

Chapter 12

Current Problems of Digital Justice in the BRICS Countries



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Abstract The research goal of this article is to identify the existing problems of implementing digital legal proceedings in the BRICS countries. It is proved that the most serious obstacles to achieving this goal are: (1) The lack of legislative regulation of the use of digital technologies for all civil proceedings; (2) The lack of technical equipment of courts throughout the territory of these countries; (3) The lack of coordinated work of judicial digital platforms or the lack of the ability to carry out certain procedural actions on it; (4) The unsatisfactory attitude of citizens to digital justice; (5) The low standard of living of the majority of the population of these countries. It is concluded that the development of digital justice occurs differently in these countries, and despite the identified problems, some of them have achieved great success. The current situation around the world related to coronavirus infection has played an impetus in some countries for the active integration of modern technologies, such as blockchain, artificial intelligence, and others, into the civil process. Digital technologies used in the process of protecting rights and legitimate interests have proven their effectiveness, but only within individual countries. It is proved that the ongoing changes in the judicial process radically change the approaches to the administration of justice.

Keywords BRICS · Civil procedure · Platform · Court · Artificial intelligence · Blockchain · Technology · Digital justice · Russia · China · India · South Africa · Brazil

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12.1 Introduction

The implementation of digital agendas in the countries under consideration has long been a major challenge. The stages of achievement are different, as the success of the implementation of digital technologies depends on many factors, including economic ones (Dudin et al., 2019).

Within the framework of economic cooperation between the BRICS countries, various acts concerning cooperation in these areas have also been adopted (Rusakova, 2018). As practice shows, despite the different levels of high-tech development, the creation of digital justice has not been achieved by any of the countries studied, although China has achieved the greatest success, which created the world's first Internet courts. India, which is characterized by the presence of large IT companies, cannot boast of implementing its results in the judicial system (Gaivoronskaya et al., 2019). Other countries are gradually integrating technology into various types of legal proceedings.

The legal problems of establishing new communication mechanisms for participants in the judicial process hinder the achievement of digital legal proceedings (Goncharov et al., 2019). The current situation in the world with COVID-19 has pushed all countries to more actively searching for a way out of the challenges, one of which is to ensure uninterrupted access to justice (Rusakova & Inshakova, 2021). It is proved that the transition of the judicial form of protection of the right to digital is not just a goal, but an existing reality of the modern world.

12.2 Materials

The basis of the regulatory framework of the study is made up of various acts regulating the procedure of digital civil proceedings: The Constitution of South Africa of 1996; acts of the Supreme Court of Appeal of South Africa; Decision No. 313 of the Brazilian Council of Justice of 2020 and the provisions of the state courts in its implementation; acts of the Supreme Court of India and judicial precedents of the highest courts of India; notice by the Supreme People's Court of Strengthening and Regulating the Online Litigation Work during the Period of Prevention and Control of the COVID-19 and a number of others; Resolution of the Presidium of the Council of Judges of the Russian Federation No. 439 "On Approval of the Concept for the Development of Court Informatization until 2020" of 2015; Resolution of the Presidium of the Council of Judges of the Russian Federation No. 457 of June 1, 2015 "On the creation of a pilot zone of GAS "Justice" on the basis of the courts of general jurisdiction of Moscow"; Resolution of the Presidium of the Supreme Court of the Russian Federation of March 18, 2020 No. 808 of April 8, 2020 No.

821 in order to counteract the spread of a new coronavirus infection in the Russian Federation.

The doctrinal positions that formed the theoretical basis of the study were studied thanks to scientific works devoted to the phenomena of digital (electronic, virtual, network) development of judicial proceedings, which have become a reality and a necessity, based on generally recognized values that are mediated by law: Goncharov et al. (2019), Matytsin and Rusakova (2021), Rusakova et al. (2019), Rusakova and Inshakova (2021), and Tarakanov et al. (2019).

Objective factors and prerequisites for the formation of the need for creating digital legal proceedings are studied in Barros and Schiller (2020), Broodryk (2019), Damle and Anand (2020), Hunter (2019), Pinheiro (2020), Rocha (2019), Vaid (2020), and Whitear (2020).

The impact of the digital economy on the state of civil society was reflected in the works of such authors as Dudin et al. (2019), Frolova et al. (2018), Gaivoronskaya et al. (2019), and Tarakanov et al. (2019).

The civil procedure law of the Russian Federation, China, and the BRICS member countries was studied by the authors in monograph “Resolution of private law disputes in the BRICS countries,” 2018, as well as in the monograph “Resolution of financial disputes in the Asia–Pacific countries,” 2019 and in the scientific work of Inshakova.

12.3 Methods

The study used the method of comparative analysis, which was used to compare the development of digital legal proceedings in the BRICS countries, as well as the methods of causal and systemic analysis, which allowed us to identify the main problems and difficulties in integrating digital technologies into the civil process of Brazil, Russia, India, China, and South Africa. Based on dialectical methods of cognition of the process of digitalization in these countries, directions for improving this process were formulated. Based on the results of the analysis, an assessment of the prospects for the creation of digital justice in these countries is provided.

12.4 Results

12.4.1 *South Africa Experience*

The process of implementing online courts has recently become increasingly important for the judicial system. The conceptual idea is to create a single judicial platform, which all participants in the process can have access to from anywhere in the world.

The concept of online courts is currently being implemented in the High Courts of South Africa, which consists of an end-to-end electronic system where litigants can file documents, manage the case and evidence online from any place and time, without being physically present in court.

It should be noted that the types of civil proceedings that can be considered online are also limited, for example, appeals against decisions in civil and criminal cases, absentee decisions, divorce proceedings, proceedings in an arbitration court, and others.

Online legal proceedings minimize the presence of persons involved in the case in court, which is now extremely important in the era of the coronavirus pandemic; cloud technologies allow you to process a huge amount of information and extract the necessary data, as well as quickly eliminate inaccuracies and prevent judicial errors, for example: when checking the identity of claims.

In the courts, the process of moving the case will occur automatically, which will reduce the flow of paper and court deadlines, as well as increase the efficiency of the judicial system. It will be possible to carry out procedural actions online on a special platform in real time.

One of the advantages of such a system is the rapid verification of documents in electronic form, as well as the ability to make various requests for information on the case, which will be received via SMS messages to mobile devices or e-mail.

The elements that make up the Court Online at present are:

- “Front-End Portal (FE),” which is accessed via the Internet, for any computer or mobile device of a law firm registered in the “Court Online” system»;
- “Workflow application,” which is located on the ships’ computers and serves the internal routing and workflows in the ships;
- “Case management application,” which is downloaded to the computers of the courts and serves the completion of the process of registering cases, generating case numbers, further processing of cases at all stages of the proceedings and monitoring in real time, as well as the overall progress in the completion of cases.

On January 10, 2020, Judge-President Dunstan Mlambo issued a Directive regarding the full implementation of the online trial evidence submission process in the case management app. The Gauteng Division of the High Court of South Africa, which has offices in Pretoria and Johannesburg, has implemented e-case technology in the proceedings, as well as a trial management system.

In a recent South African case, when the High Court allowed witnesses to give evidence by video link, the judge noted that South Africa was lagging behind the rest of the world because there was no legal framework governing remote trial. Professor Dr. Omphemetse S. Sibanda criticized the courts for not moving “at full speed” to e-justice in this time of crisis and noted that only “turtle steps” are being taken in this direction. We have never needed this framework and support for the concept of remote hearings more acutely than we do now. While the global COVID-19 disaster is unprecedented and new and causes untold suffering, it has provided a valuable opportunity for the justice system to fully embrace and support the use of technology to continue to provide essential services to the people of South Africa, namely the

realization of the right to a fair settlement of disputes by the courts, a fundamental constitutional right. It can only be restricted if there are no other reasonable means of achieving the purpose behind the restriction of the right. The health and safety of the participants in the trial could be ensured by holding remote hearings. Unfortunately, this is not done in the maximum number of cases, although it would be difficult (Whitair, 2020).

Thus, most court cases are dealt with in the usual way, although the current epidemiological situation could have a more effective impact on the process of creating digital justice in South Africa. Moreover, in his research work, Professor T. Broodryk emphasized the reverse process, when numerous practical directives restricting access to the courts were published in connection with the nationwide isolation. Consequently, the constitutional right of access to justice was severely restricted. This means that access to justice is currently unavailable to a significant portion of the South African population (Broodryk, 2019). The courts considered the possibility of filing class actions to be the most appropriate option, but this option did not solve the problem, but only delayed its solution.

In addition, this type of proceeding does not solve the problem of ensuring the right to judicial protection, but only allows a group of persons who have violated similar rights and legitimate interests to protect their rights by filing not several lawsuits in court from each plaintiff, but one lawsuit. But in any case, the judicial representative from this group will need to apply to the court and be present in the process.

An analysis of the civil procedure legislation shows that the process of ensuring that the parties can submit evidence to the court online is currently underway.

12.4.2 The Brazilian Experience

The following disadvantages are the characteristics of the Brazilian judicial system: the high workload of the courts and long deadlines. The number of appeals to the courts is constantly increasing, and the period associated with the coronavirus has only aggravated this situation.

On March 19, 2020, the Brazilian Council of Justice issued Decree No. 313, regulating the entire judicial system, which established the duty of the courts to guarantee the implementation of basic judicial services, as well as the transition to remote work. Some provisions have been adopted that implement this regulation by other states: Regulation CSM No. 2550/2020, Ato Normativo n. 7/2020, and others.

According to Decree No. 313, courts at all levels were required to provide the following minimum: I-to divide cases into judicial and administrative, depending on the priority and order of urgency; II-to technically ensure the direction and publication of judicial and administrative acts; III-to establish interaction with lawyers, lawyers, public defenders, prosecutors, and the judicial police, primarily remotely and in exceptional cases in person; IV-to provide payment services, institutional security,

communications, information technology, and health; and V-urgent jurisdictional measures.

The face-to-face presence of the parties, lawyers, and interested parties should be replaced by a remote presence with the help of available technical means. Courts should ensure that magistrates, civil servants, and court staff work remotely when preparing decisions and sentences, minutes, holding virtual meetings, and performing other administrative activities.

By April 1, 2020, the Council of justice of Brazil established the extraordinary digital platform, which can be made in various legal actions online and conduct hearings (Barro & Schiller, 2020).

In his article, a Brazilian lawyer Rafael Marques Rocha gave the following data that starting from April to March was rendered remotely about 3 million judicial decisions in Brazil, where almost a million in the courts of the state of São Paulo (Rocha, 2019).

The effectiveness of the judicial system was tested directly by practicing lawyers, who were able to participate in court sessions via videoconference during the closure of the courts and their transition to remote work.

The judge of the Court of Appeal, Maria Teresa Gazine, stated that the courts currently consider all cases from consumer protection disputes to family disputes, as well as appeals, exclusively on the basis of the court's electronic platform (Pinheiro, 2020). However, to conduct an online hearing in civil cases, the consent of all participants in the process is required, and only in six of the forty cases, the parties applied for consideration of the person case; in all other cases, the cases were considered remotely. At the same time, the judges do everything possible to consider the dispute; so during the period of restrictive measures, such digital platforms as Zoom, Skype, Google Hang Out, and WhatsApp were actively used to communicate with the parties to the dispute, although it is still unclear how much the use of such funds is legal. The process of proof and the proceedings themselves must meet certain requirements, which must be followed by all participants in the process and strictly observed. The use of such means of communication is not regulated by law and, therefore, cannot be a permissible remedy from the point of view of the law (Taranov et al., 2019).

12.4.3 The Indian Experience

Back in 2005, India launched a project to create electronic vessels, which involves several stages. The process of digitalization of the judicial system is led by a specially created Electronic Committee under the Supreme Court of India.

Currently, the third stage is underway, which provides for the complete rejection of paper media in the highest courts of India and the states, as well as the creation of the first virtual court in Delhi and the active introduction of artificial intelligence technologies into the judicial process.

However, in practice, the exact opposite is happening, when for the first time on June 1, 2020, the entire panel of the Supreme Court of India held its first-ever

paperless hearing. It was a rare sight to see three judges sitting in a virtual courtroom with laptops instead of bulky folders. Lawyers made presentations via video links and judges typed notes (Vaid, 2020).

Most lawyers support the development and preservation of electronic (virtual) courts in India since they were created as emergency courts.

According to the president of the Supreme Court Bar Association, Dushyant Dave, it is necessary to combine online and ordinary proceedings; but analyzing the existing practice of digitalization of the judicial system, he identified several problems: these are technological shortcomings of the system and the inability to create a single judicial platform, due to the huge number of courts in territories where there is no Internet, as well as the low level of knowledge of computer technologies of most participants in the proceedings. According to statistics for June 2020, 32.7 million cases were pending in Indian district courts, such a huge flow of court cases complicates the process of switching to digital format.

The stated achievements for each stage of creation do not correspond to reality, so far the electronic committee has not resolved the following issues:

1. Management of archived data that has already been submitted to the courts;
2. The definition of what constitutes a case, that is, it is not clear how to search for cases;
3. Technological guidelines for data quality control, there is no single standard for how data should be uploaded and what requirements should be met;
4. Data quality reviews, no data protocols available;
5. Institutional mechanisms, inefficient support for system users (Damle & Anand, 2020).

Despite all the shortcomings of the process of creating e-justice, the legal community hopes to continue implementing this project, which should have a positive impact on the entire judicial system of India: to improve the efficiency of legal proceedings and the quality of services provided.

12.4.4 China's Experience

Examining digital legal proceedings in the People's Republic of China, it should be noted that this process was fully implemented based on three Internet courts: Hangzhou Internet Court, which was established on August 18, 2017; Beijing Internet Court, established on September 9, 2018; Guangzhou Internet Court, established on September 28, 2018. It should be noted that the entire judicial system is actively being transformed into a digital standard of activity.

The legal regulation of the new courts is carried out in accordance with the procedural legislation, the explanations of the Supreme People's Court of the People's Republic of China, which are flexible regulators of rapidly changing public relations arising in the field of judicial proceedings. Issues related to the dispute resolution procedure were settled by the Regulation on Certain Issues of Consideration of Cases

in Internet Courts No. 1747 of September 3, 2018, of the Supreme People's Court of the People's Republic of China.

It should be noted that initially, Internet courts were created for online trading platforms, where the parties make various transactions in real time, during the execution of which various disputes arise between the parties that require a quick and transparent solution. Access to this service on trading platforms is carried out in one click, which greatly simplifies the procedure for applying for legal protection. Disputes that may be the subject of consideration of these courts are somehow related to actions carried out on the Internet: from contracts of sale, lending, protection of copyright and related rights, and others.

Blockchain technologies are actively used by judges in the process of proof, and the data obtained in this way does not cause doubts among judges, which can significantly reduce the time of the trial, since the parties do not have to search for evidence, since all information is stored on this platform (Kalinina et al., 2019).

However, there are also a number of problems in the activities of Internet courts; for example, the Hangzhou Internet Court has been criticized for its lack of impartiality, since it is technically supported by the Internet platform of Alibaba and its subsidiaries, whose interests are traced in most disputes (Hunter, 2019).

One of the innovations of these Internet courts is the ability to consider disputes by robots with artificial intelligence technologies. At the same time, as practice shows, the parties to the trial do not object to the participation of a robot judge in the process. The first visual robot judge was a female judge wearing a black robe. Especially for skeptics of the robotic trial, representatives of the Internet court explained that a human judge can actively influence the course of the process, and all actions take place under his strict control.

In the era of coronavirus infection, the task of switching to digital justice was faced by all parts of the judicial system, so the Supreme People's Court of the People's Republic of China published explanations on the work of the courts in the period of COVID-19 No. 40 of the year 2020. In which, it was emphasized that all higher people's courts should actively and effectively coordinate and direct lower courts to facilitate online trials, develop document templates, regulate relevant court procedures, and strengthen leadership over lower courts so that online judicial activities are regulated, unified, lawful, and orderly. Any process based on the judicial platform must comply with the following order: "person, case, and account."

In order to comply with the legality of digital legal proceedings, online court services were provided to the persons involved in the case through electronic means, such as China Mobile Micro Court, China Judicial Process Information Online, the unified national judicial platform, e-mail, and instant messaging services.

The analysis allows us to conclude that China has responded more adequately to all the challenges associated with restrictive measures around the world since the idea of digitalization of all areas of the population's life has long been systematically implemented.

12.4.5 Russian Experience

The process of digitalization of the judicial system in the Russian Federation lasts long enough and is being implemented gradually. There are many reasons: technological, financial, social, and other (Frolova et al., 2018).

The first attempt to transform the judicial system was undertaken in 2001 with the adoption of the Federal target program “Development of the judicial system of Russia” in the years 2002–2006. During this period, the main goals of the reform of the judicial system were announced, namely the development of the material and technical support of the judicial system and its information support (Matytsin and Rusakova, 2021).

In 2015, the Decree of the Presidium of the Council of Judges of the Russian Federation No. 439 “On the approval of the Concept of the development of informatization of courts until 2020” as well as the Decree of the Presidium of the Council of Judges of the Russian Federation of June 1, 2015, No. 457 “On the creation of the experimental zone of GAS “Justice” based on the courts of general jurisdiction of Moscow” were adopted, and then the concept of informatization of activities was developed in relation to the Supreme Court of the Russian Federation.

Initially, the possibility of performing procedural actions in electronic format concerned the procedure for filing a claim, but then, almost three years later. It became possible to download the appendices to the claim.

The law establishes the possibility of holding court sessions via videoconferencing, which is regulated, and we are talking about the presence of the party in the courtroom, which is located in the vicinity of its location.

During the period of restrictive measures related to coronavirus infection, the Decree of the Presidium of the Supreme Court of the Russian Federation and the Council of Judges of the Russian Federation of March 18, 2020, No. 808 of April 8, 2020, No. 821 were adopted in order to counteract the spread of new coronavirus infection in the territory of the Russian Federation, which provided for the courts, if technically possible, to initiate consideration of cases by using video conferencing systems.

The period of restrictive measures demonstrated all the weaknesses and problematic issues of the judicial system; so at the very beginning, the proceedings in most cases were postponed.

Subsequently, in most civil cases, the judges switched to the digital model of the dispute resolution procedure as much as possible. But it is too early to talk about fully digital justice, while it is possible to state the possibility of performing certain procedural actions in electronic format.

12.5 Conclusion

A study of the judicial systems of the BRICS countries pointed to a number of problems that these countries faced in the process of implementing digital subpoenas in this area (Rusakova et al., 2019).

The situation that has developed in the COVID-19 investigation has demonstrated all the weaknesses of the judicial form of protection of rights. The lack of legislative regulation of the use of digital technologies in legal proceedings during the period of remote work has led to a violation of the terms and procedure for the consideration of disputes, and all this has become the norm for many courts. Holding hearings with the use of messengers in many countries was the only way to somehow resolve the dispute. But such actions may in the future be the basis for filing complaints to higher authorities and what seemed to be a way out might soon become a dead end.

It should be noted that many countries have not been able to switch to a new format of interaction, due to the lack of technical support and financial capabilities (Artemyeva et al., 2019).

The technical equipment of ships in many countries, such as South Africa, Brazil, and India, is so weak that it is not necessary to talk about the introduction of any new technologies: blockchain, cloud technologies. It can be stated that in countries with large territories such as Russia, China, and India, it is not always possible to access the Internet, and therefore, the transition to electronic judicial support is impossible; so in such regions, the only way to obtain judicial protection is to proceed in the usual manner.

The last problem is the poor training of personnel in the context of the development of modern technologies when often the judges themselves do not know how to carry out a procedural action in an electronic format, what can we say about the ordinary population.

However, it is safe to say that after COVID-19, no judicial system in the world will remain the same, since society must be ready at any time to respond to global challenges.

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