

MACRO-STRUCTURAL PROCEDURAL REFORMS IN BRAZIL

AS REFORMAS PROCESSUAIS MACROESTRUTURAIAS BRASILEIRAS

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ABSTRACT

Brazilian procedural reform's motion, in both criminal and civil spheres, has followed a pragmatic line on certain issues that distort the perspective of the democratic rule of law. This essay seeks to establish a study of the stages of the legislative process for effecting macro-structural procedural reforms which are appropriate to the democratic rule of law, thus allowing due process of law with a guarantee of citizen participation. In the proposed methodology for a procedural reform, the adequacy of the constitution and the constitutional process model has been assumed in distinguishing the following stages: previous diagnosis, defining the structural bases of the reform, formulation of the draft, public debate of the draft, legislative processing, the period of *vacatio legis* and, finally, monitoring of legislative reform and determination of the adequacy of it. As the preparatory and final stages of the legislative process are delimited, we shall analyze Brazilian civil and criminal procedural laws up to the present time.

Keywords: Procedural reform; Legislative due process of law; Civil procedure; Criminal procedure.

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RESUMO

O movimento da reforma processual brasileira, tanto penal quanto civil, tem seguido uma linha pragmática que distorce em determinados pontos a perspectiva do Estado Democrático de Direito. Assim, o presente ensaio busca estabelecer um estudo das fases do processo legislativo para a efetivação das reformas processuais macroestruturais que seja adequado ao Estado Democrático de Direito, permitindo assim o devido processo legislativo com a garantia de participação cidadã. Na proposta de uma metodologia para uma reforma processual tem-se como pressuposto a adequação à Constituição e ao modelo constitucional de processo, distinguindo-se as seguintes fases: diagnóstico prévio, definição das bases estruturantes da reforma, formulação de anteprojeto, debate público do anteprojeto, processamento legislativo, período de *vacatio legis* e, por fim, o monitoramento da reforma e adequação legislativa pontual. A partir da delimitação das fases preparatórias e finais do processo legislativo analisam-se, até o presente momento, os passos da reforma processual penal e civil brasileira.

Palavras-chaves: Reforma processual; Devido processo legislativo; Processo civil; Processo penal.

INTRODUCTION

8 Brazil has made, in the past two decades, numerous sharp reforms in the Code of Civil Procedure and, to a lesser extent, reforms in the Code of Criminal Procedure. The action of partial reforms has always been criticized on grounds of loss of firmness and cohesion of procedural texts.

In the current constitutional order, a committee was created, directed primarily by the then Ministers Sálvio de Figueiredo Teixeira and Athos Gusmão Carneiro. The committee, with the help of IBDP, began its work in the early 1990s, reviewing both the Codes of Civil and Criminal Procedures. The commission has raised several bills passed by Congress that promptly changed the CPC, establishing, for example, the preliminary injunction, the specific protection, the preliminary hearing, monitory action, as well as changes in the stage of a appeal and execution. It has also changed systematically extraordinary resources to fit the 45th amendment of the Constitution that established the “reform” of the Judiciary, systematizing the overall impact and repetitive resources of civil procedural law.

Also, a committee chaired by Ada Pellegrini Grinover was organized by the Brazilian Institute of Procedural Law to review the CPP, which gave rise to seven bills presented in 2001, some projects of which were approved, changing the CPP promptly on matters such as the interrogation of the accused, evidence, procedural subjects, sentencing, the ordinary procedure and procedure of trial by jury.

The commissions chose to propose partial reforms, organized into various bills, justifying the choice because of the lengthy and difficult nature of the legislative procedure involved in the passing of a global project to Congress.

Only in 2008, a commission comprised of jurists was set up by the Federal Senate, which was responsible for presenting a draft Code of Criminal Procedure¹. The task, accomplished in record time, was completed in March 2009 when the draft of the Criminal Procedure Code was submitted to the President of the Senate, passed the Senate under number 156/2009. Then in 2009, another Commission of jurists was established² for the proposition of a new Code of Civil Procedure. The Draft was submitted in June 2010 and is being processed by the Commission in the Senate under number 166/2010³.

The perspective of the movement of reform in Brazil changed from sharp reform to discussion of a new draft Code of Procedure. This is a demonstration that partial reforms have become a problem, because the procedural laws have become disjointed and without internal cohesion, making it difficult for “law practitioners” themselves to understand them, increasing the procedural complexity.

If the proposed comprehensive reform has positive aspects as the definition of a text with systemic cohesion, it brings to light a more complex discussion, requiring the definition of the structural bases of the reform, as well as calls for greater respect for due process of law, and proper democratic rule of law, which guarantees citizens and especially civil organizations the opportunity to participate.

Based on the understanding of the democratic rule of law process itself and the concern that all procedural reforms must be in compliance with the constitution and thus the democratic constitutional process, this essay seeks to establish criteria for defining an appropriate due process of procedural macro-structural reform, based on experience in comparative law, in order to submit a review of current path of the procedural reform movement in Brazil.

THE NECESSARY RESCUE OF THE IMPORTANCE OF THE PROCESS – BEYOND THE CONCEPT OF LIBERALISM AND PROCEDURAL SOCIALIZATION

Since the attainment of independence in the study of procedural law, during the mid-nineteenth century, until shortly after World War II, the predominant

¹ Nine members composed the above mentioned Commission of Jurists: Antonio Corrêa; Antônio Magalhães Gomes Filho; Eugênio Pacelli; Fabiano Augusto Martins Silveira; Félix Valois Coelho Júnior; Hamilton Carvalhido; Jacinto Nelson de Miranda Coutinho; Sandro Torres Avelar; Tito de Souza Amaral.

² The Commission of lawyers tasked with the submission, within one hundred and eighty days, of the draft Code of Civil Procedure established by the Brazilian Senate in the ACT-379, September 30, 2009 consists of: Adroaldo Furtado Fabricio, Bruno Dantas, Benedito Cerezzo Pereira Filho, Elpidio Donizetti, Teresa Arruda Alvim Wambier, Humberto Theodoro Júnior, Paulo Cezar Pinheiro Carneiro, Luiz Fux, Jansen Fialho de Almeida, José Miguel Garcia Medina, José Roberto dos Santos Bedaque, Marcus Vinicius Furtado Coelho.

³ Disponível em: <http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=97249>. Submitted August 11, 2010.

concern of scholars was with the analysis and construction of the process from a purely conceptual perspective⁴, often indifferent to the context of its application and more closely linked to the study of procedural technique.

During this period we saw, in the civil procedure, the transition from a procedural conception inherently linked to a liberal process, written and dominated by the parties (*Sache der Parteien – señores de los pleytos*)⁵, into a process that follows the perspective of orality⁶ and of the authoritarian principle, with the resulting delineation of a technical judicial activism in the procedural action. The process as an instrument of the court as an institution of social welfare⁷.

In criminal proceedings, prying loose from the inquisitorial model did not end with procedural liberalism, in spite of it having defended the design of an accusatorial model that would withdraw judgmentary powers from the magistrate which were private do the prosecution, to propose a typically liberal model – *Parteienkampf* – the fight between the parties. However, the various Codes of Criminal Procedure in Continental Europe and Latin America extended, further still, the legacy of the Napoleonic “*Code D’Instruction Criminelle*”, marked by the figure of the inquisitor judge. Thus the ‘inquisitorial’ inheritance formed the basis of the strong authoritarian concepts of procedural law of social matrix, consolidated in procedural activism. Thus combining the matrix of the inquisitorial system⁸ – visible in the structure of the inquisitorial phase of preliminary investigation, the preliminary investigation judge’s powers in pursuing the “real truth”, in mitigating the actions of the board of prosecution before the court action – the premise of social defense of the criminal court, criminal proceedings becomes an example of judicial activism.

Nevertheless, subsequent to this period and the promotion of constitutionalism in the twentieth century, some theorists have begun to realize that in the process, there is something other than a neutral technical tool, as one may take it

⁴ WASSERMANN, Rudolf. *Der soziale Zivilprozeß: Zur Theorie und Praxis des Zivilprozesses im sozialen Rechtsstaat*. Neuwied, Darmstadt: Luchterhand, 1978. p. 45.

⁵ MONTERO AROCA, Juan. *I principi politici del nuovo processo civile spagnolo*. Napoli: Edizioni Scientifiche italiane. 2002, p. 31. CAPPELLETTI, Mauro. *O processo civil no direito comparado*. Belo Horizonte: Cultura Jurídica, 2002. p. 39-40.

⁶ CHIOVENDA, Giuseppe. Relación sobre el proyecto de reforma del procedimiento elaborado por la comisión de posguerra. In: CHIOVENDA, Giuseppe. *Ensayos de derecho procesal civil*. Buenos Aires: Ejea, 1949. v. II, p. 227. GOLDSCHMIDT, James. *Derecho procesal civil*. Buenos Aires: Labor, 1936. p. 28.

⁷ KLEIN, Franz. *Zeit- und Geistesströmungen im Prozesse*. Frankfurt am Main: Vittorio Klostermann, 1958. p. 25.

⁸ COUTINHO, Jacinto Nelson de Miranda. Sistema acusatório: cada parte no lugar constitucionalmente demarcado. In: *Revista de Informação Legislativa*, v. 183, 2009. p. 111.

as a democratizing structure of stakeholder participation in all spheres of power in order to delimit the public decision taking process⁹.

This situation led to the growing importance of the procedure, which went on to ensure an effective influence of citizens in any decision-making, since it was gradually moving away from the possibility that a person, institution or body could have the cognitive privilege in defining state provisions.

The process begins to be perceived as a fosterer institute to the democratic game¹⁰, since all decisions must come from it, and not be made by someone with superhuman abilities. Thus, in criminal proceedings, acting in accordance to the adversarial system, guaranteeing the full right of defense (or legal defense), the right to freedom and presumption of innocence are issues that only get new light, particularly in countries of Roman-Germanic heritage, after the constitutionalism and human rights movements of the twentieth century. Thus, either through partial reforms such as the French and German ones, or overall reforms as in the case of the Italian reform, the discussion pervades not only the need to revise the judicial activism or liberal matrices, but also for a discussion of the prior assumption of the adversarial system's democratic profile. In light of these templates, one can no longer defend a liberal adversarial system, nor an inquisitorial system of socializing profile.

The process then becomes the benchmark and guarantor in judicial, legislative and administrative decision taking provisions, going even as far as to standardize private ones.

However, besides the perception that the democratic process should facilitate the participation, control and thereby legal universalization, there are outlined in the scope of court proceedings, especially in the second half of the twentieth century, a dominance and a search for practical results (efficiency¹¹ – process results)

⁹ FAZZALARI, Elio. Diffusione del processo e compiti della dottrina. *Rivista Trimestrale di Diritto e Procedura Civile*, Milano, Giuffrè, n. 3, 1958, p. 875.

¹⁰ We cannot forget the overcoming of the dichotomy of *civil law* – *common law*, in fact, due to the circulation of legal models of the past two decades.

¹¹ As Taruffo states, we can see at least two perspectives of efficiency in the court system. The first quantitative perspective is defined in terms of speed of procedures and reduction of costs, through which a cheaper and faster resolution of conflicts, with greater efficiency would be obtained, and the quality of the procedural system and its decisions would be a minor factor. A second perspective of efficiency (qualitative) was one in which one of the key elements of its implementation would be the quality of decision making and reasoning leading to the need for adequate procedural techniques, as well as accurate, fair, equitable, and he would add, democratic for law enforcement. Taruffo explains thus: that both perspectives are like sides of a coin, but they can be, and often are, seen as contradictory conceptions as a fast and cheap process can form incomplete or incorrect decisions, while the search for a “fair “(correct and legitimate) decision requires money, time and shared activity between the judge and other procedural subjects. In this situation it is usually important to choose one perspective of efficiency and exclude the other completely. (TARUFFO, Michele. Orality and writing the factors of efficiency in civil litigation.

often kept apart from a constitutional vision in which it would impose the dynamic application of constitutional principles of procedure.

With the advance of scientific studies, we see evidence of the impossibility of building procedures using as a base merely the pragmatic pursuit of their results, but instead the increasing importance of an organization to apply the fundamental rules of procedure in a dynamic way, and seek their adaptation to the full context of normative adequacy of implementation with state supervision.

Obviously this new vision will not ever forget the instrumentality of the technical process¹².

It is clear, therefore, that the dispute between a liberal, social or even, pseudo-social (neo-liberalist procedural) process¹³, can no longer respond to the lonely yearnings of a participatory citizenship, since such models of design cannot meet the procedural pluralism, in the democratic and non-solipsistic current normative context.

There has been a seek for a procedural structure that meets, at the same time, the set of constitutional procedural principles and the requirements for effective normative development¹⁴ as well as the generation of useful results, within the procedural perspective of a democratic rule of law.

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CARPI, Federico; ORTELLS, Manuel. *Oralidad y escritura en un proceso civil eficiente*. Valencia: Universidad di Valencia, 2008. p. 185 et seq.) Unfortunately, in the face of numerous factors, the Brazilian procedural system usually works with the quantitative efficiency, even imposing a neoliberal vision of high productivity and uniformity of decisions leading to superficial understanding by the courts (standardization of decisions), even if this occurs before a full debate around the cases, in order to improve the “resolved” case statistics. You get to the refinement of the Brazilian National Council of Justice to create productivity goals (Goal 2, for example) and replace it with a “processometer” with the productivity index of the Brazilian Courts (www.cnj.jus.br – Access on 07/10/2009).

¹² Gonçalves advocates an “instrumentality” technique, which ensures a process that becomes a “[...] better, more responsive and more democratic structure for the sentence that results from it is formed, or generated, with the guarantee of equal participation, equality and symmetry, to those who receive its effects.” (GONÇALVES, Aroldo Plínio. *Técnica Processual e Teoria do Processo*. Rio de Janeiro: Aide, 1992. 171). The instrumentality technique should not be confused with the defenses of instrumentalists lines from the American realism, or Brazilian, that believes in judicial relevance as a mechanism for applying the law evenly, based on values shared by society, behold they did not believe in the existence of these values even in highly complex and plural societies like ours.

¹³ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. Curitiba: Juruá, 2008.

¹⁴ Calmon de Passos, backed certainly in the best foreign doctrine, states that the effect to be defended is not the case in the utilitarian sense, but rather the order because “[...] Effectiveness of procedure or effectiveness of legal protection doesn’t equate to the effectiveness of the sentence as an act of power, but the sentence that fits the name of what was institutionalized in a democratic political order. We have said repeatedly that if some feature is ineliminable, when trying to conceptualize democracy, it is the postulate that all men are equal and substantial originally by nature, so no one can assign the condition of the sovereign lord or another. Consequently this is also the principle which is essential in a democratic organization in which power is legitimate only when exercised in terms of service and the precise limits within which it was granted, ie, in the strict area of jurisdiction previously defined and formalized in pact basic policy is that the Constitution “(CALMON DE PASSOS, 1999, p. 33).

PROCESS AND PROCEDURAL REFORMS IN THE DEMOCRATIC RULE OF LAW

In order to establish an agenda for procedural reforms which are defined as macro-structural reforms, performing a total review of procedural coding, civil or criminal, in Brazil, one must first define its premises.

Thus, we intend to rebuild in a few lines, the theory of the process, to discuss its suitability for the framework of the democratic rule of law, demonstrating that the proceduralist framework¹⁵ played an important role in ensuring constitutional fundamental rights.

By revisiting the theoretical process it is possible, from the notion of process as security, to defend the proposal for a general theory of the procedure, comprised of the definition of a democratic process, i.e. the possibility of defining basic principles a unison for understanding the process, whether judicial, administrative, legislative or arbitratve.

The theoretical proposal for clarification of legal paradigms held by Habermas helps the understanding of what the process is, in that each paradigm offers a different perspective to the institute.

In the liberal paradigm, as already noted, the process has features of procedural control of the parties, as a private instrument, and its base is the formal equality and the principle apparatus¹⁶.

In the Welfare State, the understanding of the process involves greater theoretical sophistication. In Brazil, the instrumentalists, in particular Cândido Rangel Dinamarco (1987)¹⁷, intended to publish, under the framework of the Welfare State, a process theory which has the objective of ensuring “social peace”, achievable through the completion of the “metajudicial” end of the process, which help the judge to effect and mark out social justice through the court’s procedural instrument¹⁸, despite not being able to deny the roots of socialization of thought in the conceptions of Klein¹⁹.

In this context, Brazilian procedural legislation has a strong influence from the liberal process of overcoming the struggle of parties, to a process model of Welfare State built from technical judicial activism, as shown in the text’s own explanatory memorandum to the CPP, 1941 “ We cannot continue to compromise with pseudo individual rights at the expense of the common good”²⁰. Or the words

¹⁵ HABERMAS, Jürgen. *Faktizität und Geltung: beiträge zur Diskurstheorie des Rechts und des Demokratischen Rechtsstaats*. Frankfurt: Suhrkamp, 1994.

¹⁶ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit.

¹⁷ DINAMARCO, Cândido Rangel. *A instrumentalidade do processo*. São Paulo: Malheiros, 1998.

¹⁸ DINAMARCO, Cândido Rangel. *A instrumentalidade do processo*. cit. p. 159-167.

¹⁹ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit. p. 141 et seq.

²⁰ BRASIL, *CÓDIGO DE PROCESSO PENAL*, São Paulo: Revista dos Tribunais, 2008. p. 343.

of Alfredo Buzaid in the explanatory memorandum of the CPC in 1973: “The process is a tool that the state makes available to litigants in order to administer justice. Not for the simple definition of private rights in the struggle between the contending parties”²¹.

Undeniable is the influence of German and Austrian law that are precisely the procedural framework of socialization in the Brazilian Code of Civil Procedure, which is evident from the text of the explanatory memorandum. The origins of the proposed “socialization process”, the genesis of judicial activism, dating back, in theory, to Anton Menger and Oscar Bülow, through Klein who introduced this perspective into legislative proposals, and came to us through Chiovenda, as reconstructed by Nunes²². Subsequently, the socialization process in the project had Florence Access to Justice directed by Mauro Cappelletti an important milestone highlighting concern with the speed and effectiveness of adjudication and establishment of specific procedures to guarantee certain material rights.

Not only is it the legislation that is strongly marked by procedural focus on the role of the judge, which makes the task not only to judge the case but to solve the problems of social (in)justice, social control and the protection of society. There is a whole line of theoretical thinking centred on this proposal. For this theoretical basis, the process turns to its instrumentality as a means of social pacification, aiming to achieve their goals, as advocated by Dinamarco.

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The theoretical line of instrumentality, which claims that the judge, in his decision to undertake practical correction of mistakes committed by other state sectors, to ensure social justice, is easily adapted to the theory of the procedural legal relationship.

And since Bülow (1868) the process is understood as a legal relationship between the judge and the parties, understood as the subjective link that makes one who has rights (active subject) able to claim any person who has the duty (passive subject) to discharge a given conduct.

As stressed by Nunes²³, Bülow himself supported the free and, to some extent, subjective law enforcement by judges²⁴.

Therefore, the legal relationship of procedural law puts the judge as “super-party” acting in the ruling of legal proceedings. So much so in fact that it gave rise to two subjective positions, repeatedly presented in the manual process of

²¹ BRASIL, *CÓDIGO DE PROCESSO CIVIL*, São Paulo: Revista dos Tribunais, 2009. p. 583.

²² NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit. p. 47, 77, *passim*

²³ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit.

²⁴ BÜLOW, Oskar. *Gesetz und Richteramt. Juristische Zeitgeschichte*. Berlin: Berliner Wissenschafts, 2003. v.10.

instrumentalist nature, the position of power and duty of the judge and the liability of the parties.

The first question posed by Gonçalves²⁵, in the criticism of instrumentalism, was precisely the impossibility of creating a sense of conflict, as a symmetrical position of parity among those affected, with the theoretical basis of the legal relationship, which clearly establishes the link between the subjects of the process as a hierarchical position of a subject that has power and another that should submit.

Thus, appropriation by Gonçalves of the work done by Fazzalari allowed the revision of the theory in relation to legal proceedings. Fazzalari²⁶, in the field of procedural technique, from appropriating theories of rights and public procedure²⁷, revisited the concept of process and procedure to establish, through a logical criterion for inclusion, that process is a kind of procedure which is specified by virtue of the position of those affected regarding the construction of the final disposition, which thus takes place in an adversarial process, that is, with the guarantee of participation in symmetric parity being affected by the construction of the provision.

Thus, taking as the framework the deliberative concept of democratic rule of law, seen by the theory of Habermas²⁸ in view of the subject of law that arises as a subject and recipient of legal rules, it is possible to establish a criticism of the theory of process as a legal relationship, precisely because of the place of the judge as “super-party”, and also due to the instrumentalism, because of the solipsism of the judge and the metajuridical ends of court proceedings.

At the same time, one can claim upon the theory of the process as adversarial procedure, appropriate to the paradigm of democratic rule of law, mainly because of the understanding of the process beyond the jurisdiction, since the process in the procedural paradigm must be understood as constituting fundamental rights. Moreover, the notion of adversariality desired by that theory consolidates the proposed guarantee of influence and no surprise,²⁹ towards ensuring the construction of a participatory decision that will be included in the process both as authors and as recipients of the legal rule.

The process beyond the jurisdiction makes the notion of general theory of the procedure, supported by the institutes of the jurisdiction, action and process,

²⁵ GONÇALVES, Aroldo Plínio. *Técnica Processual e Teoria do Processo*. cit.

²⁶ FAZZALARI, Elio. *Diffusione del processo e compiti della dottrina*. cit.

²⁷ Heavily influenced by theories of public law and by managerialism. Also by proceduralists and Goldschmidt (1936).

²⁸ HABERMAS, Jürgen. *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des Demokratischen Rechtsstaats*. cit.

²⁹ THEODORO JUNIOR, Humberto. NUNES, Dierle. Uma dimensão que urge reconhecer ao contraditório no direito brasileiro: sua aplicação como garantia de influência, de não surpresa e de aproveitamento da atividade processual. *Revista de Processo*. São Paulo: RT, v. 168, fev./2009.

should prove inadequate especially if we take, as a base, the notion of the constitutive process as a guarantee of fundamental rights. So, to consolidate the notion of process as a safeguard, one makes use of the general theory of the procedure from the ownership and the impact of the constitutional democratic process.

The notion of process to guarantee has its basis in the Constitution, being co-dependent with fundamental rights. So, what sustains the notion of process as collateral are the constitutional principles of the process defined in the text of the constitution.

Since work published in 1956 in the Journal “Justicia”, regarding the famous essay by the “Revista de Derecho Procesal” of Uruguay (later republished by “Boletín Mexicano de Derecho Comparado” in 1977), Fix-Zamudio³⁰, referring to the work of Couture, gives us news of the birth of a new discipline, the “derecho constitucional procesal” emerged as “³¹*resultado de la confluencia de otras dos ramas de la ciencia jurídica: el derecho constitucional y el derecho procesal*” The lawyer draws attention to the prior works, and the repercussions of that work, of Couture (especially his “Las Garantías Constitucionales del Proceso Civil”) under the procedural shows the transcendence of the constitutional procedural institutes³².

The evidence is clear; “action, jurisdiction and procedure” must be rethought from a broader perspective: both procedural and constitutional.

En otras palabras, se está despertando la conciencia entre constitucionalistas y procesalistas, sobre la conveniencia de unir sus esfuerzos con el objeto de profundizar las instituciones procesales fundamentales, ya que no debe olvidarse, como ocurrió durante mucho tiempo, que poseen una implicación político-constitucional, y no de carácter exclusivamente técnico, y es en este sentido en que podemos hablar de la relatividad de los conceptos de jurisdicción y de proceso, en el sentido en que lo hiciera el inolvidable Calamandrei respecto de la acción³³.

³⁰ FIX-ZAMUDIO, Héctor. El pensamiento de Eduardo J. Couture y el Derecho Constitucional Procesal. *Boletín Mexicano de Derecho Comparado*, Ciudad Del México, a. X, v. 30, p. 315-348, 1977.

³¹ “A result of the confluence of two branches of jurisprudence: constitutional and procedural law”.

³² FIX-ZAMUDIO, Héctor. El pensamiento de Eduardo J. Couture y el Derecho Constitucional Procesal. *Cit.*, p. 317. To understand the importance of the thought of Couture in the development of the Science study procedural constitutional cf. MAC-GREGOR, Eduardo Ferrer. Hector Fix-Zamudio y el origen científico del derecho procesal constitucional (1928-1956). MAC-GREGOR, Eduardo Ferrer. LARREA, Arturo Zaldivar Lelo de (coord.). La ciencia del derecho procesal constitucional: estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho. México: Marcial Pons, 2008. t. I, p. 597 et seq. For a more accurate analysis of the theme in Brazil cf. (NUNES, Dierle; BAHIA, Alexandre. Processo constitucional: uma abordagem a partir dos desafios do estado democrático de direito. Revista Eletrônica de Direito Processual – REDP. Rio de Janeiro: UERJ, 2009. 223-249)

³³ “In other words, you are raising awareness among constitutionalists and proceduralists, on the advisability of uniting their efforts with a view to deepening fundamental legal institutions. and it should not be forgotten, as happened for a long time, that they have political and constitutional

In Brazil, the factor that shows the constitutionalization of the law, lies in the fact our Constitution of 1988, more than any previous constitution, apart from dealing with matters traditionally affected by a higher law – state organization, powers, form and system of government, in addition to an extensive and unmatched range of rights and guarantees – to bring its provisions to affect the Civil, Commercial, Tax, Criminal, Procedure (and other) laws.

So, whether you like working currently with the law in court, or simply want to study it, it is hardly possible to do it in Brazil without reference to the Federal Constitution of 1988³⁴.

This becomes even more complex in a Constitution with a long list of rights and fundamental guarantees³⁵. In fact, the Brazilian Constitution of 1988 enshrined many rights and procedural safeguards specifically, confirming the trend toward a constitutionalization process, giving this (whether civil, criminal, administrative procedures or even private) a new form, suitable for a new democratic rule of law (BARACHO, 1985, p. 60 and 2000, p. 13-14)³⁶. Just to name a few: undeniability of jurisdictional control (5, XXXV); natural judgement (5, XXXVII); principle of legality and precedence of criminal rule (5, XXXIX) due process (5, LIV); right to debate and full defense (5, LV); rational foundation for decisions and publicity (Article 93, IX); reasonable length of proceedings (5° LXXVIII) presumption of innocence (5, LVII), in addition to the guarantees of *habeas corpus* (5, LXVIII), writ of mandamus (5, LXIX), writ of injunction (5, LXXI), *habeas data* (5, LXXII) and Popular Action (5, LXXIII).

The constitutionalization of the system is a separate chapter within the presented trend. The process commences when the socialization procedure begins to

implications, which are not purely technical, and in this sense we can speak of the relativity of the concepts of legal processes in the sense that it did the unforgettable Calamandrei for action.”FIX-ZAMUDIO, Héctor. *El pensamiento de Eduardo J. Couture y el Derecho Constitucional Procesal*. cit. p. 318.

³⁴ Here we could not fail to make one point: the proceduralists should be open to the advances of the theory of law, the Constitution and the philosophy. This statement does not advocate a return to the conceptualist position from the beginning of procedural science, but to also see manifestations of “contempt” to the advances of constitutionalism, philosophy, sociology and even managerial sciences and to perceive the repetition of postures and lectures typical praxists (of times gone by) as if speaking of the process we reduced the talk of forms and formalities of a technical mechanism neutral, or worse, a mechanism open to the personal views of each applicator.

³⁵ As Alexy notes, referring specifically to the Brazilian Constitution of 1988: “The problems of fundamental legal interpretation appear everywhere, using this relatively detailed regulation, cushioned in a large part but not eliminated, in some cases arise again. Thus Article 5, IV, declaring the manifestation of thoughts as free. This means that all expressions of opinion are allowed, also those that violate the honor of others and with such racist?” (1999, p. 63).

³⁶ BARACHO, José Alfredo de Oliveira. *Processo Constitucional*. Rio de Janeiro: Forense, 1985. p. 60. BARACHO, José Alfredo de Oliveira. *A Constitucionalização do Direito: a constitucionalização do direito processual. Processo civil e direito constitucional. Direito Processual Comunitário. Revista Logos Veritas*, Santarém, n. 4, 2000.p. 13-14.

be largely absorbed by the legislation (procedural codes and ordinances) and gains strength in the way of interpreting and applying the institutes of the process³⁷. From there the lovers of law began to look differently at the “process”, not as right “adjective”, but, resuming old theories about “metajudicial” scopes present in judicial actions³⁸. This concern has not gone unnoticed by those who drafted the constitution over the past century because, as we are already reminded³⁹, these “consagran expresamente los delineamientos de las instituciones procesales, ya que los constituyentes contemporáneos se han percatado de la necesidad de otorgar la debida importancia a la función jurisdiccional⁴⁰. Thus, the three basic institutions of the general theory of the process (action, jurisdiction and procedure) must also be studied by constitutionalists⁴¹.

This is a paradigm shift in the interpretation process. As defined by Andolina and Vignera⁴² “[l]e norme ed i principi costituzionali riguardanti l’esercizio della funzione giurisdizionale, se considerati nella loro complessità, consentono all’interprete di disegnare un vero e proprio schema generale di processo, suscetibile di formare l’oggetto di una esposizione unitaria”⁴³.

In this way, one can make ready use of the concept of a constitutional process model, initially proposed by Italian authors such as, but here suitable for a process model in order to build another notion of the general theory of procedure, based precisely on the principles of the constitutional process.

³⁷ NUNES, Dierle José Coelho. *Processo jurisdiccional democrático*. cit. p. 88.

³⁸ The first references to political scopes, social and economic proceedings are in the works of Menger and Klein (NUNES, Dierle José Coelho. *Processo jurisdiccional democrático*. cit., p. 79 et seq.) On the resumption of these ideas today see Dinamarco.

³⁹ FIX-ZAMUDIO, Héctor. El pensamiento de Eduardo J. Couture y el Derecho Constitucional Procesal. *Cit.*

⁴⁰ “Devoted explicitly outlines the legal procedures, since the contemporaries constituents have realized the need to give due importance to the judicial function”. Already Alcalá-Zamora y Castillo (ALCALÁ-ZAMORA Y CASTILLO, Niceto. *Proceso, Autocomposición y Autodefensa* (contribución al estudio de los fines del proceso). México: UNAM, 2000, p. 103-104) showed the difficulty of trying to circumscribe the jurisdiction as belonging to procedural law or the Constitution. The author also pointed out that Couture, to treat the “foundations of procedural law” did not address the court, which has been criticized in the remedy. See also Fix-Zamudio (p. 317) and SANTOS (SANTOS, Boaventura de Sousa. *Pela mão de Alice: o social e o político na pós-modernidade*. Porto: Afrontamento, 1994).

⁴¹ FIX-ZAMUDIO, Héctor. El pensamiento de Eduardo J. Couture y el Derecho Constitucional Procesal. *Cit.* P. 318.

⁴² ANDOLINA, Italo; VIGNERA, Giuseppe. *I fondamenti costituzionali della giustizia civile: il modello costituzionale Del processo civile italiano*. cit. p. 13.

⁴³ “[T] he rules and the constitutional principles concerning the exercise of the judicial function, when considered in their complexity, allow the interpreter to draw a general pattern of real process, liable to form the subject of a display unit”.

The concept of a constitutional model of process allows the removal of the dichotomy between procedural constitutional law and the constitutional law processes, as this model consists of basic principles, universally applicable to any case, since the whole process is constitutional, whether due to structure or its grounds because it is a constitutive guarantee of the fundamental rights of law abiding subjects⁴⁴.

When we resume the understanding of Andolina and Vignera, the model of constitutional process is “a general scheme for the process”⁴⁵ and has three important characteristics: the expansiveness, which guarantees that the suitability for the procedural rule to be expanded to micro-systems, provided you maintain compliance with the outline of the process; variability, as the possibility exists of a procedural rule to specialize and take a different shape according to specific characteristic of a particular micro-system, providing it is in accordance with the constitutional base, and, finally, perfectibility, the ability to refine the constitutional model and set up new institutes through the legislative process, but always in accordance with the outline⁴⁶.

Therefore, for a new historical moment of macro-structural civil and criminal procedural law reform in Brazil we cannot forget our new democratic constitutional order and respect the constitutional principles of the process. This concern is not merely the necessary adaptation of the new procedural rules proposed to the constitutional text, but it begins the observance of the due process of law, because in view of the magnitude of the reformist mission, it will affect all Brazilian citizens and those under Brazilian jurisdiction, looking at judicial proceedings to guarantee their fundamental rights. Therefore, a macro-reform proposal requires a procedural debate with the participation of civil society organized in broad terms, to gauge public opinion. This is because in a movement of procedural reform of this scale, law does not go through changes alone, also altering in certain cases, repeated and consecrated procedural practices.

Thus, an important warning is the one given by Cattoni de Oliveira, between the legislative and constitutional process of judicial control of constitutionality. Making use of the distinction proposed by Günther⁴⁷, the first is the discourse of

⁴⁴ BARROS, Flaviane. Ensaio de uma teoria geral do processo de bases principiológicas: sua aplicação no processo legislativo, administrativo e jurisdicional In: GALUPPO, Marcelo Campos (org.) *O Brasil que queremos: Reflexões sobre o Estado Democrático de Direito*. Belo Horizonte: PUC Minas Editora, 2006.

⁴⁵ ANDOLINA, Italo; VIGNERA, Giuseppe. I fondamenti costituzionali della giustizia civile: il modello costituzionale Del processo civile italiano. Cit. p. 9.

⁴⁶ ANDOLINA, Italo; VIGNERA, Giuseppe. I fondamenti costituzionali della giustizia civile: il modello costituzionale Del processo civile italiano. Torino: G. Giappichelli Editore, 1997. p. 90.

⁴⁷ GÜNTHER, Klaus. *The sense of appropriateness: Application discourses in morality and law* New York: State University of New York, 1993.

justification and the second of application. Indeed, both dispense assurance of participation of affected groups, but such participation takes place in different ways. As the author asserts:

The legislative process is set at a level of discourse in which arguments of great generality and openness are welcomed and, indeed, serve as starting points for the construction of legal discourse, including judicial and administrative doctrines. Thus, the “participation in symmetric parity” of those possibly affected by legislative provision, the procedure that prepares it guaranteed by the constitutional principle of contradiction, is the possibility of participation in political discussion, procedurally mediated and not necessarily current and concrete⁴⁸.

As we observe the legislative process of comprehensive reform of procedural law we see profound differences in court proceedings. So to talk about them requires that we define as its premise the relationship between the Constitution and the Process in the Democratic Rule of Law. Therefore, while the reform is going through the process, it requires an understanding of the notion of process as a guarantee of fundamental rights, to propose the necessary amendments to the procedural law such that will have legal force to change the reality of civil and criminal procedures.

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The first assumption is therefore the need to shape a proposal for a new code for the procedural and constitutional system that makes an adaptation of the concurrent pursuit of efficiency possible, both quantitatively and qualitatively – the direct targets of the reforms – with respect to legitimacy (by applying constitutional procedural principles from a dynamic perspective). There is no other way than from the constitution and through the constitutional principles of process. In this way, given the expansiveness character of the constitutional process model it allowed procedural rules to expand, provided they would maintain their consistency with the model of constitutional process.

It can be seen, therefore, that the proceduralists should be open to the advances of the theory of law, and the theory and philosophy of the Constitution.

This statement is by no means advocating a return to conceptualist posturing typical of early procedural science, nor the withdrawal from the search for an efficient qualitative approach to the procedural system.

However, when still witnessing demonstrations of “contempt” to the advances of constitutionalism, philosophy, sociology and even the managerial sciences by a great part of the scholars of procedural law, reducing them to theoretical

⁴⁸ CATTONI DE OLIVEIRA, Marcelo Andrade . *Devido processo legislativo*. Belo Horizonte: Mandamentos, 2006. p. 142.

concepts devoid of importance, one then realizes that they still insist on keeping their own analysis of the legal landscape prior to the constitutionalization of rights.

It is also observable the repetition of postures and lectures, typical of praxists (of times gone by) as if speaking of the process had been reduced to talking about ways and procedures of a neutral technical mechanism, or worse, of a mechanism open to the personal conceptions (voluntaristic) of each applicator.

In truth, we must, once and for all, understand the impact of dynamic conceptions of fundamental rights on procedural law, to enable the achievement of efficient results and accountability to citizens who call for reinvigorated access to justice by the design of a Democratic Constitutional State.

This approach departs from a sharp analysis of institutions and insists on a valuation analysis of the state and legal landscape in search of technical macro-structural solutions consistent with the advances in rights that have occurred since the second world war in European countries.

One cannot forget that the improvement of procedural techniques (with the legislative reforms) only make efficiency in the legal system possible if they are accompanied by a policy of public access to justice, widely debated, which brings up the question of procedural reforms, but also the process management and the infrastructure of the judiciary in a joint manner, that is, if it achieves a genuine reform of the system, behold the sheer legislative amendment will not have the power to get the improvement that it aims⁴⁹.

21

FOR AN ADEQUATE LEGISLATIVE PROCESS SUFFICIENT FOR THE PROCESS OF MACRO-STRUCTURAL PROCEDURAL REFORMS

To distinguish the macro-structural reforms or specific reforms from the analysis of the trajectory of the reformist movement of procedural law after World War II, in particular, comparative law is here taken as a theme, as proposed by Taruffo⁵⁰. Thus, we can highlight against the backdrop of the countries of Europe and Latin America that the reform movement reflects the political momentum of democratization and building of a new “cultural project”.

Hence, punctual reforms arise at first, to adapt the emerging points of greater divergence from procedural rules to the new constitutional order, filling the gaps of non-receipt of standards. As stressed by Andolina and Vignera in a post-constitutional (referring to the Italian Constitution of 1948) situation, the problem

⁴⁹ NUNES, Dierle, BAHIA, Alexandre. Por um novo paradigma processual. *Rev. Fac. Dir. Sul de Minas*, Pouso Alegre, 26: 79-98, jan./jun. 2008.

⁵⁰ TARUFFO, Michele. *Aspetti Fondamentali del Processo Civile di Civil Law e di Common Law. Sui confini: scritti sulla giustizia civile*. Bologna: Il Mulino, 2002.

of the process is not understood from *essere* but the *suo dovere essere*. Rightly, this stressed the immediate need to fit the current procedural rules to the new constitutional normativity.

Already the reforms stem from a macro-structural analysis that is reflected to a greater extent when the cultural democratic project is already more consolidated, justifying the discussion of a new Code of Procedure. This understanding of the democratization process as a project that looks to the future and will always have a to-come, as Derrida suggests, is analyzed by Cattoni de Oliveira⁵¹ with regard to constitutionalism in Brazil, but may be appropriate for additional analysis of the issue.

The total reform of the Italian ‘*Codice Rocco*’ in 1930, and the founding of the fascist project can be taken as an example. Even with the new constitutional order represented in the Italian Constitution of 1948, only one *piccola riforma* {small reform} was accomplished, and the new Criminal Procedure Code only came into force in 1988.

In Portugal, it appears that the new democratic order inspired by the Carnation Revolution and the end of the Salazar regime, to promulgate the 1976 Constitution of a rather Socialist character. This matrix is the basis for formulating legislative decree-law authorizing the formulation of a new code of procedure appropriate to the new cultural project, which occurred in 1887, by decree law 78/87, to replace the markedly fascist Portuguese Code of Criminal Procedure, 1929, as highlighted in⁵².

In Latin America, an important movement of jurists were asked to propose a model of the Code of Criminal Procedure for Latin America, accounting for the proposed replacement of the procedural rules proposed by authoritarian democratization of procedural law with the recognition of rights and constitutional guarantees excluded during periods of military dictatorships that ravaged the region⁵³.

Thus, from the rereading of reform movements by comparative law, it appears that the current Brazilian scenario can represent a time of increasing legal awareness in the process of democratization in Brazil, thus justifying the discussion of macro-structural reform. A macro-structural reform shifts the center of discussion before breaking up the laws of procedure for an interpretation according to the constitu-

⁵¹ CATTONI DE OLIVEIRA, Marcelo. Democracia sem espera e processo de constitucionalização – Uma crítica aos discursos oficiais sobre a chamada “transição política brasileira” in *Constituição e Processo*. Coord. Marcelo Cattoni e Felipe Machado. Belo Horizonte: 2009, p. 365- 399.

⁵² BRANDÃO, Nuno. *Processo penal do Brasil e de Portugal. Estudo comparado: as reformas portuguesa e brasileira*. Org. L. G. Grandinetti Castanho de Carvalho. Coimbra: Almedina, 2009.

⁵³ ZAFFARONI, Eugenio Raul. *Sistema penales y derechos humanos em America latina (informe final)-documento final del programa de investigación desarrollado por el instituto interamericano de derechos humanos*. Buenos Aires: Depalma, 1986.

tion, which is then consulted to produce a new text based on its procedural normativity and returned to the project implementation of a democratic legal order.

Certainly, the macro-structural reforms require more than the performance of the various phases of the Brazilian legislative process, beginning with the bill, analysis by the Commission of Constitution and Justice, a vote in both houses of Congress and presidential approval. The extent of generality and openness of procedural codes become necessary to aggregate the acts and stages of the legislative procedure and other constitutionally defined phases that allowed the greater legitimacy of the reforms, they will be recognized because of citizen participation, civil society organizations and of “law enforcement officers.” But it is a contribution that requires appropriate methodological and technical preparation to ensure that procedural law is seen to adhere to personal understandings on procedural law. Wrapped by the concern to ensure a legitimate and democratic legislative process, there is the intention to establish stages to the macro-reforms process.

The first is the previous *diagnosis*, in other words, the need to define the problems and differences in the implementation of procedural institutes. From then on, we must conduct a preliminary survey to gather information about the functioning of the process elements and what jeopardises them in order to ensure the maintenance of procedural techniques that work well, and suggest new ones – including through analysis of comparative law – allowing better practice and institutions into the system⁵⁴.

A search of this magnitude should include various sectors of society in all regions of our country in the face of the plurality and nuances innate to the diversity of Brazil.

The aforementioned research would even need to capture the profile of the professional. If specialized in particular branch(es) of law, procedural reform could count on the delineation of numerous procedures, each devoted to one type of demand (differentiated guardianships – *tutela giurisdizionale differenziata*)⁵⁵. If

⁵⁴ See as an example of this procedure the report of the English civil procedural reform of 1998 (WOOLF, 1996).

⁵⁵ As explained in the as yet unpublished text of his own: “The issue of differentiated guardianship or the jurisdictional differentiated guardianship became an object of discussion of procedural science from the work of Proto Pisani published in 1973, starting from the obvious assumption of the need for diversity of procedural techniques for the various hypotheses of substantive law to be applied and analyzing the issue can only be properly placed under discussion from that historic moment in the face of the viability of thinking a break with the neutral model and single ordinary processes of full cognition, presumably predisposed to allow the prosecution of any case. The models were designed with different procedures intended to ensure the most suitable forms of protection for various categories of legal situations deserving of judicial protection. With this expression Proto Pisani established two contracts for the procedural issue. In these terms, judicial review could mean the different predisposition of various procedures of cognition (full and exauriente or not), some of which are modeled on individual categories of situations substantial

generalised, with the technical capability (in theory) to work in any area of legal science, such as it happens in Brazil, the reform should be more moderate in the construction of procedures, so as not to generate practical embarrassment to the “ordinary” professional, restrained to know several deadlines and countless procedural variations, which will necessarily increase the complexity of the system, against the wishes of access to jurisdiction. As warned Alfredo Buzaid, using the studies of Alcalá-Zamora y Castillo in the explanatory memorandum of the CPC in 1973, there is a need to balance innovation and conservation, that is, one cannot innovate enough to preclude the adaptation of professionals and also cannot keep all the previous structure.

The second phase is to *define the parameters of reform and the establishment of a commission of jurists*. From the diagnostic report it is necessary to trace the reform directives defining the main principles and concepts of reform, i.e. from the problems identified in the diagnostic report, there should be outlined parameters to guide the reform.

Fixing the “overriding objectives” (to use the words of Woolf in the English Reform 1998 – *Overriding Objective*) even allows the operator to understand the reasoning of the reformists.

In any reform undertaken from a democratic perspective, the assumption of a dynamic application of fundamental rights is the imperative procedure in preventing the overestimation of one of these principles (e.g. speed).

Another concern is to establish a committee of jurists who work with the technical details rather than isolated personal suggestions (e.g. their individual problems in the legal profession or the judiciary), because the creation of a new code is the duty of citizenship, not defense of theoretical and subjective conceptions.

After establishing the Commission of Jurists it would be necessary to have reasonable time to discuss and present the text of the bill to fulfil the need for democratic discussion of the draft. In this sense, organizing public hearings and meetings with specialists would ensure, during development of the bill and *especially after its completion*, the participation of citizen representatives, civil society organizations, representatives of professional associations, research institutes and graduate programs. This constitutes the third stage.

We should not forget that even in the military period, our current CPC of 1973 was subject to a major discussion led by Alfredo Buzaid in 1965 in the city of Campos do Jordao, prior to enactment, where hundreds of items were presented for

controversy, or, from another perspective, the term could refer to typical forms of anticipatory guardianship (interim, anticipatory, special etc.). “(NUNES, Dierle. Novo enfoque para as tutelas diferenciadas no Brasil? Diferenciação procedimental a partir da diversidade de litigiosidades. In: THEODORO JUNIOR, Humberto. *Tutelas diferenciadas*. Rio de Janeiro: GZ Editora, 2010.)

discussion and taken into consideration, before the Draft being sent to the National Congress. In these terms, it is unthinkable that in a democratic period a preliminary CPC or CPP is sent to Parliament before the completion of this step.

Thus, with the preliminary bill discussed and the relevant suggestions adopted and criticism taken on board, the basic text would then be ready to be submitted to the *legislative process*, which would pass through the stages of analyzing the constitutional adequacy, presentation of substitutes and amendments, approval of the text in both House of Congress to presidential approval, promulgation, and a period of *vacatio legis*. The legislative process itself is thus the fourth stage.

The fifth phase is the *period of vacatio legis* in preparing for the entry into force of the reform. It requires significant commitment of “jurists”: magistrates, members of the public prosecution, lawyers, clerks etc. Thus, in a reasonable period of *vacatio legis* (minimum of one year), all “operators” should undergo refresher courses so that they undertake a redefinition of culture, thinking and practice for the benefit of society as a whole⁵⁶.

Both the participation in the discussion stage of the project as preparation for entry into force of the reform period *vacatio legis* are important stages for the macro-structural procedural reforms to be effective, for requiring a change in the mindset of law enforcement officers. Otherwise our future and dreamed new Criminal Procedure Code and Code of Civil Procedure will be doomed to perpetuate the current reality of our processes. This qualification has been made by Coutinho⁵⁷, analyzing the partial reform of the CPP, 2008.

This step is essential, considering the large number of procedural techniques which have existed for decades but have never been implemented consistently. This is the case of orality, planned since the 1940s, but until now unable to replace the practice of writing.

It is necessary, during this period of *vacatio legis*, to implement a public policy of democratization of procedure, which requires real reform of the judiciary relating to its routines, among other interventions, because mere legislative reform does not have the power to obtain useful results.

Finally, at this stage it is necessary to prepare a proper study on a case of intertemporal law, as the ongoing processes need to adapt to the new procedural world in which they find themselves. Therefore, it is important to establish a com-

⁵⁶ In that sense we are reminded of Boaventura de Sousa Santos (2007, p. 66) that, in “Germany, there is no innovation without legislation, and that judges undergo training courses in order to implement the new law.”

⁵⁷ COUTINHO, Jacinto Nelson de Miranda. Sistema acusatório: cada parte no lugar constitucionalmente demarcado. cit.

mission to define the basis of procedural adaptation of intertemporal law, aiming to safeguard the foundations of the constitutional model of the process. Thus, one should take into account while establishing the points of change in procedure to the new order and respect for constitutional principles and the specific analysis of the microsystem, either individual civil law, consumerist law, incidents of collectivization or criminal proceedings⁵⁸.

In addition to the steps explained here in a simplified manner, it will be necessary to appoint another committee to monitor the institutional reform, namely to verify the practical impact of changes and, in the medium term, to propose adjustments in the face of evidence to suggest unconstitutionality not yet encountered, and any lack of functionality of the new system.

The comparison of the results of Brazilian macro-structural process reform with others that have succeeded in comparative law (like the English Civil Procedure 1998) shows that the reforms will be difficult to achieve if a *reform monitoring project* is not established and adequate adjustment is not made to divergent points of law, which will be the last point. Other countries have created true reform monitoring bodies, such as the Portuguese⁵⁹ and British⁶⁰.

AN ANALYSIS OF THE BRAZILIAN MOVEMENT OF PROCEDURAL REFORMS: CRITICAL STUDIES IN DRAFT BRAZILIAN CPP AND CPC

26

The movement of the overall reforms began with the establishment of the Commission of Jurists to submit the new draft of the Code of Criminal Procedure. This essay has established, in the previous section, the proposal of the establishment phase of macro-structural procedural reforms, aiming to ensure due process.

The first point of analysis is the definition of a previous study of diagnosis of the specific problems of the criminal procedure law. This step was not satisfied by the Brazilian legislative process. Despite the daily and consistent criticism of the researchers in criminal procedural law, especially after the Constitution of 1988, which would mainly criticize the inquisitorial content of the CPP and were presented with the attempt of constitutional rules of criminal procedure, those were done without prior study. Principally, a survey of the number of criminal cases in Brazil, which crimes were committed and procedures for the collection of more frequent and reliable data on the number of arrests and executed criminal procedures, among others. Additionally, no qualitative analysis was performed on

⁵⁸ BARROS, Flaviane. *(Re)forma do processo penal*. Belo Horizonte: Del Rey, 2009. BARROS, Flaviane. O modelo constitucional de processo e o processo penal: a necessidade de uma interpretação das reformas a partir da Constituição. *Constituição e Processo*. Del Rey: 2008.

⁵⁹ Permanent Observatory of Portuguese Justice: <http://opj.ces.uc.pt/>

⁶⁰ Department for Constitutional Affairs: www.dca.gov.uk

partial reforms prior to 2008, mainly from the leading point, referring to the simplification of procedure, grand jury proceedings and adoption of institutes such as the accusatory *cross examination* matrix of art. 212 of the CPP.

In this way, no matter how experience would be the Commission of Jurists appointed by the Senate as of lawyers with significant legal history, assembled without prior preparation, with such a narrow working time, it was possible only to establish the main problems of the criminal justice process, requiring that proposals would either be established from personal experience of lawyers or jurists or from the intuitive perception (empirical) that recent reform's partial changes followed a path that was right or wrong.

Without the experience of a previous diagnostic process, reform guidelines were not established, neither previously defined before the appointment of the Commission of Jurists. The latter rather set directive axis to the reform, which by reading the preamble of the draft CPP can be identified as the appropriateness of criminal proceedings for constitutional principles, especially the accusatory principle adopted by the Constitution. Moreover, the preamble intended to express a draft with a guarantistic character, which does not prevent the implementation of a rapid process:

Note, further, that the prospect guarantee in criminal proceedings, despite the possible strategies in his speech application does not lend itself to cripple the speed of the procedures and not the expected effectiveness of the Criminal Law. Quite the contrary: respect for individual guarantees demonstrates awareness of the inherent limitations of human knowledge and social maturity in the arduous task of exercising power⁶¹.

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The proposal should better reflect mainly the guaranteeistic perspective identified by the theory of social guaranteeism, initially formulated by Ferrajoli, which was adopted in Brazil by the movement of criminal guaranteeism. Indeed, the guaranteeistic theoretical proposal⁶² is incompatible with the desired bias for speed, especially by the proposal of summary procedure.

It appears that the Commission of Jurists has established this as the matrix of the reform, in particular, the proposed adoption of the adversarial system. As stressed by Coutinho (2009)⁶³, an inquisitorial system that adds nuance to an accusatory system, but with inquisitorial elements. In particular, because the draft

⁶¹ BRASIL, *Anteprojeto de Código de Processo Penal*. Brasília: Senado Federal, 2009, http://www.senado.gov.br/sf/atividade/materia/detalhes.asp?p_cod_mate=90645, acesso em 31 de março de 2010.

⁶² FERRAJOLI, Luigi. *Direito e razão. Teoria do garantismo penal*. trad. Ana Paula Zomer, Fauzi Hassan Choukr, Juarez Tavares, Luiz Flávio Gomes. São Paulo: Revista dos Tribunais, 2002.

⁶³ COUTINHO, Jacinto Nelson de Miranda. Sistema acusatório: cada parte no lugar constitucionalmente demarcado. cit.

bill has remained the same as the text of Art. 385 of the current CPP, art. 409 of the draft, which continues to allow the judge to convict the accused having the prosecution pled the court for his acquittal, provided the limits of imputation were observed. In order to maintain the inquisitorial traces in the text of the draft, it is emphasized that one cannot ignore the continuation of the investigation, even if eventually emptied, what demonstrates the difficulty in adopting the constitutionally guaranteed accusatory principle. Once the investigation continues, the interrogation of the defendant is expected to be carried out by the police officer, turning away from the notion of interrogation as a means of self-defense⁶⁴.

On the other hand, we cannot fail to highlight the advances made in the adversarial system. In particular, the design of the new code already in article 4 states the impossibility of the judge to be the manager of proof, an important characteristic of inquiry established by Cordero⁶⁵ from the notion of a “paranoid mindset.” This is because by the management of evidence the judge mentally anticipates his interpretation of the facts, addressing his questions, for example, to witnesses in such a way as to obtain results according to the mental picture previously imagined. In other words, the judge may decide to look for evidence before and after, perhaps obsessively, to justify the decision previously taken.

In this sense, the new CPP project is on right tracks insofar as prevents the management of evidence to compromising the impartiality of the judge. In the words of the draft of the committee of jurists: “Art 4. The criminal prosecution will have an accusatory structure within the limits defined in this Code, forbidden the initiative of the judge in the investigation phase and the replacement of prosecution member in the formation of evidence.”

The draft not only prevents the judge’s evidentiary initiative, but also excludes the judicial review for the closing of the investigation by the DA (District Attorney or Prosecution). Thus, we seek the definition of the place constitutionally demarcated by the parties, as stressed by Coutinho. As the accusatory body, the prosecution has the burden of proof to provide evidence for the accusation. However, it has lost the opportunity of recognizing the constitutional place of victims in criminal proceedings. The draft bill advances in human rights terms and in an attempt not to over-victimize, or even the possibility of an overlapping claim for compensation for damages, but limits its role as an assistant, in particular their right to appeal the decision⁶⁶.

⁶⁴ BORGES, Clara Maria Roman. Permeabilidade inquisitorial de um Projeto de Código Processo Penal Acusatório. In: *O novo processo penal à luz da Constituição*. COUTINHO, Jacinto Nelson de Miranda; CARVALHO, Luis Gustavo Grandinetti Castanho. Rio de Janeiro: Lumen Juris, 2010.

⁶⁵ CORDERO, Franco. *Guida Alla Procedura Penale*. Torino: Utet, 1986.

⁶⁶ BARROS, Flaviane de Magalhães. Direito das vítimas e sua participação no processo penal: a análise do PLS 156/2009 a partir de uma interpretação constitucional In: *O novo processo penal à luz da Constituição*. COUTINHO, Jacinto Nelson de Miranda; CARVALHO, Luis Gustavo Grandinetti Castanho. Rio de Janeiro: Lumen Juris, 2010.

Certainly, the absence of initial guidelines for macro-structural reform of criminal proceedings prevented the Commission that had developed concerns from reducing the influence of the struggle of liberal parties and the judicial activism, typical of the socialization process itself. A proposal reform, adequate to the proper democratic rule of law would prevent the situation arising that with the adoption of the adversarial system we are returned to the procedural liberalism in which the judge plays an inactive role in watching the arguments between the parties. Or, conversely, to keep the system of judicial involvement, where the judge plays the role of guarantor of social defense. Again, these may not be suitable prospects for the democratic rule of law, in which the court plays an important role of guarantor of the participatory construction of the decision, allowing influence and ensuring no surprise as the basis of a contradictory view. By following this approach, the best way to reform macro-structural aspects of civil procedure providing for even the contradictory decisions of the previous letter from the judge, as will be seen below.

The presentation of the draft by the Commission of Jurists has not gone through a phase of debate and was immediately transformed into the Senate Bill 156/2009. Thus, the important phase of public debate on the draft bill of macro-structural reform of criminal procedure was precluded. After the proposition of the bill to Congress, the Temporary Committee for the Study of Reform of the Criminal Procedure Code was established which held 17 meetings in 2009, 12 of them public. At the beginning of the legislative process trade associations, public and private entities were invited to participate, according to the report of Senator Renato Casagrande. Thus, at an appropriate time, considering that the Commission of Jurists has greater ability to maintain the cohesion of the proposed text, they *could have heeded the suggestions and criticisms before sending the final draft to Congress*, and could have opened the legislative process to citizen participation.

It is at this stage still not possible to look at the other phases of the legislative process as the approval of both houses of Congress and presidential approval has not yet occurred. It also serves as warning to ensure compliance with the last two steps for preparing for the entry into force of the new text, and the monitoring phase of the reform. Certainly, they are the two most important steps to prevent any major effort made toward changing the Criminal Procedure Code appropriate to the Constitution being lost because of the difficulty in implementing changes.

Finally, we must take advantage of studies of comparative law to verify the effort of re-democratization of procedure. It appears that one of the primary discussions was the inclusion of fundamental rights and guarantees of the accused, as well as the adoption of criminal procedural legislation of accusatory nature. But after the structural reform aspects of the Italian and Portuguese CPP's, for example, such laws of criminal procedure underwent partial reforms to suit the needs of time, especially those related to macro-criminality and the duration of the

process, that intended to promote speed and simplification, as well as restrictive measures and the reduction of constitutional guarantees of defendants in serious crimes related to macro-criminality.

It is therefore important that the legislative process does not allow criminal policies inspired by the emergency criminal code to remove the fundamental rights of the accused.

In the field of civil procedure, aside from the failure of the steps prior to the preparation of the draft, in particular the absence of a diagnostic step, the concerning factor is the requirement by the Senate (in order to make best use of the legislative period) of delivery of the text in 180 days.

However, after some delay to the Commission on June 8, 2010 Congress was presented with the Draft, before any public discussion of its contents (planned legal devices), which has become the Bill of the Senate (PLS) 166 2010.

In preparing the draft bill, the Commission has not indicated the structural goals of the proposal, despite the recurrent declaration of the need for speed touted in numerous Public Hearings (Belo Horizonte, Fortaleza, Rio de Janeiro, Brasilia and Sao Paulo) are taking place even today to discuss the proposals released in December 2009 (not the text of the planned law).

However, one of the proposals to be welcomed by the Commission is the reinforcement of the importance of the dynamics of the adversarial principle.

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In pursuit of increased efficiency of the procedural system, the commission realized, in part, the need to strengthen the cognition of the first degree, in order to broaden the debate between procedural subjects (“Comparticipation”)⁶⁷ and, to this extent, improve the quality of judgments. Such an enhancement would involve the loss of resources and/or reducing the rates judicial sentences reviews before the courts.

This proposition is more in line with the objectives of access to justice and speed than the frantic search for the extinction of resources, since every time the legislature stops a legal means of challenging the decision (appeal), it gives rise to a substitute appellate⁶⁸, in other words, it slotters one appeal and another technique is created (more complex and controversial) for the public, professionals and courts.

Realizing this situation the Commission has proposed a project to redefine the limits of the adversarial principle (Articles 10, 107, V 151, § 1º, 401 and others) that prevents the judge from surprising the parties with decision making arguments not subject to procedural debate.

⁶⁷ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit.

⁶⁸ NUNES, CAMARA, SOARES, 2010, p. 215.

As we have argued on other occasions⁶⁹, the adversarial principle has long ceased to be considered by foreign jurisprudence and doctrine as mere formal assurance of a bilateral hearing, but, admittedly, as a possible influence (*Einwirkungsmöglichkeit*) on the development of the process and the formation of rational decisions, with nonexistent or reduced opportunities for surprise.

This renewed conception means that, today, we can no longer believe that the adversarial system is confined to the formal argue and counter-argue between the parties, without which this creates an effective resonance (contribution) to the reasoning of the order, in other words, away from the idea that the participation of the parties can be merely notional and even unnecessary in substantive terms.

By following this trend PLS 166/2010 proposes that all matters, including unofficial matters, are subject to the adversarial scheme between the parties, supporting the idea that the adversarial system is a dynamic guarantee of influence and no surprise⁷⁰.

However, the Commission has so far not displayed any tendency to adopt a methodical preparatory stage in the process of cognition.

For that, in comparative law, for technical articulation of a suitable cognition there is a universal tendency for strengthening its first phase⁷¹ (introductory or preparatory phase of the cognitive procedure) as demonstrated by reports of the Congress of the Association of the Intent of Procedural Law, 2008⁷² in order to achieve a true preparation phase of discussions (hearing and trial) and which could generate a final abbreviated process by completion of a structured agreement (conciliation) where the interest of the parties, or if not possible an adequate preparation and education, which will promote discussions to improve the quality of decisions of first instance, with reduced rates of provisions reform of these courts.

It is well known that all modern procedural systems are *common law* or *civil law*, delineated stages in cognitive structures or procedures that are biphasic,

⁶⁹ NUNES, Dierle. *O Recurso como Possibilidade Jurídico-Discursiva do Contraditório e da Ampla Defesa*. Belo Horizonte: PUC-Minas, 2003 (Dissertação de Mestrado). NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit. THEODORO JUNIOR, Humberto. NUNES, Dierle. Uma dimensão que urge reconhecer ao contraditório no direito brasileiro: sua aplicação como garantia de influência, de não surpresa e de aproveitamento da atividade processual. cit.

⁷⁰ “C) The material officially knowable by the judge, is always subjected to the test of adversarial proceedings.” Similar to many other countries: Germany, Portugal, France, Italy, Austria, among others.

⁷¹ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*. cit. NUNES, Dierle; BAHIA, Alexandre. Eficiência processual: algumas questões. *Revista de processo*. São Paulo: RT, 2009, v. 169. p. 127.

⁷² CARPI, Federico; ORTELLS, Manuel. *Oralidad y escritura en un proceso civil eficiente*. Valencia: Universidad di Valencia, 2008.

initially the technique is the preparation of the debate (eg preliminary hearing, with the definition of issues, writing and preparation of the theme of evidence) and, secondly, the intra-procedural discussion of all relevant arguments (e.g. hearing and trial).

The most recent procedural reforms (such as the English, French, German and Norwegian)⁷³ have been well performed.

The novelty is that the most important and recurring concern in the past was around the phase of production of evidence (procedurally the second phase), to ensure the constitutional right to evidence, which has been gradually shifted to the first phase, in which the *preparation* of the discussion and production of evidence occurs, once it was realized that the almost complete clearance of the objectives of the process allows for a fruitful dialogue, whether in written procedures or oral procedures, and impede the decision is the result of a solely thinking judge⁷⁴.

However, causing concern to any researcher of the efficiency of reforms in comparative law, it is perceived that the project 166/2010 does not take the preparation phase seriously.

When analyzing its articles 333 and 354, there is evidence of great innovation, but in fact it is a step backward from article 331 of the current CPC.

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This preparatory phase should be (clearly) the time for the articulation of the *case management* powers of the judge, conforming with the arts. 107, and 151 V, §1º, of the PLS166, with adaptability and flexibility of procedure, in adversarial manner, according to the specifics of the case.

However, in the abovementioned articles that “treat” the preparation of the case (articles 333 and 354), the legislature makes no mention of procedural adaptability, creating a paradox: at what time may the judge adjust the procedure without breaking the predictability that the process should make?

Valguarnera comments, “the reforms of recent years tend to ensure a more efficient procedure with lower costs and times, based on two main elements: 1) the elasticity of the rite, which must adapt to the complexity the case, and 2) the power of the judge to manage the process, applying procedural resources according to need” (2008, p. 892). The author further informs that management happens in a “joint shared” (“comparticipation”) (as provided in §11-6 of the New Norwegian Code)⁷⁵.

⁷³ VALGUARNERA, Filippo. Le riforme del processo civile in Norvegia: qualche riflessione comparativa. *Rivista Trimestrale di Diritto e Procedura civile*, Set. 2008. p. 892.

⁷⁴ NUNES, Dierle José Coelho. *Processo jurisdiccional democrático*. cit.

⁷⁵ VALGUARNERA, Filippo. Le riforme del processo civile in Norvegia: qualche riflessione comparativa. *Cit.* p. 894.

In spite of the possibility of the sparse adaptation of the procedure (Art. 107, and 151 V, § 1, of the PLS166) and filtration of the discussion procedure (with the establishment of points of issue) the PLS166 does not articulate a methodical preparation phase.

And since the undeniable success of German reform of 1976, from the model of Stuttgart (*Das Stuttgarter model*) and of the reform simplification (*die Vereinfachungsnovelle*)⁷⁶, all bets on cognition alluded to the detailed structure of this preliminary stage.

Moreover, in order to adopt the alluded concept of dynamic adversarial as a form of influence and not surprer it becomes imperative to adopt an effective preliminary stage because otherwise, if the judge does not put on the table in the process all possible decision-making fundamentals (in setting the legal points at issue), he only realizes at the time of delivery of the sentence, creating the need for opening the adversarial, extending the time of procedure.

In summary it is noticed that the PLS166 does not stand for this universal movement for reform of cognition and structured a biphasic model of cognition, in which the first phase would be a conciliatory hearing (not preparatory) that could generate meagre results when compared with the effective preparatory phases used in comparative law.

Accordingly, the concomitant adoption of an adversarial dynamic and effective primary stage could promote a qualitative improvement and greater efficiency in our court system.

Meanwhile, it appears that the Commission will not stand for this universal movement for reform of cognition and so far intends to scale a biphasic model of cognition, in the first phase of which there will be a conciliatory hearing (not preparatory) that may generate meagre results compared with the effective preparatory stages used in comparative law.

One cannot forget the other proposals with equally dangerous themes, such as the reduction of some resources, or the withdrawal of incidents and actions of third parties (among other proposals) that could create numerous problems of efficiency and speed, along with the suppression of other fundamental rights.

We welcome the concern with repetitive (serial) litigation by using an incident of collectivization modelled on the German *Musterverfahren*⁷⁷.

However, this other element of PLS166/2010, celebrated by all, outlined with the intention of dealing with serial or repetitive litigation deserves attention: the so-called repetitive demands resolution incident of arts. 895 to 906.

⁷⁶ NUNES, Dierle José Coelho. *Processo jurisdicional democrático*, cit.

⁷⁷ THEODORO JÚNIOR, Humberto; NUNES, Dierle; BAHIA, Alexandre. Litigiosidade em massa e repercussão geral no recurso extraordinário. *Revista de Processo*. São Paulo: RT, v. 177. nov. 2009.

This institute is admittedly inspired on the German system⁷⁸, but it doesn't conform to its main characteristics.

This mechanism of incidental collectivization (*Musterverfahren*) is used in ordinary common procedures involving isomorphic claims.

This incident, to be tried by the court of second degree, suspends the processing of repetitive actions, and promotes the examination of elements common to repetitive causes with the referral, after this analysis, to the first degree for the specific trial.

In Germany this technique of collectivization comes under the act on the process model in the controversies of the German capital market – *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*. The purpose of the law is to settle in an identical and binding manner, controversial issues in parallel causes, by tempate decisions granted from the commonalities Regional Court (Oberlandesgericht), with ample opportunity for stakeholder participation. From that decision they judge the specifics of each case (CAPONI, 2007).

In the pilot issue (*Musterprozessführung*) “the various demands are proposed by a party with a purpose, not only to decide the specific case, but with scope for secondary use of the solution thus obtained in court as a reference to consensual solution of a number of unknown controversies that would lead a larger group of individuals possessing the same interest”⁷⁹.

However, in the case of the German model, as explained accurately by Cabral:

The purpose of the procedure is to secure placement on alleged factual or repetitive legal claims. The law is clear in pointing out these scopes (*Feststellungsziele*) explicitly, noting that it should also be indicated in the initial application (§ 1 (2)). So it is not difficult to identify the object of collective incident: in *Musterverfahren* it decides on only a few contentious points (*Streitpunkte*) expressly designated by the applicant (particularly pointed) and set by the court, making the decision on these issues to achieve several individual disputes. One can therefore say that the merits of cognition in the incident includes factual elements or previous questions (*Vorfragen*) of a legal relationship or reasons for the claim individually⁸⁰.

The procedure (incident collectivization) is divided into three phases:

⁷⁸ With the same goals, it was created, inspired by German law, the aforementioned incident resolution Repetitive demands, namely the identification of processes that contain the same question of law which estejamainda the first level of jurisdiction for joint decision . Excerpt from the explanatory memorandum to the Draft.

⁷⁹ WITTMAN, 2008, p. 454.

⁸⁰ CABRAL, Antonio do Passo. Il nuovo Procedimento-Modello (Musterverfahren) tedesco: un'alternativa alle azioni collettive”. Disponível em: <http://www.judicium.it/news_file/news_glo.html>.

a) Admissibility, bringing an incident with a standard (*Musterfeststellungsantrag*) by one party and the finding of several procedures dealing with questions of law or prejudicial points that should be settle under a model decision or verify the need, the first trial in which is raised the incident trial model, through the publication of the existence of action in an electronic record (www.ebundesanzeiger.de / [ebanzwww / wexsservlet](http://ebanzwww.wexsservlet)) refers to the discussion of the Regional Court;

b) The second stage develops in the Regional Court, upon the suspension of all proceedings in the judgments of origin either party is allowed to expresses its defenses (such a possibility constitutes the basis of the binding effect of the decision model) . But to avoid the turmoil the court shall automatically appoint model litigants representing the authors and defendants (and *Musterkläger* *Musterbeklagte*): as Cabral asserts,

[...] will direct interlocutors with the court (...) as we are against procedure before collectivization of issues common to several individual cases, it is necessary to communicate through the intermediary of a “spokesman”. These are a sort of “principal body”: they, along with their attorneys, will shape the procedural strategy of the group. The others, if they can not contradict or counter their arguments, can integrate them by adding elements to the formation of a judicial conviction⁸¹.

The decision binds all processes.

c) With the filing of the decision passed judged by the work of each party in each individual process, the third stage begins in which they define the individual claims of each issue (their specificities). The division of cognition, which enables the incident, mitigates the problems of analyzing the characteristics of each demand and enables a better trial of the “identical” issues of serial actions.

This example should clearly not be conveyed to Brazilian law without further reflection, but represents an example of searching for the magnitude of the problem of repetitive actions without losing sight of the procedural safeguards of the constitutional model of the process, as in the technique of test-process, and generally, may conduct⁸².

It so happens that the way illustrated by arts. 895-906 of the bill, the incident will demand a *standardized decision* in all its aspects, something that could create numerous problems.

In addition, several options of the legislature should be criticized, as we do in our own text.

⁸¹ CABRAL, Antonio do Passo. Il nuovo Procedimento-Modello (Musterverfahren) tedesco: un’alternativa alle azioni collettive”. cit.

⁸² THEODORO JÚNIOR, Humberto; NUNES, Dierle; BAHIA, Alexandre. Litigiosidade em massa e repercussão geral no recurso extraordinário. cit.

CONCLUSION

This essay sought to establish, from a proper understanding of the process for democratic rule of law and a critical reflection of conceptualism turned to procedural liberalism and socialism, a proposal of due process of law concerning macro-structural procedural reforms that has been implemented in Brazil in both the civil procedure and the prosecution.

This time, the study established phases for a due legislative process of procedural reform, defining three preparatory phases: the first of diagnosing the problems and crises of the legislation to be reformed, the second stage of legislative definition of reform directives and appointment of a commission of jurists and the third focussing on the public debate of the proposed draft code. Only after this preparatory phase would we create the legislative process itself to propose a bill for presidential approval. As in the final stages of due process of law, it is anticipated that there is a need for a period of *vacatio legis* adequate for the preparation of “jurists” for implementation of the new procedural system and a final phase which begins with the entry into force of the new code, called the monitoring phase of the reform.

From the definition of a due process of law for macro-structural procedural reforms, this study analyzed the current phase of reforms in the Brazilian Criminal Procedure Code and Code of Civil Procedure, analyzing approaches and perspectives that the proposals presented.

One should avoid conception and treatment of the process as bad, as this perspective has supported proposals and reforms in order to shorten it as much as possible. Brevity is also justified (and here perhaps with greater intensity) of the institutional point of view, that is to say that the process consumes resources (always insufficient to account for all claims), so the faster it proceeds to a solution, the lower the cost.

We cannot forget that the process is a security that cannot be conceived of as an obstacle with formalities devoid of constitutional reasoning (constitutionalized formalism), but may not have cleaned out its role in promoting the participation of interested parties in obtaining rights, for reasons of quantitative performance and the pressures of major economic or political power groups.

Thus, it is noticed that Brazilian society is faced with an unprecedented opportunity to devise procedural laws marked by democratization and constitutionalization of the law.

We hope that political, economic or social factors will keep both the Committee of Jurists and the National Congress from rush passing laws which are not in agreement with the democratic constitutional paradigm that has been ruling since 1988.

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