



# General Theory of Law, General Theory of Procedure, Science of Procedural Law and Procedural Law: necessary parallels and distinctions<sup>2</sup>

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**Abstract:** This essay aims to present the concept of the General Theory of Procedure, and its connection with the General Theory of Law and the Science of Procedural Law.

**Keywords:** General Theory of Law. General Theory of Procedure. Science of Procedural Law. Procedural Law.

**Resumo.** Este ensaio tem o objetivo de apresentar o conceito da Teoria Geral do Processo e sua relação com a Teoria Geral do Direito e a Ciência do Direito Processual.

**Palavras-chave.** Teoria Geral do Direito. Teoria Geral do Processo. Ciência do Direito Processual. Direito Processual.

## 1. Introductory Note.

General Theory of Procedure is a subject that is taught at most Latin American Law

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<sup>2</sup> This essay, including the citations contained herein, was translated by Alexandra Martins Viana Barros.



Schools and at almost all Brazilian schools.

Nevertheless, there is a great lack of understanding surrounding it, notably with regard to its content and functions.

Having a proper understanding of the General Theory of Procedure presupposes drawing some parallels and distinctions with other branches of legal study.

This essay aims to demonstrate that General Theory of Procedure is an excerpt of the General Theory of Law, that is not to be confused with the Science of Procedural Law, and much less with Procedural Law itself. This is an extract of the fellowship dissertation submitted to the Procedural Law Department of the Law Faculty of the Universidade de São Paulo, in 2012<sup>3</sup>.

## 2. General Theory of Law.

General Theory of Law<sup>4</sup> is a legal discipline dedicated to the elaboration, organisation and articulation of fundamental legal concepts – essential to the understanding of the legal

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<sup>3</sup> DIDIER Jr., Fredie. *Sobre a teoria geral do processo, essa desconhecida*. Salvador: Editora Jus Podivm. 2012.

<sup>4</sup> There are those who opt for the denomination Theory of Law, rather than “General Theory of Law”, admittedly more widespread. Regarding the tendency to suppress the adjective “general” and the consolidation of the denomination “Theory of Law”, please refer to the review of DIMOULIS, Dimitri. *Positivismo jurídico*. São Paulo: Método, 2006, p. 22-27. Recently, on the critique FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*. Bari: Editori Laterza, 2007, v. 1, p. 5. This essay accepts the existence of *particular* or *individual* theories as not all theory is general. A theory can be *individual*, when it aims to organize knowledge on a particular subject, investigated precisely due to the importance of its peculiarities. Cultural subjects, such as Law, language, the State, have scientific significance *also* due to their uniqueness. There is, therefore, the General Theory of State and the Theory of the Brazilian State; the General Theory of Law and the Theory of United States Law; the General Theory of Procedure and the Theory of Italian Civil Procedure, etc. One can restrict the generality of the theory to a group of subjects, selected according to some common element. This would then be called a *particular theory*. It constitutes a degree of abstraction between the *general* and the *individual*. The subjects of this group are compared in order to “draw from this parallel, the typical from what is simply unique, the homogenous from the merely peculiar” (*Escritos jurídicos e filosóficos*. Brasília: Axis Mvndi/IBET, 2003. v. 1, p. 91). Thus, for example, there would be a particular theory of Law for States whose legal tradition lies in the *common law*. It should be noted that the adjective “general” serves to qualify the subject of the theory. However, the adjective can be used to denote the function of the theory – “general”, because it aims to exhaust the subject under investigation. This usage of the adjective appears to be unnecessary as, to this effect, all theories are general in that they aim to fully examine their subject.



phenomenon<sup>5-6</sup>. It can thus also be called the Fundamental Theory of Law (*juristische Grundlehre*)<sup>7</sup> or Analytical Jurisprudence<sup>8</sup>.

It constitutes a formal theory of Law, as it foregoes the analysis and examination of the content of the rules that make up a given legal system<sup>9</sup>. It is a theory on the structure of the normative phenomenon, rather than on its content<sup>10</sup>.

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<sup>5</sup> RADBRUCH, Gustav. RADBRUCH, Gustav. *Filosofia do direito*. Marlene Holzhausen (trad.). 2ª ed. São Paulo: Martins Fontes, 2010, p. 35; BOBBIO, Norberto. “Filosofia del Diritto e Teoria Generale del Diritto”. *Studi sulla teoria generale del diritto*. Torino: Giappichelli, 1955, p. 35-37; KAUFMANN, Arthur. *Filosofia do direito*. António Ulisses Cortês (trad.). 2ª ed. Lisboa: Fundação Calouste Gulbenkian, 2007, p. 141; MAYNEZ, Eduardo Garcia. *Introducción al estudio del derecho*. 16ª ed. Cidade do México: Porrúa, 1969, p. 119; MACHADO NETO, Antônio Luiz. *Compêndio de Introdução à Ciência do Direito*. 6ª ed. São Paulo: Saraiva, 1988, p. 6; BORGES, José Souto Maior. *Obrigações tributárias*. 2ª ed. São Paulo: Malheiros, 1999, p. 32; DIMOULIS, Dimitri. *Positivismo jurídico*, cit., p. 40; FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*, v. 1, cit., p. 3 e 43-44.

<sup>6</sup> This is the content of the General Theory of Law for this essay. There is a great deal of discussion regarding the content of this discipline. It is not relevant to examine all the conceptions surrounding the subject. There are some, for example, who split the scope of the Theory of Law into four parts: “(a) The analysis of law: concept of law, legal rules, legal concepts, legal roles (judge, legislator, etc.), sources of law. (b) The legal methodology: legislation, application of law (interpretation, loopholes, contradictions, argument). (c) The theory of science and methodology of legal dogmatics. (d) The analysis of the ideological content of law: values and ideologies not made explicit but contained in legislation, case law and legal dogmatics”. (VAN HOECKE, Mark; OST, François. “Teoria geral do direito”. *Dicionário Enciclopédico de Teoria e Sociologia do Direito*. André-Jean Arnaud (org.). Translated into the Portuguese language under the supervision of Vicente de Paulo Barreto. Rio de Janeiro: Renovar, 1999, p. 783-784.)

<sup>7</sup> SOMLÓ, Felix. *Juristische Grundlehre*. Leipzig: Felix Meiner, 1917, p. 8. SOMLÓ, however, distinguishes between the General Theory of Law and the Fundamental Theory of Law. According to SOMLÓ, the General theory of Law is a theory about the rules that encompass a larger or smaller group of other legal rules of a determinate legal system; it consists of theory on the content of a determinate law and, regardless of how general the rules under analysis are, it is unfit to produce fundamental legal concepts applicable to any legal system (SOMLÓ, Felix. *Juristische Grundlehre*, cit., p. 8-10). As can be observed, the disagreement is about terminology: what is known here as General Theory of Law, is called by SOMLÓ the Fundamental Theory of Law.

<sup>8</sup> On that meaning of Analytical Jurisprudence, MacCORMICK, Neil. “Analítica (abordagem do direito)”. *Dicionário Enciclopédico de Teoria e Sociologia do Direito*. André-Jean Arnaud (org.). Tradução para a língua portuguesa sob a direção de Vicente de Paulo Barreto. Rio de Janeiro: Renovar, 1999, p. 25. See also, MILLARD, Eric. *Teoria generale del diritto*. Agostino Carrino (trad.). Torino: G. Giappichelli Editore, 2009, p. 16-18.

<sup>9</sup> SOMLÓ, Felix. *Juristische Grundlehre*, cit., p. 5; BOBBIO, Norberto. “Filosofia del Diritto e Teoria Generale del Diritto”, cit., p. 35-40; BORGES, José Souto Maior. *Obrigações tributárias*. 2ª ed., cit., p. 31; FALZEA, Angelo. *Ricerche di Teoria Generale del Diritto e di Dogmatica Giuridica*. Milano: Giuffrè, 1999, v. 1, p. 325-326; FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*, v. 1, cit., p. 4 e 19. It should be noted, however, that, according to BOBBIO, fundamental legal concepts, contained in the General Theory of Law, are neither *deductive* nor *universal*, as they are derived from experience. (BOBBIO, Norberto. “Filosofia del Diritto e Teoria Generale del Diritto”, cit., p. 48.)

<sup>10</sup> According to FELIX SOMLÓ’S division, the legal sciences may be divided into those with a legal content and those with a legal form. The latter precedes the former: “the account of a specific legal content presupposes knowledge of the meaning of legal content”. (SOMLÓ, Felix. *Juristische Grundlehre*, cit., p. 1). The original in German is: “Die Darstellung eines besonderen Rechtsinhaltes hat eine Kenntnis dessen zur Voraussetzung, was ein Rechtsinhalt



However, one should not ignore the relation between *fundamental legal concepts (legal logic)* and positive Law. The concepts of *legal logic* serve chiefly to help the judge, or other enforcer of the law as the case may be, to condense the legislative statement (discourse of the legislator) and the discourse of jurists. The General Theory of Law is therefore a *meta-language*: a language used to talk about other languages<sup>11</sup>.

The study of the content of the rules of positive Law appertains to the field of area-specific dogmatic legal sciences. The study of criminal rules belongs to the Science of Criminal Law; the analysis of civil procedure rules belongs to the science of Civil Procedural Law. Supplying an adequate repertoire of concepts indispensable to acquiring an understanding of the normative structure of Law<sup>12</sup>, wherever it should occur, appertains to the General Theory of Law. Its objective is, as can be observed, the formulation of concepts of *legal logic*. *Specific dogmatic legal science does not deal with the development of fundamental legal concepts*: strictly speaking, particular legal science is based on those concepts<sup>13</sup>, presupposes them.

General Theory of Law is to particular dogmatic legal sciences as “container (the formal body of the General Theory of Law) is to content (the scope of application of certain rules, as described by legal dogmatics)”<sup>14</sup>.

Thinking carefully, it is not only legal dogmatics that presupposes fundamental legal concepts: all other legal sciences (Legal Sociology, History of Law, Legal Anthropology) require such concepts in order to develop<sup>15</sup>.

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überhaupt bedeutet”. Thus also, BORGES, José Souto Maior. *Obrigaçãõ tributária*. 2ª ed., cit., p. 29.

<sup>11</sup> MILLARD, Eric. *Teoria generale del diritto*, cit., p. 17-18. It is worth transcribing an excerpt of GUASTINI’s thought: “...legal theory delves into, broadly speaking, two distinct areas of investigation: on one hand, the logical analysis of legislative language (which includes the structural analysis of the legal system); on the other hand, the logical analysis of the language of jurists (but also of the other players in the legal realm, especially judges)”. (GUASTINI, Riccardo. *Das fontes às normas*, p. 382.) At length on the subject, FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*, v. 1, p. 43-51.

<sup>12</sup> BOBBIO, Norberto. “Filosofia del Diritto e Teoria Generale del Diritto”, p. 38.

<sup>13</sup> SOMLÓ, Felix. *Juristische Grundlehre*, p. 6. Thus, also, SICHES, Luis Recasens. *Filosofia del derecho*. 19ª ed., cit., p. 13.

<sup>14</sup> BORGES, José Souto Maior. *Obrigaçãõ tributária*. 2ª ed., p. 31.

<sup>15</sup> As noted FERRAJOLI, referring specifically to Legal Sociology and to Legal Axiology (FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*, v. 1, p. 8-9.



Although it relies on innumerable logical considerations, the general Theory of Law cannot be “reduced to logic”<sup>16</sup>. Logical considerations explain the relation between normative hypothesis and normative precept, and the supreme principles of logic (identity, not contradiction and excluding the third) apply to legal science, which is also an expression of thought. However, the General Theory of Law is concerned with fundamental legal concepts, which are not concepts of formal logic, such as the concept of relation, but of *legal logic*, as that of *legal relations*. The formalization of the General Theory of Law is a conceptual formalization<sup>17</sup>.

The General Theory of Law is, therefore, a philosophical discipline<sup>18-19</sup>, specifically *epistemological*<sup>20</sup>: it deals with knowledge (*logos*) of a science (*episteme*). It is possible to state that it deals with scientific knowledge, provided one understands Epistemology as the science of knowledge<sup>21</sup>.

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<sup>16</sup> BORGES, José Souto Maior. *Obrigação tributária*. 2ª ed., p. 32.

<sup>17</sup> BORGES, José Souto Maior. *Obrigação tributária*. 2ª ed., p. 32.

<sup>18</sup> SICHES, Luis Recasens. *Filosofia del derecho*. 19ª ed., cit., p. 13; RADBRUCH, Gustav. *Filosofia do direito*. Marlene Holzhausen (trad.). 2ª ed., p. 35; MAYNEZ, Eduardo Garcia. *Introducción al estudio del derecho*. 16ª ed. Cidade do México: Porrúa, 1969, p. 119; *Lógica del concepto jurídico*, cit., p. 141; GUASTINI, Riccardo. *Das fontes às normas*, cit., p. 377; MILLARD, Eric. *Teoria generale del diritto*, cit., p. 16-18. SOMLÓ, admitting to the existence of controversy regarding the definition of the Philosophy of Law, feels that the Fundamental Theory of Law is either equivalent to the Philosophy of Law or is an excerpt thereof, which would also encompass Legal Axiology. (SOMLÓ, Felix. *Juristische Grundlehre*, cit., p. 14-16). For the purposes of this essay, the General Theory of Law is a sub-branch of Legal Epistemology and therefore a branch of the Philosophy of Law.

<sup>19</sup> To a different effect, believing it to be science rather than philosophy, BOBBIO, Norberto. “Filosofia del Diritto e Teoria Generale del Diritto”, cit., p. 40-48; FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*, v. 1, cit., p. 5; CADIET, Loïc. “Prolégomènes à une Théorie Générale Du Procès em Droit Français”. *Teoria do Processo – panorama doutrinário mundial*. Fredie Didier Jr. e Eduardo Jordão (coord.). Salvador: Editora Jus Podivm, 2008, p. 483-484.

<sup>20</sup> MACHADO NETO, Antônio Luiz. *Compêndio de Introdução à Ciência do Direito*. 6ª ed. São Paulo: Saraiva, 1988, p. 6-7; FALZEA, Angelo. *Ricerche di Teoria Generale del Diritto e di Dogmatica Giuridica*. Milano: Giuffrè, 1999, v. 1, p. 324. MIGUEL REALE also considers that the task of specifying fundamental concepts belongs to Legal Epistemology (REALE, Miguel. *Filosofia do Direito*. 20ª ed. São Paulo: Saraiva, 2011, p. 307). To a different effect, distinguishing between the General Theory of Law and Legal Epistemology, BERGEL, Jean-Louis. *Teoria geral do direito*. Maria Ermantina Galvão (trad.). São Paulo: Martins Fontes, 2001, p. XXI. BERGEL admits that the General Theory of Law aims to study “great issues”, such as the concepts and categories of law, including the concept of Law itself.

<sup>21</sup> VILANOVA, Lourival. “Sobre o conceito do Direito”, cit., p. 29. To a similar effect, SOARES, Ricardo Maurício Freire. *Curso de Introdução ao estudo do Direito*. Salvador: Editora Jus Podivm, 2009, p.16.



The *fundamental legal* concepts do not specifically belong to any branch of Law as they are used, as a given, by all those that intend to turn positive Law into a science. They are assumptions of legal science; “they are not the results, but rather the tools of legal science”<sup>22</sup>. Thus, the duty to define these concepts cannot be attributed to the science of positive Law<sup>23</sup>: this task pertains to Legal Epistemology, the theory of the science<sup>24</sup>, to meta-methodology<sup>25</sup>. It is therefore Philosophy’s<sup>26</sup> duty to “clarify and strictly demarcate thought, which would otherwise be confused and vague”<sup>27</sup>.

It is not by mere chance that the General Theory of Law has been called “jurists’ philosophy of law”<sup>28</sup>: it *arises* from problems of Legal Science; it *is* “ancillary to the work of jurists and, to a large extent, *consists* precisely of a critical contemplation of that work”<sup>29</sup>.

### 3. General Theory of Law and General Part.

It is necessary to distinguish between “General Theory of Law” and “General Part”.

In order to proceed with this distinction, it is worth reviewing the difference between *doctrinal discourse* and *normative discourse* (*legal propositions* and *legal norms*, according to Hans Kelsen’s distinction<sup>30</sup>).

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<sup>22</sup>RADBRUCH, Gustav. *Filosofia do direito*, cit., p. 54.

<sup>23</sup>VILANOVA, Lourival. “Sobre o conceito do Direito”, p. 22-23.

<sup>24</sup>MACHADO NETO, Antônio Luiz. *Compêndio de Introdução à Ciência do Direito*. 6ª ed., p. 7. The author concludes on the same page: “... to define mathematics, sociology or legal science is not the same as doing mathematics, sociology or law, but the regional epistemology of each of those scientific subjects, why would criminal law be the same as defining it, or the practice of law conceive it?”. Thus also, VILANOVA, Lourival. “Sobre o conceito do Direito”, cit., p. 27.

<sup>25</sup>UUSITALO, Jyrki. “Reflexiones sobre las metametodologías de la ciencia jurídica”. Eduardo Rivera López (trad.). *La normatividad del derecho*. Aulis Aarnio, Ernesto Garzón Valdés e Jyrki Uusitalo (org.). Barcelona: Gedisa, 1997, p. 249-250.

<sup>26</sup>Without “concrete solutions, there may be legal meta-discourse or philosophical reflection”, but there will be no Science of Law. (CORDEIRO, António Menezes. “Teoria Geral do Direito Civil – relatório”. *Separata da Revista da Faculdade de Direito de Lisboa*. Lisboa: Universidade de Lisboa, 1988, p. 21)

<sup>27</sup>WITTGENSTEIN, Ludwig. *Tratado lógico-filosófico*. 2ª ed. M. S. Lourenço (trad.) Lisboa: Calouste Gulbenkian, 1995, n. 4.112, p. 63.

<sup>28</sup>KAUFMANN, Arthur. *Filosofia do direito*, 2ª ed., p. 141.

<sup>29</sup>GUASTINI, Riccardo. *Das fontes às normas*, p. 369.



The normative discourse is a product of the work of those who have the attribution of producing legal norms. Acts, administrative acts, contracts and judicial decisions/rulings are normative discourses. From these discourses one derives commands (expected behaviour), permission (permitted behaviour) and prohibitions (forbidden behaviour). “The Law prescribes, permits, awards power or attributions – it ‘teaches’ nothing”<sup>31</sup>.

The doctrinal discourse is a product of philosophical or scientific work. Doctrine works with normative discourse, assisting in the reconstruction of its meaning (on a semantic level)<sup>32</sup>, establishing the connections between the norms (on a syntactical level) and, further still, examining its practical effects (on a pragmatic level)<sup>33</sup>, so as to determine the criteria which allow for a coherent, rational and just enforcement of the Law.

It is undoubtedly concerned with meta-language: it is a language about normative language<sup>34</sup>. However, it is not limited to this. The Science of Law also examines non-linguistic elements, such as facts (e.g. conduct), values, aims to be achieved, the assets involved, those who will enforce the rule, the effects of applying the rule, etc.<sup>35</sup> Interpreting the Law is not the same as describing the Law (which is not a given), nor is it limited to reconstructing the meanings of the normative discourses, as “some measure of reality must be included in doctrinal work, at the risk of constructing an ideal, albeit totally unreal, doctrine”<sup>36</sup>.

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<sup>30</sup> KELSEN, Hans. *Teoria pura do direito*. 6ª ed. João Baptista Machado (trad.). São Paulo: Martins Fontes, 2000, p. 80.

<sup>31</sup> KELSEN, Hans. *Teoria pura do direito*. 6ª ed., cit., p. 81.

<sup>32</sup> “It is necessary to overcome the absurd belief that the function of the interpreter is merely to describe meaning, towards an understanding that the interpreter rebuilds meaning, whether as the scientist, by the construction of syntactic or semantic connections, or as the one that applies, that adds to those connections the specific circumstances of the case to be judged”. (ÁVILA, Humberto. *Teoria dos princípios*. 12ª ed. São Paulo: Malheiros Ed., 2011).

<sup>33</sup> ÁVILA, Humberto. *Fundamentos do Direito Tributário*. Humberto Ávila (org.). São Paulo: Marcial Pons, 2012, no prelo.

<sup>34</sup> KELSEN, Hans. *Teoria pura do direito*. 6ª ed., cit., p. 82; LARENZ, Karl. *Metodologia da ciência do direito*. 3ª ed. José Lamego (trad.). Lisboa: Fundação Calouste Gulbenkian, 1997, p. 350-351; CARVALHO, Paulo de Barros. *Curso de direito tributário*. 11ª ed. São Paulo: Saraiva, 1999, p. 2-3.

<sup>35</sup> ÁVILA, Humberto. “A doutrina e o Direito Tributário”

<sup>36</sup> ÁVILA, Humberto. “A doutrina e o Direito Tributário”



This is the idea that distinguishes between the function of legal knowledge and the function of the legal authority. This distinction, which is elementary, seems to have been ignored by the authors who delved into the General Theory of Procedure, as will be seen later.

A peculiarity of legal science is that Law is a cultural product composed of language. The language of Law, however, is not the same as the language of the Science of Law. In the subject of Physics, for example, one does not find language; there is language in the Science of Physics<sup>37</sup>.

Based on these premises, it is possible to distinguish between “General Part” and “General Theory of Law”.

“General Part” is a set of normative discourses. The identification of the type of discourse to which the “General Part” belongs would be enough to distinguish it from the General Theory, which belongs to the “doctrinal discourse” type.

The term “Part” presupposes the existence of a whole (also a set of normative discourses), of which it is an excerpt. Normally, the General Part appears as a subdivision of codes or statutes.

It is “General” because it is a set of normative discourses that assist in the understanding and application of other norms, said to be special or specific. They are normative discourses that can be applied to any extract of the “normative whole”. Thus, for example, the rule regarding the limitations of the legal personality, that can be found in the General Part of the Brazilian civil Code (art. 2º)<sup>38</sup>, applies to all the other books of the Code, such as that of Family and Property Law.

The General Part can contain norms that are applicable beyond the normative vehicle to which they belong. The rules of the General Part of the Brazilian Civil Code, for example, are

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<sup>37</sup> VILANOVA, Lourival. *As estruturas lógicas e o sistema do direito positivo*. São Paulo: Max Limonad, 1997, p. 65.

<sup>38</sup> Art. 2º of the Brazilian Civil Code: “The civil personality of the person begins at birth with life; but the law safeguards, from the moment of conception, the rights of the unborn child”.





applied to all Brazilian private law, and not only to that which was regulated by the same Code. It is “General” also for that reason.

The understanding of legislative language, even of that which produces a “General Part”, does not prescind from the fundamental legal concepts developed by legal philosophy.

The General Theory of Law is unique. There is no limit to the number of “General Parts”. It is possible to have a General Part in the Civil Code, another in the Penal Code, and another one in the Children and Young Persons Act, etc. The “generality” of the Theory of Law does not imply the “unity” of the General Part.

The General Theory of Law, a product of philosophical or scientific work, and the General Part, a product of legislative work, are thus distinct<sup>39</sup>, although the product of the science and the product of legal authority are frequently confused<sup>40-41</sup>.

It is precisely because they are distinct languages that one does not recommend that legislators establish rules for fundamental legal concepts. One should not translate doctrinal discourses into legislative language, transforming into “rules” that which is a theoretical assumption for the understanding of normative texts<sup>42</sup>.

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<sup>39</sup> RICCARDO GUASTINI perceived the “weak” meaning of the term “General” Theory of Law in order to denote “the analysis of the principles and ideas common not to all legal systems but, more modestly, to the diverse areas of a given legal system”. (GUASTINI, Riccardo. *Das fontes às normas*. Edson Bini (trad.). São Paulo: Quartier Latin, 2005, p. 378.)

<sup>40</sup> KELSEN, Hans. *Teoria pura do direito*. 6ª ed., cit., p. 82.

<sup>41</sup> MENEZES CORDEIRO, while discussing the content of the discipline of “General Theory of Civil Law”, offers useful reflections that, *mutatis mutandis*, serve the purpose of this essay. The Portuguese author shows the double role of this discipline: as a General Theory, to present the general concepts and categories of Civil Law; as Civil Law, it must offer solutions to concrete problems demarcated by the scope of the rules of the General Part of the Civil Code. The General Theory is the task of legal doctrine, which follows the progress of Legal Science. The General Part of Civil Law is the product of legislative activity: it contains normative commands, but does not theorize – “it could not, as a matter of fact, do it even if it so intended”. (CORDEIRO, António Menezes. “Teoria Geral do Direito Civil – relatório”. *Separata da Revista da Faculdade de Direito de Lisboa*. Lisboa: Universidade de Lisboa, 1988, p. 28-29).

<sup>42</sup> “Codification must be a practical task containing, solely, provisions with normative efficacy with definitions, ideas, classifications and theories therefore being extraneous to it”. (GOMES, Orlando. *Introdução ao Direito Civil*. 11ª ed. Rio de Janeiro: Forense, 1995, p. 32.)



#### 4. General Theory of Procedure

The General Theory of Procedure, Theory of Procedure<sup>43</sup>, General Theory of Procedural Law<sup>44</sup> or Theory of Procedural Law is a legal discipline dedicated to the elaboration, organization and articulation of fundamental (*legal logical*) legal procedural concepts. One considers *legal-logical* procedural concepts to be all those that are indispensable to the legal understanding of the procedural phenomenon, wherever it may occur, such as: process: jurisdiction<sup>45</sup>, sentence, cognizance, admissibility, procedural rules, process, demand, legitimacy, claim, legal capacity to be a party, procedural capacity, capacity to practise law, evidence, presumption and remedy.

It is an excerpt of the General Theory of Law<sup>46</sup>.

The General Theory of Procedure is, in relation to the General Theory of Law, a partial theory, as it deals with the fundamental concepts related to procedure, one of the social facts

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<sup>43</sup> As denoted, for example, by ANGELIS, Dante Barrios De. *Teoría del proceso*. 2ª ed. Buenos Aires: Editorial BdeF, 2002; GÁLVEZ, Juan F. Monroy. *Teoría general del proceso*. Lima: Palestra, 2007, p. 125 (the author, despite the title of his work, refers to the Theory of Procedure in the body of the book); TAMAYO, Luiz Dorantes. *Teoría del proceso*. 9ª ed. Cidade do México: Porrúa, 2004; ROJAS, Miguel Enrique. *Teoría del proceso*. 2ª ed. Bogotá: Universidad Externado de Colombia, 2004; HESPANHA, Benedito. *Tratado de Teoria do Processo*. Rio de Janeiro: Forense, 1986, 2v; NUNES, Dierle; BAHIA, Alexandre; CÂMARA, Bernardo Ribeiro; SOARES, Carlos Henrique. *Curso de direito processual civil – fundamentação e aplicação*. Belo Horizonte: Editora Fórum, 2011, p. 69.

<sup>44</sup> As denoted, for example, by MERKL, Adolf. *Teoría general del derecho administrativo*. Unidentified translator. Mexico: Editora Nacional, 1980, p. 279; CASTILLO, Niceto Alcalá-Zamora y. “Trayectoria y contenido de una Teoría General del Proceso”. *Estudios de teoría general e Historia del proceso (1945-1972)*, t. 1, cit., p. 509; MOREIRA, José Carlos Barbosa. “As bases do direito processual civil”. *Temas de direito processual*. São Paulo: Saraiva, 1977, p. 8; FAVELA, José Ovalle. *Teoría general del proceso*. 6ª ed. Cidade do México: Oxford, 2005, p. 49; ARENAL, María Amparo Renedo. “Conveniencia del estudio de le Teoría General del Derecho Procesal. Su aplicabilidad a las distintas ramas del mismo”. *Teoria do Processo – panorama doutrinário mundial*. Fredie Didier Jr. e Eduardo Jordão (coord.). Salvador: Editora Jus Podivm, 2008.

<sup>45</sup> CUNHA, Leonardo José Carneiro da. “A competência na teoria geral do direito”. *Teoria do Processo – panorama doutrinário mundial*. Fredie Didier Jr. e Eduardo Jordão (coord.) Salvador: Editora Jus Podivm, 2008, p. 462.

<sup>46</sup> Also to this effect, MORELLO, Augusto M. *La eficacia del proceso*. 2ª ed. Buenos Aires: Hamurabi, 2001, p. 142-143; ARENAL, María Amparo Renedo. “Conveniencia del estudio de le Teoría General del Derecho Procesal. Su aplicabilidad a las distintas ramas del mismo”, cit., p. 624; SOARES, Ricardo Maurício Freire. “Fundamentos Epistemológicos para uma Teoria Geral do Processo”. *Teoria do Processo – panorama doutrinário mundial*. Fredie Didier Jr. e Eduardo Jordão (coord.). Salvador: Editora Jus Podivm, 2008, p. 846-850.



regulated by law. It is a philosophical discipline with an epistemological bias; in that sense, as an excerpt of the Epistemology of Procedure, it is a branch of the Philosophy of Procedure.

The General Theory of Procedure can be considered to be a general theory as the *legal-logical* procedural concepts, of which it consists, have a universal aim. Describing it as “general” is convenient precisely so that it may be distinguished from the *individual theories of procedure*, which aim to assist in understanding *determinate normative realities*<sup>47</sup>.

The broad scope of the General Theory of Procedure reduces its intensity. As the subject is very broad (any procedure in the legal sense: legislative, administrative, jurisdictional and private), the General Theory of Procedure has, in comparison with the particular or individual theories, a reduced capacity to explain the legal phenomena of a specific legal type.

In much the same way as the General Theory of Law can be seen as a set of partial theories (Theory of Legal Facts, Theory of Legal Rules, Theory of Procedure, etc.), the General Theory of Procedure can be examined as a set of the other partial theories (Theory of the Procedural Legal Fact, Theory of the Judicial Decision, Theory of Enforcement, Theory of Evidence, Theory of Jurisdiction, etc.).

## 5.       **DISTINCTIONS.**

### 5.1.     **General Theory of Procedure and the Science of Procedural Law.**

The relation between the General Theory of Procedure<sup>48</sup> and the Science of Procedural Law (Dogmatic Science of Procedure or, simply, Science of Procedure) is the same as that established between the General Theory of Law and the (dogmatic) Science of Law.

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<sup>47</sup> Thus, one cannot justify the criticism made by BENEDITO HESPANHA, who sees no “plausible reason” to qualify the theory as general, precisely because all theory would be general (HESPANHA, Benedito. *Tratado de Teoria do Processo*. Rio de Janeiro: Forense, 1986, v. 2, p. 1.272)

<sup>48</sup> The General Theory of Procedure is epistemology. Epistemology can be viewed as the science of knowledge. To this effect, the General Theory of Procedure would be one of the Sciences of Procedure, alongside the Sociology of Procedure, the History of Procedure and the Science of Procedural Law, or the Dogmatic Science of Procedure. The counterpoint made in this item is between the General Theory of Procedure and the Science of Procedural Law.



The General Theory of Procedure is the epistemological language about legal-dogmatic language; it is a language about language. It consists of a set of doctrinal discourses, of a non-normative nature, products of scientific or philosophical work. The Science of Procedure deals with the dogmatic examination of Procedural Law by formulating guidelines, presenting principles and offering assistance for an adequate understanding and enforcement of its rules.

In this regard, they belong to the same type: they both manifest themselves as doctrines and take on the functions attributed to the latter. Doctrinal theories are “sets of arguments”: consisting of a “body of persuasive formulae that influence the behaviour of the addressees, without obligating them, but through an appeal to reasonability and justice, having in mind the ability to resolve possible conflicts”<sup>49</sup>.

The General Theory of Procedure does not, as has been observed, deal with any positive law. Its concern is epistemological: to provide the procedural sciences the necessary conceptual repertoire for the analysis of positive law, whatever its content may be.

One delves in (*Dogmatic*) *Science of Procedure* when one discusses whether the possible right of recourse against a determinate sentence is an appeal proper or an interlocutory appeal; whether the time to present the argument for the defence upon enforcement of the sentence is fifteen or thirty days; whether a particular kind of third-party practice is possible in a certain type of procedure.

However, the definition of *sentence*, *defence*, or *third-party practice* is the Epistemology of Procedure. It does not deal with the problems of the *Science of Procedural Law* which, being dogmatic, accepts a specific framework of concepts as being correct and, after using them, proposes solutions for the problems of positive law<sup>50</sup>.

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<sup>49</sup> FERRAZ Jr., Tércio Sampaio. *Introdução ao estudo do direito – técnica, decisão, dominação*. 2ª ed. São Paulo: Atlas, 1994, p. 86, quotation marks in the original.

<sup>50</sup> With a different point of view, considering that the General Theory of Procedure and Procedural Law, as a legal science, are synonymous expressions, GÁLVEZ, Juan F. Monroy. *Teoría general del proceso*. Lima: Palestra, 2007, p. 128-129.



The relation between these two levels of language is permanent and inevitable, but it is necessary that their differences always be clear<sup>51</sup>.

The separation of the languages of the General Theory of Procedure and the Science of Procedure is vital to ensure the high quality of doctrinal production.

There are problems in positive law that, at times, are analysed as if they were general problems. This perceptual flaw jeopardizes the quality of doctrinal work.

An example drawn from the analysis of Brazilian civil procedural law may be useful in helping to clarify what is stated in this item.

Jurists' affirmation that the lack of procedural requisites may be taken cognizance of by the court on its own initiative is frequent. This lesson results from the science of Brazilian civil procedure, which reaches that conclusion upon analysis of § 3º of art. 267 of the CPC (Code of Civil Procedure)<sup>52</sup>.

As can be seen, it is not a postulate of the General Theory of Procedure. Knowing whether or not a lack of procedural requisites may be taken cognizance of by the court on its own initiative is a problem of positive law. It will vary in accordance with the Law under examination. It would not be implausible for a new law to be passed preventing the court from determining, on its own initiative, the lack of a certain prerequisite. This is, for example, what happens with lack of relative jurisdiction (precedent number 33 of the Superior Court of Justice) and with the absence of the spouse's authorization for the purpose of real estate actions (Article 1,649 of the Brazilian Civil Code)<sup>53</sup>.

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<sup>51</sup> FERRAJOLI, Luigi. *Principia iuris – Teoria del diritto e della democrazia*, v. 1, cit., p. 51.

<sup>52</sup> § 3º do art. 267 do CPC (Brazilian Code of Civil Procedure): "The judge shall take cognizance on his/her own initiative, at any time and at any level of jurisdiction, before judgment upon the merits, of the subject-matter dealt with in numbers IV, V and VI; however, the defendant who does not raise the issue, as soon as he/she is able to do so in the record, will be held liable for delay costs".

<sup>53</sup> Art. 1.649 of the Brazilian Civil Code: "The lack of authorization, not supplied by the judge, when deemed necessary (art. 1.647), shall render the act voidable, enabling the other spouse to claim its annulment within a period of up to two years as of the dissolution of the marriage".



The General Theory of Procedure concerns itself with the definition of a “procedural requisite”, with little or no concern for the legal regime provided for the jurisdictional control of the admissibility of procedures.

These premises are indispensable for the correct understanding of the normative text of article 526 of the Brazilian CPC, which imposes on the respondent the responsibility for alleging the lack of a requisite for the admissibility of the interlocutory appeal. It is one of those rare events of the lack of an admissibility requirement of the appeal which may not be taken cognizance of if not raised by the party.

This legitimate legislative option was criticised by jurists, who considered the requirements of admissibility of appeals as a matter of public policy and, therefore, “are not subject to preclusion, and can be taken cognizance of at the court’s own initiative”<sup>54</sup>. The lesson appears not to be correct.

Whether or not it is a matter of public policy; whether it is subject to preclusion; whether or not it can be taken cognizance of at the court’s initiative are the attributes that procedural requisite will have *according to the legal regime that prescribes the positive procedural law*. They are attributes of positive Law, not elements of a *legal-logical* concept – and therefore, invariable – of procedural requisites. The procedural requisite is not *essentially* a matter of public policy, nor is it *theoretically* a requirement the lack of which will, always, with little regard for positive Law, be able to be taken cognizance of at the court’s initiative. There is a perceptual misunderstanding with regard to the nature of the problem under analysis: when analysing a problem of positive law, the jurist is not making General Theory on procedure.

The General Theory of Law and the Science of Procedural Law are different extracts of the language of legal thought on procedure. Although distinct, or for that very reason, they are closely connected: one cannot make earnest Science of Procedure without sound knowledge of the General Theory of Procedure. They must be neither mixed nor confused. The care taken in

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<sup>54</sup> JORGE, Flavio Cheim. *A nova reforma processual*. 2ª ed. São Paulo: Saraiva, 2003, p. 170.



the use of one or other step is vital to the construction of coherent, rational and reliable legal thought on procedure.

## 5.2. General Theory of Procedure and Individual Theories of Procedure.

The existence of a General theory of Procedure does not impede the construction of *individual theories of procedure*.

It is possible to conceive a *Theory of Brazilian Civil Procedure*<sup>55</sup>. It will be a set of *positive-legal* concepts of importance to the understanding of Brazilian civil procedural law. This theory would be made up of other partial theories (Theory of Appeals, Theory of Evidence, Theory of Enforcement by execution for a Sum Certain, Theory of Jurisdiction, etc.). A Theory of Evidence for Brazilian civil procedure would, for example, organize the concepts of the characteristic means of proof and the techniques applied in the attribution of the burden of proof adopted by Brazilian Law.

Along the same lines, one contemplates theories of Brazilian criminal procedure, of Brazilian administrative disciplinary proceedings, Brazilian administrative tax proceedings, etc. A Theory of Brazilian Criminal Procedure would, for example, help to systematize the types of

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<sup>55</sup> LUIZ GUILHERME MARINONI states that the “new civil procedure”– marked by interlocutory relief, by specific relief, by prohibitory injunction, and by the relief of transindividual rights – *naturally claims another general theory of procedure*. This does not, obviously, mean that the need for a new theory of procedure arises from changes made in the normative-procedural sphere. *The indispensability of a new theory arises, above all, from the transformation of the State, that is, from the emergence of the constitutional State, and from the resulting remodelling of the legal and jurisdictional concepts themselves*”. (MARINONI, Luiz Guilherme. *Teoria Geral do Processo*. 4<sup>a</sup> ed. São Paulo: RT, 2010, p. 9, italics in the original). The author is certainly referring to the need of building a new *theory of Brazilian civil procedural law*, having in mind the transformations that occurred in Brazilian civil procedural law (mentioned by him) and the emergence of the so-called “Constitutional State”, which, according to the author is a model of the Brazilian state. If it is to be thus understood, his observation seems to be correct. It follows that it is *not a matter of constructing a new General Theory of Procedure*. A NEW “General Theory of Procedure”, constructed in view of Brazilian peculiarities, would be useless as a general theory; inapplicable to the understanding of the legal phenomenon in other countries. The terminological inaccuracy must be pointed out and, ultimately, corrected. It does not take a great deal of effort to avoid even further misunderstandings regarding the subject matter of this thesis.



detention before the judgment of conviction (provisional, preventive, etc.) A Theory of Brazilian Administrative Disciplinary Proceedings would present the *positive-legal* concepts of the disciplinary sanctions set forth in the Brazilian legal system. The Theory of Administrative Tax Proceedings would, for example, provide the *positive-legal* concept of tax assessment. Obviously, reference is made to Brazilian Law merely to exemplify.

All these theories would be built upon an analysis of a determinate positive law and would be applicable only thereto. They would be useful to foreign Law only as a basis for comparison.

However, all are derived from The General Theory of Procedure. The *positive-legal* concepts, constructed to obtain an understanding of a determinate legal system, are based on *legal-logical* concepts, on which the General Theory of Procedure is built.

### **5.3. General Theory of Procedure and Particular Theories of Procedure**

The existence of a General Theory of Procedure does not impede the construction of *particular theories of procedure*.

The construction of their own theory of procedure will be very useful to the democratic states that abide by the Rule of Law, established by the Constitution and that sanction fundamental rights. It will be a particular theory of procedural law.

In a theory such as this, fundamental rights, due process, democracy, constitution and equality are indispensable concepts. Obviously, this theory will also be made up of fundamental legal concepts of procedure, the subject of the General Theory of Procedure.





#### 5.4. General theory of Procedure and Procedural Law.

The General Theory of Procedure should not be confused with Procedural Law. In fact, differently to what occurs with between the theory and the Science of Procedure, it is *not even* possible to draw parallels between the General Theory of Procedure and Procedural Law. They are discourses that have a different nature and, thus, cannot be compared. There is no way of comparing a doctrinal lesson with a normative prescription; descriptive discourse with prescriptive discourse.

Everything that was said about the relation between the General Theory of Law and the General Part, in a previous item, serves to substantiate this conclusion. Thus, there is no need to repeat the substantiation.

Nevertheless, the word of caution regarding the impropriety of confusing them is very important.

Some view the General Theory of Procedure as a set of fundamental legal procedural rules, especially the constitutional ones. The General Theory of Procedure would, in that sense, be a General and Fundamental Procedural Law<sup>56</sup>.

The majority of the criticisms of the General Theory of Procedure are based on the premise that it is equivalent to the creation of a single Procedural Law, applicable to all kinds of procedure<sup>57</sup>. These criticisms are based on the methodological error of confusing the product of

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<sup>56</sup> This seems to be the meaning used by LUIZ GUILHERME MARINONI: "The constitutional rules follow the guidelines of the theory of procedure. It is a matter of 'constitutional remedy of procedure', which aims to ensure the conformation and workings of the procedural doctrines to the principles that are engraved in accordance with constitutional values". (MARINONI, Luiz Guilherme. *Novas linhas do processo civil*. 3ª ed. São Paulo: Malheiros, 1999, p. 21.) Thus, also taking into account the study of the constitutional principles of procedure as the content of the General theory of Procedure, LUCON, Paulo Henrique dos Santos. "Novas tendências na estrutura fundamental do processo civil", cit., p. 146-147.

<sup>57</sup> Such as, for example, VIDIGAL, Luis Eulálio de Bueno. "Por que unificar o direito processual? *Revista de Processo*. São Paulo: RT, 1982, n. 27, p. 40-48; ALVIM NETTO, José Manoel de Arruda. *Tratado de direito processual civil*. 2ª ed. São Paulo: RT, 1990, v. 1, p. 104-105; SILVA, Ovídio A. Baptista da; GOMES, Fábio. *Teoria geral do processo civil*. 3ª ed. São Paulo: RT, 2002, p. 37-40.



the Philosophy of Procedure (specifically, the General Theory of Procedure) with the set of legal procedural rules, themselves the subject of investigation by the dogmatic Science of Procedure<sup>58</sup>.

Ultimately, in any case, it is an epistemic mix-up that definitely jeopardizes the quality of the reasoning.

### 5.5. The General Theory of Procedure and General Part.

The General Theory of Procedure does not become entangled with the “General Part” of a procedural Code or Statute<sup>59</sup>.

As previously seen, the two dimensions of legal language should not be confused: the language of Law and the language of the Science of Law.

The General Theory of Procedure is constructed by the Science (or Philosophy – Epistemology) of Law. The General Part is a set of normative discourses; it is prescriptive language, a product of legislative activity (in a broad sense).

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<sup>58</sup> Correctly, separating the topics, (single procedural law and General Theory of Procedure), ARENAL, María Amparo Renedo. “Conveniencia del estudio de la Teoría General del Derecho Procesal. Su aplicabilidad a las distintas ramas del mismo”, p. 632.

<sup>59</sup> This confusion exists among jurists. NICETO ALCALÁ-ZAMORA Y CASTILLO, one of the jurists specialized in procedural law who was most dedicated to the study of the General Theory of Procedure, goes as far as saying that, in countries where there is a single code of Procedural Law (civil and criminal), the general part of this code is identified with the General Theory of Procedure (CASTILLO, Niceto Alcalá-Zamora y. “La Teoría General del Proceso y la enseñanza del derecho procesal”. *Estudios de teoría general e Historia del proceso (1945-1972)*. Cidade do México: Universidad Nacional Autónoma de México, 1974, t. 1, p. 587). Even BARBOSA MOREIRA, procedural jurist who became notable for his accuracy in the use of language, also seems to display this misunderstanding. In the author’s note of the first edition of “The new Brazilian Civil Procedure”, published right after the enactment of the Brazilian Code of Civil Procedure of 1973, he states: “On another occasion, if possible, one will try to draw up a *General Theory of Civil Procedure*, in order to study the fundamental doctrines of our discipline, including those that, though studied in Book I of the new Law, under the heading ‘The process of knowledge’, that would fit more appropriately in a General Part for which the legislator did not make room in the structure of the Code”. (MOREIRA, José Carlos Barbosa. *O novo processo civil brasileiro*. 27ª ed. Rio de Janeiro: Forense, 2008, p. 1)



Everything that was said about the relation between the General Theory and the General Part is now applied.

The confusion between the General Theory of Procedure and General Part is apparent in the in the Recitals of the Draft Bill to enact the New Code of Civil Procedure. The draft bill structures the Code of Civil Procedure as a General Part. The justification offered by the Commission of Jurists responsible for drawing up the bill can be found at the conclusion of item 33 of the Recitals: “The profound maturing of the topic observed nowadays in Brazilian procedural doctrine justifies, on this favourable occasion, the systematization of the general theory of procedure, in the new Code of Civil Procedure”<sup>60</sup>.

This does not detract from the merit of opting to draw up a General Part of the new Brazilian Code of Civil Procedure. The idea is good and deserves praise.

However, the “General Part” is not the systematization of the General Theory of Procedure, which must be effected by the Epistemology of Procedure. The General Part is an excerpt of determinate laws (Codes, statutes, etc.), composed of normative discourses applicable to all the remaining parts of the aforementioned law and, occasionally, even to other areas of the legal system. A possible systematization of the General Theory of Procedure would take place in the form of a book on the Philosophy of Procedure, a thesis or manual, a product of scientific, rather than legislative, activity.

Obviously, the Code of Criminal Procedure, the Administrative Procedure Act, the Code of Class Action Procedure, etc are not precluded from having their respective “General Parts”. These General Parts will be sets of different normative discourses, precisely because the facts which will be regulated by them are different.

The peculiarities of criminal procedure, of administrative procedure, of class action procedure, etc. suggest, by the way, that the normative content of its rules be different. There could be as many General Parts as there are “procedures” that need to be regulated.

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<sup>60</sup> BRAZIL. Federal Senate. (*Draft Bill of the New Code of Civil Procedure*) *Anteprojeto do Novo Código de Processo Civil*. Brasília: Senado Federal, 2010, p. 35.



However, the General Theory of Procedure is unique and, as a meta-language, will assist in the understanding of any of those normative languages.

Nothing impedes the “General Part” from being written in conformity with the General Theory of Procedure, on the contrary, it is recommended. It must also not be forgotten that the General Theory of Procedure is also useful in drawing up normative texts.

As shown, the General Theory of Procedure and “General Part” of a code of procedure are distinct languages.

Most of the criticisms aimed at the General Theory of Procedure are based on a presupposition of that confusion and are, for that very reason, unfounded.