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Artigos Originais

DEJUDICIALIZATION AND PROCEDURALISM BASED ON THE NATURE OF CONFLICTS AND ACCORDING TO THE BRAZILIAN CONSTITUTION

DESJUDICIALIZAÇÃO E PROCESSUALIDADE COM BASE NA NATUREZA DOS CONFLITOS E CONFORME A CONSTITUIÇÃO BRASILEIRA

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Abstract
The objective of this paper is to show that Access to Justice is a broader concept than Access to the Judiciary. Apart from the movements for access to justice, it is the intention to prove that the Alternative Means of Dispute Resolution and the studies of Conflict Perspective are equally relevant, having in mind that they both defend a plurality of conflict processing institutions (state or not), based on the hypothesis that dejudicialization is an important way to strengthen institutions and promote economic and social development. Therefore, the deductive approach method was used in conjunction with the propositional-juridical method to demonstrate that the exhaustion of the state-owned model in solving conflicts shows that it is possible (and necessary) to develop the Proceduralism beyond the scope of the Judiciary, in order to institutionally expand forms of conflict resolution in civil society. From this, the concept of Proceduralism arises, interconnected with the due process and which is also suitable for the out-of-court ways of dispute resolution, in order to achieve adequate, effective and due process protection, so that pacification is carried out along the lines of constitutional guarantees, with constitutional procedurality also acting on the unjudicialized means of resolving conflicts.

Keywords: Dejudicialization; Access to justice; Alternative Dispute Resolution; Proceduralism; Due Process.

Resumo

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O objetivo do presente trabalho é mostrar como o Acesso à justiça é conceito mais amplo que acesso ao Poder Judiciário. Além do movimento de acesso à justiça, deseja-se demonstrar que os Meios Alternativos de Solução de Conflitos e os estudos da Perspectiva do Conflito são igualmente relevantes, tendo em vista que defendem uma pluralidade de instituições (estatais ou não) de processamento de conflitos, partindo de hipótese de que a desjudicialização é um relevante caminho para fortalecer instituições e promover desenvolvimento social e econômico ao reduzir as incertezas das interações sociais. Para tanto, utilizou-se o método de abordagem dedutivo em conjunto com o método jurídico-propositivo para demonstrar que o exautimento do modelo estatal de solução de conflitos demonstra que é possível (e ncessário) desenvolver a Processualidade para além das fronteiras do Judiciário, de modo a institucionalizar a expansão de meios de solução de conflitos junto à sociedade civil. A partir disso, surge a ideia de Processualidade que, imbricada com o devido processo legal, se lança a todos os meios de solução de controvérsias para atingir uma tutela processual adequada, efetiva e justa, de modo que a pacificação seja realizada nos moldes das garantias constitucionais, atuando a processualidade constitucional também sobre os meios desjudicializados de solução de conflitos.
Palavras-chave: Desjudicialização; Acesso à justiça; Meios alternativos de solução de conflitos; Processualidade; Devido Processo.
Summary: Introduction. The “perspective of the conflict” – shaping de multidoor corthouse system. The constitutional model of process as a structuring premise for the various means of conflict resolution. The general model (or essential core of proceduralism) on dejudicialization. Conclusion. References.

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1 INTRODUCTION

Conflict is a phenomenon inherent to the human condition and social interactions. The democratic societies use this condition to revitalize norms and promote the emergence of new ones, rather than simply stifle them. In this context, the shape of institutions designed to solve conflicts and the way they are structured are institutional factors that interfere – positively or negatively – in mitigating the uncertainties generated by human interaction.

However these institutions are – or should be – a larger concept than just the adjudicatory and state-owned solutions. In this study, supported by the institutionalist theory of the Nobel Prize in Economics – Douglas North – it starts from the hypothesis that there is a correlation between the strengthening of institutions (as a condition for social and economic development) and provides special focus on initiatives that promote dejudicialized – and preferably specialized – Access to Justice.

The general objective is to demonstrate that Proceduralism must be present in all ways of conflict resolution, whether state or not, whether in methods with greater or lesser autonomy of the parties in conflict. Therefore, the objective was to demonstrate the disproportion between conflicts that occurred in the social environment and those that effectively are solved by Judiciary; the fallacy that the judicial system is available to offer – with quality – solutions to each and every

citizen; the capacity for exponential generation of conflicts and perceptions of injustice in a pluralistic society *versus the* difficulties of traditional process model.

Thus established, the exhaustion of the current state-owned model urgently needs to find ways to expand the notorious gains and achievements provided by the scientific evolution of Civil Procedure to transform Proceduralism into a tool available to civil society, structuring a true system (Niklas Luhman) of multidoor justice. In this regard, the expansiveness, variability and perfectibility characteristics of Process proposed by Italo Andolina and Giuseppe Vignera help in this construction.

Through the deductive method, the study analyzes the general lines of the problem in order to re-accommodate them to new conclusions probable and new contexts, as well as – using the legal-propositional methods – to contribute to the dejudicialization of conflicts and the implementation of the bases of a Proceduralism that goes beyond jurisdictionality.

2 THE "PERSPECTIVE OF THE CONFLICT" – SHAPING DE MULTIDOOR CORTHOUSE SYSTEM

Until the end of the 1970s, the expression "access to justice" usually implied that conflict resolution would take place only through governmental or state-owned institutions; a conception that can be largely attributed to a rationale inherited from the scientific phase[3] of Procedural Law that prevailed centuries ago.

However, based on a series of scientific studies referred to as the "Florence Project" – coordinated by Cappelletti[4] – the horizon was broadened to include a variety of methods to achieving justice under different institutional arrangements: expanding the meaning of "access" that once existed and triggering profound transformations in the studies and institutes dealing with this subject, as well as in contemporary Civil Procedural Law itself.

As is well known, in the structure proposed by Cappelletti[5], the first "wave" of Access to Justice was directed at reforming the institutions that provided legal services to underprivileged people; the second "wave" sought to expand the representativeness of collective or diffuse interests, such as those of consumers and

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[3] CASTILLO, Niceto Alcalá-Zamora y, "Evolución de la doctrina procesal", in CASTILLO, Niceto Alcalá-Zamora y, *Estudios de teoría general e historia del proceso*, 1945-1972, México, UNAM, 1974, p. 303; MAC-GREGOR, Eduardo Ferrer, "Hector Fix-Zamudio y el origen cientifico del derecho procesal constitucional", 1928-1956; MAC-GREGOR, Eduardo Ferrer, LARREA, Arturo Zaldivar Lelo de, "La ciencia del derecho procesal constitucional: estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho", México, Marcial Pons, 2008.

[4] CAPPELLETTI, Mauro, GARTH, Bryant, *Acesso à Justiça*, Trad. Ellen Gracie Northfleet, Porto Alegre, Fabris, 1988.

[5] CAPELLETTI, Mauro, GARTH, Bryant, *op. cit*, 1988.

environmentalists. The third and last "wave"[6] of Access to Justice, which is the most relevant for the purposes of this study, consisted in changing the focus from traditional forms and judicial procedures to the diversity of dispute-processing institutions**,** which, in that author's view, would create less formal alternatives to handle conflicts[7/8].

The "Access to Justice" movement, as we know it today, includes – as Galanter reports – a set of intellectual triplets, alongside Alternative Dispute Resolution and Conflict Perspective in Legal Studies[9] that, although they were born together, went in different directions and matured in quite different environments[10].

The term Alternative Means of Conflict Resolution (hereinafter referred to as MASC's), in turn, derived from the expression in English, Alternative Dispute

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6 Kim Economides, a disciple of Cappelletti, defends the existence of a supposed fourth wave. Even though we do not fully share the viewpoint of the author it is worth citing him and let the reader evaluate: It is possible to "(…) identify a fourth, perhaps last, wave of movement for the access to justice: The access of the operators of the law (including those who work in the legal system) to justice. Within the conscience of the legal profession there is a strange paradox, almost invisible: How do the lawyers, who daily manage justice, perceive and have themselves, "access to justice"? Does the everyday experience of lawyers and their proximity to the Judiciary blind the legal profession in relation to more profound conceptions of justice (internal or social) and consequently lead the profession into ignoring the relation between civil justice and civic justice. Our "fourth wave" exposes the ethical and political dimensions of the management of justice and accordingly highlight new and important challenges to both the professional responsibility as well as the legal education. The current problem is not just to measure the access for citizens to justice and ignore the mapping out of spaces in the supply of legal services, but, before this, open new perspectives on the definition of justice itself. In ECONOMIDES, Kim, "Lendo as ondas do Movimento de Acesso à Justiça: epistemologia versus metodologia?", PANDOLFI, Dulce et al (Orgs.), *Cidadania, justiça e violência,* Rio de Janeiro, Ed. Fundação Getúlio Vargas, 1999, p. 72-73.

7 CAPPELLETTI, Mauro, GARTH, Bryant, *op. cit.*, p. 67.

8 We do not ignore the historic importance of "formalism" when concretizing rights, especially those of a procedural nature. For a critical view on possible excess of casualness see ECONOMIDES, Kim. Reading the waves of the "Movement for Access to Justice": Epistemology versus methodology? In PANDOLFI, Dulce et al (Orgs.), *Cidadania, justiça e violência,* Rio de Janeiro, Ed. Fundação Getúlio Vargas, 1999, p. 72-73: "But do these "third wave" reforms promote "access to justice" or "access to peace"? In my opinion, resolution of disputes cannot necessarily be compared to access to justice, because the risk exists that citizens will be offered pacific solutions, perhaps even solutions that may make them extremely satisfied and happy, but which are in fact inferior to the results that could have been obtained had their legal rights been exercised through the formal legal system. There is therefore a real risk that this all-encompassing drive for judicial informality, currently in fashion, may result in a great negation of the values, importance and historical significance of "judicial formalism".

9 Even though the original text uses the word "disputes", we preferred for purposes of this work to use the term conflict and dispute, because it is more in line with our mother tongue.

10 GALANTER, Marc, "Acesso à Justiça em um mundo de capacidade social em expansão", *Revista Brasileira de Sociologia do Direito*, Porto Alegre, v. 2, n. 1, p. 37-49, jan./jun, 2015.

Resolution (ADR), consists of ways of resolving conflicts that do not necessarily involve judicialization (initially, the concept involved avoiding the judicial process, hence being called *alternative*) including, but not limited to, arbitration, mediation, negotiation, conciliation and early neutral evaluation.[11]

Although its origin was linked to the idea of an *alternative* to adjudication, it should be noted that currently these means are legally encouraged, including in the context of a judicial process. It is found, for example, in the Civil Procedure Code of 2015, which states that the "State will promote, whenever possible, the consensual solution of conflicts"[12] and that "conciliation, mediation and other ways of consensual solution of conflicts must be stimulated by judges, lawyers, public defenders and members of the Public Ministry, including in the course of the judicial process"[13].

The "Perspective of the Conflict in Legal Studies", on the other hand, consisted of the set of works that argue that the study of Law should focus both on the structure of conflict resolution and on the norms of the Judiciary,[14] since, after all, the adjudication is only one of the ways in which society solves them, and it is not even the most frequent one. Similarly, the conflict would be like the Sphinx of Thebes, which asks to be deciphered. Said movement distributes and qualifies the conflict in a pyramid figure to demonstrate that the number of injuries and/or conflicts that occurred in the world of facts is significantly higher than those injuries or conflicts that require intervention by the Judge-State.

As can be seen from the figure below, in this context, the injuries that occurred (at the broad base of the pyramid) are different from those injuries perceived by the subjects of the law and, successively, from those injuries attributed to a responsible agent, and from those injuries effectively claimed, which, when resisted, become in a *Carnelutian* sense[15] known among processualists a "lawsuit":

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11 CORNELL LAW SCHOOL, *Alternative dispute resolution*, Disponível em: <https://www.law.cornell.edu/wex/alternative_dispute_resolution>. Acesso em: 15 jan. 2020.

12 BRASIL, *Código de Processo Civil*, Lei 13.105, de 16 de março de 2015, art. 3º, § 2º.

13 BRASIL, *Código de Processo Civil*, Lei 13.105, de 16 de março de 2015, art. 3º, § 2º.

14 ABEL, Richard, "A comparative theory of dispute institutions in Society", *Law & Soc'y Rev*, 217, 1974; NADER, Laura, TODD JR., Nader, "The disputing process", *Law & Soc'y Ver*, 9, 1978; CARTWRIGHT, Bliss, "Conclusion dispute and reported cases", *Law & Soc'y Rev*. 163, 1975; CARTWRIGHT, Bliss, "Introduction: litigation and dispute processing", *Law & Soc'y Rev*, 5, 1974.

15 To Lúcio Delfino, based on Carnelutti, "insatisfaction is a state of mind; it can be characterized by the internalized desenchantment that arises in situations that are contrary to a certain interest, no matter of what kind. Expextation on the other hand is the real materialization or externalization of a wish aimed at satisfying interests". DELFINO, Lúcio, "Insatisfações, lides, pretensões e resistências", *Revista Jus Navigandi*, ISSN 1518-4862, Teresina, ano 12, n. 1549, 28 set, 2007, Disponível em: https://jus.com.br/artigos/10460, Acesso em: 19 jan. 2020. To Carnelutti "pretension is an act not a power; it is something someone does, not something that someone has; a manifestation, not a superiority os such desire". CARNELUTTI, Francesco, *Instituições do processo civil*, v. I, Tradução de Adrián Sotero De Witt Batista, Campinas, Servanda, 1999, p. 80.

Pyramidal Structure of Perception of Conflicts

Source: Elaborated by the author himself based on the article by GALANTER[16].

From this perspective, it is easy to see the overcoming of a predominantly state and adjudicatory view in the context of social pacification: the Judiciary, even though it has a relevant and essential role in conflict resolution, develops an unequivocally subsidiary role in this matter and does not represent neither the only nor the largest portion of that mission. As already noted, the conflict perspective pyramid model thus opened up the multiple possibilities of disconnection between the conflict stages and the prevailing adjudication culture[17] and demonstrated that the legal systems of most modern democracies promise much more than deliver results in the protection of rights, as they are structured in such a way that if all citizens with a legitimate demand invoked it, the system would collapse.[18] It is as if, surprisingly and unconsciously, the state-adjudication system was structured to be used as little as possible or only by a few subjects or otherwise risk collapsing.

This broader guideline for access to justice and studied from the perspective of conflict, in a way, restores a historical truth that consists in the fact that jurisdiction has never been effectively monopolized by the State, so many and diverse have been, over time, the means and accredited agents to prevent and/or resolve the conflicts that arise within the community, as suggested by Mancuso[19].

In this context, ironically, the viability of a predominantly state and adjudicative system of conflict resolution would depend on apathy, ignorance, cultural barriers and costs that inhibit the perception and recognition of rights, as Galanter rightly observes.[20] It turns out that the viability of such a system could be perfected both by the dissuasive effectiveness of the rules implemented (without the

16 GALANTER, Marc, *op. cit.*, 2015.

17 *Ibidem.*

18 *Ibidem.*

19 MANCUSO, Rodolfo de Camargo, *Acesso à Justiça – condicionantes legítimas e ilegítimas*, Salvador, Juspodivm, 2018, p. 365.

20 GALANTER, Marc, *op. cit.*

need for enforcing rights)[21] and by the availability of less formal forums for legal action, as advocated – among others – by Galanter[22] and Sander[23].

From this perspective, it becomes relevant to think about proceduralism and Due Process, in order to continually constitute themselves as a patrimony of society, a tool in the solution of their conflicts and not only as a mere technical method to be thought in the light of the strict reality of the Judiciary. After all, as already argued, proceduralism is not to be confused with Jurisdiction[24].

As an additional factor to the insufficiency of the predominantly adjudicatory and state model, there is the fact that the concepts of justice and injustice are fluid, not constituting a zero-sum game, as explained by Galanter[25]:

> *Justice is no longer, if ever was, stable and determined, but fluid, moving and unstable. (...) The justice to which we seek access is the denial or correction of injustice. But there is not a fixed amount of injustice in the world that is reduced by each obtaining of justice. The sphere of perceived injustice expands dynamically with the growth of human knowledge, with advances in technical feasibility and the growing yearnings for amenity and safety (…).*

For the aforementioned author[26], the more problem solutions that can be invented and performed by human beings, the more the line between misfortune (which would be inevitable) and injustice (which could be avoided) changes. For example, if, previously, the existence of an incurable disease was an unalterable misfortune, today, a perception of insufficient effort in the search for a cure or in the distribution of medicines can make a complaint of injustice emerge, therefore, the domain of injustice ends for being extended. And the Judge-State will hardly be able to follow – and pay for – the pace and intensity of the generation of these new conflicts.

Hence the importance of enabling society, in its various niches and structures, to resolve its conflicts based on a constitutional model of process and to think of a proceduralism as a cultural and social heritage and tool in order to

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21 One cannot but note that in a mass society, the control of the right to and adoption of administrative, regulatory and pre-judicial measures are essential to the balance of the system, since the rhythm of generation of conflicts in such societies is incompatible with the Judiciary's conflict resolution ability.

22 GALANTER, Marc, *op. cit.*

23 SANDER, Frank, *Varieties of Dispute Processing*, Eagan, West Publishing Company, 1976.

24 PEREIRA, Matheus Costa, "Processualidade, jurisdicionalidade e procedimentalidade (I): algumas reflexões sobre as origens da ciência processual e do paradigma instrumentalista", *Empório do Direito Coluna Garantismo Processual*, Disponível em: <https://www.academia.edu/38546178/Processualidade_jurisdicionalidade_e_procedimentalidade_I_algumas_reflex%C3%B5es_sobre_as_origens_da_ci%C3%AAncia_processual_e_do_paradigma_instrumentalista>. Acesso em: 16 nov. 2019.

25 GALANTER, Marc, o*p. cit.*

26 GALANTER, Marc, o*p. cit.*

contribute with a guarantee framework to the phenomenon of dejudicialization, observing the guidelines recommended by the constitutional model of process, as relates to variability, perfectibility and expansiveness.

3 THE CONSTITUTIONAL MODEL OF PROCESS AS AN STRUCTURING PREMISE FOR THE VARIOUS MEANS OF CONFLICT RESOLUTION

There is no doubt that, in the paradigm[27] currently in force, the Constitution is a filter[28] through which the validity of the entire legal-social system is conditioned. In this perspective, although the constitutionalizing of infraconstitutional norms does not mean the "inclusion in the Major Law of norms specific to other domains"[29], the reinterpretation of ordinary institutes from a constitutional perspective is recommended, so that all legal activity is exercised in the light of the Constitution and passed through its sieve[30].

And Civil Procedural Law, of course, also experienced such an influx.

As previously mentioned, and based on the teachings of Andolina and Vignera[31], the constitutional process model would be a general process scheme, with three structural characteristics: expansiveness, variability and perfectibility. Expansiveness would ensure suitability so that the procedural standard could be expanded to specific process microsystems, as long as it maintains compliance with the general model. The variability would authorize the specialization of certain general precepts for a given microsystem; and, finally, perfectibility would be the capacity to improve the general model through the legislative process.

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27 It is worthwhile alerting the reader to the nuances that involve the concept of paradigm, because to some (KUHN, Thomas S, *A estrutura das revoluções científicas*, São Paulo, Perspectiva, 1998) this would be a universally recognized scientific feat by a specific community that, during a certain period and in a certain context, supplies modular problems and solutions; when at the same time, to others the idea of paradigma does not limit itself to the occurrence of consensus, since these are ever rarer in contemporary plural societies. (HABERMAS, Jürgen, *Direito e Democracia: entre facticidade e validade*, v. II, Tradução Flávio Beno Siebeneichler, Rio de Janeiro, Tempo Brasileiro, 2003, p. 129).

28 SCHIER, Paulo Ricardo, *Filtragem constitucional*, Porto Alegre, SAFE, 1999.

29 BARROSO, Luis Roberto, "Prefácio: O Estado contemporâneo, os direitos fundamentais e a redefinição da supremacia do interesse público", in SARMENTO, Daniel (Org.), *Interesses públicos versus interesses privados: desconstruindo o princípio de supremacia do interesse público*, 3. Tir, Rio de Janeiro, Lúmen Juris, 2010, p. 11.

30 CANOTILHO, José Joaquim Gomes, MOREIRA, Vital, *Fundamentos da constituição*, Coimbra, Almedina, 1991, p. 45.

31 ANDOLINA, Italo, VIGNERA, Giuseppe. *I fondamenti constituzionale della giustizia civile: il modelo constituzionale del proceso civile italiano*, 2. ed, Torino, G. Giappichelli, 1997, p. 09-10.

But how to define what the proposal or the general model should be? What, after all, would be constitutionally guaranteed as an essential core of due process and accordingly projected onto all means of conflict resolution (unjudicialized or not) to promote and expand access to justice? Now, the *a priori* definition of this essential nucleus is an arduous task, perhaps impossible and unnecessary, according to the famous statement by Judge Frankfurter[32] of the US Supreme Court:

> *(...) due process cannot be imprisoned within the treacherous limits of a formula... due process is the product of history, reason, the flow of past decisions and the unwavering confidence in the strength of the democratic faith that we profess. Due process is not a mechanical instrument. It is not a standard. It is a process. It is a delicate process of adaptation that inevitably involves the exercise of judgment by those to whom the Constitution has entrusted the unfolding of this process.*

Even so, in the wake of the teachings on expansiveness, variability and perfectibility proposed by Andolina and Vignera, Abelha[33] maintains that the means of conflict resolution must fully observe the formal and substantial constitutional dictates. Therefore, because the due process is the root of all other structuring principles of the exercise of the jurisdictional function, it is inferred that the constitutional postulates of isonomy, contradictory, broad defense, impartiality of the judge, access to evidence, natural judge, reasonable length of time of process etc., are nothing more than developments of "due process", which, when exercised in the process, culminate in what is called "fair process or just judicial protection". Therefore, it would be fair to have jurisdictional protection that manages to put into practice all the principles and rules derived from due legal process, with the appropriate balance between them, to achieve a result that can be considered "fair"[34].

The definition of the general model of constitutional process or of the essential core of constitutional proceduralism will occur not in a static and a *priori* way but coming from a movement "from the inside out"[35] of the constitutional guarantee itself and always considering the peculiarities of the conflict in which it is inserted. This is nothing more than the Process connecting with the different

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[32] Frankfurter, Felix, "O Governo da lei", *Revista forense: doutrina, legislação e jurisprudência*, v. 54, n. 169, p. 68–76, jan./fev., 1957.

[33] ABELHA, Marcelo, *Processo civil ambiental*, 4 ed, Salvador, Editora Juspodivm, 2016, p. 94.

[34] MITIDIERO, Daniel, *O direito fundamental ao processo justo*, Disponível em: <http://www.rkladvocacia.com/arquivos/artigos/art_srt_arquivo20130419164953.pdf>. Acesso em: 10 fev. 2016. ZANETI, Hermes, *A constitucionalização do processo: a virada do paradigma racional e político no processo civil brasileiro do Estado Democrático Constitucional*, Tese de Doutoramento, UFRGS, 2005.

[35] HÄBERLE, Peter, *La garantía del contenido esencial de los derechos fundamentales*, Madrid, Dykinson, 2003.

segments and social structures to understand the peculiarities of each conflict ("integration of reality"[36]) and to provide more appropriate solutions.

For Häberle – creator of the concept of Open Society of Constitutional Interpreters[37] – the recipient of the norm is (or should be) an active participant in the hermeneutic process, because whoever lives the norm ends up interpreting it or at least co-interpreting it.[38] The reality would also have an important role in the definition of the essential nucleus of the fundamental right. Defining, for example, what the limits would be between what may or may not be subject to variability in each means of conflict resolution is a complex and controversial issue[39] between

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36 HÄBERLE, Peter, *Hermenêutica Constitucional – A Sociedade Aberta dos Intérpretes da Constituição: Contribuição para Interpretação Pluralista e "Procedimental" da Constituição*, Trad. Gilmar Ferreira Mendes, In DPU nº 60 – Nov-Dez/2014 – Assunto Especial – Textos Clássicos, Disponível em: <https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/2353>. Acesso em: 26 out. 2019.

37 HÄBERLE, Peter, *op. cit*. 2014.

38 *Ibidem*.

39 There are many existing theories that seek to present a response to this question. In principle, we could present the generalist and individualizing theories. The big question debated by these theories is related to the discussion about whether the essential content of the fundamental rights preserves them in a generic way or each on an isolated basis. To the generalists, it is not of importance that a law affects the core of a fundamental right on an individual basis, as long as the system of fundamental rights persists, such system materialized through the dignity of the human being. On the other hand we have the individualists to whom the essential content of a fundamental right is the specific expression of a fundamental right. With the same purpose, to limit what becomes the essential nucleus of the fundamental rights we have the existence of the objective and subjective theories. The question discussed by these theories is restricted to clarify whether the essential content of the fundamental rights is directed at protecting this right as a personal position (subjective concrete right of each individual) or if it is intended to protect only the consecrating norm of this right (as an abstract legal institution). To the fans of the objective conception, the essential content of the fundamental rights serves to protect that right as a legal institution. This way, only when this legal institution is not being respected is when there is offense to the essential nucleus of the fundamental right. The partisans of the subjective stream, believe that the essential nucleus of the fundamental rights must protect, above all, the fundamental rights a legal position of individuals. It is along these lines that lies the current jurisprudence of the German Federal Constitutional Court and the majority doctrine. The absolute and relative theories also present their suggestions on the matter. For the absolute theories, the essential content consists in a fundamental nucleus, which can de defined in abstract, proper to each right and would therefore be untouchable. It would refer to a space of major value intensity (the heart of the right) which cannot be affected or else would cease really exist. For the relative theories, the essential nucleus of a specific fundamental right could only be determined in light of restrictive law, taking the concrete case in question into consideration due to the fact only by considering the circumstances in the concrete case would it be possible to ascertain whether a restriction would be able to violate the essence of the restricted fundamental right. CHEQUER, Cláudio, *O princípio da proteção ao núcleo essencial do Direito Fundamental no Direito Brasileiro (aplicação e delimitação),* in Carta Forense, Disponível em: <http://www.cartaforense.com.br/conteudo/artigos/o-

constitutionalists and legal philosophers, with some who argue that limitations to the essential nucleus of a guarantee must start "from within" itself and are intrinsic to it (internal theory[40]) and others who argue that the limitations to the essential nucleus of a fundamental right come from colliding with other rights (external theory[41]) and weighting and weighing activity.

Häberle[42] – although affiliated with the internal theory that argues that limitations must start from within the fundamental right itself and are intrinsic to it – seems to combine interesting elements from both theories, which is why his thinking should be highlighted when reflecting about how the essential nucleus of due process results in the variability of the means of conflict resolution. For the author, while fundamental rights are expressions of "supreme values" of the *status libertatis*, they can be updated over time[43]. Not only the fundamental rights in their content undergo modifications, but also in their essential nucleus[44], such changes not only being necessary, but mandatory, since without them a Constitution would run the risk of losing the validity of its essential contents due to its incompatibility with the social updating of values[45].

In this perspective, the linking of rights to social reality would guarantee its correlation with the duty to be, which would allow the fundamental right to be constantly updated[46]. And this connection with reality would take place through the conformations (and, obviously, limitations) to the fundamental right. In Häberle's view, the limitations, rather than restricting individual freedoms, would provide a substrate for social reality,[47] since the abuse of freedom and its lack of limitation would imply a lack of equality between citizens. It turns out that any "restrictions" are conformations and determinations of the right that must occur – in the author's view – from their essence (from inside out).[48] Therefore, the limitation also serves the holder of the limited right, since he wants the "correct" exercise of the right for

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40 HÄBERLE, Peter, *La garantía del contenido esencial de los derechos fundamentales*, Madrid, Dykinson, 2003.

41 ALEXY, Robert, "Derechos Fundamentales y Estado Constitucional Democratico", in CARBONELL, Miguel (Org.), *Neoconstitucionalismo(s)*, Madrid, Editorial Trotta, 2003. ALEXY, Robert. *Teoria dos Direitos Fundamentais*, 2 ed, São Paulo, Malheiros, 2011.

42 HÄBERLE, Peter, *op. cit*.

43 HÄBERLE, Peter, *op. cit.* p. 7.

44 HÄBERLE, Peter, *op. cit.* p. 203/204.

45 It is necessary to see the fundamental right to access to justice and to due process through this perspective, in order to avoid that these constitutional guaranties lose their validity due to incompatibility with social development. In this perspective, even if one has to limit or restrict certain formalities that otherwise existed in the judicial process in order to assure greater reach of justice through alternative methods this is a way to render effective and give real social substance to the access to justice guaranty.

46 *Ibidem*, p. 50.

47 *Ibidem*, p. 116-120.

48 Häberle rejects limitations coming "from outside" because he believes that its is with basis in the essence of the fundamental right that restrictions should be made.

the benefit of the community and, because of this, for the individual manifestation of the personality in line with the social whole (...) because "it offers the individual access to the current parameter of values"[49].

The fundamental rights would be conditioned by the community (and essential for the existence thereof), and vice versa[50]. From the conception of the double dimension of fundamental rights (individual/subjective and institutional/objective) and their role in social life, the author highlights the importance of the legislator in "realizing" fundamental rights[51]. The full harmony between the normative and the real would engender what the author calls "living constitution".

In view of the above, although the concept of due process cannot and should not be defined in advance, it is a fact that – based on the reality of each conflict – it should build a range of practical definitions, going through the principles of Isonomy, Contradictory, Full Defense, Impartiality of the Third Party, Right to Proof, Reasonable Duration of the Process in order to provide the most appropriate proceduralism.

4 THE GENERAL MODEL (OR ESSENTIAL CORE OF PROCEDURALISM) ON DEJUDICIALIZATION

It is in this tone that the guarantee of access to justice based on due process must be seen[52], transposing procedural guarantees of a constitutional nature (due or

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49 *Ibidem*, p. 29-30.

50 *Ibidem*, p. 18.

51 *Ibidem*, p. 115.

52 FERNANDES, Bernardo Gonçalves, "Os Passos da Hermenêutica: Da Hermenêutica à Hermenêutica Filosófica, da Hermenêutica Jurídica à Hermenêutica Constitucional e da Hermenêutica Constitucional à Hermenêutica Constitucionalmente adequada ao Estado Democrático de Direito", in Bernardo Gonçalves Fernandes (Org.), *Interpretação Constitucional: Reflexões sobre (a nova) Hermenêutica*, 1 ed, Salvador, JusPodivm, 2010, v. 01, p. 7-101; MENDES, Conrado Hubner, *Direito Fundamentais, Separação de Poderes e Deliberação*, São Paulo, Saraiva, 2011; BARACHO, José Alfredo de Oliveira, *Processo constitucional*, Tese de Doutoramento, Universidade Federal de Minas Gerais, 1981; BASTOS, Antônio Adonias Aguiar, *O devido processo legal nas demandas repetitivas*, Tese Doutoramento, Universidade Federal da Bahia, Salvador, 2012; BUSTAMANTE, Thomas da Rosa, *Súmulas, Praticidade e Justiça: Um olhar crítico sobre o direito sumular e a individualização do direito à luz do pensamento de Misabel de Abreu Machado Derzi*, in COELHO, Sacha Calmon Navarro, *Segurança Jurídica: Irretroatividade das decisões judiciais prejudiciais as contribuintes*, Rio de Janeiro, Forense, 2012; CATTONI DE OLIVEIRA, Marcelo Andrade, *Teoria Discursiva da argumentação jurídica de aplicação e garantia processual jurisdicional dos direitos fundamentais*, in Jurisdição e hermenêutica constitucional, Belo Horizonte, Mandamentos, 2004.

giusto[53] process) to all means of conflict resolution: settlement or adjudication, whether provided by state, non-state institutions or in a hybrid model. One could not speak, for example, of a conflict solution through arbitration that fails to observe the contradictory, the production of evidence or the reasoning of decisions; not even a mediation whose mediator did not act without equality, was partial or biased; or, yet, an analysis made in a regulatory agency, in the Public Administration or in a Court of Auditors whose composition of judges was previously inclined towards a certain solution, could not be conceived as adequate, in order to violate the natural judge's guarantee.

This demonstrates, in an intuitive and almost instinctive way, that there must be proceduralism in any means of conflict resolution, whether they are state or not. Despite the plurality of conceptions and subjectivities of the Good and the Just – different and often incompatible with each other[54] – there is something peculiar: proceduralism is the means of making it possible for the parties in conflict (with the performance of a third party or not) develop, polish and, perhaps, find the maximum possible justice for the specific case. In the words of the social philosopher Hampshire[55]:

> *(...) justice in process is a non-variable value, something constant in human nature .... (...) it can be fully perceived as a well-defined necessity for conflict resolution procedures, which can substitute the brutal force, the domination and the tyranny.*

This author summarizes the essence of the practice of conflict resolution in the principle of *audi alteram partem* (listening to the other side), that is, the idea of an effective[56], substantial and dynamic contradictory[57] that is a *conditio sine qua non* for obtaining justice in any plural and democratic society. Thus, regardless of whether the means of conflict resolution is state, private or the third sector, whether adjudicative or not, proceduralism must be present from the peculiarities of the conflict itself without deviating from the due process provided for in the Constitution.

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53 COMOGLIO, Luigi Paolo, "Garanzie costituzionali e 'giusto processo' (modelli a confronto)", *Revista de Direito Comparado*, v. 2, n. 2, p. 263-264, Belo Horizonte, UFMG, mar./1998, trad. Marcelo Veiga Franco; TROCKER, Nicolò, "Il nuovo articolo 111 della costituzione e il 'giusto processo' in materia civile: profili generali", *Rivista Trimestrale di Diritto e Procedura Civile*, anno LV, n. 2, a. 55, p. 384, Milano, Giuffrè, 2001, trad. Marcelo Veiga Franco.

54 There will always be a plurality of different and incompatible conceptions of the good and there cannot be a single comprehensive and consistent theory of human virtue. (HAMPSHIRE, Stuart, *Justice is conflict*. Princeton University Press, 2000).

55 HAMPSHIRE, Stuart, *Justice is conflict*, Princeton, Princeton University Press, 2001, p. 34.

56 DUTRA, Victor Barbosa, *Precedentes vinculantes: contraditório efetivo e técnicas repetitivas*, Belo Horizonte, D´Plácido, 2018.

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

In his work "Essay on proceduralism", for example, Grinover([58]) also defends the construction of the idea of proceduralism from the existing conflicts in society in order to arrive at the appropriate and specific procedure to solve them, in order to achieve judicial protection, an effective outcome and due process. One can perceive here a great influence of one of those triplets highlighted by Galanter, which consists of the Perspective of Conflict in Legal Studies. Although there are multiple ways to achieve convergence (matching) between different techniques with different objectives (goals), outlining the appropriate procedure for obtaining the result (outcome) appropriate to the particular type of problem[59], the immanent idea of proceduralism will be present there.

Therefore, if the solution of conflicts by society itself is revealed as a "justice-making" activity and of high social relevance, as shown above, and if this pacification must be carried out along the lines of constitutional guarantees, the projection of such constitutional proceduralism is also unavoidable on the unjudicialized conflict resolution ways, based on the constitutional process model and the mechanisms of expansiveness, variability and perfectibility, listed by Andolina and Vignera.

And this seems to stem from the idea of instrumentality in the Process, which requires it to keep adherence and attunement to the needs and requirements that emerge in society, and, therefore, the proper nomenclatures and classifications of procedural science do not form a closed model but, on the contrary, they must allow changes, in direct response to the emergence of new needs and requirements[60].

Therefore, in the current moment of History, it seems more and more plausible that the proper exercise of citizenship does not consist of an immediate and untimely judicialization of any and all conflicts, but rather, in the search for settlement or adjudication solutions that aims to deal and work on the conflict instead of compulsively seeking to eliminate it – without prejudice to the fact that, throughout this process, the Judiciary is called upon in case of violations of constitutional guarantees, as highlighted by Mancuso[61].

It should be noted that the present study does not invalidate or underscore the importance of adjudication or state means, nor does it emphasize the preponderance of one method over another, but only (and above all) highlights the need for coexistence and fruitful interrelation between the several doors for resolving conflicts – even though there are unbelievable tensions between them.

5 CONCLUSION

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58 GRINOVER, Ada Pellegrini, *Ensaio sobre a processualidade: fundamentos para uma nova teoria geral do processo*, Brasília, Gazeta Jurídica, 2018, p. 33.

59 MENKEL-MEADOW, Carrie, *When Litigation Is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, Wash. U. L.J. & Pol'y 37-62 (2002), Disponível em: <http://scholarship.law.georgetown.edu/facpub/171>, Acesso em: 25 jun. 2019.

60 MANCUSO, Rodolfo de Camargo, *Acesso à Justiça – condicionantes legítimas e ilegítimas*, Salvador, Juspodivm, 2018, p. 128.

61 *Ibidem*. p. 76.

Given what was exposed, it is concluded that the way in which Access to Justice is structured in Brazil directly impacts the dynamics of social and economic relations. It was found that the exhaustion of the Brazilian state judicial model is evident, so that new paradigms for sharing responsibilities between state and non-state institutions of Access to Justice must be developed to fulfill the Constituent's dictates regarding the reasonable duration of the process and the legal security necessary for institutional maturation that leads to effective socioeconomic development.

It is essential to analyze the problems related to Access to Justice, from the perspective of the path taken and the exit door in order to relate such impasses with the Alternative Dispute Resolution and with the Studies of the Conflict Perspective, aiming to investigate ways of democratizing access to justice. In this sense, the search for the democratization of Access to Justice can, based on the openings established by the Constitution itself and by the Code of Civil Procedure, contribute to greater effectiveness of judicial protection and strengthen institutions that serve as pillars for social and economic development.

In this sense, it seems to be necessary to develop the Proceduralism beyond the scope of the Judiciary, in order to institutionally expand forms of conflict resolution in civil society. However, the specific basis of the idea are still uncertain and not enough defined.

On the other hand, Proceduralism – understood as a way of enabling the parties in conflict to develop, polish and find the maximum possible justice for the specific case, with due process, but out of Court – cannot represent a restriction of defense, weakening access to justice, compromising the hard core of fundamental rights or imposing solutions. In those terms, if constitutional guarantees are continually improved and institutionalized within and outside the Judiciary the constitutional guarantee of Access to Justice will be in desirable expansion and decentralization.

Thus, social pacification – which is one of the ultimate purposes of Law – must be carried out along the lines of constitutional guarantees, with Proceduralism also acting on the unjudicialized means of resolving conflicts, based on the constitutional model of process (expansiveness, variability and perfectibility) portrayed above. Therefore, the long awaited multidoor justice (and not only a multidoor courthouse) must combine dejudicialization that works and handles the controversy, instead of just seeking to eliminate it judicially, with the safeguard that Judiciary represents.

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