as sales carried out in response to unsolicited requests from individual indirect customers, including the supply of goods or the provision of services to such customers, provided that the sale has not been initiated by actively seeking a specific indirect customer, a group of indirect customers, or customers within particular territories, including sales resulting from participation in public procurement procedures or responses to calls for tenders (Article 2, paragraph 1, item 20).

It seems that the most immediately discernible novelty lies in the fact that the concept of passive sales now refers to sales conducted *in response to unsolicited requests from customers*, with an explicit emphasis that such sales must not be initiated by actively seeking customers, a feature absent from the current definition. Conversely, it is apparent that the formulation of the new concept of passive sales does not encompass sales made on the basis of "orders prompted by advertising in the media or online", as is the case under the current regulation. In this regard, the aforementioned stipulation that passive sales must not be initiated by actively seeking customers must be duly taken into account, given that, for the purposes of the Regulation, *active* sales, that is, actively seeking customers, include, inter alia, exactly the sales resulting from targeted advertising and promotion conducted via the internet (online), such as through digital media, including online media. Accordingly, the principal difference between the new and the current understanding of passive sales lies in the fact that it is now clearly established that customers, rather than the sellers, are the ones

initiating contact in connection with the sale, as otherwise the activity would constitute active sales (therefore, passive sales represent a response to unsolicited customer requests).

While the new definition undoubtedly achieves a more precise and comprehensive scope of passive sales, it seems that, in certain cases, it may nonetheless remain difficult to draw a clear distinction between passive and active sales. For example, further consideration could be given to whether the mere act of a seller or manufacturer advertising a particular product on its own digital platform (website) should be regarded as "targeted advertising", that is, promotion through online media, whereby the notion of online media is not further defined within the amendments. On the one hand, it is clear that displaying a product on the seller's website aims to attract customers and, ultimately, to facilitate the sale of that product (in this sense, it may constitute targeted advertising), while on the other hand, however, the question arises whether such advertising should still be deemed targeted in cases where the seller, beyond posting the products on its website, does not undertake additional actions that would unequivocally amount to actively seeking customers (for instance, sending electronic mail to those customers in connection with the sale of the products). The issue here, in essence, concerns what constitutes the initiation of contact in relation to the sale, that is, whether advertising a product on a website in itself can be treated as initiating contact with customers. It seems that such an interpretation would be unduly restrictive with respect to the concept of passive sales. Accordingly, it should be understood that, in the case of online sales of products displayed on a seller's website, contact is initiated by the customer when that customer freely (in the terminology of the Regulation, unsolicitedly) "finds" the particular platform and the product offered there, and decides to make a purchase. In such a scenario, the seller merely makes the product available to all potential customers, without targeting a specific group of customers, customers in a given territory, or any particular customer, thereby refraining from actions aimed at active sales.

The example discussed above is not the only one that may give rise to certain dilemmas. Following the completion of an online purchase, it often occurs in practice that the customer begins receiving emails concerning the sale of other products, promotional activities, special offers, and similar notifications. In such cases, it may likewise be difficult to draw a clear distinction between active and passive sales, and consequently to determine who should be regarded as the initiator of contact, where, for instance, the customer, at the time of the initial purchase, selected the option to be informed of such matters by electronic mail in the future (the well-known "*subscribe to newsletter*" option).

Such borderline cases, and others of a similar nature, whose classification within the concepts of active or passive sales may not be immediately evident, could complicate the assessment of a specific agreement by the parties concerned in the context of the block exemption, given that a considerable number of (new) rules on the exemption of agreements from the prohibition rely precisely on the distinction between active and passive sales. In any event, based on the foregoing, the expansion and corresponding adjustment of the scope of both passive and active sales may be regarded as among the positive developments introduced by the Regulation.

3.2. A New Hardcore Restriction Concerning the Use of the Internet

Agreements between non-competitors, that is, undertakings operating at different levels of the production or distribution chain, may at times contain certain restrictions that exclude the agreement from exemption from the prohibition, even where it produces certain pro-competitive effects. These are the so-called hardcore restrictions, also referred to as "black clauses", which are regarded as particularly serious and which almost invariably constitute an infringement of competition law, which is why agreements containing such restrictions may only exceptionally be eligible for (individual) exemption[3] (European Commission, 2003, pp. 22–23).

Electronic commerce offers numerous advantages over the traditional format. From the consumers' (customers') perspective, these include reduced search costs, the ease of comparing products, and access to the experiences of other customers; whereas for distributors, electronic commerce provides a significantly wider geographical reach, reduces distribution costs, and creates opportunities for the development of new business models (de Lima Assafim, 2018, p. 6). Although the aforementioned advantages are not questionable, it is nevertheless a fact that there are instances in which market participants resort to concluding agreements that adversely affect the unhindered functioning of electronic commerce and, more broadly, competition. In such cases, it becomes necessary to determine the nature of the restriction in question and to assess whether it may find justification within any of the rules governing the exemption of agreements from the prohibition.

A new hardcore restriction concerning the use of the internet is set out in Article 5, paragraph 1, item 5 of the Regulation. Specifically, the exemption shall not apply, to the agreement as a whole, where the agreement, directly or indirectly, independently or in conjunction with other factors under the control of the parties to the agreement, has as its object the prevention of the direct customer or its customers from effectively using the internet for the sale of the contract goods or services, thereby restricting the territory in which the goods or services that are the subject of contract may be sold or the group of customers to whom such goods or services may be sold. This does not, however, call into question the possibility of imposing on the direct customer other restrictions on internet sales or on online advertising, which do not have the object of preventing the use of the internet as a sales or advertising channel in its entirety.

The provision may be analysed in several steps. First, it should be noted that an agreement containing the new hardcore restriction concerning the use of the internet is rendered void in its entirety, that is, it is wholly excluded from the exemption from the prohibition. It is not possible to treat solely the clause containing the hardcore restriction as void while maintaining the remainder of the agreement in force; in this sense, partial exemption cannot be applied (the agreement is either exempted in its entirety or entirely excluded from the exemption). Given that these are restrictions of a particularly severe and serious nature, it is justified to consider that the clauses containing them affect the validity of the agreement as a whole, which is why exemption is not permitted. In any event, this principle is not new; it

[3] Hardcore restrictions may also be contained in horizontal agreements. For more on this, see: Commission, 2022b, pp. 14–15.

is also followed by the current regulation (see Article 5), although the latter does not include this specific form of restriction, in terms of which it is the new restriction.

Furthermore, the agreement in question must pursue a specific objective: the prevention of the direct customer or its customers from effectively using the internet for the sale of the contract goods or services, thereby restricting either the territory in which the contract goods or services may be sold or indirect customers to whom goods or services may be sold. Such restrictions must be assessed within the framework of the remaining rules contained in the provision governing exclusion from the exemption from the prohibition. In essence, this is territorial or customer restrictions within the meaning of items 2), 3), or 4) of this Article (Article 5 of the Regulation), which, generally speaking, stipulate that a hardcore restriction exists where an agreement has as its object the following:

- the restriction of the territory or indirect customers to whom an exclusive distributor may actively or passively sell the contract goods or services, in cases where the supplier operates an exclusive distribution system (item 2);
- where the supplier operates a selective distribution system, the restriction of the territory or indirect customers to whom members of the selective distribution system may actively or passively sell the contracted goods or provide the contract services; the restriction of cross-supplies among members of the selective distribution system operating at the same or different level of the production or distribution chain; as well as the restriction of members of the selective distribution system operating at the retail level from engaging in active or passive sales to end users (item 3); and
- the restriction of the territory or of the group of indirect customers to whom the direct customer may actively or passively sell the contracted goods or services, in cases where the supplier operates neither an exclusive nor a selective distribution system[4] (item 4),

where it should be borne in mind that within each of these points, there are specific exceptions, the fulfilment of which results in exemption from the prohibition.

3.2.1. Exception – Permissible Restrictions on Online Sales and Advertising

The provision introducing the new hardcore restriction concerning the use of the internet also contains an exception, under which the agreement is not excluded from the exemption from the prohibition. Namely, it is permissible to impose on the customer other restrictions on online sales, or restrictions on online advertising that do not have as their object the prevention of the use of online advertising *in its entirety*.

By way of example, if a manufacturer prohibits its customer from selling the contracted goods via the internet altogether and allows sales only through the customer's physical

[4] Another novelty introduced by the Regulation is the system of free distribution, in which the supplier distributes its goods or provides its services without using either selective or exclusive distribution (Article 2, paragraph 1, item 13). More precisely, what is new is that Article 5, paragraphs 1 to 4 of the Regulation now explicitly allows the combination of selective and exclusive distribution systems in different territories. This means that suppliers may now establish different distribution systems in different territories and protect the members of these systems from one another (as stated in the explanatory notes to the Regulation).

store, this constitutes a restriction that effectively prevents online sales, even though a particular (traditional) sales channel remains operational. Conversely, a good example of a restriction relating to the use of online advertising is the practice of certain manufacturers prohibiting retailers from using their brand names or trademarks for online advertising or marketing purposes. It may also occur that a manufacturer forbids the use of its brand name or logo on the websites of its distributors (European Commission, 2021, p. 8).

The reasons for stipulating such restrictions may vary, the most typical being the intention to "protect" the brand, which may relate to the sale of goods through specific platforms. In this respect, it sometimes occurs that manufacturers either entirely prohibit retailers from selling online or prohibit online sales on platforms that do not meet certain qualitative criteria, justifying such measures, *inter alia,* by reference to the need to protect the brand and its reputation in general, considering that a brand's reputation may be compromised if the manufacturer or supplier lacks control over the presentation of its products on a given platform – for instance, where the contracted goods are advertised alongside lower-quality products, or where the platform itself is overly restrictive in terms of the content and information available to consumer (European Commission, 2021, p. 7, fn. 14).

It appears that the introduction of the aforementioned exception, in the case of a hardcore restriction concerning the use of the internet, reflects the need to recognise and accommodate certain legitimate business interests (in the examples discussed above, those of manufacturers), while at the same time ensuring conditions (in the examples above, for retailers) under which the pursuit of those interests will not harm the parties upon whom the restrictions are imposed. In other words, by providing for this exception, the Regulation achieves the necessary balance between protecting interests that may be regarded as legitimate from the perspective of one party, and safeguarding the opportunity to remain competitive in the relevant market from the perspective of the other. While it is to be expected that a manufacturer will seek to protect its brand and thereby its market position, the equally legitimate interest of other actors within the production or distribution chain to develop and strengthen their own market position cannot be disregarded, which creates the need for a corresponding rule allowing those restrictions which are not, so to speak, of such a severe or serious nature as would necessarily require their exclusion from the exemption. The prescribed exception thus establishes a balance between the protection of legitimate business strategy, on the one hand, and the protection of competition, on the other.

In any event, although the function of this exception is clear and its introduction, as the examples above demonstrate, appears justified, further consideration may be given to how useful it will prove in practice when assessing whether the conditions for exemption of an agreement from the prohibition have been met, and to how reliably the parties to an agreement will in fact be able to interpret the exception. As with the assessment of agreements more generally, as previously explained, the risk of error is present to a greater or lesser extent. Relying solely on the text of Article 5, paragraph 1, item 5 of the Regulation, the parties to an agreement should, with some degree of certainty, first exclude the possibility that the restriction in question prevents the effective use of the internet for the sale of the contract goods, then determine whether it may fall under the notion of an "other" restriction of online sales, and finally examine, where the restriction concerns online

advertising, whether it has as its object the prevention of the use of online advertising in its entirety or only in part. This task may be complicated by the fact that the provision in question does not specify what is to be regarded as the "effective" use of the internet for the sale of the contract goods or services (thus increasing the risk of misjudgement), together with the likelihood of differing interpretations of the scope of a restriction by different parties (for example, a manufacturer might consider it permissible to restrict the customer from advertising the goods via social networks and to require that advertising take place solely on the customer's official website, whereas the customer might interpret such a restriction differently, namely, as a limitation on online advertising in its entirety, particularly where the customer does not operate a website and relies exclusively on social networks as an advertising platform). Accordingly, while the introduction of the exception is indeed significant, it must be applied with due care, as must, ultimately, the provision on the new hardcore restriction as a whole.

3.2.2. Conclusion on the New Hardcore Restriction

The Regulation not only introduces a new hardcore restriction (concerning the use of the internet) but also gives the entire article dealing with hardcore restrictions (Article 5) a new, enhanced, more comprehensive, and more precise dimension. This is reflected, *inter alia*, in the explained interrelation between the new restriction and the meaning that the Regulation attributes to the provisions concerning other restrictions (territorial or customer-based), as well as in the extensive regulation of the various forms of restrictions that exclude an agreement from the exemption from the prohibition.

With regard to the new hardcore restriction in particular, it may be said that its introduction represents a response to the evident expansion of online business activity and that, from a legislative standpoint, it affects a specific segment thereof. In essence, the strongest impression left by the newly introduced restriction is that it constitutes a rule aimed at protecting, preserving, and appropriately regulating, in legal terms, access to and the use of online sales channels. In any event, for "small" and potential competitors, the detailed regulation of this area, which recognises and responds to market developments, is of particular significance.[5]

3.3. Parity Obligations

The Regulation also introduces a new specific restriction that is not exempted from the prohibition, relating to parity obligations at the level of the sale of goods or the provision of services to end customers across multiple online platforms (Article 6, paragraph

[5] A potential competitor is a market participant who, in the absence of a vertical agreement, could, on a realistic and not merely hypothetical basis, and within a short period of time, make the necessary additional investments and/or incur other necessary costs in order to commence business on the relevant market (Regulation, Article 2, paragraph 1, item 5). Although both the Regulation and its current counterpart apply to agreements between market participants operating at different levels of the production or distribution chain, i.e., who are not competitors, it should be borne in mind that they may nevertheless become competitors. This may occur through the effect of vertical integration. For example, a manufacturer may decide to sell the goods it produces directly to customers via its own website, thereby becoming a competitor to its customer, who, conversely, may begin producing the relevant goods, thereby becoming a competitor to the manufacturer, its seller (supplier).

1, item 4). For the purposes of this provision of the Regulation, a parity obligation refers to the direct or indirect prevention of the direct customer of online intermediation services (online intermediation) from offering, selling, or reselling goods, or from providing services to end customers, under more favourable conditions through competing online intermediation services.[6] In the context of digital markets, two forms of parity obligations may be distinguished. The narrower form ensures that the prices and conditions offered by a participant on one platform will not be less favourable than those offered for the same goods or services on its own website; whereas the broader form ensures that they will not be less favourable in comparison with those offered on other platforms or through any other channels, including the participant's own website (Colangelo, 2017, p. 4; Wang & Wright, 2016, pp. 1–2). It may also be said that a parity obligation refers to the requirement that goods or services be offered on terms that are at least as favourable as those offered through other sales or marketing channels (for instance, through platforms and/or direct sales channels such as website) (European Commission, 2022, pp. 2–3).

When analysing parity obligations under the Regulation, one must begin by clarifying what is meant, for the purposes of the Regulation, by online intermediation. This concept is of particular importance for understanding the very essence of parity obligations, given that they concern precisely the provision of online intermediation services (and it is also crucial for determining how the provision should be applied, in light of the examples discussed below). Thus, online intermediation, or online intermediation services, refer to information society services that enable market participants to offer goods or services: (i) to other market participants, in order to facilitate the initiation of direct transactions between those market participants; or (ii) to end consumers, in order to facilitate the initiation of direct transactions between those market participants and end consumers, regardless of whether and where such transactions are ultimately concluded (Regulation, Article 2, paragraph, item 7). Information society services are, in turn, services normally provided for remuneration, at a distance, by electronic means, and at the individual request of a recipient of services (Regulation, Article 2, paragraph 1, item 8).[7]

It should be emphasised that, under the Regulation, the exemption does not cover across-platform parity obligations that have as their object the prevention of the customer of online intermediation services from offering, selling, or reselling goods, or from providing services to end customers, under more favourable terms through competing online

[6] The Regulation also broadens the concept of a supplier, so that it encompasses a market participant who sells the contracted goods or provides the contracted services, including a market participant that provides online intermediation services (Article 2 paragraph 1 point 6).

[7] The concept of an information society service originally derives from the Electronic Commerce Act, under which an information society service is defined as a service provided at a distance, normally for remuneration, by means of electronic equipment for the processing and storage of data, at the individual request of a service user, including in particular online trade, the provision of data and online advertising, electronic search engines, as well as enabling the search for data and services transmitted via an electronic network, providing network access, or the storage of users' data (Article 3, paragraph 1, item 1). Compared to this definition, the meaning attributed to information society services for the purposes of the Regulation is narrower in scope, but essentially the same. Given the context in which the term is used, certain differences are sometimes unavoidable and, in any event, justified, so in this case any divergences should be regarded as negligible.

intermediation services – if in the specific case it is about another type of parity obligation, including parity obligations at the level of the sale of goods or the provision of services to end customers that relate to direct sales channels, those obligations remain covered by the exemption, as clarified by the Commission in the explanatory memorandum accompanying the proposal for the new regulation.

Finally, parity obligations should not be equated with the practice of resale price maintenance. Namely, the exemption does not apply to vertical agreements that have as their object the restriction of the direct customers' right to determine the resale price freely, which does not preclude the supplier from setting a maximum resale price or recommending a resale price, provided that such conduct does not result in the establishment of fixed or minimum resale prices as a consequence of coercion, pressure, or incentives exerted or offered by either party to the agreement (Regulation, Article 5, paragraph 1, item 1). By contrast, parity obligations, as explained above, concern the direct or indirect prevention of the direct customer of online intermediation services from offering, selling, or reselling goods or services to end customers under more favourable conditions. The difference lies in the fact that the prohibition of resale price maintenance relates to the restriction of the direct customers' right to determine the resale price freely, resulting in fixed or minimum resale prices, whereas the prohibition of parity obligations concerns preventing the customer from offering goods, primarily, under more favourable conditions across different platforms, including at a lower price. Parity obligations and resale price maintenance therefore produce distinct effects. In any event, parity obligations, as described above, are considered specific restrictions that are not exempted from the prohibition, whereas resale price maintenance constitutes a hardcore restriction, which causes the exemption to cease applying to the agreement as a whole.

3.3.1. Parity Obligations and Digital Platforms – Selected Examples

One of the more notable examples of such obligations in practice, which has been the subject of several recent studies concerning digital platforms and competition law, involves cases of vertical agreements that include online booking platforms, that is, platforms through which users can make online reservations for specific products or services. Among these, particular attention has been devoted to cases concerning platforms that provide online intermediation services for hotel booking and accommodation services in general (see, e.g., Johansen & Vergé, 2017, pp. 2–7; Mantovani, Piga & Reggiani, 2020, pp. 7–15; Ennis, Ivaldi & Lagos, 2022, pp. 2–20).

An illustrative case of this kind came before the Court of Justice of the European Union (hereinafter: the Court of Justice or the Court) in relation to the platform Booking.com (Case C-264/23), a well-known company providing its users with online intermediation services for the reservation of (hotel) accommodation worldwide. For a clearer understanding of the case, it should first be noted that the mechanism of online intermediation in accommodation booking operates in such a way that hotels whose accommodation is listed on the platform pay a commission to the platform when a reservation is made through it. However, since platforms have a legitimate concern that users, having found the accommodation they wish to book via the platform, might subsequently, for example, make that same reservation directly with the hotel, possibly at more favourable terms (i.e.

through a channel other than the platform), they include in their agreements with hotels so-called parity clauses, intended to prevent the practice whereby the same accommodation unit is offered through an alternative sales channel at a lower or more advantageous price (Mackenrodth, 2019, p. 1132).

Offering of accommodation via the platform should not prevent the use of alternative distribution channels for the provision of accommodation services (for instance, through the hotel's own website). However, what occurred in the case of Booking was that the platform concluded contracts with a large number of hotels (in Germany) containing, initially, a clause prohibiting those hotels from offering accommodation at more favourable prices either on their own websites or on competing platforms (the "wide parity clause"). Following pressure from European competition authorities, this was later replaced with a clause prohibiting hotels only from offering accommodation under more advantageous conditions on their own websites (the "narrow parity clause"). After the German Federal Cartel Office (*Bundeskartellamt*), the national competition authority, found such clauses to be restrictive as well and therefore unlawful, imposing a fine on Booking, the popular platform sought judicial review of that decision, which ultimately led to the referral of the question to the Court of Justice. In its judgment, the Court held that the provision of online hotel booking services by Booking and similar platforms has a neutral, or even positive, effect on competition, as these services provide users with a broad range of accommodation offers and enable them to compare such offers quickly and easily according to their own chosen criteria. However, the Court did not find that parity obligations, whether in their narrow or wide form, were objectively necessary for the effective provision of such services, nor that they were proportionate to the objectives pursued. Moreover, the Court concluded that parity clauses in cases of this kind may lead to the exclusion of smaller or new platforms from the market and that they are not indispensable for the economic viability of the platform (2024, paras. 13–19, 23, 59–62).

Clauses such as the one described above may prove problematic for several reasons. From the perspective of the present example, a hotel that is prohibited from offering accommodation at a price more favourable than that displayed on a platform acting as an intermediary is primarily affected in terms of its price competitiveness, thereby weakening the competitive pressure (that arises precisely in relation to prices, ancillary services, and other factors that consumers may value in various ways – Commission, 2022b, p. 1). It is particularly important to consider the consequences that parity obligations of this kind have for consumers, that is, the ultimate users. In this respect, the Court of Justice has observed that the provision of online hotel booking services may have a positive effect on competition, as it affords users access to a wide range of offers and enables them to compare those offers easily and rapidly in order to identify the most advantageous one. However, where there is no possibility that, through another platform or sales channel, a more favourable price may be offered for the same accommodation (the same offer), consumers may be deprived of that choice, with the result that the (negative) effects of the parity clause extend to them as well. Furthermore (which, if there is room for nuance at all, is perhaps the most serious potential consequence), there appears to be a risk of a cartel-like situation emerging, given that cartels are characterised by practices that artificially alter

(in fact reduce), competitive pressure and significantly restrict the choice that consumers would otherwise enjoy on a given relevant market in the absence of such coordination. This concern is particularly acute where, for instance, a hotel lists its accommodation capacity on several intermediary platforms (a common occurrence), each of which applies parity obligations at the same or a very similar level.

Admittedly, cases involving booking platforms are not the only ones that reveal a clear potential link between parity obligations and digital platforms – although they are particularly instructive for analytical purposes, given their practical relevance and relative novelty; indeed, the case-law concerning them remains largely in its infancy. In this respect, there are comparable examples equally suitable for examination from the standpoint of a new type of specific restriction that is not exempted from prohibition. In this context, it is important to distinguish between two models of parity obligations: the wholesale model and the agency model. Under the wholesale model, the parity obligation determines the price paid by the distributor, but not necessarily the price ultimately paid by the end customer. In contrast, under the agency model, the agent or intermediary is intended to connect suppliers and end customers, typically in exchange for a commission paid by the supplier, whereby the supplier (and not the agent) is the one who determines the price of the goods in relation to whose sale the agent intermediates, and the parity obligation in this model ensures that the price of the goods or services offered on the agent's platform remains competitive in relation to other channels through which the same goods or services are sold (Weiner & Falls, 2014, p. 4). Whether parity obligations under the models described are permissible is not always easy to assess, since the answer depends on several factors: the scope of the obligation, the nature of the distribution model, and the characteristics of the relevant market (Ezrachi, 2015, p. 489).

Although parity obligations are contained in vertical agreements, it is worth emphasising that their principal anticompetitive effect in fact manifests at the horizontal level and concerns the foreclosure of the market to new entrants (Colangelo, 2017, pp. 4–5). Parity obligations relating to online intermediation services (and to digital platforms more generally) typically comprise two elements: (i) a vertical one, as they involve parties operating at different levels of the production or distribution chain, and (ii) a horizontal one, as they link the prices of competing goods. The parties to such agreements are most often suppliers and retailers, whereas consumers, that is, end users, are frequently unaware of their existence, despite the fact that these agreements directly affect the prices that they pay (OECD, 2022). In this regard, after Booking restricted the freedom of listed hotels to offer users lower prices or better terms for accommodation services, many hotels began to include on their own websites notices informing customers of the advantages of joining various loyalty programmes they offer, thereby reintroducing price competition at the horizontal level (Ezrachi, 2015, p. 509). Price parity clauses have also been employed by the well-known company Amazon, in a case likewise examined by the German Federal Cartel Office (*Bundeskartellamt*). Amazon, being the largest online retailer in Germany and directly competing with the sellers on its own platform, also acts as a supplier; accordingly, at the retail level, the horizontal effect of the parity obligation raised particular concern (OECD, 2015, p. 4). After the platform agreed to remove the contested clause from its contracts with sellers, the *Bundeskartellamt* discontinued the proceedings against it.

3.3.2. Conclusion on Parity Obligations as a New Type of Specific Restriction

The foregoing considerations lead to the conclusion that parity obligations essentially aim to maintain the same price level for a given good or service across different platforms, that is, across different sales channels. Since, as already noted, price represents one of the principal criteria valued by consumers when choosing goods or services, parity obligations may even be regarded as part of a legitimate and justified business strategy designed to achieve or preserve competitiveness on the relevant market. This consideration is particularly important from the standpoint of smaller competitors, who are unable to match the lower, or significantly lower, prices that certain other competitors may be able to offer. In this respect, there can be no dispute as to the right of any market participant to shape its business strategy in the manner it deems most conducive to ensuring its competitiveness or sustainability on the relevant market, especially within the framework of its own platform.

However, it is evident that parity obligations, and more precisely, the consequences that their imposition may have for competition as a complex and highly dynamic market process, must be assessed from a broader perspective. The examples discussed above demonstrate that parity obligations may, in particular, give rise to effects that are detrimental to consumers. Specifically, they affect consumers by discouraging the use of direct sales channels, thereby increasing the final price borne by them (Mantovani, Piga & Reggiani, 2020, p. 5). On the other hand, the (negative) effect of price uniformity is equally apparent, and such obligations may also give rise to barriers to entry (Ezrachi, 2015, p. 519). At the same time, since parity obligations may appear in various forms, it is necessary to take into account the specific features that accompany those forms in each individual case.

For precisely these reasons, parity obligations cannot easily be situated within the context of the block exemption regime. Accordingly, the provision relating to them should, much like that concerning the new category of hardcore restrictions, seek to achieve a certain balance between, on the one hand, the freedom to design business strategy and, on the other, the necessity of ensuring that the exercise of that freedom does not result in a distortion of competition. As provided by the Regulation, and as noted earlier, not all parity obligations are excluded from the benefit of the exemption from the prohibition. The exemption does not apply solely to practices that directly or indirectly prevent the direct customer of online intermediation services from offering, selling or reselling goods or services to end customers by using competing online intermediation services. Other forms of parity obligations remain covered by the exemption. In essence, this means that, under the Regulation, the narrower form of parity clauses (those relating to direct sales channels) is permitted, whereas their wider form (those relating to multiple digital platforms as sales channels) is not covered by the exemption. It appears that this distinction was drawn precisely in order to achieve the balance described above. Moreover, proceedings in relation to several recent cases indicate that the restrictions entailed by the narrower form of parity clauses may stimulate competitive dynamics and enhance consumer welfare (Ezrachi, 2015, p. 517). Such restrictions are generally less rigid, although, as regards their admissibility, there does not appear to be a uniform position: thus, the *Bundeskartellamt* found in the Booking case that even these clauses were problematic (Mantovani, Piga & Reggiani, 2020, p. 3).

In any event, at the domestic level, the regulation currently in force remains incomplete with respect to parity obligations and digital platforms. Accordingly, the introduction of this specific restriction, that is, the clarification of which parity obligations are not covered by the exemption, constitutes another positive development, reflecting an acknowledgement of the new directions in which the market is evolving.

4. Relationship between the Regulation and Regulation (EU) 2022/720 – Online Platforms

The increasingly significant role of online platforms in the distribution of goods and services has already been recognised in the preamble to Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101, paragraph 3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices[8] (hereinafter: Regulation (EU) 2022/720). The preamble observes that online platforms enable new forms of business models, some of which cannot easily be categorised within the framework of vertical agreements as understood in the traditional economy (recital 11).

The Regulation has been aligned with Regulation (EU) 2022/720, which replaced the identically titled Regulation (EU) No 330/2010, whose period of application expired on 31 May 2022. The new Commission Regulation entered into force the following day. Shortly thereafter, the European Commission also adopted the Guidelines on Vertical Restraints (hereinafter: the Guidelines), which contain the guiding principles relevant for the assessment of vertical agreements and concerted practices within the meaning of Article 101 of the Treaty on the Functioning of the European Union and Regulation (EU) 2022/720. At the domestic level, however, no document comparable to the EU Guidelines has been included among the proposed package of rules on block exemption. In any event, there is nothing to preclude the Guidelines from serving as non-binding guidance for market participants in the domestic market who conclude vertical agreements, particularly given that the proposal for the national regulation has been modelled precisely on Regulation (EU) 2022/720, to which the Guidelines relate, and that the Commission for Protection of Competition follows the practice of the European Commission.

With regard to the proposed solutions analysed in this paper and the provisions of Regulation (EU) 2022/720 corresponding to them, there is virtually no difference. The domestic provisions represent a faithful translation of their EU counterparts and are, in structural terms, situated within the corresponding articles. Thus, the concepts of active and passive sales and of information society services are defined in identical terms under both the domestic Regulation and Regulation (EU) 2022/720; likewise, the concept of supplier under Regulation (EU) 2022/720 also encompasses providers of online intermediation services. It is precisely in accordance with Regulation (EU) 2022/720 that the domestic regulation has incorporated a provision on a new hardcore restriction relating to the use of the internet, as well as a provision on parity obligations as specific restrictions not exempted from the prohibition. An identical approach to the rules on dual, or double distribution, has been adopted both in the domestic Regulation and in Regulation (EU) 2022/720. Dual distribution refers to

[8] This refers to the provision concerning restrictive agreements.

situations in which a supplier sells goods or services both at the upstream and downstream levels of the production or distribution chain, thereby competing with its independent distributors. In the absence of hardcore restrictions, and provided that the customer does not compete with the supplier at the upstream level, the potential negative effect of a vertical agreement on the competitive relationship between the supplier and the customer at the downstream level is less significant than the potential positive effect of the vertical agreement on competition in general, whether at the upstream or downstream level, which is why such agreements should benefit from exemption from the prohibition. This reasoning, however, is not applicable to vertical agreements concerning the provision of online intermediation services where the provider of such services simultaneously acts as a competitor on the relevant market for the sale of goods or services, since providers of online intermediation services performing such a hybrid function may also have the ability to influence competition on that market (Preamble to Regulation (EU) 2022/720, recitals 12 and 14). These principles have likewise been incorporated into the proposed domestic act (see Article 3, paragraphs 6 and 8 of the Regulation).

On the basis of the foregoing, it may be concluded that the degree of alignment between the domestic Regulation and Regulation (EU) 2022/720, in respect of the solutions examined in the preceding part of this paper, is rather high, whereby it is commendable that the provisions of the domestic Regulation are not confined to a mere literal translation of the European ones, but instead form a coherent whole. Considering that the Republic of Serbia aspires to membership in the European Union and has, in pursuit of that objective, undertaken certain obligations regarding the harmonisation of domestic legislation with that of the Union, it is essential that the provisions of the national regulation be adapted to the instrument that served as its model. Moreover, the harmonisation of rules in this field may prove especially beneficial for undertakings engaged in cross-border operations and already aligning their business practices with Regulation (EU) 2022/720, insofar as they will not face or will face only to limited extent requirements under the domestic regulation with which their operations are not already consistent or which may, for instance, be unfamiliar to them. Finally, but by no means of lesser importance, alignment with Regulation (EU) 2022/720 is also significant for consumers, given that certain practices potentially detrimental to them are no longer legally unregulated.

5. Conclusion

In light of foregoing, it may be concluded that the innovations analysed have found their place within the Regulation as a response to the increasingly important role of digital platforms not only in everyday life but also in various business models. The development of e-commerce and business operations conducted through digital platforms ranks among the principal reasons for the adoption of the new Regulation. The emergence of new business models has been accompanied by new types of vertical restraints not covered by the previous block exemption regulation on vertical agreements, which made it necessary to carry out a revision of the existing legal framework in this field and to adapt it appropriately to the needs, challenges and requirements of the new digital era.

Thus, the refinement of the concept of active sales clearly reflects the need to keep pace with the new trends of digital business, given that online channels for seeking customers have become an increasingly prevalent model compared with traditional ones. This represents a desirable, and also necessary change, as it clarifies the scope of active customer solicitation and thereby removes uncertainties regarding its interpretation. However, it should be emphasised, as previously noted, that despite the certainly improved and more comprehensive definitions of both active and passive sales, there remain instances in which it will still be difficult to draw a clear distinction between the two, and to classify specific conduct as one or the other. Such cases may complicate for the parties to a given agreement its assessment within the context of the block exemption, bearing in mind that a number of the rules governing exemption from the prohibition of agreements rely precisely on the distinction between active and passive sales.

The Regulation also introduces a new hardcore restriction concerning the use of the internet, which appears to be aimed at safeguarding and legally regulating access to and use of online sales channels, which is of particular importance for small and potential competitors. A shortcoming that may be attributed to the provision relating to this new hardcore restriction lies in its failure to specify what constitutes an effective restriction of internet use (for the sale of the contracted goods or services), given that this represents a legal standard that the parties to an agreement might interpret differently, potentially making it more difficult for them to assess whether their agreement satisfies the conditions for exemption. In any event, the inclusion of a new hardcore restriction concerning the use of the internet is necessary in order to ensure that new forms of competition restraints characteristic of emerging trading models are legally recognised and prohibited. The same applies to parity obligations as a new category of specific restriction not exempted from the prohibition. Since parity obligations appear in several forms, it is likewise not always easy to place them within the context of the block exemption. The greatest challenge in this respect may lie in striking an appropriate balance between legitimate business strategies and the protection of competition.

Without prejudice to the observations set out above, the research may be concluded with the following key findings regarding the innovations analysed in this paper: (i) despite certain criticisms concerning the precision of specific parts of particular provisions and concepts, the positive effects of their introduction or extension prevail; (ii) they are consistent with an increasingly dynamic economic environment, while, to some extent, also contributing to its acceleration; (iii) they help to relieve the workload of the Commission for Protection of Competition; and (iv) they simplify compliance for market participants and reduce their potential costs. Whether the application of these innovations in practice once (or, more accurately, if) the Regulation is adopted, will confirm the conclusions advanced herein remains to be seen.

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IMPACT OF JURISDICTION ON THE EFFICIENCY OF E-JUSTICE SERVICES IN THE REPUBLIC OF SERBIA

Abstract

The online issuance of criminal certificates is a project that, in 2021, in Serbia was rated as the most promising electronic service on the eGovernment Portal, because it enables all steps to be taken electronically. Against this backdrop, this paper will primarily deal with the development and key features of electronic judicial services, with a special focus on the electronic service of issuing certificates on (non)conduct of criminal proceedings and certificates of (non)convictions. Subsequent to that, the authors examine the impact of the current national legal framework on the jurisdiction of courts on the effectiveness of the electronic service of issuing selected criminal certificates. The basic question that the paper should answer is whether the existing national legal regime of jurisdiction constitutes a limitation for further digitalisation, and what the appropriate criteria are for determining jurisdiction in situations where there is an "electronic" element.

Keywords: e-justice, territorial jurisdiction, e-administration, criminal record certificates, e-services

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1. Introduction

Traditionally, the issue of jurisdiction has been resolved by identifying an element within the legal relationship that determines the competent legal system or state authority (Vukadinović Marković, 2024, pp. 165-166). However, with the diminishing relevance of immediate physical presence in social interactions, the importance of the territorial principle in establishing territorial jurisdiction appears to have decreased. The most advanced digital services are now provided entirely online, enabling users to receive confirmations or other documents electronically or to perform procedural actions through digital platforms. The online provision of judicial services also raises the question of reconsidering the role and contours of the concept of subject-matter jurisdiction.

The Internet, as a global network of interconnected networks, offers numerous services (such as the World Wide Web, file sharing, and email) that are increasingly used in legal affairs for information and document exchange as well as for carrying out legal actions. Given the technological characteristics of the Internet, several authors (Popović *et al.*, 2023, pp. 16-22) highlight its inherent spatial elusiveness. For legal practice, key issues concern the applicable law and territorial jurisdiction in disputes arising from online interactions. These matters have become the subject of extensive scholarship within this area (ICP, 2001, pp. 3-8; Ćeranić Perišić, 2020, pp. 78-82; Višekruna, 2015, pp. 501-509).

If the analysis begins from the scientific definition of space, that it is where matter spreads, i.e. that it is a part of the boundless, three-dimensional range in which objects and events happen and have a relative position and direction (Britannica, 2025), then the "space" of the Internet may be understood as the hardware and software that constitute its underlying infrastructure. The disks housed in servers and storage units that hold and process information and documents, the records of transactions, and other outputs generated by the execution of computer programs are typically located in specialised facilities known as data centres. Moreover, cloud computing technologies enable data to be distributed across multiple physical locations.

It has been argued that such geolocations are elusive and not decisive, which undermines the importance of territorial jurisdiction (Razmetaeva, Ponomarova, & Bylya-Sabadash, 2021, p. 172). In the contemporary environment, where advanced information society services, such as qualified electronic signatures, time stamps, and technologies, including blockchain, enable virtual presence to be reliably authenticated and provide immutable records of actions performed, the regulatory approaches should be mindfully adjusted to take into account the virtual presence of subjects whose rights, obligations, and legal interests are at issue.

Various electronic services in the judiciary have been introduced in the Republic of Serbia, and most of them coexist alongside traditional services, resulting in equal availability of non-digital judicial services. However, the scope of this paper is limited to examining the development of services of online issuance of selected criminal certificates and the impact of current national rules on jurisdiction on the efficiency of those services.[1] For the purpose

[1] The service of online issuance of criminal certificates is a project that in 2021 was rated by the Office for Information Technology and Electronic Administration as the most perfect electronic service on the eGovernment Portal, because it enables all steps to be taken electronically: submitting a request for the issuance

of this paper, a criminal certificate relates to the certificate issued by public authorities based on the courts' records of criminal proceedings. Although the notion of criminal certificates is quite extensive in scope, the paper will be particularly focused on examining electronic judicial services dealing with the issuing of two specific categories of criminal certificates. These are certificates on (non)conduct of criminal proceedings, and certificates of (non) convictions of legal persons. The scope of this paper is limited only to those two categories of criminal certificates as both are issued by competent courts and their operation is supported by reliable statistics. Special attention will be placed on exploring the effect of those electronic judicial services within the current regulatory framework on the jurisdiction of courts, and how the rules on jurisdiction influence the efficiency of the electronic service of issuing the selected criminal certificates, which exists alongside the traditional way of issuing criminal certificates.

The hypothesis to be tested is that the existing legal regime on jurisdiction for electronic issuing of certificates limits further digitalisation and optimisation of judicial processes, and that more appropriate criteria are needed for determining jurisdiction in situations that involve an "electronic" element. It is apparent that various electronic services available in the judiciary, introduced in the Republic of Serbia, significantly challenge the traditional concepts of jurisdiction. To test the underlying hypothesis, the second chapter of the paper provides an analysis of the development and key features of the electronic service for issuing two selected categories of criminal certificates. In the third chapter, the current efficiency of the electronic certificate issuance service will be demonstrated by using methods of analysis and comparison of data from electronic systems for issuing the above certificates on the number of electronically processed requests by court location and data on the workload of the court measured by the number of incoming cases, as well as on the time required to process the electronic request and send the certificate by the court in the electronic inbox of the party.

In the fourth part, the paper considers the impact of national rules on jurisdiction on the efficiency of the examined procedures for issuing two selected ~~two~~ categories of criminal certificates, along with proposals for modifying the applicable national rules on jurisdiction in order to improve the efficiency of the service of electronic issuance of criminal certificates. This chapter also presents proposed directions for regulatory reform and for reorganising the work of courts and the software responsible for distributing electronic requests. Specifically, it discusses a shift from an orchestration model based on territorial jurisdiction to a model that assigns requests to the competent court according to a current-load algorithm, in line with the nature of electronic services, which operate through centralised systems that marginalise geographic location and enable the remote submission of requests and receipt of certificates. The conclusion sets out a vision of digitalisation based on comprehensive automation that enhances legal certainty. It is also warned that full automation diminishes the relevance of jurisdiction and moves the focus towards the authority responsible for service maintenance and data access approval. In sum, it is asserted that reducing the role of jurisdictional constraints streamlines court operations and increases both efficiency and legal certainty.

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of a certificate, paying the fee for the certificate, receiving an electronic certifi-cates in the digital eMailbox on the eGovernment Portal (Đilas & Kuzmanović, 2023, p. 54).

2. Development and Key Features of the Service of Electronic Issuance of Certificates on (Non)Conduct of Criminal Proceedings and Certificates of (Non)Conviction of Legal Persons in the Republic of Serbia

In July 2021, within the system of electronic judicial services, the electronic submission of requests and the electronic issuance of two selected categories of criminal certificates were introduced and became available to the public. These are certificates on (non)conduct of criminal proceedings of natural and legal persons (hereinafter: CP) and certificates of (non)conviction of legal persons (hereinafter: CRLP). The service of issuing those certificates is enabled through the eGovernment Portal, and is carried out by basic and higher courts based on their access to electronic records of criminal proceedings. It is noteworthy that the eGovernment portal now also enables the electronic submission of requests for certificates of (non)conviction of natural persons. However, it was argued that, contrary to the above electronic services for issuing the CP and CRLP, the electronic service for issuing certificates of (non)conviction of natural persons is not issued by the courts and therefore remains out of the scope of this analysis.

These two electronic services for issuing CP and CRLP constitute the first fully digitalised judicial services in the Republic of Serbia, as they have eliminated paper-based communication and enabled an entirely electronic process from start to finish. The services allow for electronic submission of requests, authentication of the applicant through a qualified electronic certificate, online payment of court fees, and the issuance of a certificate as a digital document to the applicant's electronic inbox. The digitalisation of this administrative service constitutes an important step in providing quality and efficient services to citizens, particularly in light of the fact that these certificates are commonly used by citizens in the process of employment, particularly in the public sector, and also by legal persons participating in public procurement procedures.

Since 2018, the availability of the services of state authorities on the eGovernment Portal has been normatively regulated. Namely, the Law on Electronic Administration and the Decree on the Method of Managing the Meta Register, the Method of Approving, Suspending, and Terminating Access to the Authority's Service Bus, and the Method of Working on the eGovernment Portal stipulate that the authority (in this case, the court) provides services through the eGovernment Portal. Those normative novelties were followed by the introduction of the eCertificate software.

2.1. Form and Content of Electronic Criminal Certificates under Serbian Law

The issued electronic certificates fall under the category of public documents, pursuant to the Law on General Administrative Procedure and under the category of electronic documents as regulated by the Law on Electronic Document, Electronic Identification and Trust Services in Electronic Business (hereinafter: Law on Electronic Document). Namely, the latter specifies that an electronic document may be originally electronic or digitised. A digitised document is considered a copy unless it is certified by the issuing authority with a qualified electronic signature or seal. In the judicial context, this means that electronic court certificates are either created as original electronic documents signed

with the qualified electronic signature of a natural person, who is authorised by the court president as stipulated in Article 7 of the Court Rules of Procedure, or they are digitised and subsequently certified with the qualified electronic signature of a person authorised by the court. It is noteworthy that the national system is configured to permit the issuance of certificates in either of the two forms provided for under the Law on Electronic Document. Due to various limitations, such as an outdated Court Management System (hereinafter: CMS), which cannot apply an electronic seal during document generation.

For the form and content of electronic criminal certificates, the provisions of Articles 123 and 157a of the Court Rules of Procedure are also relevant, as they stipulate that any court certificate (thus including a non-electronic certificate), as an act of court administration, may be signed by the person authorised by the president of the court and must contain the signature of an authorised person. In addition, it is stipulated that an electronic document that includes electronic certificates must be signed by a qualified electronic signature of the respective person. Therefore, the electronic court certificate must contain all elements of the form and content required for an electronic document under the Law on Electronic Document, as well as all elements of form and content prescribed by the Court Rules of Procedure.

2.2. Coexistence of Traditional and Electronic Procedures for Requesting Criminal Certificates

Although a fully electronic procedure for obtaining certificates has been introduced, submitting a request for the issuance of a certificate at the court counter still exists alongside the issuing of electronic certificates and, in fact, is to this day the prevalent option used by court users. In other words, the introduction of the electronic judicial service did not completely replace the traditional method of submitting a request for criminal certificates at the court counter, even though this administrative procedure is considered quite complicated for several reasons.

Firstly, there is a wide set of applicable national procedural statutes that shape various procedures for issuing criminal certificates. Similar, but not identical, requirements and procedures for issuing different categories of criminal certificates lead to the fragmentation of the national regulatory framework in the field, which may adversely impact legal certainty, considering that an applicant may face a dilemma about whom to submit a request to.

Secondly, applicants are required to visit the counter of the competent, commonly basic court of their residence in order to file a request for the issuance of a criminal certificate. Once the request is submitted, a complicated procedure is activated, requiring direct communication and exchange of data between various courts and public prosecutor's offices, leading to increased workload. For instance, in the event that the issuing of a certificate on (non)conduct of criminal proceedings is requested, the competent court is bound to formally request confirmation from the relevant basic and higher public prosecutor's office within its territorial jurisdiction regarding whether an investigation had been initiated – an act that, pursuant to Article 7 of the Criminal Procedure Code, constitutes the commencement of criminal proceedings. Subsequently, as part of the fact-finding process, the court examines its electronic records of the ongoing criminal proceedings by checking the

applicant against multiple criteria. After gathering the relevant information, the court, in accordance with criminal legislation, issues either a certificate confirming that no criminal proceedings are pending within its territorial jurisdiction against the person submitting the request, or a certificate stating that criminal proceedings are underway, including all information concerning the stage of the procedure (case referent number, legal basis, name of the offense, etc.). This procedure is, therefore, very complex and demanding.

The third limitation of the above procedure relates to the fact that the given criminal certificate did not cover all courts and public prosecutor's offices, including the Special Department of the Higher Court in Belgrade for Organised Crime, Special Departments for Suppression of Corruption established within four higher courts, the Public Prosecutor's Office for War Crimes, the Public Prosecutor's Office for Organised Crime, as well as special departments of higher public prosecutors' offices for the suppression of corruption.

Finally, some of the national legal acts that regulate the procedure for submitting the request for issuing a criminal certificate do not regulate the specifics applicable to the procedure of electronic submission and issuance, although they are carried out in practice. This may create confusion in implementation. For instance, contrary to the Court Rules of Procedure, the Law on the Responsibility of Legal Entities for Criminal Offences and the Criminal Code remain silent on the requirements and procedures concerning the issuance of electronic criminal certificates.

Namely, the Law on the Responsibility of Legal Entities for Criminal Offences regulates the issuance of a regular certificate of (non)convictions of legal entities, envisaging that a legal entity, upon its request, may be provided with information regarding its criminal convictions or the absence thereof solely when such information is necessary for the exercise of its legally recognised rights. It is envisaged that criminal records are kept by the first-instance court whose territorial jurisdiction includes the registered office of a domestic legal entity or the regional or branch office of a foreign legal entity (Article 32, paras. 4 and 5). Not surprisingly, the said law, which was not amended after its adoption in 2008, does not regulate the procedure for the electronic issuance of such a certificate. The electronic issuance is also not provided for the certificate of (non)convictions of natural persons by the Criminal Code, when this provision was introduced through amendments of 2009. Instead, it only stipulates that citizens may, upon their request, be provided with information regarding their criminal convictions or lack thereof (Article 102 of the Criminal Code).

On the other hand, as already mentioned, the procedure for the issuance of certificates stating that no criminal or misdemeanour proceedings are underway against the applicant filing the request within the territorial jurisdiction of the court is regulated by Article 100 of the Court Rules of Procedure in a slightly different manner. Namely, the Court Rules of Procedure contain an additional solution for applicants filing a request for the issuing of the certificate confirming that no criminal proceedings are pending, provided that two or more courts are integrated with ICT. If two or more courts are integrated with ICT means, the court shall, at the request of an applicant, issue the said certificate for the territory of the connected courts. That provision was applied in the same way to the databases of public prosecutors' offices. It contributed to the centralisation of criminal certifications, which constitutes a key prerequisite for the digital transformation of this service.

The centralisation of the criminal databases has been a gradual process that is still not completed, which explains the parallel reliance on so-called traditional and electronic criminal certificates in the Republic of Serbia. Namely, the first improvement to this service was implemented through the centralisation of the criminal databases of all basic and higher courts, as well as basic and higher public prosecutor's offices that use the CMS. This development made it possible to issue certificates with nationwide validity, including through basic courts situated outside the applicant's place of residence. The centralisation did not include the databases of the special departments of the courts and public prosecutor's offices for war crimes, organised crime, and the suppression of corruption. At that time, certificates relating to war crimes, organised crime, and corruption issued by these special departments still required a separate request. In practice, certificates were issued by basic courts as well as by those higher courts that have special departments. This reduced the need for administrative staff in each higher court (without a special department) to issue such certificates.

3. Statistics on Requests Filed Through the Court Counter

The issuance of certificates on (non)conduct of criminal proceedings and certificates of (non) conviction for legal entities constitutes the most frequently provided administrative service of the courts. In the three years preceding the introduction of the electronic service for issuing criminal record certificates (2018–2020), all basic and higher courts issued a total of 896,309 certificates, as presented in Table 1.

Table 1. *Number of certificates issued at the court counter in all basic and higher courts in Serbia*

Year	Basic Courts	Higher Courts	Total
2018	300,029	15,703	315,732
2019	299,231	13,492	312,723
2020	255,735	12,119	267,854
Total			**896,309**

These figures indicate that the special departments of the Higher Court in Belgrade issue over 20,000 certificates annually, on average, which amounts to a total of 60,000 in the observed period. The Special Department for the Suppression of Corruption of the Higher Court in Belgrade issued 95% of this number annually.

Table 2. *Number of certificates issued at the counter in all basic courts in Serbia and at the Special Department for Organised Crime of the Higher Court in Belgrade*

Year	Legal persons	Natural persons	Total
2018	3,821	5,738	9,559
2019	3,786	6,463	10,249
2020 until 31.10.	9,098	7,013	16,111
Total			**35,919**

3.2. Statistics on Electronically Filed Requests and Certificate Issuance

Since the introduction of the electronic service on July 1, 2021, 39,111 requests for certificates have been filed through the eGovernment Portal.

Table 3. *Number of electronically filed requests for issuing certificates to all basic courts in Serbia and Special Departments of higher courts in Belgrade, Niš, Novi Sad, and Kraljevo*

Basic courts	Higher courts - special department
37,607	1,504
Total	39,111

By analysing the number of electronically filed requests for each year using the service, it can be concluded that the number of electronically filed requests is growing from year to year and that this service is becoming increasingly popular. In the first year of use, 9,280 requests were filed, while in the first six months of the fourth year of use, 7,121 were filed. Assuming that the same number will be filed in the second half of the year, it can be said that by the end of the fourth year, over 14,000 requests will have been filed.

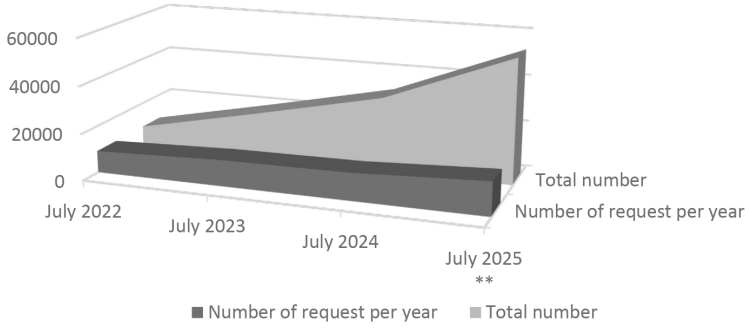
Table 4. *Trend of the number of electronically filed requests to all basic courts in Serbia and Special Departments of higher courts in Belgrade, Niš, Novi Sad, and Kraljevo*

Date	Number of requests per year	Total number
July 2022	9,280	9,280
July 2023	11,093	20,373
July 2024	11,617	31,990
January 2025 *	7,121	39,111
July 2025 **	14,242	53,353

* in 6 months of use

** prediction of the end of the fourth year of use

Chart 1. *Trend of the number of electronically filed requests to all basic courts in Serbia and Special Departments of higher courts in Belgrade, Niš, Novi Sad, and Kraljevo*

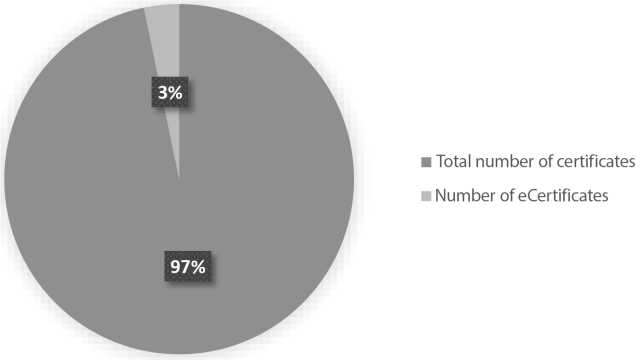


While the number of electronically filed requests is increasing, the total of 31,990 such requests over three years (by July 2024) represents only 3.35% of all requests filed during the three-year period of 2018-2020 (total of 956,309, including an estimated 60,000 certificates issued by specialised departments of the Higher Court in Belgrade).

Table 5. *Share of electronic certificates*

Total number of certificates	956,309
Number of certificates	31,990

Chart 2. *The proportion of electronic certificates*



The practice of larger courts is to issue a certificate on the same day the request is filed at the court counter. Smaller courts, especially those located far from highly populated areas, which are required to verify data with public prosecutor's offices outside the centralised system, usually issue certificates the following day.

In 72% of cases, the time needed for the issuance of a certificate through the electronic service from the moment of filing the request to the moment the certificate is sent to the party's eInbox is within one day. From the table below (Table 6), it can be seen that, out of 44 electronically filed requests (on September 30, 2024), 32 had been resolved by the start of business (on October 2, 2024). According to the Law on General Administrative Procedure, the deadline for issuing a certificate is eight days. More than 95% of certificates were issued within the set legal deadline.

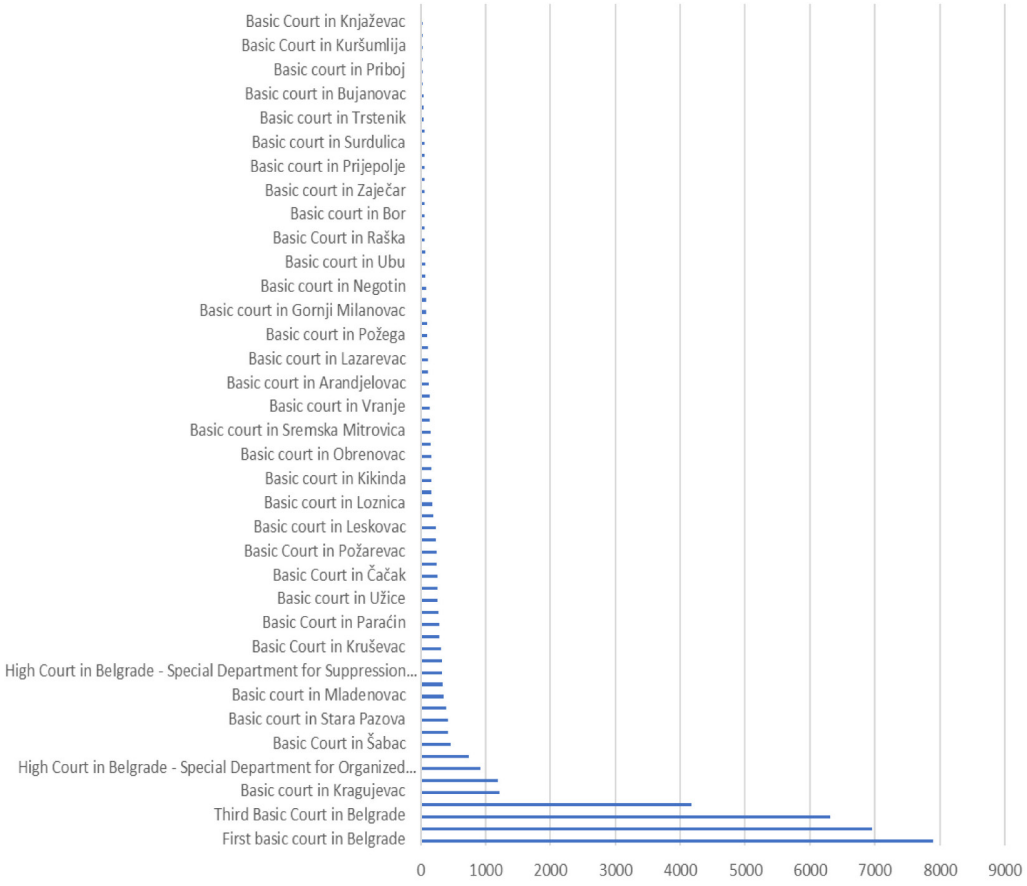
Table 6. *Service efficiency in all basic courts in Serbia and Special Departments of higher courts in Belgrade, Niš, Novi Sad and Kraljevo*

Date	Number of certificates requested	Number of certificates issued
30.9.2024*	0	44
2.10.2024.	32	44
8.10.2024.	42	44

The low share of the electronic method, amounting to only 3% compared with 97% for the traditional method, cannot be attributed to poor performance or unreliability of the electronic service. Further, bearing in mind that over two million citizens, so-called eCitizens, are registered on the eGovernment Portal, the limited use of the e-service cannot be attributed to digital disinterest or a lack of digital literacy. In order to try and identify the causes of the said imbalance, additional research was conducted through a survey of a group of citizens who are not professionally connected to the public sector, and the results indicated a low level of awareness regarding the existence of the service.

The survey included 51 respondents. When asked whether they were familiar with the possibility of submitting a request for the issuance of a certificate of (non)conduct of criminal proceedings through the eGovernment Portal, 70,6 % of respondents answered negatively, even though 64,7% of them use other services on the eGovernment Portal. Furthermore, the results show that in more than 50 % of cases, respondents did not know which authority is responsible for issuing the certificate (Appendix 1. Survey of the e-Justice Service).

Chart 3. *Number of filed requests per court*



The research further demonstrated the need to raise public awareness about the existence of the service. It also showed that in the digital era, when the services of various authorities are accessed through a single point using the user's IP address, it is no longer necessary for citizens to know the subject-matter or territorial jurisdiction of the authority in order to obtain the required certificate. The place they visit is an internet portal, and the authority they perceive is the one that manages that portal and its services.

These technical constraints require that all electronically filed requests be routed to the court with jurisdiction over the applicant's place of residence. As a consequence of this service design, the basic courts in Belgrade, which are located in the most populous

city, are significantly overloaded. The ratio between the number of requests received by the busiest court (the First Basic Court) and the least busy court (the Basic Court in Sjenica) is 7,895 to 6.

4. Impact of Current Regulations Concerning Jurisdiction on the Efficiency of Selected Criminal Certificates and Proposals for Improvements

The electronic court certificates provide significant advantages for Serbian applicants in proceedings before both domestic and foreign authorities, particularly within the EU. In addition to the widely cited benefits associated with the digitalisation of judicial services (Zou & Lefley, 2025, p. 7; Knežević Bojović & Ćorić, 2024, pp. 377-379), it is important to underscore that such certificates contribute to establishing common foundations for secure electronic interactions among citizens, businesses, and public administration. Namely, Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, which repeals Directive 1999/93/EC and towards which the alignment of the national Law on Electronic Document is directed, identifies the establishment of these common foundations as one of its key objectives.

Notwithstanding the benefits of the electronic court certificates, they should be adequately regulated and operationalised so as to achieve optimal results. The broad range of national statutes on jurisdiction indirectly influences the effectiveness of electronic certificates of (non)conduct of criminal proceedings and of (non)convictions of applicants. Within this section, after examination of the jurisdictional issues, it will be proposed that legal improvements be made that would (arguably) enhance the efficiency of the service of issuing electronic criminal certificates. It has been argued in the literature that a reasonable timeframe for the attainment of legal rights has emerged as a *sine qua non* in evaluations of regulatory effects. Although traditionally limited to trials in the narrowest sense, it has been increasingly recognised that these reasonable time requirements cover-a broad spectrum of proceedings before judicial bodies and legal professionals (Mihajlović, 2025).

When it comes to determining subject matter jurisdiction and communication with courts from which data must be collected, provisions of the following statutes should be taken into account. According to the Law on the Organisation of Courts, basic and higher courts adjudicate criminal offenses in the first instance, while the basic and higher public prosecutor's offices initiate and conduct investigations. Under the Law on the Organisation and Competence of State Authorities in Suppression of Organised Crime, Terrorism and Corruption, the Public Prosecutor's Office for Organised Crime is responsible for initiating and conducting investigations into criminal offenses expressly stipulated in that Law. Finally, the Law on the Organisation and Competence of State Authorities in War Crimes Proceedings envisages that the Prosecutor's Office for War Crimes is competent to initiate and conduct investigations into criminal offences.

As regards establishing the territorial jurisdiction of the court competent for issuing criminal certificates, provisions of the Criminal Procedure Code are applied. Namely, the court in whose territory the criminal offence was committed or attempted shall have

territorial jurisdiction. Under this Code, if the place where the criminal offence was committed or attempted is not known, or if the defendant has no temporary or permanent residence, the court in whose territory the defendant has temporary or permanent residence shall have territorial jurisdiction. If the place where the crime was committed is not known, nor is the temporary or permanent residence, the court whose territorial jurisdiction includes the defendant's place of birth shall have jurisdiction. The same statute also determines special rules for the territorial jurisdiction of the court in cases where a criminal offence was committed on a domestic vessel or aircraft, or the criminal offense was committed through the media. The presented national legal framework clearly demonstrates that establishing both subject-matter and territorial jurisdiction in any particular case can be a complex task.

As discussed earlier, the centralisation of databases thus far has achieved some positive results. For instance, it made it possible for the competent court's authority to issue a certificate on (non)conduct of criminal proceedings, to include data from the records of public prosecution offices. Also, the provisions of the Court Rules of Procedure have enabled the centralisation of criminal certificates through the issuing of certificates for the territory of connected courts, and these provisions were applied to the databases of public prosecutor's offices in the same way.

Finally, the provision of services of issuing electronic certificates through the eGovernment Portal was particularly welcome. This provision, under the assumption of complete centralisation of all data on criminal prosecution (which has not been achieved so far), has the potential to marginalise the territorial jurisdiction of courts for issuing criminal certifications. The marginalisation of jurisdiction for issuing criminal certificates, in practice, implies the possibility of filing a request for the issuance of a certificate to any basic or higher court in the territory of the country and the possibility of issuing a certificate for the territory of all courts and public prosecutor's offices.

However, although national regulations allow for overcoming the rules on jurisdiction, this is currently not possible in practice, because approximately 20% of the cases handled by public prosecutors' offices are not managed through the CMS. The issuing of criminal certificates thus still implies the need for verification of the applicant's identity and direct communication between the court and the public prosecutor's office competent for the territory of the applicant's residence. This technical obstacle has affected the design of the certification service in such a way that the software algorithm always directs the electronic request to the court of the applicant's residence.

The technical limitations of the lack of centralised data on certain public prosecutions could be overcome by redirecting electronic requests without exception to the courts in whose jurisdiction the applicant resides; for all other courts, the algorithm would distribute requests based on workload. This solution could be implemented without the need to change regulations.

However, the full effect of automation, which in this case would imply the complete or almost complete elimination of the work of court officials, could only be achieved after complete centralisation and unification of all data in such a way that the system automatically issues certificates without the need for court participation. Such a solution would

require the amendment of the regulations on the subject matter competence for issuing certificates in order to address the question of who issues the certificate in the case of a fully automatic system. The issue becomes even more complicated when the data of the courts has to be accessed by another authority in the performance of official duties. Who would be responsible for approving access to centralised data?

For instance, this regulatory gap regarding the authority to determine data usage currently prevents the establishment of a service for issuing data from the register of misdemeanour sanctions. In a technical sense, this misdemeanour offence record is completely centralised and ready for display through applications and portals. The president of the misdemeanour court designates a controller of data in the register who, among other things, enables authorised persons to inspect the register, as stipulated in Article 326 of the Law on Misdemeanours. This provision effectively requires each misdemeanour court to consent to every individual access request to centralised data.

As a solution, the determination of a central authority for approving access to data is required. The Law on Misdemeanours recognises the ministerial authority for judicial affairs as the authority responsible for data protection. This ministry is entrusted with the development, maintenance, and coordination of the judicial information system according to Article 10 of the Law on Ministries.

However, none of these laws regulates the management of centralised data. When it comes to approving the inspection, acquisition, processing, or delivery of data from the central records, due to the principle of division of powers, the High Judicial Council should be competent as the representative of the judicial branch of power.

Although electronic services represent a means of enhancing access to the services of public authorities, in addition to the electronic method, until the introduction of dedicated administrative points or other mechanisms enabling electronic communication with authorities on behalf of citizens, it is necessary to retain the possibility of issuing certificates through the court counter, which is why it is necessary, with an amendment, to retain the provisions on subject matter and territorial jurisdiction.

For such a solution, it would be sufficient to amend Article 100 of the Court Rules of Procedure, which would determine that the request for issuing a certificate from the criminal record on (non)conduct of criminal proceedings for legal and natural persons and from the criminal record for legal persons can be filed electronically. Access to data shall be provided to judicial and state authorities and parties through a system provided by the ministry responsible for judicial affairs. In that case, the responsibility for the correct functioning of the system would remain with the administrative body (Ministry of Justice), while the responsibility for the accuracy of the records would still rest on the courts.

In addition to this, it is necessary to regulate the approval of access by other state bodies through the Governance service bus by the High Judicial Council as a central judicial body. In this case, it would be necessary to amend the Law on the Organisation of Courts and expand the work of the judicial administration performed by this body. This would change both factually and formally the subject matter competence for issuing certificates from the court to the central authority. In practice, communication with applicants would be managed by the central authority, and formally, because the responsibility in case of

non-issuance of the certificate, except in the case when it is a consequence of inconsistent data, would no longer rest with the judiciary.

Digital transformation is increasingly marginalising the previous territorial powers of the authorities, and in terms of subject matter jurisdiction, it is increasing the importance and responsibility of the authorities responsible for maintaining the system and approving access. However, a prerequisite for the efficiency of any electronic service is data consistency. This emphasises the importance of data sources that include data entry and data processing.

The digital era brings the automation of many administrative tasks of the court staff; however, on the other hand, it increases the work engagement in data entry. This creates a balance in the sense that although the workload on the one hand is decreasing (verification of data for Certificates), on the other hand, it is increasing (data entry).

5. Conclusion

The service of providing certificates on (non)conduct of criminal proceedings is one of the most requested services falling in the domain of court administration. The statistical data show that requests for electronic issuance of criminal certificates have been resolved within one day. However, the potential number of requests that this service can reach is close to 300,000, which is thirty times more than the current number of electronic requests per year. The assumption is that all requests will be resolved within the legal deadline because, in most cases (without exception in the courts in Belgrade), the resolution of requests for issuing certificates over the counter and electronic requests is handled by the same group of employees in each court. However, the introduction of a mechanism for the allocation of filed requests from Belgrade courts to less burdened courts would significantly affect the efficiency of the service and enable a more efficient distribution of work in the most burdened courts. This would serve as a clear case showing that a modified understanding the existing contours of the concept of territorial jurisdiction may improve the efficiency of the service of electronic issuance of criminal certificates.

Moreover, full automation also requires the authority responsible for service maintenance and data access approval. The marginalisation of jurisdiction reduces the workload of court services and increases efficiency and legal certainty. While digital transformation is streamlining judicial processes in Serbia, particularly electronic certificate issuance, existing legal frameworks and jurisdictional limitations hinder the full potential of eJustice services. The technical capabilities to marginalise territorial jurisdiction exist, but normative changes are needed to fully support automation through centralising data management and modifying subject-matter competence for certificate issuance. The ultimate vision is complete automation that enhances legal certainty, efficiency, and service delivery in the judicial system.

Caution is paramount when introducing new technologies to ensure they serve as a means to a desired end, rather than driving unintended changes. This can generate friction between central bodies implementing digitisation initiatives and the judiciary, which must safeguard its independence. Soft law sources, such as recommendations, best practices, and

guidelines, are particularly valuable in properly designing and implementing electronic tools. Furthermore, given the inherent organisational implications of such technical changes, heightened attention must be paid to the potential impact on judicial independence.[2]

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[2] For more on soft law regarding judicial governance and judicial self-governance, see: Knežević Bojović, pp. 235-254.

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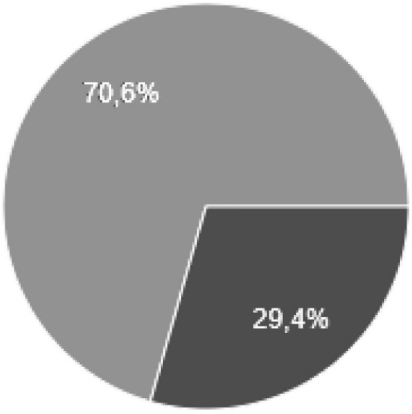
Appendix 1. Survey of the e-Justice Service

A Google Forms survey was conducted in January 2025. Respondents included individuals with no professional affiliation to the judicial system, either directly or through family members.

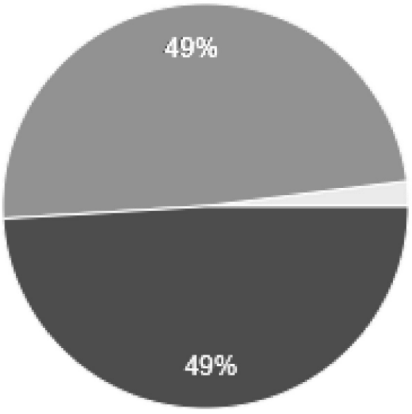
1. Are you familiar with the possibility of submitting a request for the issuance of a certificate of (non)conduct of criminal proceedings through the eGovernment Portal?

Result: 29,4% YES 70,6% NO



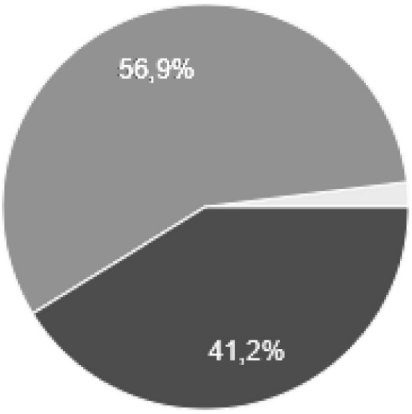
2. Mark the authority that, in your opinion, is competent to issue a certificate on (non) conduct of criminal proceedings

Result: 49% Court / 49% Ministry of Interior / 2% Other state body



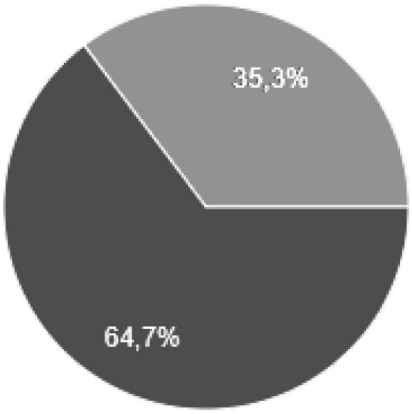
3. Mark the authority that, in your opinion, is competent for issuing a certificate of impunity (non-conviction)

Result: 56,9% Court / 41,2% Ministry of Interior / 2% Other state body



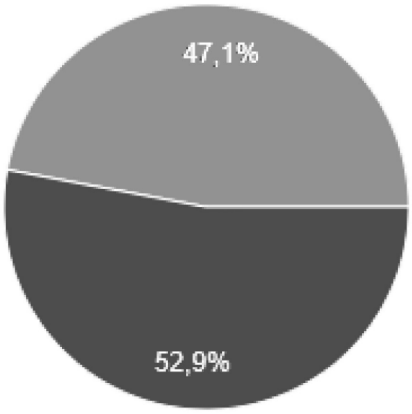
4. Do you use the services on the eGovernment Portal?

Result: 64,7% YES / 35,3% NO



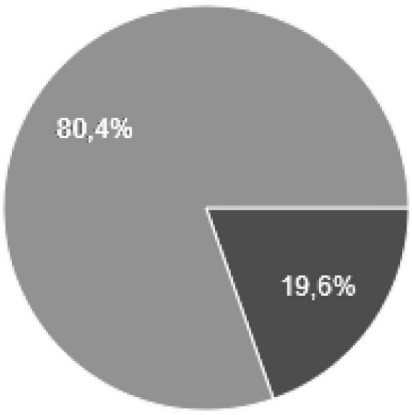
5. Do you use electronic services on the portals of other authorities (Tax Administration, local tax administration, Ministry of Justice, etc.)

Result: 47,1% NO / 52,9% YES



6. Did you know that you can check on the Internet whether you have been served with enforcement proceedings? (https://etabla.sud.rs/)

Result: 80,4% NO / 19,6% YES



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