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THE CONSTITUTIONAL PROCESS AND FUNDAMENTAL RIGHTS IN THE CONTEMPORARY BRAZILIAN DEMOCRATIC STATE

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Abstract: In the Brazilian state, as determined by Article 1 of the CPC/15, the process must be ordered, disciplined and interpreted in accordance with the fundamental values and norms established in the Federal Constitution. Thus, due process of law, adversarial proceedings and full defense must be respected (art. 5, items LIV and LV, of the CF/88), as well as the provisions of articles 9 and 10 of the CPC/15, where the judge, before handing down any sentence, must hear and give the parties the right to make their case. In addition, according to article 489 of the CPC/15, every judicial decision must be reasoned and address all the arguments put forward in the case that are capable of undermining the judge's conclusion. Thus, unfounded, solipsistic and autocratic judicial decisions are not permissible in the constitutional process. Thus, in order to answer whether the legal nature of the process is instrumental or a procedure carried out in contradiction between the parties, the object of the research, after studies, bibliographic, normative, jurisprudential and doctrinal data on the subject were compiled, the hypothesis was outlined and, subsequently, using the inductive theoretical-bibliographical method, it was possible to answer the problematized theme above.

Keywords: Process; Contradictory; Instrumental; Procedure; Due process of law.

INTRODUCTION

In Brazil, the process must comply with the country's constitutional and infra-constitutional legal framework. Procedural law is one and the same and, although it is not indifferent, it is autonomous from substantive or material law. The existing subdivisions - criminal, civil and labor procedural law, etc. - are of a practical and didactic nature.

In the Brazilian Democratic State of Law, the process must comply with due process of law, the adversarial process and a broad defense, institutes enshrined, respectively, in art. 5, sections LIV and LV, of the CF/88 . This is because art. 1 of the CPC/15 "2015 Code of Civil Procedure" states that the process, obeying the provisions of the CPC/15 itself, will be ordered, disciplined and interpreted in accordance with the fundamental values and norms established in the Federal Constitution of 1988 . Thus, for there to be a process, these constitutional principles must be respected. In other words, the process must be constitutionalized. Furthermore, according to art. 9, *caput*, *of* the CPC/15, a decision should not be made against one of the parties without their prior hearing, with the only exceptions being the prerogatives of injunctions of urgency, of evidence, and the decision provided for in art. 701 of the same law. Likewise, art. 10 of the CPC/15 states that the judge may not decide, at any level of jurisdiction, based on grounds on which he has not given the parties an opportunity to express their views, even if it is a matter on which he must decide ex officio. Art. 489, §§ 1, 2 and 3, of the CPC/15, establishes that every judicial decision, whether interlocutory, sentence or judgment, must be duly substantiated, starting with the confrontation of all the arguments put forward in the process capable of, in theory, infirming the judge's conclusion, as well as the combination of all the other elements essential to the decision, which must be presented in accordance with the principle of procedural good faith. As a result, unfounded, solipsistic and autocratic judicial decisions are unacceptable in the constitutional process.

The question therefore arises: is the legal nature of the process instrumental (an instrument of jurisdiction) or is it a procedure carried out in contradiction between the parties? In order to answer this question, which is the subject of this research, we compiled a database of bibliographical, normative, case law and doctrinal data on the subject, outlined the

hypothesis that conceives of the process as a procedure carried out in an adversarial manner between the parties and, subsequently, using the inductive theoretical-bibliographical method, it was possible to answer the question posed above.

PROCEDURAL LAW IN THE CONSTITUTIONAL DEMOCRATIC STATE

As we have seen, although procedural law is one and autonomous, there are practical subdivisions - civil, criminal and labor procedural law, etc. - which serve to theoretically and pragmatically delimit some of the specificities of these branches of law.

Thus, while substantive law deals with the rules that regulate - subjective rights - legal relations between private individuals, procedural law deals with the sovereign functions of the state (jurisdictional function), so even if the dispute is eminently of private interest, there will still be a public interest in the process, which is social pacification and the maintenance of the legal order.[1] In reality, or in essence, as is the case with procedural law, the jurisdictional function is also unique, regardless of the material law being debated. Civil procedural law is autonomous from substantive law and has a general application, which is done by exclusion, as it must be used for any conflict that is not covered by the other procedural branches, which are considered to be special, but in these cases, the application must occur in a subsidiary manner. [2]

Based on the legal framework and jurisprudence of the country, procedural law aims to contribute to the maintenance of public order and social pacification, while State Jurisdiction, legally constituted, aims to ensure the rights and interests of those under jurisdiction. Therefore, it is inconceivable that the judge should use meta-legal arguments to support his decision in a Solomonic and solipsistic way. The subjectivism used in judicial decisions is inadmissible, but is still supported by some jurists. This is due, as a rule, to the understanding that considers the process "an instrument of jurisdiction", where the magistrate places himself in a superior position to the parties and decides - freely - according to his conscience or motivated conviction. This term is inappropriate, as it was abolished in the wording of the 2015 Code of Civil Procedure. Despite the aforementioned autonomy of procedural norms in relation to material norms, the process cannot be understood as an instrument with an end in itself, to the point where its application contradicts, without due justification, the very norm of material law in dispute. It is therefore important to revisit the main theories of procedure and the evolution of procedural law, since the systematization of procedure began between the end of the 18th century and the beginning of the 19th century, under the influence of the Liberal State and based on private law. The aim was to protect individual rights and property. Therefore, the first theory of the process, conceived in the 1800s, understood it as a contract.

> This theory bears a resemblance to Roman Law, from the formulist phase [...], because the process, in the view of its advocates, was constituted by the prior contractual acceptance of the containers to accept the judge's decision, but, if they went to court, they undertook, by virtue of the litiscontestatio (the transformation of the conflict, vague and indeterminate, into a dispute - organization of the conflict by the intelligence of the praetor), to comply with the decision issued by the judge. [...]. Finally, this theory proved to be inadequate to explain the legal nature of the Process, given that, as early as the 18th

1. ARAÚJO, Évelyn Cintra. **General theory of procedure handout**. PUC de Goiás, 2018. Available at: https://professor.pucgoias.edu.br/SiteDocente/admin/arquivosUpload/15445/material/Apostila%20completa%20-%20TGP%202018.pdf. Accessed on 22 Mar. 2024.
2. THEODORO JÚNIOR, Humberto. **Course in civil procedural law**: general theory of civil procedural law, knowledge process and common procedure. 56. ed., rev., atual. e ampl., vol. 1. Rio de Janeiro: Forense, 2015, p. 45-46.

> century, the judge did not need the prior consensus of the parties to make the sentence binding.[3]

The second theory of the process (1850) considered it to be almost like a contract, and because of its patrimonialist bias, it also belonged to private law. But the judiciary, in a subsidiary way and with the author's agreement, had the power to settle conflicts of private interests.

> This theory, defended by Saviny and Guényvau (1850), insisted on framing the Process in the sphere of private law, and stated that, while the Process was not typically a contract, it should be a quasi-contract, because the party who filed the lawsuit already consented to the decision being favorable or unfavorable to them, and there was a nexus between the plaintiff and the judge, even if the defendant did not spontaneously join the debate. However, like the first contractualist theory, this one also proved to be insufficient for the study of the legal origin of the lawsuit, since, since jurisdiction was already compulsory at that time, the judge did not need the plaintiff's prior consent to hand down a decision that was favorable or unfavorable to him.[4]

Thus, the third theory of the process - of procedural exceptions and presuppositions - devised in 1868 by the German jurist Oskar von Bülow, adopted the model of the process as a legal relationship. This standard of procedure, with updates, still prevails today.

> Even in the 19th century, a series of cultural tensions began to impose some changes in the conceptual configurations of legal decision-making. In some cases, the political pressure from the judiciary itself - which, towards the end of the century, began to grow stronger, gaining more and more autonomy with the radicalization of the rule of law and the detachment of civil procedure from the realm of material law - led to this change of course. This can be seen, for example, in the work of Oskar von Bülow, who called for a greater role for the judiciary in the process of shaping the law. For him, the true reception of Roman law did not take place at the university, but through the decisions made by the magistracy, which shaped living law, the law of the case.[5]

In addition to pioneering scientific autonomy for procedural law, the third theory of process also elevated it to the level of public law. But for Bülow and his followers, the process is structured by a hierarchical relationship between subjects - judge, plaintiff and defendant - where the judge is placed in a superior position (autocratic process). The theory of the process as a legal relationship, systematized by Oskar von Bülow, was later developed by Chiovenda, Calamandrei, Carnellutti and Liebman. [6]

For Giuseppe Chiovenda, procedural law is instrumental in relation to substantial law, but, according to the author, it is a necessary instrumentality, since in order to obtain a court order on the merits, strict observance of procedural law is required.[7] With the same understanding, Piero Calamandrei accepted and developed the theory - of the potestative right - of the legal relationship, and considered that, in order to act procedurally, one must observe the relationship between the fact and the norm, constitutive requirements of the action, legitimacy and procedural interest.[8] According to this jurist, the judge is the most important character in the process, a third party, alien to the controversy, who is above the par-

3. LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. rev. and current. Rio de Janeiro: Forense, 2014, p. 82.
4. LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. rev. and current. Rio de Janeiro: Forense, 2014, p. 83.
5. STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise**: uma exploração hermenêutica da construção do direito. 11. ed. rev., atual. e ampl. Porto Alegre: Livraria do Advogado Editora, 2014 , p. 149.
6. PENNA, Saulo Versiani. **Control and procedural implementation of public policies in Brazil**. Belo Horizonte: Fórum, 2011, p. 243.
7. CHIOVENDA, Giuseppe. **Action in systems of rights**. Translation by Hiltomar Martins Oliveira. Belo Horizonte: Líder, 2003, p. 289.
8. CALAMANDREI, Piero. **Institutions of civil procedural law**. Translation by Douglas Dias Ferreira. 2. ed. Campinas: Bookseller, v. I, 2003, p. 215.

ties, who, when deciding, does not have to limit himself to reading and applying the legal norm set out in the Code, but must look to his inner sense of justice to find the solution to the specific case. [9]

Thus, in Chiovenda's dualist theory, the procedural norm is autonomous from the material law and the judicial decision is exogenous to the normative order, it does not create the law, it only declares it. In the theory of the process as a legal relationship (unitary), defended by Carnelutti, the procedural norm has no autonomy from the material norm, there is no split between them, one complements the other, but the judicial decision does not declare, but creates the norm of law, which becomes part of the legal order.[10] However, when Chiovenda supported the theory of the (dualist) legal relationship, distinguishing procedural and substantive rules as autonomous institutes, he did not establish, in contrast to Carnelutti's understanding, that these rules were separated into distinct classes in the legal framework. He simply stated that the institutes of jurisdiction and action had different normative qualities from the material norms. Therefore, the duality referred to by Chiovenda was not in the legal system, which could never be dichotomous, but in the norms. Thus, the procedural norm governs the legal acts that form the procedure and the material norms are, within the scope of the process, creators of rights, and therefore do not lend themselves to the movement of procedures to resolve the dispute.[11] The interdependence between procedural and substantive rules cannot be considered in a watertight manner, implying a bilateral neutrality between them. The fact that the rules of civil procedural law are autonomous in relation to those of substantive law does not mean indifference to the varied situations of substantive law. Autonomy is not synonymous with neutrality or disregard. In reality, procedural law has never been, or could ever have been, isolated, as there is a clear interdependence between it and substantive law. Thus, the supposed neutrality of the judge is false, because what can and should exist is their impartiality.[12] However, in the dualist or unitary theory of the legal relationship, the judge must decide fairly, but he can use legal and meta-legal arguments according to his conscience and modify the law, because he submits it to his ideal of justice. In this (autocratic) procedural model, the parties, those who will suffer the effects of the ruling, do not participate in the formation of the procedural merits, and therefore have no influence on the final decision. The judge decides solipsistically and does not subject his actions to any external control.

The legal relationship theory is unable to think of jurisdictional activity without the figure of the judge, endowed with superpowers. Jurisdiction is seen as a state activity, but the process is no more than a simple instrument of jurisdiction. The most this theory has achieved is to reduce the subjectivity of judicial decisions, since the parties' subordination to the judge compromises dialogue on equal terms.[13]

The right to equality involves the broad, effective and unrestricted exercise of fundamental rights at constitutional levels. Procedural isonomy is the principle that guarantees argumentative equality and is a presupposition of the Constitutional Process in the De-

9. CALAMANDREI, Piero. **Process and Democracy**: Lectures given at the Faculty of Law of the National Autonomous University of Mexico. Translated by Mauro Fonseca Andrade. 2. ed. rev. Porto Alegre: Livraria do Advogado, 2018, p. 38-40.

10. CARNELUTTI, Francesco. **System of civil procedural law**. Translation by Hiltomar Martins Oliveira. 2. ed. São Paulo: Lemos e Cruz, v. I, 2004, p. 224.

11. LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. rev. and current. Rio de Janeiro: Forense, 2014, p. 79.

12. MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Course in civil procedure**: protection of rights through common procedure. V. 2. 4. ed. São Paulo: Thomson Reuters Brasil, 2019, p. 37.

13. OMMATI, José Emílio Medauar. **A theory of fundamental rights**. 5. ed. Rio de Janeiro: Lumen Juris, 2018 , p. 129-130.

mocratic State of Law.[14] Thus, with the aim of overcoming the bond of subordination of the parties to the judge, in 1925 James Goldschmidt, breaking with the understanding of the process as a legal relationship, formulated the theory of the process as a legal situation in Germany.

> Thus, for Goldschmidt, there is no procedural legal relationship, given the absence, in his opinion, of a "nexus" between the parties and the judge, and even between the parties themselves. What exists in the process would be the judge's functional duty, of an administrative nature, with the parties simply being subject to his authority.[15]

This theory, defended by Goldschmidt, removed the presumed subjective bond of subordination to the judge from the parties, but maintained the same functional submission to the magistrate's power to decide, as it was also based on autocratic jurisdiction, where the judge, without any reasoning, using only his conscience, would decide the dispute. However, the Spaniard James Guasp, in 1940, developed the theory of the process as an institution, but due to the vagueness of the concept of institution, especially with regard to the legal institutional aspect, the theory received a lot of criticism and did not prosper in the legal world.

> Guasp's concept of institution is imprecise and absolutely open-ended, not least because it is based solely on sociological elements, which does not give it any meaning in the legal field. There is therefore no explanation of the process as a legal institution, let alone a constitutional one that is fundamental to the consolidation of democracy. [...]. The judicial process, which is defended as institutional for the implementation of public policies, clearly cannot be conceived on the basis of sociological or occasional elements, which vary according to events or the convenience of groups (*folkway*) and, consequently, be at the service of power strategies, but on the basis of constitutionalized principles that bind all normative commands on procedures.[16]

Still in 1940, the Italian Enrico Tullio Liebman, a former professor at the University of São Paulo Law School, founder of the Escola Paulista de Processo and follower of the legal relationship theory advocated by Giuseppe Chiovenda and Piero Calamandrei, understood the process as an instrument for exercising jurisdiction, where the judge should decide fairly, but solipsistically and subjectively, an autocratic model of process. However, Liebman improved the concept of action (eclectic theory); for him, the right of action should be seen - independently of the judgment on the merits - as an individual citizen's guarantee against the state. However, the examination of the merits presupposes the validity of the process, i.e. when the procedural preconditions are present, among them the conditions of the action - interest in acting and legitimacy - and the judge then has to decide whether to accept or reject the claim. Although the decision on preliminary issues must logically precede the decision on the merits, this decision may take place separately, or together with the decision on the merits. [17]

Nevertheless, the Uruguayan Eduardo Juan Couture (1950) developed the first theoretical propositions on the constitutional model of procedure, which advocated procedural bilateralism (adversarial) with legal equality,

14. COSTA, Fabrício Veiga. Constitutional model of collective proceedings in the theory of collective actions as thematic actions. In: OMMATI, José Emílio Medauar; DUTRA, Leonardo Campos Victor. (Coord.) **Critical theory of the process**: contributions of the Minas Gerais School of Process to democratic constitutionalism. Rio de Janeiro: Lumen Juris, 2018, p. 97.
15. PENNA, Saulo Versiani. **Control and procedural implementation of public policies in Brazil**. Belo Horizonte: Fórum, 2011, 249.
16. PENNA, Saulo Versiani. **Control and procedural implementation of public policies in Brazil**. Belo Horizonte: Fórum, 2011, p. 251-253.
17. LIEBMAN, Enrico Tullio. **Manual of civil procedural law**. Translated by Cândido Rangel Dinamarco. 3. ed. São Paulo: Malheiros, 2005, p. 201-228, *passim*.

giving the parties the right to promote debate and expose the controversial issues that are part of the dispute.

Couture sees the process as a guarantee of adversarial proceedings and the production of evidence, but does not break with the concepts - of the legal relationship - of the subordination of the parties to the judge and does not see jurisdiction as a fundamental right, factors that are essential to the constitutional democratic process.[18] However, between 1960 and 1970, the Italian Elio Fazzalari (excerpt below) renewed the concept of process and procedure, which must take place symmetrically and in an adversarial manner.

> The procedure is identified and, so to speak, named, in view of the provision (public law) to which it gives rise. [...]. The most complete distinction within the *genus* procedure - and in any case, the one that most interests us here - is the split between procedure and process. [...]. As we have repeated, the process is a procedure in which those whose legal sphere the act is intended to affect participate (are entitled to participate): in an adversarial manner, and in such a way that the author of the act cannot obliterate their activities.[19]

In this understanding, procedural action is not limited to simple participation in the process, but also consists of the interaction - active, dialogical and contradictory - of the parties, thus contributing to the formation of the procedural merit and consequently to the realization of the final outcome. For Elio Fazzalari, the use of the structure of the process allows all the lawful and/or due acts - conductors - of each of the protagonists (magistrates, assistants, parties, etc.) to take place throughout the course of the process in an imposed, ordered and schematized manner. This series of acts, in reality, constitutes the content of the legitimacy to act, the legitimized situation of the aforementioned protagonists of the process. It is therefore obvious that these series of acts are mutually implicated, since they are contradictory acts or those relating to the magistrate and his assistants. The order that is determined for the succession and mutual implication of the acts of the protagonists - of one party, the other, the magistrate, the assistants, etc. - constitutes the process. Unlike the procedural *iterary*, which is positively disciplined, the plaintiff's legitimate situation is not limited to the subject's ability to set the process in motion, but also to observing it from the point of view of subjective positions. In other words, the legitimate situation allows the subject to carry out a series of legally permitted acts, powers and duties throughout the course of the process, up until the sentence or judgment that accepts or rejects the claim. Therefore, without the development of the process, there is no formation of the merits and no judicial decision.[20] In the Fazzalarian theory, there will only be a process when the procedure is carried out in contradictory fashion, and its essence lies in the symmetrical parity of participation of those who will suffer the effects of the device in the acts that will form the procedural merit and consequently the final outcome.[21] The activity of the parties in the formation of the procedural merit and in the preparation of the judicial order, together with its author, the judge, characterizes the process, in Fazzalari, as a "species" of the "genre" procedure, which is carried out in an adversarial manner and in symmetrical parity between the parties.

18. MARTINS, Naony Souza Costa; COSTA, Fabrício Veiga. Jurisdiction, action and process in Eduardo Juan Couture. In: COSTA, Fabrício Veiga (Org.); MENEGHETTI, Rayssa Rodrigues; MÓL, Ana Lúcia Ribeiro (Coord.). **Estudos avançados de teorias do processo, da jurisdição e da ação**. Porto Alegre: Fi, 2023, p. 244-245.
19. FAZZALARI, Elio. **Institutions of procedural law**. Elaine Nassif. (Trad.). Campinas: Bookseller, 2006, p. 116-119.
20. FAZZALARI, Elio. **Institutions of procedural law**. Elaine Nassif. (Trad.). Campinas: Bookseller, 2006, p. 500-504.
21. GONÇALVES, Aroldo Plínio. **Técnica processual e teoria do processo**. 2. ed. Belo Horizonte: Del Rey, 2012, p. 96-98.

José Alfredo de Oliveira Baracho, in 1984, based on the views of Mexican jurist Hector Fix-Zamudio, also defended the model of a process for the realization of fundamental constitutional rights. He considered the adversarial principle to be the cardinal principle of constitutional procedural law.[22] This is because in the constitutionalized process, the magistrate must give the parties the right to express their opinion and make a reasoned decision on all the evidence and controversial issues raised in the case. However, Rosemiro Pereira Leal (extract below) considers the constitutionalist theory to be flawed and defends the neo-institutionalist theory of the process.

> Constitutional Jurisdiction, in the Constitutionalist School of Procedure, considered to be the tutelary activity of judges and other trial decision-makers, is an institute for conducting a process that instruments the jurisdictional authority, while, in the neoinstitutionalist school, constitutional due process is an institute for problematizing and testing the positive deontology of legal-political discourse and not a constitutional model of a guaranteeing process based on the constructed basis of the right to be settled by the jurisdictional authority, as we read in the Constitutionalist School of Procedure.[23]

The neoinstitutionalist theory differs from the constitutionalist theory in that it is based on the problematization and testability of the positive deontology of legal discourse. However, both theories are based on the construction of the final judgment through the discursive, symmetrical and adversarial practice of the litigating parties.

THEORIES OF PROCEDURE IN LIGHT OF THE FUNDAMENTAL RIGHTS OF CONSTITUTIONAL PROCEDURE

As already explained, the theory of the process as a legal relationship, established by Bülow and developed by Chiovenda, Calamandrei, Carnelutti and Liebman, understands the process as an instrument of jurisdiction. This theory advocates that the judge should decide fairly, but under the aegis of the autocratic model of process. In other words, the judge is hierarchically above the parties, analyzes the rule, but decides - alone and subjectively - according to his personal conviction. Therefore, he does not give the opportunity, as he should, to those who will suffer the effects of the judicial decision to be heard in equal measure. For this reason, this theory has been - and still is - widely questioned by various jurists and scholars of procedural law.

The socialization movement that culminated in the creation of the aforementioned theory of the legal relationship, which increased the powers of the magistrate, reached the Brazilian state in the 20th century. However, at that time (1940) the adversarial process, despite already being considered a procedural principle, did not have the same importance as the figure of the judge, which was the reason for the maxims about judgment: "give me the facts and I'll give you the right"; "the judge decides according to his conscience", among others. In this instrumentalist model of the legal relationship, the adversarial process is limited to procedural bilateralism and the formal guarantees - say and contradict - of presenting evidence and contesting it. The debates between the parties only serve to give the judge the issue and its respective contours, since it is he who will "say the right" applicable to the specific case. [24]

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22. BARACHO, José Alfredo de Oliveira. Constitutional Procedure. Rio de Janeiro: Forense, 1984, p. 354.
23. LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. rev. and current. Rio de Janeiro: Forense, 2014, p.94.
24. BAHIA, Alexandre de Melo Franco; SILVA, Diogo Bacha e; PEDRON, Flávio Quinaud. (Re)Construction of the adversarial

As mentioned, the legal relationship theory was disseminated in Brazil by Liebman, who greatly influenced the Brazilian procedural system, since Alfredo Buzaid, his former pupil and follower, was the author of the preliminary draft of the CPC/73 "Code of Civil Procedure of 1973". Therefore, this procedural code reflects the values of liberal law and, in particular, the Chiovendian doctrine of the abstraction of the process in relation to material law. The action is structured on the basis of the concept of the right of action, refined by Liebman, the so-called conditions of the action, set out in art. 267, item VI, of the CPC/73. The disregard for substantive law is notorious, given that the link between the processes of knowledge and enforcement stems from a sentence that is silent in terms of substantive law or in terms of protecting subjective rights. The condemnation is characterized by applying the enforcement sanction. It should be noted that this conception, in addition to obscuring the claim for protection of the substantive right exercised by the court in the action for knowledge, transforms the substantive relationship into a mere obligation, since it removes from the sentence any link with the protection of the substantive right, to the extent that it is characterized by applying the enforcement sanction.[25] The model of civil procedure adopted by the legislator in the revoked CPC/73 is incompatible with the democratic constitutionality in force in the Brazilian state. This is because this model of procedure does not allow for the participation of interested parties in the definition and proposition of the broad discourse of the issues of merit that delimit the object of the demand. Therefore, it makes any attempt to achieve the participatory formation of procedural merit unfeasible. In this procedural model, it is not guaranteed that all the issues brought before the court will make up the matter of procedural merit. This is because it is the magistrate who will define which issues alleged by the parties will be considered by him to be relevant to the respective procedural merits.[26]

Due to the indifference adopted by the CPC/73 in relation to substantive law, the magistrate does not have to worry about the substantial law surrounding the dispute. This favors the bureaucracy of the jurisdictional function, as it denies the judge the prerogative to participate in favor of the differences and particularities presented in the specific case, but allows the judge - to determine evidence ex officio and without the need for reasoning - to interfere in the evidentiary activity (art. 130 of the CPC/73) and also to grant injunctive relief ex officio (art. 797 of the CPC/73). It should be noted that, in this model, injunctive relief is an instrument of the jurisdiction, the granting of injunctive relief ex officio clearly portrays the supremacy and guarantee of the authority of the State. However, the magistrate was not given any power to distribute the burden of proof according to the particularities of the situation of the material right being litigated. Obviously, this could not be allowed in an autocratic procedural model, uncommitted to protecting the substantive right.[27] In Brazil, this instrumentalist conception of the process, which delegates the attribution of meanings in favor of the judge, ran throughout the 20th century (*e.g.* from Carlos Maximiliano to Paulo Dourado de Gusmão). Proponents of this theory admit the existence of meta-legal scopes, with

principle: a dialog between the Minas Gerais School of Procedure and Nicola Picardi. In: OMMATI, José Emílio Medauar; DUTRA, Leonardo Campos Victor. **Critical Theory of Procedure**: contributions of the Minas Gerais School of Procedure to democratic constitutionalism. Rio de Janeiro: Lumen Juris, 2018, p. 15-16.

25. MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **The new civil procedure**. São Paulo: Revista dos Tribunais, 2015, p. 53-54.

26. COSTA, Fabrício Veiga. **Procedural merit**: participatory formation in class actions. Belo Horizonte: Arrais Editores, 2012, p. 68-69.

27. MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **The new civil procedure**. São Paulo: Revista dos Tribunais, 2015, p. 55.

the judge being allowed to make legal determinations that are exogenous to the legislated law and, consequently, in accordance with the "healthy protagonism" and conscience of the judge.[28] The jurist José Roberto dos Santos Bedaque is one of the defenders of this theory of the legal relationship of the process. He argues that, in the instrumentalist stance, with a view to improving the system, the process should be conceived as a means of eliminating economic differences. To this end, the process must be interpreted in line with the political and social values that exist outside the process. Thus, he defends the influence of external axiological pressures, represented by political, constitutional, social, economic and legal mutations emanating from society. However, according to this jurist, there is no intention of imposing the inquisitive process, but neither is there an attempt to reach a fair decision, for which the judge's interest in the formation of the body of evidence seems essential. This proposes a middle ground between passivity and inquisition. The procedural system must be interpreted in the light of political and social values exogenous to the process. This is simply a method of thinking, based on a teleological view of the procedural phenomenon.[29]

In the same vein, Antonio Carlos de Araújo Cintra, Ada Pellegrini Grinover and Cândido Rangel Dinamarco state that the state is responsible for the well-being of society, so it must use the process to eliminate conflicts and promote the desired social peace. Through the instrumentality of the process, the state, legitimized by jurisdiction, pursues social, political and legal objectives. However, the instrumentality of the process is often attributed a negative aspect, but the successes of the process must not be such as to outweigh or contradict the intentions of substantial law, of which it is also an instrument. As a rule, questions about the negative aspect of the instrumentality of the process are based - on the principle of the instrumentality of the forms - on the formal requirements of the process, which only deserve to be complied with to the letter, under penalty of invalidity of the acts, insofar as this is indispensable for achieving the desired objectives, *e.g.* the process is not annulled due to faulty service if the defendant has appeared and defended himself.[30]

As we have seen, the theory that conceives of the process as an instrument of jurisdiction (legal relationship), in addition to giving the judge a superior position to the parties, attributes to the magistrate, in the provision of jurisdiction, the power to comply with the aims of the Welfare State and, with this, to implement public policies, even if he has to use teleological - meta-legal - arguments in his decision with political and social foundations external to the judicial process. These improprieties, in theory, are based on the establishments of the revoked CPC/73, since, as mentioned, its preliminary draft was drawn up by Justice Alfredo Buzaid, a follower of Liebman, who conceived of the process as - an instrument of jurisdiction - a legal relationship. However, with the enactment of CPC/15, Law No. 13.105/15, in order to be considered valid, civil proceedings must comply with constitutional norms. As already mentioned, art. 1 of CPC/15 establishes that civil procedure will be ordered, disciplined and interpreted in accordance with the fundamental values and norms established in the Federal Constitution, observing the provisions of said Code.

28. STRECK, Lenio Luiz. **What is it - I decide according to my conscience?** 5. ed. ver. and current. Porto Alegre: Livraria do Advogado Editora, 2015, p. 44-46.

29. BEDAQUE, José Roberto dos Santos. Instrumentalism and guarantee: opposing visions of the procedural phenomenon? In: BEDAQUE, José Roberto dos Santos; CINTRA, Lia Carolina Batista; EID, Elie Pierre (Coord.). **Garantismo processual**: garantias constitucionais aplicadas ao processo. Brasília: Gazeta Jurídica, 2016, p. 3-5.

30. CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. **General theory of procedure**. 31. ed., rev. and expanded. São Paulo: Malheiros, 2015, p. 64-65.

Although it is accepted as scientifically correct, on a purely procedural level, the understanding that procedural rules have autonomy from the substantive right invoked by the litigant before the Judiciary. In the provision of justice, the State-Judge must relativize this understanding, because in the globalized order and on constitutional grounds, there is a duty established in art. 5, item XXXV, of the CF/88, which ensures the fundamental guarantee that no violated or threatened subjective right will be deprived of access to the protection of justice. Therefore, the modern study of procedural law cannot fail to note this extremely important connection between the Democratic State of Law, which combines the legal-constitutional order with procedural law.[31] In these terms, for there to be a process, all the constitutional rules must be observed. The Federal Constitution of 1988 sets out in an exhaustive manner the provisions that establish due process of law, adversarial proceedings and ample defense. These institutes are, respectively, set out in art. 5, sections LIV and LV of the CF/88, determining that: no one shall be deprived of their liberty or property without due process of law; and litigants, in judicial or administrative proceedings, and the accused in general, are assured the adversarial process and a broad defense, with the means and resources inherent to it.

According to jurist Nicola Picardi, in the current phase of procedural science, there are clear signs of a new attitude that distinguishes and exalts the confrontations between the adversarial principle and the process. In addition to the specific characteristics of the procedure, there is clear evidence of an effective correspondence and equivalence between the participants in the process, made possible by the distribution of symmetrically equal positions between the parties. Thus, today the definition of the process as a procedure with a dialogical structure and development in contradictory fashion is being put forward. Once the visual angle of the process is shifted towards the judge, the adversarial process becomes the main point of the dialectical investigation, conducted with the participation of the parties. Stripped of the logical axioms of the Enlightenment tradition and the general principles of positive systems, the adversarial process returns to the center of the procedural phenomenon, but now with the expression of principle and due process. [32]

Picardi's contribution is very relevant to understanding the process as a procedure carried out in an adversarial manner and in symmetrical parity between the parties. These understandings are in line with the concepts advocated by the Escola Mineira de Processo, as both concepts are based on the fundamental precepts of the constitutionalized process, as established in the CPC/15.[33] The great merit of the 2015 Code of Civil Procedure lies in the express positivization of the constitutional principles of the process, established in Fundamental Norms of Civil Procedure , articles 1 to 12 of the Code, to which are added other provisions that are also principled, such as, for example, the reasoning of judicial decisions (art. 489 of the CPC/15). This completely revamped legal framework expressly establishes procedural grounds. Although they seem to be just a repetition of what the 1988 Federal Constitution already regulates, on closer examination, it will be understood that this

31. THEODORO JÚNIOR, Humberto. **Course in civil procedural law**: general theory of civil procedural law, knowledge process and common procedure. 56. ed., rev., atual. e ampl., vol. 1. Rio de Janeiro: Forense, 2015, p. 48.

32. PICARDI, Nicola. **Jurisdiction and process**. Translated by Carlos Alberto Alvaro de Oliveira. Rio de Janeiro: Forense, 2008, p. 140-143.

33. BAHIA, Alexandre de Melo Franco; SILVA, Diogo Bacha e; PEDRON, Flávio Quinaud. (Re)Construction of the adversarial principle: a dialog between the Minas Gerais School of Procedure and Nicola Picardi. In: OMMATI, José Emílio Medauar; DUTRA, Leonardo Campos Victor. **Critical Theory of Procedure**: contributions from the Minas Gerais School of Procedure to democratic constitutionalism. Rio de Janeiro: Lumen Juris, 2018, p. 18.

is not a simple reproduction, as these provisions densify the constitutional precepts, give them more specific contours and reinforce the deontological, normative and obligatory character that they already have since the Constitution, but sometimes seem weakened and forgotten by legal operators. Among all the institutes that make up the aforementioned list of Fundamental Rules of Civil Procedure, two stand out: the adversarial process and the reasoning behind decisions. [34]

However, in order to ensure compliance with and the validity of the constitutional process, it is imperative to respect the fundamental constitutional and infra-constitutional rules of civil procedure. Thus, it is worth noting that many of the problems that led to the aforementioned challenges to the 1973 Code of Civil Procedure were relativized or resolved with the enactment of the current 2015 Code of Civil Procedure. It should be noted that both in the revoked procedural code (art. 130 of the CPC/73) and in the current code (art. 370, *caput* and sole paragraph, of the CPC/15) the judge may, ex officio or at the request of the party, order the evidence necessary for the investigation of the case, but, unlike the CPC/73, the 2015 Code of Civil Procedure stipulates that, in order to reject steps considered useless or merely delaying, the judge must give reasons for his decision. As mentioned above, art. 797 of the CPC/73 was also the subject of doctrinal disagreement, as it established that in exceptional cases, expressly authorized by law, the judge could order precautionary measures without hearing the parties. These questions have now been overcome, as the aforementioned article has no correspondence in the current Code of Civil Procedure; on the contrary, art. 9, *caput*, of the CPC/15 establishes that no decision shall be handed down against a party without that party first being heard. Another criticism of the revoked Code of Civil Procedure was based on the impossibility of the judge distributing the burden of proof in a different way, since the provisions of art. 333, *caput* and items I and II, of the CPC/73 delimited the burden of proof to the plaintiff, as to the constitutive fact of his right and, to the defendant, as to the existence of a fact capable of preventing, modifying or extinguishing the plaintiff's right (static theory of the burden of proof). However, these questions have also been dispelled, as the current Code of Civil Procedure has innovated and allowed the judge, if necessary, to reverse the burden of proof. Thus, in principle, this burden will be assigned according to the terms of the static theory of the burden of proof (art. 373, *caput* and items I and II, of the CPC/15), which states: the burden of proof is on: I - to the plaintiff, as to the fact constituting his right; to the defendant, as to the existence of a fact capable of preventing, modifying or extinguishing the plaintiff's right. However, as established in art. 373, §§ 1, 2, 3 and 4 of CPC/15 - the dynamic theory of the burden of proof - the judge may, in a reasoned decision, assign this burden differently. This may occur in cases of inversion *ope legis* (legal provision) or convention - prior to or during the process (available rights) - or even in inversion *ope judicis*, due to the peculiarities of the case (concrete case), related to the impossibility or excessive difficulty of fulfilling the burden, under the terms of the static theory of the burden of proof, or even in the greater ease of obtaining proof of the opposite fact. However, the judge must give the party the opportunity to discharge the burden assigned to them and the reversal of the burden of proof must not create a situation in which it is impossible or excessively difficult for the party to discharge the burden.

34. BAHIA, Alexandre de Melo Franco; SILVA, Diogo Bacha e; PEDRON, Flávio Quinaud. (Re)Construction of the adversarial principle: a dialog between the Minas Gerais School of Procedure and Nicola Picardi. In: OMMATI, José Emílio Medauar; DUTRA, Leonardo Campos Victor. **Critical Theory of Procedure**: contributions of the Minas Gerais School of Procedure to democratic constitutionalism. Rio de Janeiro: Lumen Juris, 2018, p. 19.

Evidence should be seen as a guarantee of providing the judge with elements to establish the existence or non-existence of facts. Thus, proof is one of the essential aspects of the adversarial principle. However, the mere formal declaration of adversarial proceedings would be of no use if the court were not guaranteed proof of the facts that support its position in the case.[35] The importance of the innovations brought about by the CPC/15 for procedural law is notorious, but some criticisms, such as those made by André Cordeiro Leal and Vinícius Lott Thibau, are not restricted to the provisions of the repealed CPC/73, but are also directed at the current procedural code. When questioning art. 16 of the CPC/15, which states: civil jurisdiction is exercised by judges, these jurists claim that the 2015 Code of Civil Procedure did not bring anything new to the legal system. This is because, in traditional dogma, the exercise of jurisdiction has always been state. Thus, according to these jurists, the CPC/15, by textual reproduction, portrays exactly what Alfredo Buzaid had inherited from Oskar von Bülow and other followers.[36] These questions should be put into perspective, because, in addition to the institutes already mentioned, the CPC/15 brought with it several other changes and innovations that run counter to the fundamental principles of Constitutional Procedure. *For example*, the repealed art. 131 of the CPC/73 established that the judge shall "freely" assess the evidence, taking into account the facts and circumstances contained in the case file, even if not alleged by the parties; but shall indicate in the judgment the reasons that formed his conviction. In art. 371 of the CPC/15, the word "freely" has been deleted, and the judge will assess the evidence in the case file and, regardless of the person who provided it, will indicate in the decision the reasons for his conviction.

The so-called principle of motivated free will could represent a blank check in the hands of the magistrate. These rights are not at the judge's disposal, so they should not be exercised according to the judge's will, but according to the non-negotiable exercise of argument, carried out in an adversarial manner, as determined by the Federal Constitution of 1988.[37] With this, the legislator ruled out the possibility of the judge establishing the production of certain evidence according to his free will and legitimately rejecting it. This is clearly an attempt to bring procedural legislation into line with the constitutional rule, which establishes in art. 93, item IX, of the CF/88 that judicial decisions must be motivated under penalty of nullity. Thus, the magistrate may not reject the production of evidence, except when it is useless or merely delaying, but even then, the decision must be reasoned.[38] The removal of the word "freely" from Article 371 of the CPC/15 puts an end to the so-called "principle of free will", which in reality was never a principle. As a result, the magistrate will no longer be able to justify his decision by claiming that he "judged according to his conscience". Thus, by removing the power of free judgment or conviction, the CPC/15 removes the role of the judge, the rational presumption and the archaic procedural instrumentalism. However,

35. LOPES, João Batista. The right to evidence, judicial discretion and the grounds for sentencing. In: DIDIER JR., Fredie *et al.* (Coord.). **Direito probatório**. 2. ed. rev. Salvador: Juspodivm, 2016, p.51.

36. LEAL, André Cordeiro; THIBAU, Vinícius Lott. The fundamental structure of dogmatic procedural law and its repercussions on the 2015 Brazilian Code of Civil Procedure. In: OMMATI, José Emílio Medauar; DUTRA, Leonardo Campos Victor. **Teoria Crítica do Processo**: contributos da Escola Mineira de Processo para o constitucionalismo democrático. (Coord.). Rio de Janeiro: Lumen Juris, 2018, p. 39.

37. PINHO, Ana Cláudia Bastos de; BRITO, Michelle Barbosa de. Is it possible to control motivated free will? When the lack of a decision theory turns discretion into a "principle". In: OMMATI, José Emílio Medauar. (**Ronald Dworkin and Brazilian law**. Rio de Janeiro: Lumen Juris, 2016, p. 99.

38. LANES, Júlio Cesar Goulart; POZATTI, Fabrício Costa. Is the judge the sole recipient of evidence? In: DIDIER JR., Fredie *et al.* (Coord.). **Direito probatório**. 2. ed. rev. Salvador: Juspodivm, 2016, p. 97-102.

this does not mean that the judge should become a 19th century exegete or be prohibited from exercising hermeneutic interpretation. [39]

As we have seen, the 2015 Code of Civil Procedure established a set of rules that must be applied in the process. Among other legal requirements, the judge must decide in a reasoned manner and observe the adversarial process, full defense and due process of law. It is therefore inconceivable to accept unfounded, solipsistic and autocratic judicial decisions. Therefore, the concepts that underpin the instrumentalist theory of the procedural legal relationship are untimely and inconceivable for the constitutionalized process, since the equal exercise of the adversarial process is impractical in a procedural environment that places the judge above the parties, adopts arguments with meta-legal foundations and admits subjective decisions, based on the conscience of the judge.

With this understanding, José Emílio Medauar Ommati advocates overcoming this instrumentalist theory of the legal relationship and adopting new concepts that do not restrict the process to the mere exercise of the magistrate's jurisdictional power. This is because the aforementioned theory gives the magistrate broad decision-making powers, even ignoring the right of interested parties to participate with their arguments in the construction of the final decision. It should be noted that jurisdiction appears as a simple act or power of the state, exercised through the process, the instrument of jurisdiction, and the magistrate is the solitary subject who will guarantee state power. According to the legal relationship theory, the process not only serves to resolve the contentious situation presented by the parties, but must also develop and satisfy meta-legal goals, which can be achieved as a result of the moral and ethical training of the magistrate, the guardian of society's values.[40] In this way, this autocratic understanding, which considers the process to be a simple instrument of jurisdiction, cannot last, because the mitigation of the broad defense and the adversarial process negatively interferes in the formation of the procedural merit, consequently compromising the judicial decision.

The judge does not decide in a wise, mathematical and solitary way; a dialogical link must be created between the parties involved in the process, because "the light" will emerge from the contradictory debate between these parties.[41] In this sense, where there is no bond, there can be no dialog. For there to be a contradiction, a dialogic bond must first be created, because only then can an understanding be reached that is free of any coercion.[42] Only under the aegis of a truly democratic paradigm can we consider the possibility of overcoming the archaic ties that still bind some Brazilian jurists to the mantle of legal positivism and to a General Theory of Procedure that advocates it as an instrument of the legal relationship.[43] In order to overcome the legal dogma that is closely linked to the state, it is necessary to implement new legal models that value the universality of constitutional principles.[44] In this understanding, the Fazzalarian model,

39. STRECK, Lenio Luiz. Evidence and the new CPC: the extinction of the power of free conviction. In: DIDIER JR., Fredie *et al.* (Coord.). **Direito probatório**. 2. ed. rev. Salvador: Juspodivm, 2016 , p. 110-111.

40. OMMATI, José Emílio Medauar. The crisis of paradigms in process theory in Brazil. In: OMMATI, José Emílio Medauar. (**Writings on fundamental rights**. V. 1. Belo Horizonte, Conhecimento Livraria e Distribuidora, 2019, p. 245.

41. PÉRES LUÑO, Antonio Henrique. **Perspectives and current trends of the Constitutional State**. Translated by José Luis Bolsan de Morais and Valéria Ribas do Nascimento. Porto Alegre: Livraria do Advogado Editora, 2012, p. 95.

42. GADAMER, Hans-Georg. **Truth and Method I**: Supplements and Index. Translated by Ênio Paulo Giachini and Marcia Sá Cavalcante-Chuback. 6. ed. Petrópolis: Vozes; Bragança Paulista: Universitária São Francisco, 2011, p. 139.

43. PEDRON, Flávio Quinaud. Overcoming the thesis of the magistrate's free will in the face of the duty to seek the correct answer in Ronald Dworkin's theory of law as integrity. In: NUNES, Dierle; LEITE, George Salomão; STRECK, Lenio Luiz. **O fim do livre convencimento motivado**. Florianópolis: Tirant Lo Blanch, 2018, p. 91.

44. JULIOS-CAMPUZANO, Afonso de. **Constitutionalism in times of globalization**. Jose Luis Bolsan de Morais; Valéria Ribas

which considers the process as a procedure carried out in an adversarial manner between the parties, goes beyond the theoretical conception of the process as an instrument of a legal relationship. This is because adversarial proceedings are the opportunity given to the recipients of the judicial order to contribute, in an adversarial manner and in symmetrical parity, to the formation of the procedural merit and the judicial order. This prerogative cannot be reconciled with the autocratic subjection of the parties to the magistrate. With the conceptual evolution of the right to adversarial proceedings, the instrumentalist model of the procedural legal relationship is no longer logically admissible, since the relationship of subject or subordination is unacceptable in the constitutionalized model of proceedings. The parties are subject to the judgment, to the final act of the process, in the preparation of which they participate, and not to the magistrate. The concept of process as a procedure carried out in an adversarial manner between the parties also renews the concept of action, which becomes a series of subjective and composite propositions, attributed to the parties throughout the course of the process, which must be exercised in correlation with the activities of the judge, in the exercise of his jurisdictional function. In the normative structure of the constitutionalized process, the powers, faculties and duties of the parties cannot be demanded; they (the parties) may or may not turn them into burdens. However, the jurisdictional function, which cannot be waived, belongs to the State, which must fulfill the power/duty of the response, the judicial decision. The concept of the process as an adversarial procedure does not involve any extra-legal purposes, because the participatory production of procedural merit and consequently the preparation of the final (valid) judgment are legally regulated.[45] Furthermore, although it is not indifferent, there is no logical interdependence between procedural and substantive rules in the process. Therefore, by conceiving of the process as an adversarial procedure between the parties, the recipients of the judicial decision no longer need to worry about the ideological preferences of the judges. This is because it is the parties who will contribute, in a dialogical and adversarial way, to the formation of the procedural merit and consequently influence the final outcome. Thus, the old instrumentalist theory of the legal relationship was supplanted by the Fazzalari theory, because this theory is in line with the precepts of Constitutional Procedure and the principles of the Democratic Rule of Law. This is because in Fazzalari, the procedural *iterary* is carried out in a contradictory manner and in symmetrical parity of the parties, ensuring ample defense and, in addition, the judicial decision will only be considered valid if it is duly substantiated, therefore, in accordance with due process of law.

In a democratic state, the judge must act impartially and cannot use meta-legal arguments in his decision, as the instrumentalist theory claims. In exercising jurisdiction, the judge is not authorized to innovate legislation (neo-positivism), but must impartially interpret the normative text and apply it to the specific case, as determined by the national legal system.

FINAL CONSIDERATIONS

As stated above, art. 1 of CPC/15 establishes that, in compliance with the provisions of the Code, the process will be ordered, disciplined and interpreted in accordance with the fundamental values and norms established in the Federal Constitution of 1988. Therefore, in order for the process to be considered valid, the legislation and constitutional norms must be observed, in particular, the adversarial process, full defense and due process of law (art. 5, items

Nascimento (Trad.). Porto Alegre: Livraria do Advogado Editora, 2009, p. 64.

45. GONÇALVES, Aroldo Plínio. **Técnica processual e teoria do processo**. 2. ed. Belo Horizonte: Del Rey, 2012, p. 170-172.

LIV and LV, of the CF/88), in addition, judicial decisions must be substantiated (art. 93, item IX, of the CF/88). At the infra-constitutional level, art. 9 of CPC/15 establishes that a decision should not be made against one of the parties without their prior hearing, subject to the exceptions set out in the procedural code itself. Article 10 of the CPC/15 states that the judge may not decide, at any level of jurisdiction, based on grounds in respect of which the parties have not been given the right to comment, even if it is a matter on which he must decide ex officio. Art. 489, §§ 1, 2 and 3 of the CPC/15 imposes that, based on the principle of procedural good faith, every judicial decision, be it interlocutory, sentence or judgment, must be duly substantiated, starting from the confrontation of all the arguments raised in the process capable of, in theory, infirming the judge's conclusion. Therefore, unfounded, solipsistic and autocratic judicial decisions are unacceptable, as the procedural merits must be produced dialogically and in an adversarial manner by the parties, thus contributing to the formation of the judicial decision.

In these terms, the process cannot be considered an instrument of jurisdiction, but a procedure carried out in an adversarial manner, guaranteeing litigants the right to participate in symmetrical parity, in the phase that shapes the procedural merit and prepares the judicial decision. However, as mentioned above, some jurists, supporters of the instrumentalist theory of the legal relationship of the process, argue that the formal requirements of the process only deserve to be complied with to the letter, under penalty of invalidity of the acts, only when this is indispensable for achieving the desired objectives. To support this view, these jurists claim that proceedings cannot be annulled due to faulty service of process if the defendant has appeared and defended himself. However, it is inappropriate to generalize and expand a procedural exception, which does not cause any harm to the parties and aims to achieve procedural speed (art. 4 of CPC/15) to justify solipsistic and subjective judicial decisions, based on the judge's conscience and meta-legal arguments, as advocated by the supporters of this theory. This is extremely contrary to deontology and good legal-procedural technique, and therefore violates the Constitutional Process. The (instrumentalist) theory of the legal relationship cannot persist and must be overcome. The process must be understood as a procedure carried out in an adversarial manner and on an equal footing between the parties. As a result, judicial decisions will only be considered valid if they are properly substantiated, as determined by the 2015 Code of Civil Procedure and the 1988 Federal Constitution itself.

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