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THE JURISDICTIONAL POWERS OF THE JUDGE

Solange Salete Sprandel da Silva

Universidade do Contestado

Concordia, Santa Catarina

<http://lattes.cnpq.br/7709442885104726>

Greice Sprandel da Silva Deschamps

Universidade do Contestado

Mafra, Santa Catarina

<http://lattes.cnpq.br/7153545567184157>

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Abstract: The Jurisdictional Powers of the Judge, presents a sociological perspective on the Judge, showing how Society and the content of the legal culture condition the Judge in the service of the idea of Justice. Jurisdiction, conceived as a political-legal power of the State, legitimized through the Principle and guarantee of Due Process of Law and through the development of the Adversary Principle. The Process, as an ethical instrument, capable of consolidating Democracy and transforming the existing means of Access to Justice into effective means for those lacking socioeconomic and cultural conditions. The concept and constitutional foundations of the Jurisdictional Powers of the Judge, gravitating around the Law, from which the Judge derives his power-duty linked to the evidentiary initiative and his competence to judge. It delineates the connection between the constitutional foundations and the jurisdictional powers of the judge, especially within the scope of the Democratic State of Law. The central focus is the appreciation of individual and collective rights and the search for a more accessible and equitable justice. The research historically traces the emergence of the post-World War II Democratic State of Law and examines in detail the Brazilian Constitution of 1988, along with its fundamental rights and guarantees. Incorporating doctrinal views and analyzing basic principles, the study also examines the axiological dimension of enshrined rights and evaluates infraconstitutional laws in their relationship with the Constitution. In its conclusion, the role of the judge, as a promoter of a fair process and facilitator of access to justice, is emphasized.

Keywords: Constitutional Foundations; Jurisdictional Powers; Democratic state.

INTRODUCTION

In the Democratic State of Law, justice occupies a prominent position, being seen as a pillar for the promotion of order, equity and human dignity. Since the dawn of civilization, man has yearned for a system that would protect him from oppression and ensure justice. The pressing need to avoid the anarchy derived from autonomous justice led to the incorporation of the function of administering justice by the State, a role assumed with zeal by the jurisdiction. The evolution of legal thought, influenced by Enlightenment philosophers such as Locke and Montesquieu, established the separation of powers, creating a carefully calibrated balance between the branches of the Legislative, Executive and Judiciary.

The judiciary, in this scheme, emerged as the guardian of justice, charged with the responsibility of interpreting and applying the law impartially. However, this function is not simply technical, but deeply rooted in constitutional principles and guarantees that guarantee citizens the right to a fair and equitable process. The current social and legal situation calls for an accessible Judiciary that is not restricted by socioeconomic or cultural barriers and that can deliver justice effectively and quickly. This need guides the view that the process must transcend its technical nature, serving as an ethical and democratic instrument that safeguards fundamental rights.

In this article, our focus is on the jurisdictional powers of the judge - a central figure in the administration of justice. Through a meticulous analysis, we seek to understand its nature, responsibilities, and the active and essential role it plays in the judicial process, guaranteeing the impartiality and effectiveness of the delivery of justice.

LAW AND CULTURE

Law belongs to every form of human society and is relevant to each culture. It concerns everyone and each one, not forming a specific cultural construction.

Any Society, however distinguished it may be, has a sense of order without which no humanity is possible. Law is characterized by the very organization of this Society in what is firmest and most concise. Its specificity resides in the variety of its manifestations, in the ability to receive the people's experience and reflect their conflicts and aspirations. Law is the palpable result of the knowledge of a Society or a culture of its capacity to distinguish what is fair and what is unfair, formulating principles and ordering rules for social coexistence.

Several things govern men: climate, religion, laws, maxims of government, examples of past things, customs, manners; whence a general spirit resulting from them is formed. As, in each nation, one of these causes' acts with more force, the others give way proportionally (MONTESQUIEU, 1748, LXIX, cap. 4).

The process of evolution and institutionalization of law shows that the organic predicates of human communities, such as the function of the judge, with the passage of time, become individualized and become the property of particular classes. Judgment institutions, sociologically, are related to the endogenous form of communities and the implementation of state apparatuses.

The State has not always existed and the Societies that dispensed with it, autonomous among themselves, lived in natural conflicts in their environment. To resolve internal conflicts, they organized norms of conduct, indispensable to social coexistence, establishing Justice based on the knowledge and morality of men. Seeking to satisfy the

needs, each collectivity endows its good men in the functions of Justice. It is competence and rectitude that make the Judge. Competence, in the sense of knowing the rules of life and current practices in the community. Straightness, in the sense that it is recognized by all that the interested party has respected the rules and observed customary practices. Conceptually, Judge is the legal operator who, invested with public authority, manages the Judicial Process attentive to changes in social standards and values, committed to the ideal of Justice.

The advent of the State as the main sphere of political and legal activities suggests a complete reversal of perspective. The idea thrives according to which the power to judge would be one of the attributes of sovereignty, an essential attribute. Henceforth, the faculty of ministering justice it seems to be a delegated competence of the sovereign power, be it its administrative technical source or its abstract reference. An institution specifically reserved for the role of Justice emerges, assumed by a particular professional body. The oral norm intensely experienced and shared by the community, devoid of immunological defenses in the face of the textual mass of written law, is incorporated by it. The literate judge is supported by the science of the logical configurations of legal writings. It is with this distortion that the sovereign will play to replace the jurisdictional autonomy of the primary social bodies by a Justice inserted in the administrative labyrinth (ASSIER-ANDRIEU, 2000, p. 260-263).

The judge in political society is faced with the people's concern about a hierarchical justice, exceptional courts or the ability of politicians to withdraw from common law. Likewise, the virtue placed in the judicial institution in the name of Democracy, originating from an ideal of freedom, shudders when the duties of citizens and

the duties of politicians are conceived as an absolutely inseparable pair, which is why any look at the relationship between the judiciary with the political is, by virtue of the Principle of the separation of powers, a distrustful look. The court, an organ of justice, is responsible on behalf of the community for the task of announcing what must and what must not be done with regard to all the particular cases presented by the Society. Between the hammer of power and the anvil of the citizen, this is exactly the position of the republican magistrate (ASSIER-ANDRIEU, 2000, p. 264-265).

In the Democratic State of Law – the one that guarantees a political Process of free and open formation, whose content results in measures of protective normalization of fundamental Rights (HESSE, 1998, p. 106), the main objective is the promotion of Justice. In a Society debilitated by a crisis of moral, social and ethical values, experiencing globalization and technical and technological advances, most times devoid of ethics, what is just will not depend only on the current legal norm, but on a set of Principles capable of to ensure equality and human dignity. Democracy as a regime that aims at equality before the law, safeguarding individual and social rights (MELO, 2000, p. 28), now requires less law and basic rules, but more Principles and procedural rules. The Judge, even when he is free, is not totally free. It cannot innovate at will, it must adhere to principles and exercise its function disciplined by the need to put order in social life, through a law that is less sacralized, more respected and with truer control (GARAPON, 1996, p. 40- 41).

Acting independently of the judge constitutes the differential so that he can defend the freedom of the citizen in the pursuit of fairness. The performance of the

Judge is linked to a swift, objective, timely provision of jurisdiction, which guarantees the access of the parties to Justice, in order to meet the legitimate desires of those who seek the solution of problems in the judicial sphere. The Judge, in this context, when interpreting the Law, must remember that he serves not the State, but Justice (CASTRO, 2002, p. 97).

THE JURISDICTION – HIGHLIGHTS

The history of man coincides with the history of the search for his release from the bondage imposed on him by man himself and the use of self-defense. The dismantling of the legal order and social peace caused by Justice done by one's own hands made the State assume the mission of doing Justice through a judge. It is the Right and the duty to exercise the function of Justice (SHÖNCKE, 2003, p. 67).

The highlighted aspects about the Jurisdiction will have as landmark the seventeenth century, when a first systematization of the tripartite theory of powers appears with the work of Locke. Based on the English State of his time, Locke points to the existence of four fundamental functions, exercised by two organs of power. The legislative function would fall to the Parliament. The executive function, exercised by the king, involved a development, called federative function when it was a question of the power of war and peace, of leagues and alliances, and of all questions that must be dealt with outside the State. The fourth function, also exercised by the king, was the prerogative, conceptualized as the power to do the public good without being subordinated to the rule (SILVEIRA, 2001, p. 98).

With Montesquieu ¹, the theory of the distribution of functions related to power ²,

1. In England, at the time of Montesquieu (1689-1755), there was already a separation of Legislative (Parliament) and Executive (King) Powers (SILVEIRA, 2001, p. 98).

2. Power: expresses the energy capable of getting the conduct of others to adapt to one's own will (CRUZ, 2001, p. 55).

comes to be conceived as a system in which a legislature, an executive and a judiciary are combined, which would be modularly separated and mutually contained, according to the idea that power holds the power. The central idea, which supports the Powers, is to prevent tyranny by virtue of the concentration of power in a dominant person or group ³.

For Dallari (2001, p. 218), it was with the intention of weakening the power of the State, complementing the limiting function exercised by the Constitution, which imposed the separation of powers as one of the dogmas of the Modern State, even sustaining the impossibility of democracy without that separation.

By the Principle of Powers, the balance of power is established, to be maintained between the three branches of government: the Executive – with the primary function of governing and administering the State; the Legislature – as the body that elaborates the laws or legal norms regulating the actions of those who are part of the State, in their relations with each other or with the State itself; and, the Judiciary – constituted by the set of authorities, which are invested with the power to judge (SILVA, 1975, v. 3, p. 1171).

The three Powers – Legislative, Executive, Judiciary – operate within their specific sphere of competence, delimited by the Constitution of the Federative Republic of Brazil. It follows from the principle of the distribution of functions that the primary role of the Judiciary, along with judging particular cases, submitting itself to the laws, is to

3. The containment of the absolute power of the monarchies began in Albion, where, in 1215, the barons managed to obtain from João-Sem-Terra the oath to the Magna Carta (SILVEIRA, 2001, p. 98).

4. Objective law: unity of principles, from which new propositions are deduced.

5. Secondly, it is incumbent upon to determine functions of an administrative or self-governing nature (SILVA, 2001, v. 1, p. 52).

6. State is the territorial organization of a community, endowed with sovereign power and its own legal system (CRUZ, 2001, p.43).

7. The Jurisdiction, under analysis, is civil (litigation), that is, it will deal with disputes of a non-criminal nature and that do not constitute the object of special jurisdictions.

8. Process: set of legal rules that enable the administration of Justice (MELO, 2000, p. 53).

9. Sovereignty is the inherent power of the State, that is, the organization of all citizens for purposes of general interest. But

control the acts of the other Powers, whether administrative or legislative. The Judiciary that represents the State-Judge must act within the limits of its authority, with complete impartiality in the judgment (SANTOS, 2002, v. 1, p. 10). The role of the Judiciary is to ensure the application of objective law ⁴, exercising jurisdictional activity, disciplining concrete cases ⁵.

Justice needs to be done. The State ⁶assumes responsibility for doing so. Through the Jurisdiction ⁷, it formulates and puts into practice the concrete legal rule disciplining the legal situation. The State replaces the parties, through the Process ⁸.

The Jurisdiction is the function developed by the State to know and decide on the case, to execute the firm sentence issued with an imperative nature by an impartial third party, instituted by that one and placed over the parties, regarding one or more contentious claims deduced by the litigants and channeled to the judge through the corresponding Process, in which they could also have requested preliminary and securing measures (ALCALÁ-ZAMORA Y CASTILHO, 1974, t. 1, p. 57-58).

Conceptually, Jurisdiction is one of the functions of the State, through which it replaces the holders of conflicting interests to, impartially, seek to pacify the conflict that involves them, with Justice (CINTRA; DINAMARCO; GRINOVER, 1998, p. 129).

Jurisdiction as power is a manifestation of ⁹national sovereignty itself, exercised by competent state bodies (judges). As a

function, it expresses the charge that state bodies have to promote the realization of the right through the process, as an activity, it translates the idea of the exercise by the state body of power and the function assigned to it by law (TUPINAMBÁ, 2001, p. 18).

In the view of Humberto Theodoro Júnior (2004, p. 30-31), the Jurisdictional Function only acts upon concrete cases of conflict of interests, and always depending on the invocation of the interested parties. It puts into practice concrete wills of the law that are not addressed to the jurisdictional body, but to the subjects of the substantial legal relationship deduced in court. Seeking to eliminate conflicts and exercising the legal rule relevant to each case that is presented to it in search of a solution (CINTRA; DINAMARCO; GRINOVER, 1998, p. 23).

As subjective law is conceived as the power of the will of its holder, jurisdictional activity must always be provoked by the holder of the right. To invoke the Jurisdiction in the resolution of controversies it is necessary to have subjective presuppositions: parties that ask and a judge that decides; and, objective presuppositions: the litigation that reflects the pretensions of the parties and the Process that allows the instruction in search of the definition that falls on it (ALCALÁ-ZAMORA Y CASTILHO, 1974, t. 1, p. 52). From this relationship results the sentence, whose dispositive part is covered with the authority of *res judicata* - immutability, as an almost absolute rule.

The Jurisdiction is based on Principles, in the form of concrete rules, such as: a) Principle of territoriality links the Jurisdiction to a delimited territory. Judges and Courts only exercise jurisdictional activity within the national territory; b) Principle of non-delegability establishes that the exercise of jurisdictional activities cannot be delegated

this single power inserts three major functions: the legislative, the governmental [or administrative] and the jurisdictional (CHIOVENDA, 1998, v. 3, p. 9).

or transferred; w) Principle of Indefeasability establishes that the Judge, in the face of the concrete case, cannot exempt himself from deciding; d) Principle of inertia shows that only by provocation is the contentious process initiated. It is the exclusive availability of the parties for provoking judicial protection; e) Principle of the Natural Judge, ensures a Judge effectively integrated into the Judiciary with all the institutional and personal guarantees provided for in the constitutional order; f) Principle of Publicity aims to guarantee the development of judicial activity publicly with some exceptions foreseen to safeguard the public interest and extends the responsibility of judicial decisions (PORTANOVA, 1999a, p. 69).

The jurisdictional function fits into the category of constitutional guarantees, such as the non-delegability and non-delegability of the Jurisdiction, ample defense, grounds for judicial decisions, among others, which guarantee citizens access to judicial decisions. It is legitimized by the application of the Law through Due Process of Law - which constitutes the guarantee of the individual, as guardian of the Process itself; and for development through the Adversary Principle - which ensures equal opportunities for the parties.

The judiciary system, despite being able to resolve public law disputes and defend the diffuse rights of the community, does not have full conditions to assert the rights of common people at the individual level. The principle of equality, considered as equal opportunities for access to justice (MARINONI, 2000, p. 25), remains hampered by the absence of instruments and means capable of ensuring individual and environmental rights and of mitigating obstacles such as costs, duration of Process and Judge as a mere spectator of the judicial debate. It is still necessary to overcome

social, cultural and psychological barriers of the citizen in relation to the Judiciary. Power that presents problems of judicial organization, administration, autonomy, internal democracy, creativity, limited as state power and linked to the law in the name of neutrality (PORTANOVA, 2000, p. 73).

For Rui Portanova (2000, p. 72-73), the Judiciary is discredited within society, its mission weakened and its legitimacy questioned. As reasons, he points to the traditional model adopted, the cost of the Process, poverty, slow procedures, access difficulties, misinformation of the population, criminal impunity and depoliticization in the use of the Law.

The Jurisdiction and the Process experience a crisis of inability to meet social needs and present concrete solutions to the social problems of each concrete case.

Overcoming the crisis could reside in the change of position of the Judge from a servant of the State to a servant of Justice, as a representative of the people. The Judge and Justice are not neutral and equidistant from the parties. Every valuation of Evidence, verification of facts, decision of a concrete case is permeated with intentionality and values. They represent a position taken and a form of interpretation and application of the law in the concrete case.

In this context, the perception of the idea of Justice and the desire to achieve a fair society is confused with its protagonists and, among them, the Judge. Once aware of the performance of its role and its historical challenge of giving each one of the excluded the due respect for their condition as a human person, it will be able to establish itself as holder of the state function of resolving disputes.

In the organization of the Democratic State of Law it is necessary to overcome the declaration of rights and transform them

into effective ones. The Judiciary can be the transforming agent of individual, collective and diffuse rights and of new rights. The existence of these social interests requires effective protection and a Process adequate to the effectiveness and equality of all before the law. The effectiveness of the Process will take place through the contradictory, the Judge, the instruction and the procedure.

The Contradictory will allow the dialectic between Action and defense in the Process. The Judge, due to the Principle of equality contained in the Constitution, must have an effective participation in the Process, in the adequate verification of the affirmations of the facts and in the production of the Evidence so that, between two possible interpretations, he chooses the one whose result is fairer (PORTANOVA, 2000, p. 117-119). The instrumentality of the procedural system must ensure to those who are right a legal situation equal to that which must have derived from the normal and timely fulfillment of the obligation. Effectiveness requires fair results, through conciliation or decision.

The Process available to the State for the realization of Justice will no longer be a means of exclusive individual use. The predominance of public order over the private instance in conflict is manifested in the axiological and normative structuring that the Constitution confers on the Process. It is necessary to understand the Civil Procedure not as a mere technical instrument, but as an ethical instrument to which litigants submit during the demand (CAMBI, 2001, p. 98-99), capable of consolidating Democracy and transforming, in effective, the existing means of Access to Justice for those deprived of socioeconomic and cultural conditions (MARINONI, 2000, p. 25).

The Process is now conceived as an instrument at the service of Justice (CAPELLETTI, 1988, p. 8-12). It reinforces

the idea of a legal system that is equally accessible to all, producing results that are individually and socially fair. The universality of judicial protection is linked as a means of democratic participation and popular intervention in society. By filling the gap between the action and the effective provision of judicial protection, it serves the Law, not only the material, but the Law as a whole (GRINOVER, 1998, p. 13). By receiving the outline of the guarantee of the adversary, of the fullness of the Right of defense, of the procedural isonomy and of the bilaterality of the procedural acts, the judicial provision, when delivered by the State, will give to each one what is his (SILVA, 1990, p. 411).

Constitutional Principles must be introduced into legal practice to ensure effective application of norms and for the Process to become characterized as an instrument of constitutional security of rights and the execution of laws. In this conception, the Process does not exist by itself, based on Principles and technically improved, it will certainly facilitate the realization of two fundamental Principles: equality and freedom. It is necessary to broaden the horizon of the Process – it is not about enforcing the objective Law, or only pacifying the conflict – but seeking education for life in society, the affirmation of the State and the Law, pacification with Justice (GRINOVER, 1998, p. 108). All the guarantees that are part of the constitutional protection of the Process must converge to the guarantee of Access to Justice (DINAMARCO, 2002, v. 1, p. 107).

The effectiveness of the Jurisdiction will occur through Access to Justice, which is characterized as a movement for the realization of social rights, through suitable methods of making human Justice work, in a simple and accessible way. With a libertarian conception, it aims at the effectiveness of equality declared and enshrined by the

Welfare State (CAPELLETTI, 1988, p. 8-16).

Access to Justice transcends mere admission to the Process or the possibility of entering the court, it includes the guarantees of Due Process of Law, non-refusal and participation in the formation of the Judge's conviction, of a fair and motivated decision. It constitutes the ideological, political and legal basis of the State to provide jurisdictional protection and the very guarantee of jurisdictional provision to the socioeconomically and culturally disadvantaged, to the new rights and diffuse, collective and homogeneous individual interests and constitutional actions.

The Jurisdiction as a political-legal power of the State and as one of the dimensions of Power, has the purpose of achieving social peace, fulfilling the political, social and legal intentions of the Process and solving the existing difficulties for the realization of intentions. In the first intention, lies the interest in the fair pacification of conflicts, based on legal certainty. It shows that the procedural law must be destined to the realization of the values of the State and of Society itself. In the second, the maintenance of the State's power to decide imperatively is observed, but in balance with individual freedoms and the promotion of citizen participation in the destinies of the Political Society. The third intention is to make the concrete will of the law act for political and social purposes (DINAMARCO, 2001, p. 159). In order for intentions to materialize the Right of Action, which abstractly guarantees Access to Justice, it must remove economic, social and legal obstacles that could prevent the realization of Law and Justice. The power to act, in the complex of procedural activities, points to the possibility of argumentation and use of evidentiary means allowed by both parties.

The Legal System must be equally accessible to all to allow for results that are fair, both in the individual and in the social sphere, to

guarantee, promote and protect the Right of Access to Justice.

For Mauro Cappelletti (1988, p. 8), the sensitive points to be overcome in order to achieve Access to Justice require a reform that includes: a) the forms of procedure; b) the change in court structures or the creation of new courts; c) the use of laypersons or paraprofessionals, both as judges and advocates; d) changes in substantive law intended to avoid disputes or facilitate their resolution; e) the use of private or informal dispute resolution mechanisms. Regarding Civil Procedure, it reinforces the need to correlate and adapt it to the type of litigation. Reform that would make the Civil Procedure simpler, faster and more accessible to the poor. Aware that regular courts will continue to be necessary, reforms are presented through arbitration, conciliation and economic incentives for out-of-court dispute resolution.

The evolution of Access to Justice alternatives and procedures to make Justice effective cannot disregard the fundamental guarantees of Civil Procedure, an impartial and contradictory judge, because it could mean a return to arbitrariness and injustice. The procedure must be fair, fast, accessible and result in a quality product.

THE JURISDICTIONAL POWERS OF THE JUDGE

The State organizes the jurisdictional function through judges, as state agents exercising the Jurisdiction. The Judge disposes, in the exercise of his functions, of the Jurisdictional Power and of the police power.

The judge's coercive powers are characterized as: a) powers intended to prevent or repress acts contrary to the dignity of Justice and to honor procedural loyalty; b) the powers linked to the executive acts or destined to carry out the execution; and, c) the powers

of the police, which are intended to maintain the order and decorum of the hearing, falling on people linked to the Process and people from the public without any dependency. The judge's police power is conferred on him, so that he can exercise with authority and efficiency the Jurisdictional Power (CINTRA; DINAMARCO; GRINOVER, 1998, p. 131).

As an organ of the Judiciary Power, the Judge acts on behalf of the State, through the Jurisdictional Function assigned to him, to administer Justice. As leader, the Judge gives direction to the Process, and jointly with the parties promotes it. The judge who occupies the condition of executor of the rules and duties of the State, also has rules related to himself. The former includes all acts to be performed in the Process (dispatches, decisions, sentences, Process management); the second are related to the judge's behavior, in particular, the requirement of impersonal action (DINAMARCO, 2002, v. 1, p. 221), the impartiality, independence and responsibility of the judging body.

Impartiality is an essential condition for the legitimate exercise of the jurisdictional function. The impartiality of the Judge and of the judgment constitutes one of the essential characteristics of the Jurisdictional Function, because the action must be disinterested in the dispute. The Code of Civil Procedure disciplines the cases in which the judge becomes impeded or incurs suspicion and deals with the consequences arising from these situations. Judgment is also achieved by extending the Principle of impartiality to all those who interact with the Process. Impartiality differs from neutrality, because the latter corresponds to indifference to the success of the lawsuit. The impartial Judge is interested in the Process and in the successful outcome of the case, he protects himself against himself and guarantees the parties his impartial performance. The judge, as a

jurisdictional body, is impartial in any degree of jurisdiction. It must be a third party in relation to the parties, being prevented from exercising Jurisdiction, when evidence points to partiality. To ensure the judge's impartiality, he is endowed with complete independence, to the point of not being subject, at trial, to any higher authority (SANTOS, 2002, v. 1, p. 11).

The judge's responsibility is linked to his independence. It extends to the Powers of directing the Process, controlling its development, searching for sources of Evidence, establishing the limits of the parties and determining the content of the claim.

For Cândido Rangel Dinamarco (2002, v. 1, p. 228-229), the Judge not only exercises powers, but also duties, because the exercise of power is for him a duty before the parties due to the constitutional guarantee of judicial control and Due Process. The Author summarizes that the powers and duties of the Judge reside in directing and protecting the Process, which correspond to the Constitutional Principles of Due Process of Law and Access to Justice. It is the pertinence of carrying out the acts of preparation and conclusion for the granting of judicial protection guaranteeing the effectiveness of rights.

The power to judge is linked to the obligation of judgment itself. The judge is not exempt from sentencing or dispatching alleging a gap or obscurity in the law. In the judgment of the dispute, it will be up to him to apply the legal norms; if there are none, it will resort to analogy, customs and general principles of law.

The nature of the Jurisdiction is obliged to rule on a request made by someone. The whole legal order would be compromised if, in the face of a dispute, the Judge refrained from deciding. With the responsibility of deciding the Judge, must stick to an interpretation, not

merely formal, but real, human and socially fair (GRECO FILHO, 2003, p. 226).

The Code of Civil Procedure establishes that the Judge will direct the Process in accordance with the law. The Jurisdictional Powers of direction and development of the Proceeding are intended to ensure the parties equal treatment in the Proceedings, to ensure the effectiveness of the Jurisdiction, to conciliate the parties at any time, to honor the Principles of the indeclinability of the Jurisdiction and to give effect to the Principle of the initiative of the part.

The power to judge¹⁰, which the judge is vested with, gravitates around the law, from which the judge draws his competence to judge on behalf of the State and to apply the will of the law on the concrete case. Outside the limits of the law, there are no Jurisdictional Powers.

In relation to the powers of the Judge before the probative instruction, these are extracted from the Code of Civil Procedure. These are powers delineated by law, making the judge follow certain procedures. Thus, the acts of the Judge, in the evidentiary activity, are based on the Code of Civil Procedure, which must be analyzed in conciliation with the operative system, that is, the party's initiative system, including in relation to the production of evidence. The judge cannot replace the probative initiative, which belongs to the party, so as not to violate the principle of equal treatment and impartiality. Pursuant to the aforementioned article, in order to ensure a quick solution to the dispute, it must prevent the parties from using the evidence for delaying purposes. Once all probative possibilities have been exhausted and the judge is not convinced, he will be able to decide according to the discipline of the burden of proof, deeming the unproven fact as non-existent.

10. Judging, according to the law, means giving the judgment the content that results from the material legal order as a whole (DINAMARCO, 2002, v. 1, p. 231).

The binding of the judge's jurisdictional powers to the law is justified in view of the model of civil procedure, a classic device, in which the judge is required to direct and call for order when necessary. The premise of this model is the availability of material rights in conflict, in the sense that the parties assume the consequences of their own omissions and legitimize the passivity of the Judge, when they omit, without compromising impartiality (DINAMARCO, 2002, v. 4, p. 231). The predominance of the operative Principle – the Judge is not responsible for probative initiatives – needs to be reviewed in view of the dynamic posture of the Judge that the Process requires to meet its purpose.

The probative activity must be analyzed through the dispositive and inquisitive principle. The inquisitive principle allows a certain procedural freedom to develop the process up to the final adjudication. The Device Principle has no connection with the structure of the Process or the statement of the cause (MARINONI, 2000, p. 71). The Judge must actively participate in the production of the Evidence so that substantive equality prevails in the Process. Participation that also does not violate the Adversary Principle, which informed by the Principle of equality, is strengthened by the active stance of the judge.

The ideal would be a balance between the device model and the inquisitive one. Recognize judicial statics as a general rule, but admit that the Judge takes the initiative to prove it in certain cases, such as, for example, in the face of omission by the parties, due to economic and sociocultural poverty. The judge must determine *ex officio* the carrying out of evidence in cases associated with the status or capacity of persons [...]; in collective actions, popular actions; and, in causes of any kind (DINAMARCO, 2002, p. 55).

The Code of Civil Procedure has articles that invest the Judge with the power-duty to

take the evidentiary initiative, reducing the rigors of the Device Principle and allowing the analysis committed to the Inquisitive Principle, reinforced by the power to freely form his conviction. It has the power-duty to ensure equality between the parties; the possibility of summoning the parties at any time to testify on the facts of the case, without necessarily having been requested; establish authorization to question said witnesses; and carrying out a new inspection when the first one was unsatisfactory, and judicial inspections to be carried out by the Judge himself.

Rui Portanova (1999b, p. 67), analyzing the principle of equality in terms of evidence, emphasizes that the Process has an efficient instrument to balance the disparities between the parties, when the Judge makes use of the power-duty to determine the necessary Evidence to the instruction of the Process. The Code of Civil Procedure not only invests the Judge with the necessary powers to collect evidence, but also reinforces his directive powers (GRINOVER, 1982, p. 18).

The powers-duties of the Judge, linked to the probative initiative, must occur within the limits of reason. As, for example, to ensure equal treatment for the parties, it often consists of compensating for inequalities and producing *ex officio* evidence, when the parties are unable to afford or produce the evidence (DINAMARCO, 2002, v. 4, page 234). It consists of ensuring the Right to Evidence with parity of arms, keeping within the limits of procedural legality.

For Cândido Rangel Dinamarco (2002, p. 56), the forces that impel the Judge to probative activism are: a) the duty to promote equality between litigants, b) the dignity of the Jurisdiction, which wants the Judge as an agent of Justice and not a mere hostage to the conduct and omissions of the parties, c) the unavailability of legal-substantive rights and

relationships in certain cases (emphasis in the original). The active, dynamic Judge, who seeks the substance of the controversy, will be able to appreciate the Process, attentive to the dosage of dynamism to act on the probative elements (SENTIS MELENDO, 1979, p. 13).

The Judge's Powers are expanded and with it the relevance to the Judge of the initiative of the Evidence necessary for knowledge of the facts constituting the Action. essential for your knowledge about the facts that matter to the fair decision (THEODORO JUNIOR, 1999, p. 7).

The Judge must be the active protagonist of the Process, with participatory intervention in the production of Evidence to better establish his conviction (FIGUEIRA JUNIOR, 1992, p. 52). His intervention does not affront the Device Principle – which is a technical principle – because it takes place within the system.

The State convinced that the administration of Justice is an integral function of sovereignty, must have the conviction that the Judge, as an organ of the State, must no longer passively watch the judicial dispute between the parties, as it used to happen, but participate in the cause as a living and active force.

In the current stage of Civil Procedural Law – autonomous and public – the conception of passive Judge needs to be reviewed. In fair proceedings – which can only be reached through probative instruction – the predominance of the dispositive principle ¹¹needs to give way to the dynamism of the process and the judge. The Principle of impartiality does not hinder the active participation of the Judge in the development of the Process. Impartiality ceases to exist when the judge, knowing that evidence is fundamental for the elucidation of facts, fails to act.

For Cândido Rangel Dinamarco (2002, p. 54), experience shows that impartiality is not compromised when, with serenity and

11. "Device Principle is the array of rules and systems for which the judge does not compete for probative initiatives" (DINAMARCO, 2002, p. 52).

awareness of the need to instruct oneself in order to judge better, the judge supplies the evidentiary deficiencies of the parties with his own initiatives.

The judge constitutes the generating center of the probative impulse. Assume a defined position in the condition of director of the Process, having the Right of initiative and Valuation in the evidence produced by the parties, according to their free conviction. The Evidence is, for the Judge, the means by which he uses to know the truth of the disputed fact. The Judge seeks the truth through the Evidence, not to satisfy the will of the parties, but to meet the public interest evidenced by the nature of the Evidence Law.

The judge, aware of his social responsibility, must assume effective participation in the democratic process, so that substantive equality prevails. It has the duty to remind the parties of the burden of producing Evidence, and even that of informing them of a specific fact, in addition to the obligation to determine the carrying out of Evidence *ex officio* (MARINONI, 2000, p. 71).

The constitutional foundations of the Jurisdictional Powers of the Judge constitute the theme presented below.

CONSTITUTIONAL FOUNDATIONS OF THE JURISDICTIONAL POWERS OF THE JUDGE

With the implementation of the modern Democratic State of Law, after World War II, there is a revaluation of the individual rights of freedom, which it is understood can never be too sacrificed, in the name of the realization of social rights. Harmonization of public, private and collective interests is sought to achieve common objectives (GUERRA FILHO, 2001, p. 25).

The 1988 Constitution of the Federative

Republic of Brazil, in this sense, establishes fundamental rights and guarantees for every subject of law. It expands the Jurisdictional Function and its values through the Principles and constitutional guarantees of the Process, the jurisdictional control of the illegal acts of the Executive and Legislative, the judicial organization and the constitutional Jurisdiction of the liberties ¹².

According to José Frederico Marques (1990, v. 1, p. 19), the Constitution, by declaring individual rights and their guarantees, prescribes norms that directly affect the procedural protection of the rights and interests of citizens vis-à-vis the Public Power and other citizens.

The principles, values and rights enshrined in the Constitution of the Federative Republic of Brazil, require the Jurisdiction to meet social rights, consumers, quality of life, the environment, diffuse and collective interests, Democracy and new rights ¹³, through of instruction and knowledge of the Process.

In understanding these rights and values, the Action is directed against the State, not against the opponent, and has as its immediate object the jurisdictional provision, not the litigious good. Through the Process, the State applies force to the author and to the one who is right. It is the Civil Procedural Law allowing the democratic defense of rights and seeking reasonable decisions.

Highlights Moacyr Motta da Silva (2004, p. 136):

The judge has the power-duty to know that, above the formal codes, there are, in the political Constitution, constitutional principles of the Process, expressed and implicit, that guide the application of the Law, within standards of Justice. the judge has the power-duty to apply the values of justice enshrined in the rules of a constitutional nature.

12. *Habeas corpus, habeas data*, individual or collective writ of mandamus, writ of injunction, popular action and public civil action.

13. Emerging rights resulting from technological, social and/or political advances that require legal norms.

It is up to the Judge, through the Process, interpreting the Law in line with the Constitution, to seek the meaning that Justice assumes in the face of new social values, with the purpose of obtaining the best decision.

The Jurisdictional Powers of the Judge begin to seek their foundation in the individual and social Rights of man, enshrined in the Constitution of the Federative Republic of Brazil, in an axiological dimension, capable of implementing Justice in decisions, as an imposed duty. The infraconstitutional laws that govern the Jurisdictional Powers of the Judge in relation to the evidential activity and limitations, require a rereading in accordance with the Constitution, to favor the Right to Evidence. In this sense, the Judge is recognized as having the power to control, in the practice of the concrete case, the reasonableness of abstractly imposed limits, in order to ensure that the parties have the possibility of proving the alleged facts (CAMBI, 2001, p. 186). The judge not only exercises powers, but also duties. The very exercise of power is for him a duty before the parties and an inherent part of the constitutional guarantee of judicial control (DINAMARCO, 2002, p. 228).

FINAL CONSIDERATIONS

The foundations of the judge's jurisdictional powers within the constitutional scope are intrinsically linked to the Principles of Adversary, Due Process of Law and Isonomy. The role of the judge is vital to ensure the effectiveness of the Contradictory, promoting the active participation of both the parties involved and the magistrate himself in the process. As a protagonist in this context, the judge is compelled to carry out acts of official impulse, sanitation and evidentiary initiative, always aiming at a fair decision.

Through the Principle of Isonomy,

the magistrate is committed to providing equal treatment to the parties, neutralizing inequalities that may arise during the dispute. Its impartiality is evidenced in aspects such as deadlines, manifestations and production of evidence. In addition, by the Principle of Due Process of Law, the judge is compelled to obey the norms of procedural legality, which include: participation in the contradictory, guarantee of isonomy between the parties, ensuring effectiveness in the defense of rights and, above all, respecting the Right to Proof.

The process, in this sense, is not just a mere legal instrument; it is an intrinsic

guarantee of the dignity of the human person. Consequently, the judge is given a wider margin of freedom to, through the evaluation of the evidence, guarantee a fair trial. As society evolves in its perception of justice and rights, the expectation of procedures that safeguard citizens' rights becomes more rigorous. Justice, based on ethics and morality, must be in tune with social reality. With the growing recognition of individual and collective rights, the notion is strengthened that justice is a pillar for full citizenship and that access to it is, in itself, a fundamental right.

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